Ref. No. I NOZP 3/19

RESOLUTION
by the Supreme Court sitting in the bench of seven judges

8 January 2020

The Supreme Court composed of:

Ewa Stefańska, SCJ (president)
Leszek Bosek, SCJ (rapporteur)
Tomasz Demendecki, SCJ
Adam Redzik, SCJ
Mirosław Sadowski, SCJ
Aleksander Stępkowski, SCJ (co-rapporteur)
Krzysztof Wiak, SCJ

Clerk of the Court Iwona Kotowska

In cases regarding appeals filed by A.Ś. and M.J.
from the resolution of the National Council of the Judiciary no. (…)/2018 of 4 December 2018
on submission of a request to appoint to exercise the office of appeal court judge at the Appeal Court in (…), announced in Monitor Polski of 2018, item (…),
with the participation of D.J. and the Prosecutor General,
having examined in open sitting at the Extraordinary Control and Public Affairs Chamber, on 8 January 2020, legal issues presented by the bench of three Supreme Court judges in decision taken on 3 December 2019, ref. No. I NO 75/19:

1. “Is the Supreme Court required, when reviewing an appeal against a resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland – in light of the judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, A.K. and Others versus the Supreme Court – to examine *ex officio*, irrespective of the scope of and the grounds for the appeal, whether the National Council of the Judiciary is a body independent of the legislature and the executive?”;

2. “Whether the determination by the Supreme Court that the National Council of the Judiciary is not a body that is independent of the legislature and the executive represents autonomous grounds for setting aside the appealed resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland, and if so, is such a resolution to be set aside completely, irrespective of the scope of the appeal?”

has adopted a resolution:

“I. The Supreme Court, in reviewing an appeal against a resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland, examines – upon the grounds for the appeal and within its scope – whether the National Council of the Judiciary is an independent body according to the criteria as determined in the judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, A.K. and Others versus the Supreme Court, paragraphs 139-144.

II. The Supreme Court sets aside, within the scope of the appeal, a resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland, provided that an appellant proves that the lack of independence on the part of the National Council of the Judiciary did affect the contents of such a resolution or provided that – having regard to the constitutional prohibition of reviewing effectiveness of the act of appointment to the office of judge by the President of the Republic of Poland, as well as the relation resulting thereof – the appellant will demonstrate the circumstance indicated in paragraph 125, or jointly the circumstances listed in paragraphs 147-151 of the judgment referred to in point I of the resolution, indicating that the court in whose bench such a judge will sit will not be independent and impartial.”

and granted to the resolution force of a legal principle.

REASONS

I.

1. The Supreme Court sitting in its ordinary bench, by decision of 3 December 2019, I NO 75/19, pursuant to Article 398^{17} § 1 of the Code of Civil Procedure (hereinafter: CCP) in connection with Article 44(3) of the Act of 12 May 2011 on the National Council of the Judiciary (i.e. *Dz.U.* of 2018, item 389 as amended, hereinafter: the Act on KRS) and Article 82 of the Act of 8 December 2017 on the Supreme Court (i.e. *Dz.U.* of 2019, item 825 as amended) presented for adjudication to the bench of seven Supreme Court judges the following legal issues that raise serious doubts: "Is the Supreme Court required, when reviewing an appeal against a resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland – in light of the judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, A.K. and Others versus the Supreme Court – to examine *ex officio*, irrespective of the scope of and the grounds for the appeal, whether the National Council of the Judiciary is a body independent of the legislature and the executive?" and "Whether the determination by the Supreme Court that the National Council of the Judiciary is not a body that is independent of the legislature and the executive represents autonomous grounds for setting aside the appealed resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland, and if so, is such a resolution to be set aside completely, irrespective of the scope of the appeal?".

2. These issues were brought to light during the examination of appeals filed by A.Ś. and M.J. (hereinafter: the complainant or the appellant) against the National Council of the Judiciary resolution no. (…)/2018 of 4 December 2018 on presenting a request to appoint to exercise the office of appeal court judge in the Appeal Court in (...), announced in Monitor Polski 2018, item (…). Krajowa Rada Sądownictwa (the National Council of the Judiciary) (hereinafter also: KRS or the Council) in point 1 of the resolution presented the President of the Republic of Poland with D.J. to be appointed to exercise the office of appeal court judge in the Appeal Court in (...), and in point 2 refused to present the President of the Republic of Poland with A.C., M.J. and A.Ś. to be appointed to exercise the office of appeal court judge in the Appeal Court in (...).

3. Both appellants appealed against the KRS resolution in point 1 in full and in point 2 in the part that concerned them, i.e. in the scope of the decision not to present the President of the Republic of Poland with a request to appoint them to exercise the office of appeal court judge in the Appeal Court in (...). They motioned for setting aside the resolution in the scope that was the subject matter of their appeal and to remand the case to the KRS to be re-examined. They alleged, among others, that the appealed resolution had been adopted in breach of Article 2 in connection with Article 4(3)(3) and Article 6(1) and Article 19 of the Treaty on European Union (*Dz.U.* of 2004, no. 90, item 864/30 as amended, hereinafter: TEU) in connection with Article 15(1) and Article 20, Article 21(1), Article 47 and Article 52(1) of the Charter of Fundamental Rights of the European Union (hereinafter after also: the Charter), i.e. violation of the rule of law, the rule of equal treatment and the rule of equal access to public services following the creation of the composition of a Member State body that was supposed to guard the independence of the courts and of the judiciary that adopted the appealed resolution so that representatives of the judiciary in this body are elected by the legislature which violates the rule of institutional balance and will lead to this body issuing a resolution in breach of the aforementioned norms of European law by discriminating the complainants and by violating the rule of equal access to public services.

