**The Primacy of Union Law over Incompatible National Measures: Beyond Disapplication and Towards a Remedy of Nullity?**

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**1. Introduction**

This paper examines how far recent caselaw suggests that the CJEU is taking a more robust and interventionist approach towards its own jurisdiction in relation to the legal status and effects of national measures found to be incompatible with the Treaties – including the possible emergence, through the principle of primacy, of a new “remedy of nullity”, in addition to the traditional expectation of disapplication.

After briefly recalling the well-established caselaw on decentralised enforcement (Section 2), we will consider a series of major rulings – *Berlusconi* (2018),[[1]](#footnote-1) *Rimšēvičs* (2019),[[2]](#footnote-2) and *W.Ż.* (2021)[[3]](#footnote-3) – that arguably step beyond those familiar frameworks and predictable principles (Sections 3-5). But our evaluation concludes that the Court’s recent assertion (particularly in *Rimšēvičs*) of direct jurisdiction over the lawfulness of certain national measures, while no doubt radical, is nevertheless confined to quite exceptional circumstances. By contrast, the Court’s novel instructions (particularly in *W.Ż.*) about when national courts should treat certain domestic measures as null and void are both potentially more far-reaching and yet still possible to reconcile comfortably with the existing paradigms of the primacy caselaw. Nevertheless, the criteria for determining when Union law might in practice require the annulment (rather than mere disapplication) of incompatible national acts remain deeply unclear (Sections 6-7).

Three quick points of clarification, before we proceed further. First, in these days when European cooperation and integration are so often framed and portrayed in terms of some unquenchable tension between the Union and its Member States, it feels sadly necessary to stress that this analysis neither adopts nor implies any such conflictual or antagonistic understanding of relations between the EU and national legal systems. Our main role is to articulate and explore the evolving interpretation of core Union law principles by the CJEU, in particular, as regards the duties expected of domestic judges in their capacity *qua* the Union’s ordinary courts.[[4]](#footnote-4) That is not to deny that the Court’s caselaw can sometimes raise difficult challenges and even controversial issues for the national legal systems – merely to recall that not every legal problem should be seized upon as fresh evidence of some contrived constitutional maelstrom pitting power-grabbing winners against sovereignty losers.

Secondly, when we talk about the potential implications of primacy in terms of “nullity” and “voidness”, it is essentially as a means of contrasting the Court’s recent caselaw with its more established jurisprudence on the traditional remedy of disapplication – without intending to engage in any more detailed theoretical or doctrinal debate about the different types of nullity or voidness that might exist within (or be entirely alien to) any given legal system. For the purposes of our discussion, the key question is how far the Court might increasingly conceive of primacy as a Union law vehicle for rendering incompatible national acts not just inapplicable but non-existent within the domestic legal system – without us being overly concerned (for example) with whether such non-existence should arise automatically by force of law or only after a positive declaration from the competent judicial authorities; about the knock-on consequences of any non-existence for derivative or subsidiarity acts or for the rights and interests of third parties; or indeed about whether the more detailed mechanics of primacy-induced nullity / voidness should be governed by a common approach developed under Union law or would instead be best left to the more detailed conceptual and procedural structures of each Member State.[[5]](#footnote-5)

Thirdly, when we refer to “incompatible national measures”, we are not limiting our discussion only to public law acts adopted by the state and its various emanations, but rather we envisage any phenomenon capable of being endowed with some recognised status under the domestic legal system, yet also of conflicting with some directly effective obligation created by or under the Treaties – thereby including also purely private acts and omissions, since the latter are of course equally able to attract the attention of the principle of primacy in appropriate situations.[[6]](#footnote-6)

**2. Established principles on decentralised enforcement**

Let’s start by recalling some of the well-established principles that govern relations between the EU and national legal orders.[[7]](#footnote-7) First, when it comes to determining the validity of Union acts, exclusive jurisdiction lies with the Union courts – in direct actions as well as through preliminary references.[[8]](#footnote-8) However, the CJEU does not exercise direct jurisdiction over the validity of national acts. The Court can declare the existence of an infringement through enforcement proceedings against the Member State, and provide guidance as to the proper interpretation and application of Union law through preliminary references, but the actual legal consequences of incompatibility within each domestic legal system are worked out by the Member State’s own institutions – including the national courts in accordance with the principles of decentralised enforcement.[[9]](#footnote-9)

Secondly, those principles of decentralised enforcement are predicated upon the idea that the Union and national legal systems form distinct, albeit closely interlinked, legal orders. As the Court has also expressed it: Union law has given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States (as well as its Member States with each other).[[10]](#footnote-10) To be more precise: where it is not possible to interpret national law in conformity with the Member State’s obligations under the Treaties, the domestic courts should turn to the principles of direct effect and primacy.[[11]](#footnote-11) Direct effect converts qualifying provisions of EU law into acts that must be treated as directly cognisable also within the domestic legal order.[[12]](#footnote-12) Where the direct effect of a given Union provision is established, this will in turn trigger the principle of primacy: directly effective Union law must take priority over incompatible domestic rules, including even those with constitutional status.[[13]](#footnote-13) However, the Court does not require or expect such domestic rules to be rendered null and void, only to be disapplied, and only to the extent of their incompatibility with the Treaties.[[14]](#footnote-14)

Thirdly, Union law recognises that, in certain situations, that requirement of disapplication might be excused or suspended on an exceptional basis – particularly on grounds related to the protection of legal certainty. In some cases, the power to limit the full effects of primacy falls directly under the jurisdiction of the Court itself: for example, when it comes to restricting the general temporal effects of a preliminary ruling, or to declaring a Union act unenforceable for want of adequate publication.[[15]](#footnote-15) In other situations, the initiative to withhold disapplication lies with the national courts, albeit subject to guidance and oversight by the ECJ: for example, as regards compliance with domestic limitation periods, or respect for national rules protecting *res judicata*.[[16]](#footnote-16) The caselaw here continues to develop steadily and incrementally – particularly when it comes to a national court’s request temporarily to suspend the disapplication of admittedly incompatible domestic rules, on the grounds that such suspension is necessary to avoid the creation of a regulatory vacuum, capable of doing even greater damage to the public interest than the Member State’s breach of its Treaty obligations.[[17]](#footnote-17)

All that having been said and acknowledged, it may well be that an incompatibility with Union law should indeed result in the nullity (not mere disapplication) of certain domestic acts – albeit through legal channels going beyond the basic expectations associated with the principle of primacy *per se*. At one extreme, the Treaties might explicitly demand a sanction of nullity for certain incompatible national measures: perhaps the most famous example is Article 101(2) TFEU, which provides that anti-competitive agreements or decisions “shall be automatically void”;[[18]](#footnote-18) though Union secondary legislation can also expressly demand the nullity of particular domestic acts as the appropriate sanction for their breach of Union law.[[19]](#footnote-19) At the other extreme, each national legal system may, of course, opt for itself to provide that certain forms of incompatibility with Union law shall serve to nullify the relevant domestic provision – and it is clear that that is what happens in a great many situations, covering both public law acts and private law relationships.[[20]](#footnote-20) In between those two poles, Union legislation might specifically call for types of legal relief against incompatible national measures that are virtually indistinguishable from straightforward nullity – so it is unsurprising to find that that is precisely how such Union legislation ends up being implemented in practice within the Member States. For example, the Unfair Contract Terms Directive obliges Member States to ensure, under their national law, that unfair contractual terms shall not be binding on the consumer:[[21]](#footnote-21) the Court has interpreted this to mean that unfair contractual terms must be regarded, in principle, as never having existed, so that they cannot have any effect on the consumer;[[22]](#footnote-22) in practice, various domestic legal systems therefore opt to treat unfair contractual terms simply as being null and void.[[23]](#footnote-23) But in all such cases, it is important to stress that annulment is either a distinct obligation imposed directly under the Treaties, or a voluntary choice made by the Member State itself, rather than an outcome demanded by the Court pursuant to the principle of primacy as such.

Nevertheless, in recognition of the fact that mere disapplication may not in itself suffice to ensure the effective judicial protection of rights and interests created under the Treaties – and regardless of any more explicit provision contained in Union primary or secondary law, or of any voluntary choices made by each Member State under the exercise of its own procedural autonomy – the Court is also capable of prescribing certain more specific legal outcomes and / or remedies that go beyond the basic effects associated with the principle of primacy: for example, instructing the referring court to assume jurisdiction for itself over particular categories of dispute that might otherwise be stranded beyond proper judicial supervision; insisting that claimants enjoy a Union law-based right to the recovery of charges levied contrary to the Member State’s obligations under the Treaties; or highlighting the possibility for individuals to seek reparation from the Member State, pursuant to the *Francovich* caselaw, in respect of any sufficiently serious breach of Union law.[[24]](#footnote-24) And ultimately, whatever the precise nature or legal origin of the individual remedies provided by the domestic courts, the Member State as such remains obliged to rectify a situation of incompatibility between national law and Union law, by taking all other general or particular measures necessary to ensure that the Treaties are respected within its territory.[[25]](#footnote-25)

Those are the fundamental principles developed under Union law to determine the legal consequences of incompatibility – with direct effect and primacy indeed ranking amongst the “essential characteristics” of the European Union and its legal order.[[26]](#footnote-26) But of course, it remains possible (simply as a matter of fact, and passing no comment on the issue of legitimacy or desirability) for national courts consciously to deviate from their Union law obligations, on the basis of alternative doctrines extrapolated from their own domestic constitutional system. As we all know, certain national courts are more vocal than others about asserting a residual jurisdiction directly to review the legality of EU acts, at least for the purposes of the latter’s recognition and status within the relevant domestic legal system;[[27]](#footnote-27) while other national courts might recognise the direct effect and primacy of Union law in principle, but nevertheless withhold the remedy of disapplication in practice, in circumstances that do not clearly tally with the framework and / or criteria approved by the CJEU.[[28]](#footnote-28)

Such national judicial challenges to the fundamental framework of EU-Member State legal relations seem to attract the lion’s share of academic interest in this field: after all, we seem naturally drawn into the drama of “judicial confrontation”, particularly when tinged with some existential angst, as befits the “cluster crisis” ethos of our turbulent times.[[29]](#footnote-29)

But though we might refer to the Court’s own caselaw as “well-established”, and it is certainly true that the great majority of fresh rulings from Luxembourg (and there are many) fit neatly into our existing conceptual framework and jurisprudential precedents, such familiarity and predictability should not be taken to imply that the underpinning Union law principles are entirely static or themselves uncontroversial. After all, consider the remarkable fact that it was only in the *Popławski* judgment of 2019 that the Court finally settled a decades-old dispute about the underlying relationship between the fundamental principles of direct effect and primacy,[[30]](#footnote-30) by clarifying that the latter’s capacity to procure the disapplication of incompatible national rules ultimately depends upon the former attribute first attaching to the relevant provision of Union law,[[31]](#footnote-31) a proposition that had been consistently rejected by a significant proportion of the scholarship,[[32]](#footnote-32) and indeed challenged by several of the Court’s own Advocates General.[[33]](#footnote-33)

This paper is concerned with another set of recent developments in the Union’s own doctrinal framework for interacting with the domestic legal orders of the Member States – developments that might also be considered as stepping outside the familiar and predictable. In particular, a series of major rulings – *Berlusconi* (2018),[[34]](#footnote-34) *Rimšēvičs* (2019),[[35]](#footnote-35) and *W.Ż.* (2021)[[36]](#footnote-36) – prompt questions about how far the Court is becoming more interventionist about its own jurisdiction to rule directly on the validity / status of national acts (not just leaving the determination to national courts, but actually settled by the CJEU itself); and indeed more prescriptive about the legal consequences of incompatibility that should flow from the principle of primacy (not merely expecting the disapplication of national rules, but insisting that the latter be rendered null and void).

What new legal principles do these major cases suggest? Do their novel doctrinal points add up to some more coherent development than the sum of their individual parts? Whether individually or collectively, how far do these cases support an evolution or even a revolution in the established principles governing EU-Member State legal relations? Our analysis will acknowledge that these rulings deal with very different situations and that each suggests its own quite distinct legal development. But taken together, these judgments do confirm that, in principle, the unity and effectiveness of Union law might well demand the annulment of certain incompatible national measures. The more difficult challenge is to extract, from this relatively limited and diverse body of caselaw, potentially reliable and useful factors or criteria that might help guide the future development of our novel “remedy of nullity”.

**3. Division of jurisdiction between Union and national courts: *Berlusconi***

Both *Berlusconi* and *Rimšēvičs*are essentially concerned with shifting the boundary between CJEU and national court jurisdiction over certain categories of national act – though even on this issue, the two rulings deal with different situations and establish distinct legal principles. In particular, *Berlusconi* afforded the Court an opportunity to clarify and develop its caselaw on the division of jurisdiction between the Union and national courts in mixed (or hybrid, or composite) administrative procedures, where the adoption of some national preparatory measure subsequently leads to the adoption of a definitive Union act.[[37]](#footnote-37)

Where the preparatory national act (for example, an unfavourable opinion from the competent Member State authorities on an application for funding) is a necessary stage in a procedure that leads to the adoption of a definitive Union act, as regards which the competent Union institution has limited or even no discretion, so that the prior national act is effectively binding upon the Union institution (i.e. the latter could not nevertheless decide to grant the relevant funding): it falls to the domestic courts to rule on any irregularities affecting the legality of the relevant national act and to ensure the effective judicial protection of affected individuals. Such judicial review must be ensured, even if preparatory acts would not normally be amenable to challenge under ordinary domestic law.[[38]](#footnote-38)

However, where the preparatory national act (for example, a request that certain documents held by a Union institution though originating from the Member State should not now be disclosed) is part of a procedure that leads to the adoption of a definitive Union act, and the competent Union institution ultimately retains full decision-making power, so that the prior national act is not binding as such on the Union institution (i.e. the latter could nevertheless decide to disclose the relevant documents): it falls to the CJEU to exercise exclusive jurisdiction over the legality of the final Union act and to ensure the effective judicial protection of affected individuals. In that context, the Court itself will examine any defects vitiating the national preparatory act that could affect the validity of the definitive Union measure.[[39]](#footnote-39)

So far, nothing very new, one might rightly think. But at this point, *Berlusconi* adds something to the established caselaw. In the latter category of mixed (hybrid / composite) situation, the duty of loyal cooperation requires that national preparatory acts cannot be subject to parallel or additional judicial review before the national courts. The effectiveness of such mixed EU-Member State procedures calls for a single judicial review, conducted by the Union courts, and only once the definitive Union decision has been adopted, so that the administrative process is brought to an end and any binding legal effects are produced. If the national courts were to exercise jurisdiction in respect of such national preparatory acts, alongside the Court’s own jurisdiction in respect of the definitive Union measure, there would be a risk of divergent assessments and a threat to the CJEU’s exclusive powers – especially in cases where the competent Union institution follows the analysis of or a proposal from the Member State authorities.

There is no doubt that the ruling in *Berlusconi* brings greater coherence to the system of judicial protection in respect of mixed (hybrid / composite) administrative processes. But for present purposes, the Court’s judgment contains a latent ambiguity and lies open to (at least) two competing interpretations: the first minimises its significance for EU-Member State relations; whereas the second is more radical and paves the way for the subsequent ruling in *Rimšēvičs*.

According to the minimalist interpretation, *Berlusconi* is just as important for what the Court did not say as for what it did. The Court’s sole focus in *Berlusconi* concerned the division of jurisdiction between the Union and national courts. But even then, the Court does not explicitly claim direct jurisdiction of its own to pronounce on the lawfulness of the relevant category of national preparatory acts. On the contrary: the Court’s powers are still categorised as those of exclusive jurisdiction in relation to the legality of Union measures; only as an “incidental matter” will the Court examine whether the legality of a definitive Union act is affected by defects in the prior adoption of a national preparatory act. Instead, the Court’s primary concern lies elsewhere: in insisting that national courts refrain from exercising their own powers of judicial review in respect of that same category of national preparatory acts – and to do so, regardless of the type of procedure or the nature of the claim as a matter of domestic law, i.e. not just on grounds of an alleged infringement of Union law, but also on grounds of an alleged contravention of purely national law, such as the principle of *res judicata*.

The implication of *Berlusconi* is that certain national preparatory acts are effectively shielded from direct judicial review by either the Union or the national courts, either for breach of Union law or as a matter of domestic law.[[40]](#footnote-40) Instead, alleged defects in their adoption (certainly those based on Union administrative law, possibly also those recognised under the relevant national legal standards)[[41]](#footnote-41) are to be examined by the CJEU itself, as an incidental issue, when the latter is called upon to assess the lawfulness of the final Union act as a matter of Union law.[[42]](#footnote-42) As jurisdictional shifts go, *Berlusconi* may well bring welcome coherence, but it is hardly radical or transformative. Beyond that, *Berlusconi* has no wider implications for the system of decentralised enforcement: for example, the Court says nothing here about how far the principle of primacy extends beyond mere disapplication to a possible remedy of nullity. And of course, even this minimalist reading of *Berlusconi* is only as good as the willingness of national courts to comply in practice, by refraining from exercising their own jurisdiction over relevant domestic preparatory acts – though as we know, that is true of everything under the *Popławski* model of separate, albeit closely interlinked, EU-Member State legal systems.

By contrast, a more expansive interpretation of *Berlusconi* would argue that the Court did not merely instruct the domestic courts to refrain from engaging in their own judicial review of national preparatory acts. The Court in fact asserted its own power directly to assess and pronounce on the lawfulness of such acts, where they are part of a process that leads to the adoption of a definitive Union act involving the exercise of discretionary powers by the competent Union institution. In effect, the Court asserted a double exclusive jurisdiction of its own: not only over the legality of the final Union act, but also over the lawfulness of the national preparatory act (again: certainly as a matter of Union law; possibly also according to domestic law criteria).[[43]](#footnote-43) The Court’s assessment of national preparatory acts may well be “incidental”, but it is still direct and tangible – leaving no category of domestic measure effectively shielded from amenability to judicial review on its own terms.[[44]](#footnote-44)

If that more expansive interpretation is correct, then the jurisdictional shift announced in *Berlusconi* becomes much more significant. For the first time, the Court would have claimed the power both to assess and to determine for itself the lawfulness of certain national acts, and to do so not just in the declaratory sense of enforcement proceedings but also for the purposes of the Member State’s own legal system – thereby creating an exception to the fundamental principle that the Union courts exercise exclusive jurisdiction directly over the legality of Union acts, while the national courts exercise exclusive jurisdiction directly over the lawfulness of domestic acts.

Such an interpretation of *Berlusconi* would also raise an important knock-on question: once the Court has directly determined that a national preparatory act is vitiated by a defect that renders it unlawful, should the Court then revert to the ordinary principles of decentralised enforcement and leave it to be national courts to work out the appropriate consequences of that incompatibility under the familiar terms of primacy and disapplication; or, having found for itself that the relevant domestic act is unlawful, should the Court instead be more prescriptive about the proper legal effects of such incompatibility – by insisting that the impugned measure now be treated simply as null and void, also by the national courts for the purposes of their internal legal order? However, in answer to that question, the judgment in *Berlusconi* itself is entirely silent.[[45]](#footnote-45)

The trouble with our more expansive interpretation of *Berlusconi* is that, if the Court indeed intended to create a derogation from one of the most fundamental rules concerning legal relations between the Union and its Member States, and thereby also raise the prospect of creating a knock-on exception to another basic tenet of the principles governing decentralised enforcement, one might have expected the Court to have done so rather more explicitly and categorically – particularly since the Court was already in the mood to clarify and systematise its caselaw and the opportunity for explicit and categorical statements lay right at its feet. Moreover, the Court has generally not treated mere preparatory acts of the Union institutions as amenable to judicial review on their own terms, so it might again seem odd if *Berlusconi* were to have (only implicitly) created an exceptional approach, allowing the Court directly to assess and determine the validity of national preparatory acts. After all, the Court’s usual practice, of carrying out a purely incidental investigation into alleged defects in the adoption of mere preparatory acts, is quite sufficient to serve the primary purpose of the proceedings – which is to determine the lawfulness of the definitive Union measure.[[46]](#footnote-46)

So the present author prefers to read *Berlusconi* in a more restrained fashion – at least when it comes to understanding what the Court intended at the time the judgment itself was delivered (even if subsequent caselaw might in due course lead us to re-evaluate the significance of *Berlusconi* with the benefit of hindsight). The *ratio* of the case therefore properly consists in a direction to the national courts that they should refrain from exercising their ordinary jurisdiction over a particular category of domestic preparatory acts, while the Court itself will undertake only an incidental assessment of any defects affecting those acts, during the course and only for the purpose of exercising its own exclusive jurisdiction over the definitive Union measures.[[47]](#footnote-47)

That said, we did not have to wait much longer than *Berlusconi* itself for the Court both to stake the more radical assertion of Union jurisdiction directly over the lawfulness of certain national measures, and to imply the knock-on consequence that such acts should indeed be treated as null and void (not merely disapplied) by the domestic courts. In fact, the Court took precisely those steps, only a matter of months afterwards, in the *Rimšēvičs* dispute.