4. The Supreme Court sitting in its ordinary bench has found that by reviewing the appeal against the KRS resolution to present the President of the Republic of Poland with a candidate to the office of judge is faced with a dilemma whether in such proceedings it is allowed to examine the independence of the KRS and whether this circumstance can at all affect the conformity (with the law) of the appealed resolution, considering the national legal order, including specifically provisions of the Act on KRS and the relevant applicable provisions of the CCP (Article 44(3) of the Act on KRS). According to the Supreme Court sitting in ordinary bench, in the context of the judgment of the Court of Justice of the European Union (hereinafter: CJEU or the Court of Justice) of 19 November 2019, two rulings are possible. On the one hand, admittedly the competence norm created by CJEU in the aforementioned judgment concerns exclusively the examination of the independence of the Disciplinary Chamber of the Supreme Court, and the lack of independence of the KRS is only one of the premises that has to be found to exist in order to determine the matter of

independence of this Chamber. The other premises of its application are so specific that it is impossible to relate them to the situation of another court (paragraphs 147-151 of the CJEU judgment). On the other hand, it is possible to conclude that the examination of the KRS's independence is always necessary whenever a ruling has to be delivered, including specifically when the conformity of a resolution adopted by the KRS is examined. This is supported by the duty of sincere cooperation between bodies of EU Member States (Article 4(3) TEU) and the need to reduce to a minimum the scope of the KRS's faulty measures, fundamental for the proper operation of the entire system of the administration of justice. In the opinion of the Supreme Court sitting in ordinary bench, it is necessary to consider whether finding that the KRS is not a body that is independent of the legislature and the executive may constitute autonomous grounds for concluding that the KRS resolution on presenting to the President of the Republic of Poland a candidate for the office of judge violates the law.

5. The Prosecutor General motioned to adopt a resolution that reads as follows: "When reviewing an appeal against the National Council of the Judiciary resolution on presenting to the President of the Republic of Poland a candidate for the office of judge – in light of the judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-626/18, A.K. and Others against the Supreme Court – the Supreme Court is under no obligation to examine *ex officio* whether the National Council of the Judiciary is a body that is independent of the legislature and the executive" and motioned not to adopt a resolution in the remaining scope.

6. The appellants motioned not to adopt a resolution, or optionally, to conclude that the National Council of the Judiciary is not independent of the legislature and the executive.

II.

The Supreme Court has noted as follows:

7. The European Union (hereinafter also: the EU or the Union) was founded because all Member States agreed to do so. Member States are the most fully legitimised forms of the realisation of the democratic will of the Nations of Europe.

The Treaties establishing the European Union's primary law are an expression of this will. They are based on an order of values, which the Union works to realise and that are laid down in Article 2 TEU. These are the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The Union operates on the basis of mutual trust of Member States which leads them to realise these values, specifically by observing EU law. For this reason, pursuant to the duty of sincere cooperation laid down in Article 4(3) first paragraph TEU – Member States shall ensure that Union law is applied and observed in their territories, and, to this end, they shall undertake measures to ensure that obligations arising from Union treaties or its institutional acts are carried out (cf. opinion of the full bench of the CJEU 2/13 of 18 December 2014, accession to the ECHR, paragraph 168, 173 and the case-law cited there).

8. The judicial system, composed of the Court of Justice of the European Union and Member States courts, should be implementing European Union goals. Ensuring consistent application of Union law across its territory requires close cooperation between the CJEU and Member States courts. The framework of this cooperation is set by the procedure of references for a preliminary ruling laid down in Article 267 of the Treaty on the Functioning of the European Union (consolidated version in OJEU *2016 C 202, p. 1,* hereinafter: TFUE). This procedure, by establishing a dialogue between courts, specifically between the Court and Member States courts, aims to ensure consistent interpretation of Union law and, by this token, ensure its consistency, effectiveness and autonomy (cf. opinion of the full bench of the Court of Justice of the European Union 1/17 of 30 April 2019, CETA; judgment of the Grand Chamber of the Court of Justice of the European Union of 6 March 2018, Achmea, C-284/16).

III.

9. The Supreme Court, when reviewing appeals against KRS resolutions, is bound by the interpretation of EU law adopted in the CJEU judgment of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, A.K. and Others versus the Supreme Court. In this judgment, the CJEU concluded: "Article 47 of the Charter of Fundamental Rights of the European Union and Article 9(1) of Council Directive

2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provisions. That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court).

If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the above-mentioned chamber, so that those cases may be examined by a court which meets the above-mentioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field."

10. The interpretation of Article 47 of the Charter adopted by the CJEU helped the Supreme Court to resolve disputes brought by A.K. and Others against the Supreme Court "concerning their [these judges'] early retirement due to the entry into force of new national legislation." (paragraph 2 of the CJEU judgment).

11. The Court of Justice formulated the obligation to consider many legal and factual circumstances when applying Article 47 of the Charter. According to the Court, the first and foremost obligation is to evaluate the degree of independence enjoyed by the KRS in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered, under Article 186 of the Constitution, to ensure the independence of the courts and of the judiciary (paragraph 139).

12. In turn, paragraph 143 and 144 of the aforementioned CJEU judgment, pointed out that the following circumstances may be relevant for the purposes of an overall assessment of the KRS's independence from the legislature and the executive: reduction of the term in office of the members of that body at that time; and increasing influence of the executive over the KRS by the election of 23 of the 25 members of that body by the Sejm of the Republic of Poland. The Court of Justice went on to note that factual circumstances related to the operation of the newly formed KRS and those related to its non-transparent appointment should be taken into account.

13. The CJEU further noted that: "in the light of the fact that, as is clear from the case file before the Court, the decisions of the President of the Republic appointing judges to the Sąd Najwyższy (Supreme Court) are not amenable to judicial review, it is for the referring court to ascertain whether the terms of the definition, in Article 44(1) and (1a) of the Law on the KRS, of the scope of the action which may be brought challenging a resolution of the KRS, including its decisions concerning proposals for appointment to the post of judge of that court, allows an effective judicial review to be conducted of such resolutions, covering, at the very least, an examination of whether there was no *ultra vires* or improper exercise of authority, error of law or manifest error of assessment" (paragraph 145). It follows from this that the assessment of KRS's independence, in the light of the inadmissibility of judicial review of the President of the Republic of Poland's constitutional acts, is important for ensuring effective judicial review of KRS resolutions by the Supreme Court.