**4. Division of jurisdiction between Union and national courts and the implications for primacy: *Rimšēvičs***

*Rimšēvičs* also concerned the division of jurisdiction between the Union and national courts. This time, however, the Court isfar more explicit than in *Berlusconi* about the nature and extent of its jurisdictional shift; while *Rimšēvičs* is also more significant when it comes to the knock-on consequences of the Court’s jurisdiction for the obligations of the national courts pursuant to the principle of primacy. Though it must also be stressed: in practice, *Rimšēvičs* involved such a specific and exceptional situation that its relevance (however direct) is also very limited and the ruling appears difficult to generalise into any broader doctrinal change.

The defining characteristic of *Rimšēvičs* is that Union primary law itself created a direct exception to the normal division of jurisdiction between the Union and national courts, by explicitly conferring power upon the ECJ to examine and rule on the legality of a specific category of national act. In particular: as well as requiring that the statute of each national central bank should provide that its Governor holds office for at least five years, and may be removed from post only if he / she no longer fulfils the conditions for performance of their duties or has been guilty of serious misconduct, Article 14 of Protocol No 4 on the Statute of the ESCB and of the ECB provides that a removal decision may be referred to the ECJ, either by the Governor concerned or by the Governing Council of the ECB, on grounds of infringement of the Treaties or of any rule of law relating to their application, provided such proceedings are instituted within a two-month limitation period.

In *Rimšēvičs*, the Court confirmed that its powers under Article 14 of Protocol No 4 cover not only permanent / definitive but also temporary / provisional removal decisions. But in addition, the Court also held that its powers under Article 14 of Protocol No 4 are not to be equated with those in enforcement proceedings against the Member State, where the Court issues a declaratory judgment that obliges the national authorities to take all necessary steps, within their domestic legal order, to rectify the finding of incompatibility. Instead, the Court’s powers under Article 14 of Protocol No 4 are equivalent to those in annulment actions brought against the Union institutions: the Treaties have conferred upon the Court a power directly to quash any disputed national removal decision, if the latter fails to comply with the conditions specified in Union primary law.[[48]](#footnote-48)

As the Court stressed: the Treaties created this specific legal remedy, of Union judicial review directly in respect of a domestic act, in derogation from the normal division of jurisdiction between the Union and national courts, so as to reflect the “novel legal construct” of the ESCB. The latter brings together national and Union institutions, and causes them to enter into close mutual cooperation, within a highly integrated system, characterised by a less marked distinction between the Union and national legal orders.[[49]](#footnote-49) A key feature of that novel legal construct lies in the importance the Treaties attach to ensuring the functional independence of the ECB and the ESCB.[[50]](#footnote-50) Article 14 of Protocol No 4 is an essential component of that institutional balance: by providing a swift means to challenge unlawful removals via the Union courts, the Treaties reinforce the fundamental principle of independence from political influence, and avoid any prolonged absence of a national central bank Governor, of the sort that could seriously affect the proper functioning of the ECB and ESCB.

*Rimšēvičs* obviously goes further than *Berlusconi,* insofar asthe Court explicitly confirms its own direct jurisdiction to determine the validity of certain domestic acts, for the purposes of both the Union and the national legal orders. Under Article 14 of Protocol No 4, the Court neither provides a concrete declaration of incompatibility that the Member State is then expected to correct (as in ordinary enforcement proceedings) nor issues an abstract statement of incompatibility whose full domestic legal consequences should be determined and worked out by the national courts (as usually happens with decentralised enforcement). Moreover, that means *Rimšēvičs* is not just a statement about the division of jurisdiction between the Union and national courts. It also has direct implications for the specific legal effects that should arise, through the principle of primacy, within the Member State’s own legal system: after all, the natural consequence of the Court’s powers under Article 14 of Protocol No 4 is that a finding of incompatibility is no longer merely a matter of asking the national courts to disapply the impugned removal decision, but now entails the direct voiding of the relevant domestic act, based solely on the ECJ’s own decision to annul it – with the national courts thence expected to recognise the Court’s jurisdiction and respect the full consequences of its exercise.

Of course, there are still questions to answer about the precise nature of the “specific legal remedy” at issue in *Rimšēvičs*. Not least: while *Rimšēvičs* goes further than *Berlusconi* in that the Court expressly assumes direct jurisdiction over the lawfulness of national removal decisions, it remains unclear whether such jurisdiction should also be considered exclusive, so that national courts (indeed, as was the case in *Berlusconi*) are expected to renounce their own domestic jurisdiction over the same category of national act. Advocate General Kokott seemed to suggest not only that the substantive grounds for removal of a national central bank Governor were exclusively governed by EU law; but also that jurisdiction to evaluate compliance with those substantive Union rules should vest solely in the ECJ.[[51]](#footnote-51) Nevertheless, the Court itself did not explicitly assert the exclusivity of its own direct jurisdiction – merely stressing that the specific legal remedy against removal, as provided for under Article 14 of Protocol No 4, is without prejudice to other purely national procedures such as criminal investigations into the behaviour of a national central bank Governor.[[52]](#footnote-52) But if Article 14 of Protocol No 4 is truly analogous to an annulment action, we might expect national removal decisions effectively to be assimilated to Union acts in terms of their amenability to judicial scrutiny and thereby to become subject to the same rule of exclusivity: only the ECJ can rule on the legality of removal decisions as such, and regardless of the outcome of any other domestic proceedings (however related those may be to the wider factual situation surrounding the Governor’s position or behaviour); if a removal decision as such were to be challenged instead before the national courts, the latter should either decline jurisdiction altogether or (at most) pass the challenge on to the Court itself via a preliminary reference – presumably subject to the usual *TWD* principle that indirect validity references cannot be used to circumvent the two-month limitation period applicable to direct actions.[[53]](#footnote-53)

Whatever the answer to the outstanding question about exclusivity, the constitutional significance of *Rimšēvičs* is clear: the case confirms, not just the existence of a jurisdiction vested directly in the Court itself to assess and determine the lawfulness of certain national acts, but also and as an inherent consequence the strengthening of Union law’s capacity to prescribe the precise legal consequences of incompatibility within the domestic legal system – extending primacy beyond the standard expectation of disapplication, so as to create a novel remedy of nullity.

As ever under the *Popławski* model of separate, albeit closely interlinked, EU-Member State legal systems, the jurisdictional shift in *Rimšēvičs* is only as good as the willingness of the national courts to comply in practice: first, by recognising the Court’s competence directly to adjudicate over the validity of national removal decisions; secondly, by accepting that the latter’s annulment may produce immediate legal effects as such within the domestic legal system; and thirdly, possibly also (if the Court’s competence is indeed to be considered exclusive) by refraining from exercising their own national jurisdiction to undertake the judicial review of removal decisions (whether pursuant to Union or domestic law).

But the practical significance of *Rimšēvičs* is also numbed by the fact that the underpinning legal framework was so highly unusual – as the Court itself was at pains to stress throughout the judgment. The “specific legal remedy” of direct action against national removal decisions was explicitly created under Union primary law; it is available only to a very restricted class of claimants; it relates to a virtually unique category of decisions; and it can be exercised only in an exceptional set of circumstances. Commentators have naturally speculated about whether *Rimšēvičs* could potentially be extended to other situations, either more or less analogous to the “novel legal construct” of the ECB / ESCB – reflecting the growing interdependence between Union and Member State institutions within Europe’s increasingly complex governance structures – but the general consensus seems to be that further exceptions to the traditional jurisdictional rule dividing Union courts / acts from national courts / acts are unlikely to be recognised without express authorisation under Union primary law.[[54]](#footnote-54) Of course, the fact that such authorisation existed at all gives *Rimšēvičs* the sort of clear constitutional mandate that we argued (in Section 3) was missing from academic efforts to interpret the ruling in *Berlusconi* to similarly expansive effect. But for that very reason, it is also difficult to regard *Rimšēvičs* as a wider precedent for transforming the relationship between the Union and Member State legal orders.

**5. Primacy extending its effects from disapplication towards nullity: *W.Ż.***

And yet, insofar as *Rimšēvičs* necessarily implies the existence of a Union law remedy of nullity (not just disapplication) it did anticipate an important dimension to the subsequent ruling in *W.Ż..* The latter is to be counted among the many judgments delivered by the ECJ to address the rule of law crisis in Poland and, in particular, the Polish Government’s systematic and deplorable attempts to undermine the very existence of an independent and impartial judicial system.[[55]](#footnote-55) More specifically, *W.Ż.* concerned the consequences that should flow from a national court’s finding that the conditions surrounding a given judicial appointment failed to satisfy the need for an independent and impartial tribunal previously established by law in accordance with Article 19(1) TEU.