14. The Court of Justice has separately pointed out that genuine judicial independence is an autonomous circumstance which has a bearing on the correct application of Article 47 of the Charter. Judges must be free not only of any direct influence, in the form of instructions, but also of types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (paragraph 125). In view of the above, an assessment of court and judicial independence, in the light of the inadmissibility of judicial review of the President of the Republic of Poland's constitutional acts indicated by CJEU, makes the body authorised to review KRS resolutions has special responsibility to realise fully these values.

15. The Court of Justice has pointed out, however, that there is a relation between the correct application of Article 47 of the Charter and the organisation of the Disciplinary Chamber of the Supreme Court – the circumstances referred to in the CJEU judgment, paragraphs 147-151 – and expressed it in the operative part of the judgment. The Court of Justice has concluded that the circumstances set out jointly in paragraphs 147-151 of the judgment may lead to the conclusion that the court appointed in such circumstances will not be independent and impartial in the meaning of Article 47 of the Charter. In connection with the above, an assessment of this court – in the light of the inadmissibility of judicial review of the President of the Republic of Poland's constitutional acts pointed out by the CJEU – puts the Supreme Court under a special obligation to ensure effective judicial review of KRS resolutions containing requests to appoint a judge to the Supreme Court.

IV.

16. The Supreme Court has concluded that the Constitutional Tribunal judgment of 25 March 2019, K 12/18, does not release it from the obligation to implement the values referred to in paragraphs 7-8 and the CJEU judgment. The Constitutional Tribunal within the scope of the appeal and the charges only stated that "Article 9a of the Act of 12 May 2011 on the National Council of the Judiciary (*Dz.U.* of 2019 item 84) is consistent with Article 187(1)(2) and Article 187(4) in connection with Article 2, Article 10(1) and Article 173 and Article 186(1) of the Constitution of the Republic of Poland", and "Article 44(1a) of law referred to in paragraph 1 of the operative part of the judgment violates Article 184 of the Constitution of the Republic of Poland." The Constitutional Tribunal has provided its interpretation of only some provisions of the Constitution of the Republic of Poland and has passed in their light some provisions of the Act on KRS. The Supreme Court sitting in the bench of seven judges shares in this regard the opinion expressed by the Supreme Court in the reasons of the judgment of 5 December 2019, III PO 7/18.

17. The Supreme Court also has not found any legal grounds to ask the Constitutional Tribunal to examine this case under the procedure set out in Article 193 of the Constitution of the Republic of Poland. The Constitutional Tribunal itself has acknowledged that it is inadmissible to deliver a judgment on the compliance of

a provision of law with EU law, because the Supreme Court should rule whether a statue conflicts with EU law pursuant to Article 91(2) and Article 91(3) of the Constitution of the Republic of Poland, and the Court of Justice should interpret the norms of Community law (decision of the Constitutional Tribunal sitting in full bench of 19 December 2006, P 37/05; judgment of the Court of Justice of 19 May 1990, Factortame, C-213/88; judgment of the Federal Constitutional Court of the Federal Republic of Germany of 31 May 1990, 2 BvL 12, 13/88, 2 BvR 1436/87 and judgment of the Italian Constitutional Court of 5 June 1984, Granital, 170/84).

V.

18. The principle of the primacy of EU law is expressed in CJEU case-law (judgments of 9 March 1978, Simmenthal, 106/77; 22 October 1998, IN.CO.GE.'90, C-10/97 to C-22/97; 3 May 2005, Berlusconi, C-387/02, C-391/02 and C-403/02; 21 September 2005; Yusuf and Kadi, T-306/01 and T-315/01; 24 June 2019, Popławski, C573/17; 19 December 2019, Umwelthilfe, C752/18) and in the Constitution of the Republic of Poland. Article 91(2) of the Constitution of the Republic of Poland provides that an international agreement that has been ratified with prior agreement expressed in an act has precedence over an act, in the event of a conflict of laws. Article 91(3) of the Constitution of the Republic of Poland explains that if an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws. Pursuant to Article 8(1) of the Basic Law, the Constitution of the Republic of Poland is the highest law in the Republic of Poland. It provides grounds for the enforceability and determines the scope of the application of legal norms in the territory of the Republic of Poland (cf. judgment of the Constitutional Tribunal sitting in full bench of 27 April 2005, P 1/05; judgment of the Constitutional Tribunal sitting in full bench of 11 May 2005, K 18/04; judgment of the Constitutional Tribunal of 18 December 2007, SK 54/05; judgment of the Constitutional Tribunal of 5 October 2010, SK 26/08; judgment of the Constitutional Tribunal sitting in full bench of 24 November 2010, K 32/09; judgment of the Constitutional Tribunal sitting in full bench of 16 November 2011, SK 45/09; judgment of the Constitutional Tribunal sitting in full bench of 26 June 2013, K 33/12; judgments

of the Supreme Administrative Court of: 13 May 2008, I FSK 600/07; 25 June 2008, I FSK 743/07; 24 September 2008, I FSK 922/08; resolution by the Supreme Court sitting in the bench of seven judges of 25 August 2017, III CZP 11/17, judgments of the Supreme Court of: 16 May 2019, I UK 64/18; 8 August 2017, I UK 325/16; 17 March 2016, V CSK 377/15; 8 January 2009, I CSK 482/08). The principle of the supremacy of the Constitution of the Republic of Poland is not at adds with a friendly interpretation of provisions of Polish law in line with EU law (Article 9 and Article 91 of the Constitution of the Republic of Poland).