That question arose in a complex and distinctive factual and legal situation, which can nevertheless be summarised for present purposes as follows. The claimant was transferred (in effect, demoted) from his judicial post without consent. However, the National Council of the Judiciary (acting as first instance tribunal) resolved that there was no need to adjudicate over his legal challenge to that non-consensual judicial transferral. The claimant then appealed to the Supreme Court against that first instance resolution. His appeal fell within the jurisdiction of the Chamber of Extraordinary Control and Public Affairs – but the claimant further requested that the Supreme Court should recuse all the judges currently sitting in that Chamber from hearing his appeal, on the grounds that they could not be considered independent and impartial, due to fundamental flaws in their own judicial appointment. Nevertheless, a single judge from the Chamber – without awaiting the outcome of the claimant’s recusal request, without access to the relevant casefile, without offering the claimant any opportunity to present his case, and purportedly ruling as tribunal of last instance – found the claimant’s appeal against the resolution of the National Council of the Judiciary to be inadmissible.

Against that background, the competent Supreme Court panel charged with deciding on the claimant’s recusal request needed to know whether the relevant judge from the Chamber of Extraordinary Control and Public Affairs even had the status of “judge” in the first place, and therefore, whether his decision on the claimant’s appeal in fact enjoyed any legal existence. That distinction would have important procedural consequences: if the judge were legitimate and his decision legally existent, the competent Supreme Court panel would be obliged to terminate proceedings into the claimant’s recusal request because the latter had become devoid of purpose; whereas if the judge were in fact a non-judge and his decision was to be considered legally non-existent, the competent Supreme Court panel should proceed to rule on the claimant’s recusal application as a preliminary issue to his appeal against non-consensual transfer. The competent Supreme Court panel referred that question to another panel of the same court and it was the latter that decided to make a preliminary reference to Luxembourg. Since the proper status or otherwise of the disputed judge from the Chamber of Extraordinary Control and Public Affairs hinged upon Poland’s compliance with its obligations under Article 19(1) TEU, the ECJ was asked for guidance both on the substantive questions surrounding judicial independence and as to the consequences of a finding of non-compliance in this particular case.

Having considered the substantive questions in considerable detail, the ECJ held that – if the referring court were to consider that the disputed judge’s appointment indeed failed to satisfy the requirements of Article 19(1) TEU – it should respond as follows to the competent Supreme Court panel responsible for deciding upon the claimant’s recusal request: in accordance with the principle of primacy, the disputed judge’s decision to dismiss the claimant’s appeal must be declared null and void, without any provision of national law being able to preclude this.

To reach that conclusion, the Court recalled that the principle of primacy establishes the preminence of EU law over national law and requires all Member State bodies to give full effect to EU law. The Member State cannot rely on rules, even of a constitutional nature, to undermine the unity and effectiveness of EU law. As bodies of the Member State, any national court hearing a case within its jurisdiction is obliged to disapply any provision of domestic law that is contrary to directly effective EU law. Given that Article 19(1) TEU imposes on Member States a clear, precise and unconditional obligation as to result, the Polish Supreme Court is required to ensure the full effectiveness of that Treaty provision. Here, taking into account the particular procedural features identified by the referring court, compliance by the competent Supreme Court panel with its obligations under Article 19(1) TEU requires that the disputed judge’s decision be declared null and void. No national legal considerations relating to the principle of legal certainty or finality of decisions can be relied upon to prevent that outcome. As the Court concluded in the operative part of its judgment: a national court seised of a recusal request, as an adjunct to an appeal against the claimant’s non-consensual judicial transfer, must – where such a consequence is essential in view of the procedural situation at issue, in order to ensure the primacy of EU law – declare null and void a decision dismissing that appeal, if the circumstances of the relevant judge’s appointment fail to satisfy the requirements of Article 19(1) TEU.

The *W.Ż.* case differs from both *Berlusconi* and *Rimšēvičs* insofar as the Court in *W.Ż.* leaves intact the traditional division of jurisdiction between the Union and national courts. The CJEU does not seek to assert its own direct jurisdiction, nor to suppress existing domestic jurisdiction, in relation to any national acts. Far from it: the Court expressly affirms that its proper role here is to provide guidance as to the interpretation and application of Union law, so that the national court may undertake its own assessment of the compatibility of domestic law with the Member State’s Treaty obligations. To a far greater and more explicit extent than either *Berlusconi* or even *Rimšēvičs*, the Court in *W.Ż.* focuses instead on the legal consequences that should flow, within the domestic legal system, from a finding of incompatibility reached as such by the national court.

In that regard, much of *W.Ż.* draws upon traditional and familiar caselaw, as indeed do previous and subsequent rulings also delivered in the context of the Polish rule of law crisis – from the general statement that all national bodies are obliged to ensure the full effectiveness of Union law, to the more specific reiteration that domestic courts are obliged to disapply provisions deemed incompatible with directly effective EU measures – with Article 19(1) TEU included among the EU acts that are to be treated as directly effective for those purposes.[[56]](#footnote-56) Where *W.Ż.* appears to break new ground is the Court’s explicit extension of the national court’s obligation, beyond mere disapplication of the disputed domestic act, so as to declare and treat the latter simply as null and void.[[57]](#footnote-57) Is this concrete evidence that the Court conceives of primacy not only in terms of the traditional remedy of disapplication, but potentially also as embracing a novel remedy of nullity? Read together with the implicit consequences of *Rimšēvičs*, does *W.Ż.* thereby suggest the beginnings of a wider trend – whereby the Court adjusts (even revolutionises) the Treaties’ relationship with and status within the national legal systems, by launching a more far-reaching incursion into the competence of the domestic courts to manage the proper legal consequences of incompatibility?

**6. Evaluation: A new Union law remedy of nullity?**

It is possible to offer a minimalist interpretation of the ruling in *W.Ż.*. Save in the truly exceptional circumstances of *Rimšēvičs*, EU law cannot directly render national acts null and void; and nor can the Court even require the domestic judges to treat national acts as non-existent as a legal consequence of incompatibility, direct effect and primacy. Despite initial appearances, the judgment in *W.Ż.* does not contradict that fundamental proposition. In *W.Ż.*, it was the national legal order itself that offered a remedy of nullity; indeed, it was the domestic courts themselves that framed the incompatibility issue in terms of non-existence. The Court’s response merely tailored the principle of primacy to the palette of consequences made available under domestic law – in fact, to the range of possible outcomes dictated by the Member State’s own peculiar national procedural logic. But surely the Court would not have used the same approach, or employed the same language, in other factual and legal situations and / or as regards the procedural systems of other Member States, where nullity was not among the outcomes positively available to (indeed, logically demanded by) the competent domestic courts in order to resolve the consequences of incompatibility.[[58]](#footnote-58)

The trouble with such a minimalist interpretation is that it does seem to airbrush out of the *W.Ż.* ruling some of the Court’s own clear judicial intentions. The expectation of nullity is phrased in mandatory terms. Indeed, the French text of the ruling goes even further than the English version in that regard: the disputed judge’s decision must be declared *non avenue*, i.e. implying a form of legal non-existence that is conceptually and practically distinct from and even more far-reaching than an act’s annulment.[[59]](#footnote-59) Even recalling our introductory point – that we are not concerned as such with the different varieties of nullity or non-existence that might be more or less familiar across different national legal systems – surely the French text nevertheless reinforces the point that the Court in *W.Ż.* was in the mood for giving positive directions, not offering mere suggestions. Moreover, the Court furthermore specifically orders that no other domestic principle (such as legal certainty or the finality of decisions) can relieve the national court from its obligation to declare the incompatible domestic act null and void / non-existent. Again, that hardly supports an interpretation that would reduce the ruling in *W.Ż.* to no more than a matter of the Member State’s own voluntary action within the confines of its pre-existing domestic procedural framework.

The alternative and more expansive interpretation of *W.Ż.*, is that the ruling does indeed mark an important evolution in the legal consequences that might flow, as a matter of Union law itself, from the principle of primacy – insofar as the Court laid the foundations for a novel remedy of nullity that positively instructs the national courts to treat certain incompatible domestic acts as non-existent within the Member State’s own legal order.

In one sense, it is fair to say that *W.Ż.* is not so constitutionally radical as *Rimšēvičs*: after all, the Court in *W.Ż.* is not directly establishing a finding of incompatibility and annulling the offending national act for itself, but rather simply interpreting the principle of primacy, to the effect that nullity is a legal consequence the national courts should positively draw from their own exercise of jurisdiction over incompatible domestic measures. But for precisely that reason, surely *W.Ż.* is potentially more significant, and potentially significantly more far-reaching, than *Rimšēvičs*: to support its innovative approach to the consequences of incompatibility, the Court in *W.Ż.* is not drawing upon any explicit and effectively unique authorisation in written Union primary law, but exercising its ordinary judicial power to provide binding guidance to the national courts about their obligations *qua* Union courts. If and insofar as *W.Ż.* does stand as persuasive authority for the evolution of a novel remedy of nullity, the capacity of that innovation to reverberate across the domestic legal systems is surely substantially greater than that of *Rimšēvičs*.

So: how persuasive is this alternative, more expansive interpretation of *W.Ż.*? We will now consider two main questions. In the first place: in principle, should we regard a remedy of nullity as even compatible with the existing framework governing Union-Member State relations? In the second place: in practice, according to what criteria might the Court treat nullity (rather than disapplication) as the appropriate legal consequence of primacy?

*6.1. Nullity in principle?*

Dealing with the first question – whether a Union demand for nullity sits uncomfortably with the established framework of EU-Member State legal relations – the argument against an expansive interpretation of *W.Ż.* might proceed as follows.

Particularly since the critical constitutional clarifications laid down in *Popławski* – affirming the indispensable character of the principle of direct effect as a means of translating Union provisions into domestically cognisable legal acts, and denying the capacity of the principle of primacy to operate independently against incompatible national measures – the Court appears to endorse an understanding of the Union and domestic legal systems as essentially separate, albeit closely interlinked, rather than as effectively unitary and seamlessly interwoven.[[60]](#footnote-60) Disapplication expresses that understanding perfectly: Union law has no capacity to render incompatible domestic acts null and void within their own legal system; it falls to the Member State to rectify its breach of the Treaties and, in the meantime, for the national courts to refrain from enforcing incompatible measures. By contrast, nullity appears better suited to a more unitary conception of Union-Member State relations: it reflects the capacity of Union law to correct situations of incompatibility for itself, not merely by conveying instructions across some strict or formal jurisdictional divide, but by directly adjusting a wayward domestic component within the wider European legal space. Yet since we live in a reality built on separation, not of merger, we should limit primacy to disapplication and avoid short-circuiting the system by introducing also a remedy of nullity.