19. Ensuring the primacy of EU law, the Supreme Court, irrespective of the chamber and the composition of the bench that delivers the ruling, pursuant to Article 267 TFEU is the court of the last instance because its decisions are not appealable. Therefore, the Supreme Court is under a special obligation and duty to ensure coherence and effectiveness of EU law. However, interpretations in line with EU law have their limits. These limits are set by the norms of EU primary law. Article 5(1) and Article 5(2) TEU express the principle of conferral, pursuant to which the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. Article 4(2) TEU in turn guarantees equality of Member States before the Treaties, respect of the identity of Member States inalienably connected with their fundamental political and constitutional structures and their basic functions (cf. K. Lenaerts, *EU values and constitutional pluralism: the EU system of fundamental rights protection*, Polish Yearbook of International Law 2014, pp. 137-138).

20. The limits of the primacy of EU law are also set by the constitutions of Member States. They set the grounds and determine the scope of Member States' competences transferred to the Union (cf. judgments of the Federal Constitutional Court of the Federal Republic of Germany of: 21 June 2016, 2 BvR 2728, 2729, 2730, 2731/13, 2 BvE 13/13; 15 December 2015, 2 BvR 2661/06; 6 July 2010, 2 BvR 2661/06; 30 June 2009, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09; 12 October 1993, 2 BvR 2134, 2159/92; decisions of the Constitutional Council of the French Republic of: 31 July 2017, 2017-749 DC; 20 December 2007, 2007-560 DC; 27 July 2006, 2006-540 DC; 30 November 2006, 2006543 DC; and also A. von

Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, CML Rev. 48/2011, pp. 1424-1425; P. Kirchhof, *Der deutsche Staat im Prozeß der europäischen Integration*, [in:] J. Isensee, P. Kirchhof (ed.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 10, 2012, p. 302; M. Quesnel, *La protection de l'identité constitutionnelle de la France*, Paris 2015, p. 3 et subseq.; F. Schorkopf, *Nationale Verfassungsidentität und europäische Solidarität: Die Perspektive des Grundgesetzes*, [in:] C. Calliess (ed.), *Europäische Solidarität und nationale Identität: Überlegungen im Kontext der Krise im Euroraum*, 2013, pp. 99-107).

21. The application of EU law "must not lead to outcomes which are contrary to the explicit wording of constitutional norms and which are impossible to agree with a minimum of the guarantee functions carried out by the Constitution of the Republic of Poland" (judgments of the Constitutional Tribunal sitting in full bench of: 27 April 2005, P 1/05; 11 May 2005, K 18/04; 16 November 2011, SK 45/09; judgment of 26 June 2013, K 33/12; C. Mik, *Przekazanie kompetencji przez Rzeczpospolitą Polską na rzecz Unii Europejskiej i jego następstwa prawne (uwagi na tle Article 90 ust. 1 Konstytucji)*, [in:] C. Mik (ed.), *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej*, Toruń 1999, p. 92; M. Dobrowolski, *Zasada suwerenności Narodu w warunkach integracji Polski z Unią Europejską*, Lublin 2014, p. 3; M. Szpunar, Komentarz do Artykułu 90 Konstytucji Rzeczypospolitej Polskiej, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, Warsaw 2016, pp. 118-140; K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym. Wybrane zagadnienia prawnokonstytucyjne*, Kraków 2007, pp. 265-303; K. Wójtowicz, *Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej*, „Przegląd Sejmowy" 2010, no. 4, pp. 15-21; M. Zirk-Sadowski, *Tożsamość konstytucyjna a prawo europejskie,* „Analizy Natolińskie" no. 1(53)2012, pp. 19-20). If a common court of law has serious doubts about how to interpret the law in this fundamental issue, these are the grounds on which it presents them to the Supreme Court for it to decide under Article 390 CCP or to the CJEU under Article 267 TFEU.

VI.

22. Protection of the irremovability of judges, which is closely connected with the independence and impartiality of courts, falls within the competences of the Union. It is covered by a legislative consensus of the Member States. By its operation, a judge is protected against retirement after he/she reaches the newly defined retirement age (cf. Article 157 TFEU; Article 1, 2 and 9(1) of Directive 2000/78/EC of 27 November 2000 establishing the general framework conditions for equal treatment with regard to employment and occupation, (OJ L 303, 02/12/2000, p. 0016-0022); Article 5 letter a) and Article 9(1) letter f) of Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, pp. 23-36, as well as judgments of the Court of Justice of the European Union of: 5 November 2019, Commission/Poland, C-192/18; 24 June 2019, Commission/Poland, C-619/18, paragraph 50 and 19 November 2019, C-585/18, C-624/18 and C-625/18, A.K. and Others versus the Supreme Court and the case-law cited there).

23. The Union does not have the power to appoint judges. They are appointed by Member States. In the case of CJEU judges, they are appointed by the governments of Member States. National judges are appointed in the manner provided for in the respective constitutions of Member States. In some Member States, the appointment of a judge is a prerogative of parliament at the request of the president (Lithuania in the scope of Supreme Court judges – Article 112 of the constitution; Latvia – Article 84 of the constitution) or parliament at the request of the council of the judiciary (Slovenia – Article 130 of the constitution). In the majority of Member States, judges are appointed by the president (the Czech Republic – Article 93 of the constitution, Cyprus – Article 153 of the constitution, Ireland – Article 35 of the constitution, Lithuania in the scope of circuit court judges (sędziowie okręgowi) following the council of the judiciary's opinion – Article 112 of the constitution; Hungary – Article 9 of the constitution) or by the president at the request of the competent federal minister and a parliamentary and ministerial committee for electing judges (the Federal Republic of Germany – Article 95 of the Basic Law; the committee's choice is not subject to judicial review; cf. judgment of the II Senate of