That argument against an expansive interpretation of *W.Ż.* has a certain intuitive appeal, but upon closer inspection, it is surely guilty of conflating issues that should in fact remain distinct. There is, in fact, no logical connection between jurisdictional separation and the remedy of disapplication (on the one hand) and jurisdictional unity and a remedy of nullity (on the other hand). The *Popławski* understanding of the Union and national legal orders as distinct but closely interlinked systems, hinges upon the principle of direct effect and its role as the essential *passerelle* that translates qualifying Union provisions into domestically cognisable acts, whilst denying that Union law is capable of directly impacting upon the national legal system merely through its own existence as such. But once the jurisdictional divide is bridged by the principle of direct effect, the next task is to determine the legal consequences of an incompatibility between directly effective Union law and provisions of purely domestic origin, and that task falls to the principle of primacy as interpreted by the Court and applied by the national judges. In that context, the world according to *Popławski* is surely agnostic as to whether primacy means disapplication or nullity; that choice cannot of itself reshape the prior framework of EU-Member State relations as it already exists and within which that very same choice now falls to be made.

So the key question is: should the effects of primacy be limited to disapplication, or can one justify extending them into a remedy of nullity? The answer to that question neither depends nor impacts upon the underlying reality of the Union and national legal systems as separate albeit closely interlinked. Our response should instead be governed by the fundamental values that inform and shape the entire system of decentralised enforcement as it operates under the auspices of the basic *Popławski* model: securing a sufficiently effective and uniform application of Union law within and across the Member States.[[61]](#footnote-61) For the sake of that unity and effectiveness, what is it that the Court is prepared to demand as a matter of Union law? And what might the national courts be willing to accept, bearing in mind (again: simply as a matter of fact) their own domestic constitutional constraints?

There are other grounds for regarding the potential for primacy to extend beyond traditional disapplication into a more novel remedy of nullity, not as some radical transformation in Union-Member State relations, but as an evolutionary development of the caselaw founded upon essentially orthodox constitutional principles and informed by essentially familiar underpinning values and interests. After all, the Court has long acknowledged that certain forms of incompatibility between Union law and national law cannot effectively be remedied through the latter’s disapplication alone. Hence the accompanying expectation of more elaborate forms of effective judicial protection for the individual’s Treaty-based rights and interests – including the need to provide distinct Union law remedies such as the recovery of unlawfully levied charges or the right to reparation for Member State infractions.[[62]](#footnote-62) *W.Ż.* simply falls into the same category: it marks a recognition by the Court that certain forms of incompatibility are to be remedied through a specific sanction of nullity – a remedy created and required by Union law as such, and regardless of whether it would ordinarily be available within the national legal system. Moreover, *W.Ż.* can hardly be considered unique, let alone pioneering, in suggesting that the effective and uniform application of Union law sometimes requires redress through the straightforward nullity of incompatible domestic acts: not only had the Court already implied as much in *Rimšēvičs*, but as we noted above, the Treaties themselves already set a precedent through the sanction of voidness under Article 101 TFEU, while the Union legislature has also make explicit provision to the same effect in a variety of regulatory contexts.[[63]](#footnote-63)

None of which, however, should be taken to downplay the significance of a shift from disapplication to nullity of the sort here postulated by our expansive interpretation of *W.Ż.*. Disapplication is effectively an individual remedy, provided by the national court in accordance with the principle of primacy, so as to resolve a particular dispute – but otherwise, the relevant domestic act remains in existence and operational for all other purposes. By contrast, nullity is a remedy of general effect and application – such that the relevant domestic act simply ceases to exist, including for all other purposes. As the Court itself has expressed it, “[t]he concept of ‘nullity’, in its usual meaning, refers to actions seeking the annulment of an act, that result in its elimination and that have an effect *erga omnes*”.[[64]](#footnote-64) Imagine a Member State’s failure to notify the Commission of new technical regulations concerning breathalysers:[[65]](#footnote-65) disapplication requires that the incompatible national act should be set aside insofar as it might hinder the lawful marketing of non-compliant goods;[[66]](#footnote-66) whereas nullity implies that the incompatible national act should cease to exist with more generaleffects – including (say) when it comes to the admissibility of evidence in criminal proceedings against a defendant accused of driving under the influence of alcohol.[[67]](#footnote-67)

Whether the Court exercises its own direct jurisdiction to annul incompatible national acts (as in *Rimšēvičs*) or whether the Court instructs the domestic judges to treat incompatible national acts as void (as in *W.Ż.*) – and regardless of the fact that each such route to nullity falls, in principle, within the constitutionally legitimate range of legal consequences attributable to primacy within the Member State’s legal order – the fact remains that nullity is a very different, more robust and more far-reaching, response to incompatibility than disapplication. Not least since nullity carries potentially widespread and more penetrating implications within and across the national legal system (for example) as regards the impact on other relationships, and for other powers or actions, as well as for third parties.[[68]](#footnote-68) But that fact does not serve as a prior objection to the very possibility of a remedy of nullity; it goes rather to the question of when such a remedy might be considered appropriate in practice as a matter of Union law.

*6.2. Nullity in practice?*

Since there is no prior constitutional objection against a more expansive interpretation of *W.Ż.*, that brings us to our second main question: in what circumstances, and according to which criteria, might the unity and effectiveness of Union law now lead the Court to insist that the legal consequences of primacy should extend beyond the standard expectation of disapplication and into the more robust response of nullity?

In that regard, it is certainly possible to maintain the momentum of an adventurous understanding of the Court’s innovation in *W.Ż.* – treating the remedy of nullity as a fully-fledged weapon in the Court’s primacy arsenal, perhaps even capable of evolving into the equal of disapplication itself, because the decisive question should be: which remedy is the most appropriate to ensure the unity and effectiveness of Union law in any given situation or dispute?

Of course, disapplication works well enough (for example) when it comes to national rules that are incompatible with the primary free movement provisions: one and the same domestic act can be disapplied in cross-border disputes, while still remaining applicable to wholly internal situations, in a manner that reflects the nuanced interaction between internal market law and Member State competence.[[69]](#footnote-69) So there is no need for the undeserving drunk driver to escape criminal conviction thanks to the absolute nullity of unnotified breathalyser specifications, when the disapplication of those technical rules specifically for the purposes of commercialisation suffices to protect the Union interest in transparent market regulation. But in other situations, particularly where the legal consequences of incompatibility between Union law and national law really only admit of one possible outcome for all possible scenarios, the logic of primacy might well be equally or indeed better served by means of nullity: for example, either this judge is independent and impartial, or he / she is not; and in the latter case, there is no remaining hinterland untouched by Union law behind which the incompatible national act might retain some active and independent existence of its own – so why not let primacy aid the logic of its non-existence?

In that regard, it is even arguable that an expansive interpretation of *W.Ż.* is but a small step beyond some of the Court’s existing pronouncements on the legal consequences of incompatibility. Consider the caselaw concerning the implications of a Member State’s failure to conduct an environmental impact assessment as required under Union law – precisely the sort of incompatibility that only admits of one possible analysis for every scenario, since non-compliant decisions must by their nature be non-compliant for all relevant purposes.[[70]](#footnote-70) According to the Court, it is for the Member States to eliminate the unlawful consequences of any such breach of Union law: in earlier caselaw, the Court noted that – besides the obligation to set aside any incompatible domestic measures – the competent national authorities, including those courts hearing an action against any instrument adopted in breach of Union law, are required to take all the necessary measures, within their sphere of competence, to remedy the failure to carry out an environmental impact assessment;[[71]](#footnote-71) in subsequent caselaw, the Court has added that that may consist (for example) in adopting measures to suspend or annul the relevant plan or programme, or in revoking or suspending planning consent already granted in order to carry out the necessary assessment.[[72]](#footnote-72) So the Court has already treated nullity as one of the range of appropriate measures that may be required to rectify a situation of incompatibility; perhaps now the ruling in *W.Ż.* merely specifies that, in some situations, nullity is to be considered the *only* response appropriate for fulfilling the requirements of primacy.

However, it is worth noting that the Court’s caselaw on rectifying a failure to comply with Union environmental impact assessment legislation also frames the question of the Member State’s responsibilities as one, not of primacy as such, but rather of national procedural autonomy – with the possibility of annulment being identified primarily as a domestic choice, to be evaluated in accordance with the principles of equivalence and effectiveness.[[73]](#footnote-73) And of course, there is an appreciable – more than appreciable, in fact, a very significant – difference between the Court (on the one hand) identifying a range of potential responses that includes annulment, each solution being open to the national courts within their existing domestic powers, and each being equally capable of meeting the expectations of primacy and / or effective judicial protection; or (on the other hand) the Court specifying that primacy positively compels the national courts to treat a given domestic measure as null and void, regardless of whether that outcome would ordinarily lie within their legal competence.

But in addition, the trouble with such a maximalist interpretation of *W.Ż.* is that it relies, in its own fashion, upon a degree of airbrushing with the actual text of the ruling. After all, the Court was at pains to stress the importance of how the Union law principle of primacy here needed to interlock with the specific context and features of the Polish legal system, and to do so within the particular factual and procedural circumstances of the dispute at hand. Only a formal finding of nullity / non-existence in respect of the disputed judge’s inadmissibility order would entitle the competent Supreme Court panel to proceed with its adjudication over the claimant’s recusal request, in turn paving the way for a substantive hearing (in compliance with Article 19(1) TEU) of the claimant’s appeal against his non-consensual judicial transfer. As the operative part of the judgment summarises the Court’s reasoning: a declaration of nullity in respect of the incompatible national act is essential, in view of the procedural situation at issue in the case, in order to ensure the primacy of EU law.

So while the Court in *W.Ż.* surely went further than regarding nullity merely as some voluntary act undertaken entirely within the existing framework of national law, it is far from obvious that the Court in *W.Ż.* instead intended to craft a new and autonomous Union law remedy of nullity capable of truly generalised application – let alone to do so simply on the basis that it might better serve the unity and effectiveness of Union law for national courts to void certain incompatible acts rather than merely to disapply them. Nullity was “essential” to the proper legal resolution of *W.Ż.*, not merely “appropriate” or “convenient” to the uniform and effective application of Union law.

Moreover, in the particular circumstances of *W.Ż.*, for the Court to mandate nullity of the relevant national act with an effect *erga omnes* was surely not so dissimilar in practice to mere disapplication of that act in the particular dispute at hand. After all, annulment applied only to an individual decision (the disputed judge’s order dismissing an appeal) affecting an individual claimant (the judge subject to a non-consensual transfer) – so, besides matching the Union law consequences of incompatibility more appropriately into the specific procedural logic of the Polish legal system, the practical impact of the general remedy of nullity was virtually indistinguishable from that of an individual remedy of disapplication. It is worth noting that the Court avoided saying anything about the consequences of breaching Article 19(1) TEU for the relevant judicial appointment or the disputed judge’s status as a “judge”; ordering a sanction of nullity in respect of that broader state of incompatibility would have had much wider and more significant impacts within the Polish legal system.[[74]](#footnote-74)

In that sense, the remedy of nullity as explicitly ordered by the Court in *W.Ż.* shares an important characteristic with the de facto annulment action at issue in *Rimšēvičs*. In both cases, nullity was restricted to the elimination of an individual decision (whether judicial or administrative), so that the practical effects of legal elimination were not quite so *erga omnes* as the latter phrase often suggests. Perhaps this shared characteristic should in itself be read as useful guidance about when the unity and effectiveness of Union law might require action that extends beyond mere disapplication: the Court is prepared to order the annulment of relatively self-contained acts whose non-existence will produce only limited knock-on consequences; but there is no evidence to support the proposition that the Court might require the national courts to treat (say) domestic legislation of general application as being “null and void”.

Frustrating as this conclusion might be, it nevertheless remains our most apt assessment of the ruling in *W.Ż.*: primacy might well be capable of extending to a remedy of nullity, and there are no fundamental constitutional barriers to that principled possibility; but the circumstances in which the Court might reach that interpretation are unclear to the point of feeling ad hoc, though in any event would appear to be genuinely exceptional in nature.[[75]](#footnote-75)

To that evaluation, it remains to add one final and by now surely even predictable qualification. However its precedential status develops into the future, in *W.Ż.* as everywhere else in the world of decentralised enforcement, the capacity of primacy to produce the effect of nullity within the national legal system still depends ultimately upon the willingness of domestic courts to recognise and operationalise such an outcome – just as much as for the compulsory ousting of national jurisdiction in *Berlusconi*, just as it is with the direct assertion of centralised ECJ jurisdiction in *Rimšēvičs*, and indeed just as it has long been for granting the traditional remedy of disapplication – all of which inhabit the same *Popławski* model of separate, albeit closely interlinked, Union-Member State legal orders.

**7. Conclusions**

When it comes to expressing the legal consequences of incompatibility between directly effective Union provisions and purely domestic acts, the latter’s disapplication in accordance with the nuanced framework developed over decades by the CJEU remains the very essence of the principle of primacy.

Recent cases do suggest that there are exceptional circumstances when the unity and effectiveness of EU law might propel the Court to insist that primacy entails legal consequences going beyond mere disapplication, instead calling upon the national courts to regard certain incompatible domestic acts simply as null and void. That is certainly true of *Rimšēvičs* and *M.Z.* (though, in the author’s view, it is not so persuasive an interpretation of the ruling in *Berlusconi*).

As a matter of principle, those developments are of an evolutionary rather than revolutionary nature. They do not fall beyond the boundaries, let alone directly challenge the conceptual basis, of the underlying framework governing Union-Member State legal relations as encapsulated in rulings like *Popławski*. And it is already well established that the unity and effectiveness of Union law may sometimes impose additional constraints upon the competence of the national courts to process the detailed legal consequences of incompatibility within their domestic legal system. So it is entirely appropriate for the Court’s caselaw now to prompt us to ask the question and debate the answer: how far should the principle of primacy evolve new forms of remedy that go beyond mere disapplication, into the very legal existence and status of incompatible national acts?

However, it is difficult to see this recent caselaw as offering any general and coherent answer to that enquiry. After all, the situation in, reasoning behind and outcome of *Rimšēvičs* are all entirely different from those underpinning the case of *W.Ż.*. And *Rimšēvičs* really is an exceptional decision, hard to generalise beyond its bespoke Treaty framework. As for *W.Ż.*, it is certainly less exceptional in terms of its underpinning Union law context – but the case remains just as unusual, in terms of its factual and legal anchoring to the specific procedural features of Polish law.

Notwithstanding the fragmented landscape within which our already limited caselaw is to be located, it is difficult to resist the academic urge to look for commonalities and patterns, that might combine to produce something meatier and more coherent than the few individual elements now scattered messily across the Court’s database. In that regard, it is possible to extrapolate from *Rimšēvičs* and *W.Ż.* certain more abstract factors that might help us to identify precisely when the unity and effectiveness of Union law might compel the national courts to a finding of nullity rather than mere disapplication: for example, whether the relevant incompatibility with Union law only really permits of one possible outcome in all potential scenarios, rather than a situation where the same domestic act might remain compliant with, or entirely outside the scope of, Union law for a range of alternative purposes; or concerning the essential character of the relevant national measure as an individual administrative or judicial decision, whose annulment would be more akin to disapplication within the context of a specific dispute benefiting an identifiable claimant, than would be true (say) with the voiding of national legislation enjoying general application.

But even assuming our natural urge to systematise and generalise is well-founded as we map out this particular body of caselaw and explore its fresh avenues of enquiry, such common and relevant factors as we do manage to identify must nevertheless remain tentative and speculative. In truth, the conditions under which the Court might again reach the conclusion that “primacy means nullity” are doctrinally unclear – though we can feel confident that, whatever more precise guidance might emerge in due course, that conclusion is bound to remain exceptional. It is certainly hard to imagine that the Court would direct a national court to declare null and void a domestic measure that offends against directly effective Union law – simply as an abstract proposition about the implications of primacy.