the Federal Constitutional Court of 20 September 2016, 2 BvR 2453/15), or by the president at the request of the government from among three candidates put forward by the competent court (Austria – Article 86 of the constitution), the president at the request of the prime minister, who is not bound by recommendations of the committee that nominates judges (Malta – Article 96 and 100 of the constitution), the president at the request of the minister of justice on the basis of an accepting opinion by the council of the judiciary (France – Article 13 in connection with Article 64 of the constitution; Greece – Article 90 of the constitution; Romania – Article 125 of the constitution; Slovakia – Article 145 of the constitution), the president at the request of the Supreme Court (Estonia – § 78 and § 150 of the constitution), the president with the consent of the Sejm (Lithuania in the scope of appeal court judges – Article 112 of the constitution), the king in the scope of Supreme Court judges at the request of the upper house of parliament (the Netherlands – Articles 117-118 of the constitution), the Grand Duke (Luxembourg – Article 90 of the constitution, with the exception that judges of the Administrative Court are appointed by the Grand Duke at the request of the Administrative Tribunal – Article 95 bis of the constitution), or by the government (Sweden – Article 6 of the constitution). Only in a small number of Member States are judges appointed by the council of the judiciary (Bulgaria – Article 129 of the constitution, Croatia – Article 124 of the constitution, Portugal – Article 217 of the constitution).

24. It transpires from the above that judicial appointments are regulated by the constitutions of Member States, as they concern a key matter for every State, namely that of forming and staffing its constitutional bodies. In Member States there is no constitutional or legislative consensus concerning judicial appointments. Naturally, constitutional regulations of Member States are different from each other in significant ways and in substantial issues, both with respect to the democratic legitimisation of the appointment process, types of courts and judges, subjects eligible to appoint judges, and also with respect to the existence or the scope of judicial review of the nominating process (cf. paper by President of the Federal Court G. Hirsch, *Appointing of Supreme Court Judges. Examination of Situation in Individual Countries*, http://network–presidents.eu/sites/default/files/Report_Hirsch_eng%5B1%5D.pdf (access:

14.01.2020)). Article 19 TEU does not specify the criteria of appointment, the appointing entity; it also does not release Member States from the constitutional obligation to guarantee judicial appointments democratic legitimacy. Nor is the matter regulated by any other legislative provision of EU law.

25. Under the Constitution of the Republic of Poland, judges are appointed by the President of the Republic of Poland, who possesses democratic legitimacy and is elected in a general election (Article 179 in connection with Article 144(3)(17) in connection with Article 126(1) and Article 126(2) in connection with Article 127(1) and in connection with the principle of democracy, legal certainty and trust in the State derived from Article 2 of the Constitution of the Republic of Poland). The appointment by the President of the Republic of Poland of a judge is an act in law relating to the State system, which shapes the personal substratum of the judiciary, which – consistently with the established and consistent case-law – is not subject to judicial review (decision of the Constitutional Tribunal of 3 June 2008, Kpt 1/08; judgment of the Constitutional Tribunal of 25 June 2012, K 18/09; decisions of the Supreme Administrative Court of: 7 December 2017., I OSK 857/17; 20 March 2013, I OSK 3129/12; 17 October 2012, I OSK 1876/12; I OSK 1877/12; I OSK 1889/12; decisions of the Supreme Administrative Court of 16 October 2012: I OSK 1870/12; I OSK 1871/12; I OSK 1878/12; I OSK 1879/12; I OSK 1880/12; I OSK 1881/12; I OSK 1885/12; I OSK 1886/12; I OSK 1887/12; I OSK 1888/12; decisions of the Supreme Administrative Court of 9 October 2012: I OSK 1872/12; I OSK 1873/12; I OSK 1874/12; I OSK 1875/12; I OSK 1882/12; I OSK 1883/12; I OSK 1890/12; I OSK 1891/12; judgments of the Supreme Court of: 27 March 2019, I NO 59/18; 27 March 2019, I NO 8/19; 1 July 2019, I NO 70/19; 24 July 2019, I NO 86/19; 6 September 2019, I NO 99/19; decision by the Supreme Court sitting in the bench of seven judges of 16 October 2019, I NOZP 2/19). Appointment to the judgeship is an expression of the head of state's sovereign power (*cf.* judgment of the Supreme Court of 10 June 2009, III KRS 9/08, OSNP 2011, nos. 7-8, item 114).

26. The President of the Republic of Poland's prerogative stays in harmony with the principle of the separation of powers, guarantees the balance of powers in the Republic of Poland (Article 10 of the Constitution of the Republic of Poland). It represents an important element of the mechanism of checks and balances of the

branches of government (cf. decision of the Supreme Administrative Court of 9 October 2012, I OSK 1883/12). The separate and independent nature of courts cannot lead to the elimination of the mechanism of the necessary balance between branches of government since this requirement arises directly from Article 10 of the Constitution of the Republic of Poland (judgment of the Constitutional Tribunal of 15 January 2009, K 45/07). These mechanisms are intended to prevent the concentration and abuse of State power, and by so doing, to guarantee that the competences of each one of them are respected and to lay the foundations for stably operating mechanisms of a democratic state ruled by law. Thus, they are to ensure that power is exercised in accordance with the will of the Nation while respecting individual freedoms and rights (judgments of the Constitutional Tribunal of: 14 April 1999, K 8/99; 15 January 2009, K 45/07 and of 27 March 2013, K 27/12). An important element of the mechanism of checks and balances with respect to the judiciary is the President of the Republic of Poland's power to appoint judges (decision of the Supreme Administrative Court of 9 October 2012, I OSK 1883/12). This nature of this competence is authoritative and represents a manifestation of the reciprocal interaction of the branches of government, and more specifically of the balancing of the judiciary by the executive, represented by the President of the Republic of Poland (K. Weitz, *Komentarz do Artykułu 179 Konstytucji RP*, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP, Komentarz*, vol. II, pp. 1045-1046, J. Sułkowski, *Uprawnienia prezydenta do powoływania sędziów*, „Przegląd Sejmowy" 2008, no. 4, p. 54). The separation and separateness of the judiciary refer primarily to the implementation of its fundamental jurisdictional function. As regards the administration of justice, the legislature and the executive are entirely prohibited from interfering with the operations of courts and tribunals (judgment of the Constitutional Tribunal of 8 November 2016, P 126/15). However, staff formation of the third estate is part of the mechanism of balancing powers that follows from the principle of the division of powers. An important element of this process are the competences of the President of the Republic of Poland (Article 179 of the Constitution). His role in the State system in this regard is of fundamental importance for the assessment of the legal nature and rank of the act of appointing to the judgeship. It is also an important guarantee of the constitutional standard of the right

to court (decision of the Supreme Administrative Court of 9 October 2012, I OSK 1883/12).