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   Case C-219/17, *Berlusconi*, EU:C:2018:1023. [↑](#footnote-ref-1)
2. Cases C-202/18 & C-238/18, *Rimšēvičs,* EU:C:2019:139. [↑](#footnote-ref-2)
3. Case C-487/19, *W.Ż.,* EU:C:2021:798. [↑](#footnote-ref-3)
4. See, e.g. Opinion 1/09, *Unified Patent Court,* EU:C:2011:123. [↑](#footnote-ref-4)
5. Though see Section 6.1 (below) on the Court’s own interpretation of the “usual meaning” of the concept of “nullity”, e.g. in Case C-394/18, *Maria Grazia Cicenia*, EU:C:2020:56. [↑](#footnote-ref-5)
6. E.g. Art. 101 TFEU: see further Section 2 (below). [↑](#footnote-ref-6)
7. See further, e.g. Dougan, “Primacy and the remedy of disapplication”, 56 CML Rev. (2019), 1459. [↑](#footnote-ref-7)
8. Case 314/85, *Firma Foto-Frost*, EU:C:1987:452. [↑](#footnote-ref-8)
9. Recently, e.g. Cases C‑357/19, C‑379/19, C‑547/19, C‑811/19 and C‑840/19, *PM*, EU:C:2021:1034. [↑](#footnote-ref-9)
10. E.g. Case C‑573/17, *Popławski*, EU:C:2019:530, para 52. [↑](#footnote-ref-10)
11. Recently, e.g. Case C-716/17, *A*, EU:C:2019:598; Case C-615/18, *UY*, EU:2020:376; Case C-30/19, *Braathens Regional Aviation*, EU:C:2021:269;Case C-882/19, *Sumal*, EU:C:2021:800; Case C-282/20, *ZX*, EU:2021:874. [↑](#footnote-ref-11)
12. Recently, e.g. Case C-261/20, *Thelen Technopark Berlin*, EU:C:2022:33. [↑](#footnote-ref-12)
13. Recently, e.g. Case C-107/19, *XR*, EU:C:2021:722; Case C-564/19, *IS*, EU:C:2021:949; Case C-497/20, *Randstad Italia*, EU:C:2021:1037. [↑](#footnote-ref-13)
14. Recently, e.g. Case C-205/20, *NE*, EU:C:2022:168. [↑](#footnote-ref-14)
15. Recently, e.g. Case C-439/19, *B*, EU:C:2021:504; Case C-160/20, *Stichting Rookpreventie Juegd*, EU:C:2022:101. [↑](#footnote-ref-15)
16. Recently, e.g. Case C-620/17, *Hochtief Solutions AG Magyarországi Fióktelepe*, EU:C:2019:630; Case C-676/17, *Călin*, EU:C:2019:700; Case C-424/19, *Cabinet de avocat UR*, EU:C:2020:581; Case C-120/19, *X*, EU:C:2021:398; Case C-600/19, *Ibercaja Banco*, EU:C:2022:394. See further, e.g. Turmo, “National *res judicata* in the European Union: Revisiting the tension between the temptation of effectiveness and the acknowledgement of domestic procedural law”, 58 CML Rev. (2021), 361. [↑](#footnote-ref-16)
17. Recently, e.g. Case C-597/17, *Belgisch Syndicaat van Chiropraxie and Bart Vandendries,* EU:C:2019:544; Case C‑411/17, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen,* EU:C:2019:622; Case C-236/18, *GRDF*, EU:C:2019:1120; Case C-24/19, *A and Others*, EU:C:2020:503; Cases C‑511-512/18 and C‑520/18, *La Quadrature du Net*, EU:C:2020:791; Case C-64/20, *UH*, EU:C:2021:207; Case C-439, *B*, EU:C:2021:504; Case C-140/20, *G.D.* v. *Commissioner of An Garda Síochána,* EU:C:2022:258; Case C-817/19, *Ligue des droits humains*, EU:C:2022:491. [↑](#footnote-ref-17)
18. E.g. Case C-126/97, *Eco Swiss China*, EU:C:1999:269; Case C-453/99, *Courage* v. *Crehan*, EU:C:2001:465. [↑](#footnote-ref-18)
19. E.g. Temporary Agency Work Directive 2008/104, O.J. 2008, L 327/9; Legal Protection of Computer Programs Directive 2009/24, O.J. 2009, L 111/16. [↑](#footnote-ref-19)
20. Recently, e.g. Case C-397/18, *DW*, EU:C:2019:703; Case C-679/18, *OPR-Finance*, EU:C:2020:167. [↑](#footnote-ref-20)
21. Directive 93/11, O.J. 1993, L 95/29. [↑](#footnote-ref-21)
22. E.g. Cases C‑154/15 & C‑307-308/15, *Gutiérrez Naranjo*, EU:C:2016:980; Case C-385/20, *Caixabank*, EU:C:2022:278. [↑](#footnote-ref-22)
23. E.g. Cases C-698-699/18, *Raiffeisen* *Bank*, EU:C:2020:537; Cases C-224/19 & C-259/19, *Caixabank*, EU:C:2020:578. [↑](#footnote-ref-23)
24. Recently, e.g. Cases C-924-925/19 PPU, *FMS*, EU:C:2020:367; Case C-233/19, *B*, EU:C:2020:757; Case C-501/18, *BT*, EU:C:2021:249. [↑](#footnote-ref-24)
25. Recently, e.g. Case C-177/20, *Grossmania*, EU:C:2022:175. [↑](#footnote-ref-25)
26. Recently, e.g. Case C-621/18, *Wightman*, EU:C:2018:999; Case 741/19, *Republic of Moldova* v. *Komstroy*, EU:C:2021:655. And recall Declaration No 17, attached to the TEU and TFEU by the Treaty of Lisbon, which includes a reference to primacy as a “cornerstone principle” of EU law. [↑](#footnote-ref-26)
27. E.g. Judgment of the Danish Supreme Court in Case 15/2014, *DI acting on behalf of Ajos,* 6 December 2016. However unconvincing the exercise of such residual jurisdiction may sometimes appear to the outside (or indeed the inside) observer: consider, e.g. the ruling of the German Federal Constitutional Court in the *Public Sector Purchase Programme* case (Judgment of 5 May 2020); to say nothing of the unedifying “judgment” of the (politically compromised) Constitutional Tribunal of Poland in Case K 3/21 (decision of 7 October 2021). [↑](#footnote-ref-27)
28. E.g. Judgment of the French Conseil d’État in *ANODE*, FR:CEASS:2017:370321.20170719. See, for a broad range of examples from across the Member States, Botman and Langer (Eds), *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order* (Proceedings of the XXIX FIDE Congress in The Hague, Volume 1, Eleven International Publishing, 2020). [↑](#footnote-ref-28)
29. For just a few examples even from the most recent literature, consider, e.g. Spieker, “Framing and managing constitutional identity conflicts: How to stabilise the *modus vivendi* between the Court of Justice and national constitutional courts”, 57 CML Rev. (2020), 361; Editorial Comments, “Not mastering the Treaties: The German Federal Constitutional Court’s *PSPP* judgment”, 57 CML Rev. (2020), 965; Bobić and Dawson, “Making sense of the ‘incomprehensible’: The *PSPP* Judgment of the German Federal Constitutional Court”, 57 CML Rev. (2020), 1953; Amtenbrink and Repasi, “The German Federal Constitutional Court’s Decision in *Weiss*: A Contextual Analysis”, 45 EL Rev. (2020), 757; Mayer, “The ultra vires ruling: deconstructing the German Federal Constitutional Court's *PSPP* decision of 5 May 2020”, (2020) 16 *EUConst* 733; Galetta and Ziller, “The Bundesverfassungsgericht’s Glaring and Deliberate Breaches of EU Law Based on ‘Unintelligible’ and ‘Arbitrary’ Grounds” (2021) 27 *European Public Law* 63; Vergara and Puig, “The Quiet Architect Finds its Voice: The Primacy of the Law of the European Union after Press Release No 58/20 of the Court of Justice of the European Union” (2021) 27 *European Public Law* 673; Editorial Comments, “Clear and present danger: Poland, the rule of law and primacy”, 58 CML Rev. (2021), 1635; Editorial Comments, “The Polish Constitutional Court, Primacy, and Lawlessness”, 46 EL Rev. (2021), 717. [↑](#footnote-ref-29)
30. Case C‑573/17, *Popławski*, EU:C:2019:530. Subsequently, e.g. Case C-183/18*, Bank BGŻ BNP Paribas,* EU:C:2020:153; Case C-335/19, *E. sp. z o.o. sp. k.*, EU:C:2020:829; Case C-430/21, *RS*, EU:C:2022:99. See further, e.g. Miąsikand Szwarc, “Primacy and direct effect – still together: *Popławski* *II*”, 58 CML Rev. (2021), 571. [↑](#footnote-ref-30)
31. Though the full implications of *Popławski* still remain to be worked out: e.g. the present author has argued that the principle of direct effect is also the starting point for the duty of consistent interpretation (via the direct effect of Art. 4(3) TEU) and indeed the *Francovich* right to reparation (which is constituted as an autonomous and directly effective right of its own by satisfying the Court’s threefold liability criteria); while acknowledging that subsequent caselaw (including *Popławski* itself) suggests that those principles should (or at least might) be treated as more specific manifestations of the principle of primacy as such. Contrast Dougan, “When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Primacy”, 44 CML Rev. (2007), 931 with Dougan, “Primacy and the remedy of disapplication”, 56 CML Rev. (2019), 1459. In any case, the Court has made clear that – even if Union law itself reserves disapplication only for directly effective provisions – the Member States remain free to offer a remedy of disapplication also in respect of non-directly effective measures, i.e. on the basis of national law alone: see, e.g. Case C-278/20, *Commission* v. *Spain*, EU:C:2022:503. [↑](#footnote-ref-31)
32. E.g. Lenz, Sif Tynes and Young, “Horizontal What? Back to Basics”, 25 EL Rev. (2000), 509; Tridimas, “Black, White and Shades of Grey: Horizontality of Directives Revisited”, 21 YEL (2002), 327; Lenaerts and Corthaut, “Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law”, 31 EL Rev. (2006), 287. [↑](#footnote-ref-32)
33. E.g. AG Saggio in Cases C-240-244/98, *Océano Grupo Editorial,* EU:C:1999:620; AG Alber in Case C‑343/98, *Collino,* EU:C:2000:23; AG Léger in Case C‑287/98, *Linster,* EU:C:2000:468. [↑](#footnote-ref-33)
34. Case C-219/17, *Berlusconi*, EU:C:2018:1023. [↑](#footnote-ref-34)
35. Cases C-202/18 & C-238/18, *Rimšēvičs,* EU:C:2019:139. [↑](#footnote-ref-35)
36. Case C-487/19, *W.Ż.,* EU:C:2021:798. [↑](#footnote-ref-36)
37. See further, e.g. Brito Bastos, “Derivative illegality in European composite administrative procedures”, 55 CML Rev. (2018), 101. And more generally, e.g. Craig, *EU Administrative Law,* 3rd ed. (OUP, 2018); Chiti and Mendes, “The Evolution of EU Administrative Law” in Craig and de Búrca (Eds), *The Evolution of EU Law,* 3rd ed. (OUP, 2021). [↑](#footnote-ref-37)
38. See, e.g. Case C‑97/91, *Oleificio Borelli* v.*Commission,* EU:C:1992:491; Case C-269/99, *Kühne,* EU:C:2001:659. [↑](#footnote-ref-38)
39. See, e.g. Case C-64/05, *Sweden* v. *Commission*, EU:C:2007:802. [↑](#footnote-ref-39)
40. Note that the General Court has also drawn the converse conclusion, in the case of mixed (hybrid / composite) procedures where the final power of decision is vested in a national authority: any preparatory acts adopted by a Union institution should not be subject to judicial review before the Union courts: see Case T-660/18, *VodafoneZiggo Group* v. *Commission*, EU:T:2019:546. [↑](#footnote-ref-40)
41. Though the latter point is very far from being clear or uncontroversial: consider, e.g. Brito Bastos, “Derivative illegality in European composite administrative procedures”, 55 CML Rev. (2018), 101; Brito Bastos, “An administrative crack in the EU's rule of law: composite decision-making and non-justiciable national law” (2020) 16 *EUConst* 63. See further, on the difficulties surrounding national law’s status and role within EU judicial actions, e.g. Prek and Lefèvre, “The EU Courts as ‘national’ courts: National law in the EU judicial process”, 54 CML Rev. (2017), 369. [↑](#footnote-ref-41)
42. See, e.g. Cases T-351/18 and T-584/18, *Ukrselhosprom* v. *ECB*, EU:T:2021:669. [↑](#footnote-ref-42)
43. Again, the latter point is far from clear or uncontroversial: see above. [↑](#footnote-ref-43)
44. Consider, e.g. Brito Bastos, “Judicial review of composite administrative procedures in the Single Supervisory Mechanism: *Berlusconi*”, 56 CML Rev. (2019), 1355. See also, e.g. Spaventa, “Constitutional creativity or constitutional deception? Acts of the Member States collectively and jurisdiction of the Court of Justice”, 58 CML Rev. (2021), 1697. [↑](#footnote-ref-44)
45. Though note that AG Campos Sánchez-Bordona did suggest that the Court should rule for itself on whether national preparatory acts contain defects that render them void / determine for itself the lawfulness of the relevant domestic measures: Case C-219/17, *Berlusconi,* EU:C:2018:502, paras 102-115. [↑](#footnote-ref-45)
46. On judicial review of preparatory Union acts, e.g. Case 60/81, *IBM*, EU:C:1981:264. [↑](#footnote-ref-46)
47. Note that the Court restated the key principles from its ruling in *Berlusconi*, along similarly cautious lines, e.g. in Case C-414/18, *Iccrea Banca*, EU:C:2019:1036; whereas AG Bobek in Cases C-59/18 & C-182/18, *Italy* v. *Council*, EU:C:2021:812 seems to classify *Berclusoni*, alongside the ruling in *Rimšēvičs,* as examples of the Court exercising direct jurisdiction over the lawfulness of certain categories of national act: see para 48 of the Opinion. [↑](#footnote-ref-47)
48. In that regard: departing from the advice of AG Kokott: see Cases C-202/18 & C-238/18, *Rimšēvičs,* EU:C:2018:1030. [↑](#footnote-ref-48)
49. On the wider legal implications of which, see also Case C-316/19, *Commission* v. *Slovenia*, EU:C:2020:1030; Case C-3/20, *AB*, EU:C:2021:969. [↑](#footnote-ref-49)
50. On which, recall Case C-11/00, *Commission* v. *ECB*, EU:C:2003:395. [↑](#footnote-ref-50)
51. See Cases C-202/18 & C-238/18, *Rimšēvičs,* EU:C:2018:1030, especially paras 151-160. [↑](#footnote-ref-51)
52. Subject, however, to the immunities conferred upon national central bank Governors as a matter of Union law: see Case C-3/20, *AB*, EU:C:2021:969. [↑](#footnote-ref-52)
53. Case C-188/92, *TWD*, EU:C:1994:90. More recently, e.g. Case C-135/16, *Georgsmarienhütte,* EU:C:2018:582. [↑](#footnote-ref-53)
54. See, e.g. Hinarejos, “The Court of Justice annuls a national measure directly to protect ECB independence: *Rimšēvičs*”, 56 CML Rev. (2019), 1649; Tridimas and Lonardo, “When can a national measure be annulled by the ECJ? Case C-202/18 *Ilmars Rimsevics* v. *Republic of Latvia* and Case C-238/18 *European Central Bank* v. *Republic of Latvia*”, 45 EL Rev. (2020), 732; Smits, “A national measure annulled by the European Court of Justice, or: High-level judicial protection for independent central bankers” (2020) 16 *EUConst* 120. Note also the jurisdictional problems and potential solutions explored by Spaventa, “Constitutional creativity or constitutional deception? Acts of the Member States collectively and jurisdiction of the Court of Justice”, 58 CML Rev. (2021), 1697. [↑](#footnote-ref-54)
55. See also, e.g. Case C-619/18, *Commission* v. *Poland*, EU:C:2019:531; Case C-192/18, *Commission* v. *Poland*, EU:C:2019:924; Cases C‑585/18 & C‑624-625/18, *A.K.*, EU:C:2019:982; Case C-824/18, *A.B.*, EU:C:2021:153; Case C-791/19, *Commission* v. *Poland*, EU:C:2021:596; Cases C-748-754/19, *WB*, EU:C:2021:931; Case C-132/20, *Getin Noble Bank*, EU:C:2022:235. To be read alongside the wider caselaw on judicial independence, e.g. Case C‑64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117; Case C-896/19, *Repubblika*, EU:C:2021:311; Cases C‑83/19, C‑127/19, C‑195/19, C‑291/19, C‑355/19 and C‑397/19, *Asociaţia ‘Forumul Judecătorilor din România’*, EU:C:2021:393; Cases C‑357/19, C‑379/19, C‑547/19, C‑811/19 and C‑840/19, *PM*, EU:C:2021:1034; Case C-430/21, *RS*, EU:C:2022:99; Case C-245/20, *Autoriteit Persoonsgegevens*, EU:C:2022:216. As well as rulings concerning the implications for mutual trust / mutual recognition, e.g. Case C-216/18 PPU, *LM*, EU:C:2018:586; Cases C‑354/20 PPU & C‑412/20 PPU, *L* *and* *P*, EU:C:2020:1033; Cases C-562-563/21 PPU, *X and Y*, EU:C:2022:100; Case T-791/19, *Sped-Pro* v. *Commission*, EU:T:2022:67. For selected commentary and analysis, from a vast literature, see further, e.g. Pech and Platon, “Judicial independence under threat: The Court of Justice to the rescue in the *ASJP* case”, 55 CML Rev. (2018), 1827; Konstadinides, “Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: *LM*”, 56 CML Rev. (2019), 743; Zinonos, “Judicial Independence and National Judges in the Recent Case Law of the Court of Justice” (2019) 25 *European Public Law* 615; Krajewski and Ziółkowski, “EU judicial independence decentralised: *A.K.*”, 57 CML Rev. (2020), 1107; Bárd and Śledzińska-Simon, “On the principle of irremovability of judges beyond age discrimination: *Commission* v. *Poland*”, 57 CML Rev. (2020), 1555. [↑](#footnote-ref-55)
56. See, e.g. Cases C‑585/18 & C‑624-625/18, *A.K.*, EU:C:2019:982; Case C-824/18, *A.B.*, EU:C:2021:153; Case C-508/19, *MF*, EU:C:2022:201. See also, e.g. Cases C‑83/19, C‑127/19, C‑195/19, C‑291/19, C‑355/19 and C‑397/19, *Asociaţia ‘Forumul Judecătorilor din România’*, EU:C:2021:393; Cases C‑357/19, C‑379/19, C‑547/19, C‑811/19 and C‑840/19, *PM*, EU:C:2021:1034; Case C-156/21, *Hungary* v. *European Parliament and Council*, EU:C:2022:97; Case C-157/21, *Poland* v. *European Parliament and Council*, EU:C:2022:98. [↑](#footnote-ref-56)
57. In that regard, going further than the advice of AG Tanchev, who suggested it would be sufficient to set aside or ignore the disputed order: see Case C-487/19, *W.Ż.,* EU:C:2021:289, paras 99 and 104. [↑](#footnote-ref-57)
58. In that regard, the ruling in *W.Ż* would be comparable to other judgments where the Court has explicitly discussed the nullity of incompatible domestic measures, but only in light of the existing framework of judicial relief already provided for as such under national law, e.g. Case C-430/19, *S C C.F.*, EU:C:2020:429. [↑](#footnote-ref-58)
59. I am very grateful to Loïc Azoulai for bringing this point to my attention. And see also the detailed discussion of the same issue, within the context of the Polish legal system, provided by Manko and Tacik, “*Sententia non existens*: A new remedy under EU law?: *Waldemar Żurek* (W.Ż.)”, 59 CML Rev. (2022), forthcoming. [↑](#footnote-ref-59)
60. See further, e.g. Dougan, “When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Primacy”, 44 CML Rev. (2007), 931. Though, of course, there remains considerable scope to debate the nature of the legal / conceptual intertwinement between the EU and Member State legal orders: consider, e.g. Burchatdt, “The Relationship between the Law of the European Union and the Law of Its Member States: A Norm-Based Conceptual Framework” (2019) 15 *EUConst* 73; Tuominen, “Reconceptualizing the Primacy–Supremacy Debate in EU Law” (2020) 47 *Legal Issues of Economic Integration* 245. [↑](#footnote-ref-60)
61. In that regard, consider also, e.g. the caselaw following Case C-399/11, *Melloni*, EU:C:2013:107 on the interaction between Union and national fundamental rights. [↑](#footnote-ref-61)
62. See Section 2 (above). [↑](#footnote-ref-62)
63. Again, see Section 2 (above). [↑](#footnote-ref-63)
64. Case C-394/18, *Maria Grazia Cicenia*, EU:C:2020:56, para 80. [↑](#footnote-ref-64)
65. In accordance with Directive 2015/1535, O.J. 2015, L 241/1. [↑](#footnote-ref-65)
66. E.g. Case C-194/94, *CIA Security,* EU:C:1996:172; Case C-443/98, *Unilever Italia*, EU:C:2000:496. [↑](#footnote-ref-66)
67. Recall Case C-226/97, *Lemmens*, EU:C:1998:296. Consider also, e.g. Case C-140/20, *G.D.* v. *Commissioner of An Garda Síochána,* EU:C:2022:258, para 127. [↑](#footnote-ref-67)
68. Though many of the tools for dealing with such consequences (based on the principle of legal certainty, e.g. limiting temporal effects, limitation periods, *res judicata* etc) have already been developed in the context of disapplication and would be readily transposable to the context of nullity: see Section 2 (above). [↑](#footnote-ref-68)
69. E.g. Case C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*, EU:C:2008:178. [↑](#footnote-ref-69)
70. Primarily under the Environmental Impact Assessment Directive 2011/92, O.J. 2012, L 26/1. [↑](#footnote-ref-70)
71. See, e.g. Case C-72/95, *Kraaijeveld*, EU:C:1996:404; Case C-435/97, *World Wildlife Fund*, EU:C:1999:418. [↑](#footnote-ref-71)
72. See, e.g. Case C-379/15, *Association France Nature Environnement*, EU:C:2016:603; Case C-261/18, *Commission* v. *Ireland*, EU:C:2019:955; Case C-24/19, *A and Others*, EU:C:2020:503. The Court adopts a similar approach in other regulatory contexts: consider, e.g. CasesC‑129-130/13, *Kamino International Logistics*, EU:C:2014:2041. [↑](#footnote-ref-72)
73. See, e.g. Case C-201/02, *Wells*, EU:C:2004:12; Case C-41/11, *Inter-Environnement Wallonie*, EU:C:2012:103. [↑](#footnote-ref-73)
74. In that regard, the Court followed the advice of AG Tanchev: see Case C-487/19, *W.Ż.,* EU:C:2021:289, paras 101-105. Consider also, e.g. Case C-508/19, *MF*, EU:C:2022:201. [↑](#footnote-ref-74)
75. Though consider Manko and Tacik, “*Sententia non existens*: A new remedy under EU law?: *Waldemar Żurek* (W.Ż.)”, 59 CML Rev. (2022), forthcoming – who offer an interesting analysis of how the Court’s particular and robust approach to the consequences of primacy in *W.Ż.* might relate / extend specifically to the legal status of judicial rulings delivered in breach of the standards of independence and impartiality imposed under Art. 19(1) TEU / Art. 47 CFR. [↑](#footnote-ref-75)