27. The President of the Republic of Poland, when appointing a judge, ensures the necessary democratic legitimacy for such judge and the legitimacy of the entire judiciary. By so doing, he realises the fundamental principle of the political system, which arises from Article 2 of the Constitution of the Republic of Poland, as expressed in its first chapter “The Republic” – the principle of democracy. By appointing judges, the President of the Republic of Poland also ensures continuity of State authority (Article 126(1) of the Constitution of the Republic of Poland).

28. In the literature about constitutional law – still before the meaning of the President of the Republic of Poland’s prerogative to appoint a judge was explained in case-law – the relation that binds a judge to the Republic by means of a President’s act was defined using the term “the relation of creation”, having its source in constitutional law (P. Czarny, *Realizacja konstytucyjnych kompetencji Prezydenta RP w odniesiesniu do sądów i Krajowej Rady Sądownictwa*. *Uprawnienia kreacyjne Prezydenta wobec sądów*, [in:] M. Grzybowski (ed.), *System rządów Rzeczypospolitej Polskiej. Założenia konstytucyjne a praktyka ustrojowa*, Warszawa 2006). Appointment of a judge by the President of the Republic of Poland is based on constitutional law norms (cf. A. Kijowski, *Odrębności statusu prawnego sędziów Sądu Najwyższego*, „Przegląd Sejmowy” 2004, no. 1, p. 6). This opinion is still topical (J. Sułkowski, *Uprawnienia Prezydenta RP do powoływania sędziów*, „Przegląd Sejmowy” 2008, no. 4, pp. 59-60; M. Masternak-Kubiak, comment no. 6 to Article 179, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2014, LEX).

29. The adopted construction relating to the State system continues the constitutional traditions of the Republic of Poland (cf. Article 76(1) and Article 76(2) of the Constitution of the Republic of Poland of 17 March 1921 *Dz.U.* of 1921, no. 44, item 267 and Article 13(1) and Article 65(1) of the Constitution of the Republic of Poland of 23 April 1935 *Dz.U.* 1935, no. 30, item 227, and also W. Komarnicki, *Polskie prawo polityczne*, Warsaw 1922, p. 507, A. Mogilnicki, *Niezawisłość sędziów w nowym ustroju sądowym*, Gazeta Sądowa Warszawska of 1928, no. 10, p. 145 and subseq.; S. Starzyński, *Kilka słów o niezawisłości sądowej wedle Artykułu 77-78 Konstytucji polskiej*, „Czasopismo Sędziowskie” 1931, nos. 7-8, pp. 153-157).

30. The Constitution of the Republic of Poland's regulations concerning the appointment of judges are one of the fundamental constitutional structures because they are closely related to the basic principles underpinning the Republic of Poland's State system. The authority to judge in the name of the Republic of Poland needs democratic legitimacy, permanent justification by the will of the society (Article 2 and 4 of the Constitution of the Republic of Poland). By so doing, constitutional regulations carry into effect the fundamental functions and values of the Republic of Poland. By operation of the Constitution of the Republic of Poland, they are not transferable to the Union or to other international organisations under Article 90 of the Constitution of the Republic of Poland.

VII.

31. As demonstrated the most recent literature "Judicial authority exercised by a judge is real, although one should not overestimate its importance in the triad of the different branches of authority. The office of judge (*officium iudicis*) is a clearly defined scope of this authority entrusted to specific judge. Entrusting judicial authority, awarding the right to judge, is a prerogative of the ruler, the head of state, of a person who exercises the highest office in the State. Appointing to the judgeship, otherwise awarding the right of jurisdiction, awarding the title to exercise judicial authority embodies the right of the designated person to exercise judicial authority. Pursuant to Article 144(3)(17) of the Constitution, the president appoints judges and the appointment does not require the prime minister's countersignature" (from: M. Laskowski, *Uchybienie godności urzędu sędziego jako podstawa odpowiedzialności dyscyplinarnej*, Warsaw 2019, p. 39; also: J. Gudowski, *Urząd sędziego w prawie o ustroju sądów powszechnych*, „Przegląd Sądowy" 1994, nos. 11-12, p. 19).

32. The examination of the binding force or the effectiveness of a constitutional act to appoint a judge issued by the President of the Republic of Poland and the resulting constitutional relation that binds the judge to the Republic of Poland by the President of the Republic of Poland – separate from a labour-law relation – is not allowed in any proceedings before the court or other State body (e.g. KRS – cf. *a contrario* Article 45 of the Act on KRS). In particular, establishing in court whether this relation exists or does not exist is not allowed (e.g. decision of the Supreme Court

of 5 November 2009, I CSK 16/09). The power to judge in the name of the Republic of Poland, which results from the constitutional relation, cannot be abstract and vain, but always concerns its defined scope, which materialises solely in a specific court. Therefore, for constitutional reasons, it is not allowed to separate such authority from such court. For this reason the court, of which such judge is a part, cannot be regarded as being staffed irregularly in the meaning of Article 379(4) and Article 401(1) of the CCP, Article 439 § 1 paragraphs 1 and 2 of the Criminal Procedure Code (hereinafter: CPC) and Article 183 § 1 paragraph 4 and Article 271 paragraph 1 of the Act of 30 August 2002 – the Law on Proceedings before Administrative Courts (hereinafter: LPAC.) Because the court does not have an abstract dimension, but must always be staffed by a judge (*See* M. Laskowski, *Uchybienie godności urzędu sędziego jako podstawa odpowiedzialności dyscyplinarnej*, Warsaw 2019, p. 48), for this reason – since examining the binding force or effectiveness of the act of appointment and the resulting constitutional relation is not allowed – annulment of proceedings before this court pursuant to Article 379 paragraph 4 and Article 401 paragraph 1 of the CCP, Article 439 § 1 paragraphs 1 and 2 of the CPC and Article 183 § 1 paragraph 4 and Article 271 paragraph 1 of the LPAC, due to shortcomings in the nomination procedure (leading up to an appointment), cannot be allowed either. Similar conclusions were reached – on much weaker normative grounds – by the Supreme Court in its resolution of 20 February 2008, III SZP 1/08 (paragraph 2 of the operative part of the judgment and paragraph 15 of the reasons). This is all the more reason why possible irregularities in the nomination proceedings should not warrant the conclusion that supposedly procedural steps by a court staffed in such way were non-existent. A different interpretation of the above-mentioned regulations does not have grounds in the norms of international law and cannot be justified by rules of interpretation that are friendly to international law, sincere cooperation or mutual trust. Mutual trust of Member States and sincere judicial cooperation in the Union can only be ensured by judges who are internally independent and who do not succumb to external influence, that is those who are guaranteed irremovability by the Republic of Poland guarantees.

33. However, invalidity of proceedings can be caused by circumstances following an act of appointment of a judge or circumstances that are external to the

constitutional relation that binds a judge to the Republic of Poland by the President of the Republic of Poland. Hence, infringements by a judge can take on such a dimension that proceedings will be affected by error of invalidity. In extreme cases, they could also constitute separate grounds for a judge's disciplinary responsibility. Article 180(2) of the Constitution provides that removal of a judge from office may only take place pursuant to a court ruling and only in cases laid down in an act (M. Laskowski, *Uchybienie godności urzędu sędziego jako podstawa odpowiedzialności dyscyplinarnej*, Warszawa 2019, p. 39).

34. The decision of the Supreme Administrative Court of 26 November 2019, I OZ 550/19, delivered after the analysed judgment of the Court of Justice of 19 November 2019 was announced, additionally explained that the lack of grounds for re-opening proceedings because of invalidity concluded by a ruling delivered by a court on which sat the judge that was designated by the KRS established by the resolution of the Polish Sejm, of 6 March 2018 also results from the fact that the fulfilment by the candidate of the requirements specified in the law does not give him the right to be appointed by the President of the Republic of Poland to the office of judge and the President of the Republic of Poland has the right to refuse to consider the requests put forward by the KRS, if such requests ran contrary to the values the Constitution of the Republic of Poland put him in charge to uphold (similarly also the decision of the Supreme Court of 27 November 2019, IV KO 138/19).

35. Even if one successfully argues before the Constitutional Tribunal that the nomination procedure was faulty, it does not justify annulling the act of appointment or the constitutional relation resulting from it or the re-opening of specific proceedings before the court, where the judge that had been selected under this procedure worked. The Constitutional Tribunal found that "re-opening proceedings that ended with the appointment of a judge by the President of the Republic of Poland would have led to effects that would be in violation of the Constitution of the Republic of Poland", while persons whose candidacies had been rejected when the challenged legislative provision was applied or were deprived of the right to appeal against the KRS resolution in violation of the Constitution of the Republic of Poland "have the possibility to again apply for vacant judicial positions based on rules set out in legislative provisions that should be enacted after the Constitutional Tribunal's ruling

enters into force” (cf. judgments of the Constitutional Tribunal of: 29 November 2007, SK 43/06; 27 May 2008, SK 57/06).

36. Allowing for an examination of the binding force or effectiveness of the constitutional relation that binds a judge with the Republic of Poland represented by the President as the highest representative and guarantor of the continuity of state authority (Article 126(1) of the Constitution of the Republic of Poland) would have violated the principle of the tripartite system of separation of powers and would have led to circumventing absolutely binding regulations, which precisely specified the judicial review procedure for the nomination procedure by the Supreme Court. It could also lead to challenging the validity of Supreme Court judgments delivered in proceedings concerning appeals against KRS resolutions. No third party has a legal interest or legitimacy to initiate such proceedings.

37. Allowing to challenge constitutional acts of the President of the Republic of Poland or the resulting constitutional relations could paralyse for many years every court proceedings with lawsuits against successive judges who were part of the compositions of courts of all instances under the procedure of Article 189 of the CCP to determine the non-existence of the right – resulting from the constitutional relation – authorising them to deliver judgments in the name of the Republic of Poland. This can apply to any even alleged irregularity, like for example, the appointment by the Council of State of the Polish People’s Republic or by the Speaker of the Sejm an acting President of the Republic of Poland. Evidently, accepting this concept would challenge the very essence of the right to court that is absolutely protected by Article 45 of the Constitution of the Republic of Poland in connection with Article 31(2)(2), and Article 47 in connection with Article 51(1)(1) of the Charter of Fundamental Rights and Article 19 TEU, and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Accepting such opinion would make the right of a party to an effective ruling and then to its execution illusory. It would also violate the principle of legal certainty and trust in the State and the guarantee of irremovability of judges referred to in Article 180 of the Constitution of the Republic of Poland. Ultimately it would lead to inadmissible identification of creative acts by the head of state and the resulting constitutional relations with civil or employee relations.

VIII.

38. In paragraph 144 of its judgment of 19 November 2019, the CJEU pointed out that the KRS that operates under the Act on KRS in the wording given to it by the Act of 8 December 2017 Amending the Law on the National Council of the Judiciary and certain other laws (*Dz.U.* 2018, item 3 as amended), which includes in its composition judges appointed by the resolution of the Sejm of the Republic of Poland of 6 March 2018, was formed as a result of the shortening of the four-year term of office of its earlier members, that 15 members of the KRS elected from among judges had previously been selected by judges and now they are designated by a body of the legislature from among candidates, who can be put forward by a group of 2000 citizens or 25 judges. This reform led to an increase in the number of KRS members elected by the Sejm to 23 out of the 25 members that make up this body, and the process of appointing some KRS members in the new composition could have been irregular. The Court of Justice additionally pointed out that consideration can also be given to the manner in which the KRS fulfils its constitutional task of guarding court and judicial independence and exercises its different powers, and specifically whether it does so in a way that can lead to questioning its independence from the legislature and the executive (paragraph 144). Applying these criteria the Supreme Court, in the reasons of its judgment of 5 December 2019 III, PO 7/18, concerning continued holding of the position of a Supreme Administrative Court judge, concluded that the KRS is not a body that is independent of the legislature and the executive (paragraphs 40-60).

39. Independence in Polish constitutional law is understood first as freedom from interference in the exercise of functions and powers and as organisational separation (ruling of the Constitutional Tribunal sitting in full bench of 9 November 1993, K 11/93; judgment of the Constitutional Tribunal sitting in full bench of 14 April 1999, K 8/99, as well as the judgment of the Constitutional Tribunal of 3 December 2015, K 34/15), as well as a ban on carrying out these competencies by other entities. Neither the legislature nor the executive can administer justice or enter into those areas in which judges are independent (judgments of the Constitutional Tribunal: of 3 December 2015, K 34/15; of 19 July 2005, K 28/04; of 29 November 2005, P 16/04)

and those that the Constitutional Tribunal refers to using the term “competence nucleus” (judgment of the Constitutional Tribunal of 7 November 2013, K 31/12). The principle of independence should not be interpreted, however, in a way that wrecks the required relations with other elements of the State, and in consequence, in a manner that undermines the principle of cooperation of authorities in order to ensure integrity and efficiency of public institutions (cf. preamble to the Constitution). Even independence and separateness of courts must not be interpreted in a way that would lead to doing away with the mechanism of the necessary balance between all the branches of government. Each of them should possess such instruments as would allow it to restrain and check the activities of the others (judgment of the Constitutional Tribunal of 18 February 2004, K 12/03, as well as the judgment of the Constitutional Tribunal sitting in full bench of 15 January 2009, K 45/07).

40. The Supreme Court, in the bench of seven judges, notes that the KRS, like other constitutional bodies whose independence is guaranteed – both from the National Broadcasting Council and the Monetary Policy Council, is a collegial body that unites different authorities by operation of the Constitution of the Republic of Poland. Persons appointed to the KRS by these authorities should cooperate in the Council in the furthering of its purposes. As L. Garlicki says, the National Council of the Judiciary is not a body of judicial authority, but a body placed between the legislature, the executive, and the judiciary, whose task is to act as an intermediary in the most important decisions concerning the judiciary taken by the legislative and the executive (L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2014, p. 330).

41. The National Council of the Judiciary is, by operation of the Constitution of the Republic of Poland, structurally connected to the legislature, the executive, and the judiciary, since it is an emanation of these authorities. The nature of this relation is formal. In this aspect – guided by the formal criteria laid down in the CJEU judgment – the lack of independence of the Council from the legislature and executive can be concluded. However, considering the facts indicated in the CJEU judgment, it has to be concluded that they can be shown *ad casum*, when assessing the Council’s actions, and first of all when assessing the legality of the Council’s resolutions. The appellant may, by referring to this circumstance, rely on presumptions of facts. This

examination should take into account the degree of the Council's dependence on the legislature and the executive. One should also not ignore the fact that threats to the independence of the Council, and indirectly to court and judicial independence, could be found in the different types of influence: direct, in the form of instructions, or in a more indirect way, on decisions being made. All of its members, especially the independent judges sitting on the Council are required legally and ethically to show special respect for court and judicial independence.

42. The Constitution guarantees the KRS participation in proceedings for judicial nominations (Article 179 of the Constitution of the Republic of Poland). It also ensures its participation in nominating assessors. Case-law and doctrine emphasise that the reciprocal relations between the President of the Republic of Poland and the KRS are not symmetrical, because judges are appointed by the President (judgment of the Constitutional Tribunal of 5 June 2012, K 18/09; decision of the Constitutional Tribunal of 23 June 2008, Kpt 1/08; L. Garlicki, *Komentarz do art. 179* [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 4, Warsaw 2005, p. 5). Nevertheless, important conclusions arise for the practice of nominations from the normative model of cooperation between the President of the Republic of Poland and the National Council of the Judiciary laid down in Article 179 of the Constitution of the Republic of Poland. The first conclusion that should be derived from it is about the obligation for the Council to present and for the President of the Republic of Poland to appoint only those candidates that meet the criteria laid down in the law to exercise the judicial office, both ethical and merit-based, which guarantee that justice is duly administered. Next, a conclusion should be drawn from it about stopping appointments of judges in the event that the Supreme Court sets aside a KRS resolution and to order not to appoint a judge until a KRS resolution comes into force for other reasons than its quashing by the Supreme Court and also to prohibit presenting requests to the President of the Republic of Poland until a resolution comes into force.

IX.

43. The Supreme Court will review violations of EU law provisions, if a party has referred to them in a cassation appeal, unless there is a need to ask the Court of

Justice for a preliminary ruling (judgment of the Supreme Court of 18 December 2006 II PK 17/06, and also T. Ereciński, [in:] T. Ereciński, J. Gudowski, *System Prawa Procesowego Cywilnego, vol. III part 2, Środki zaskarżenia*, ed. J. Gudowski, Warsaw 2013, p. 949). The Supreme Court in the bench of seven judges shares this opinion. Binding character of the grounds for appeal against KRS resolutions results directly from statutory provisions (Article 398^{13} § 1 CCP in connection with Article 44(3) of the Act on KRS). However if the appellant does not refer to the specific violation of law, the Supreme Court cannot set aside the resolution, even if the Supreme Court has noticed some additional irregularities. At this point, the Supreme Court makes an important reservation. In the opinion of the Supreme Court in the bench of seven judges, provisions of EU law should be considered also when it is obvious that they regulate the same subject matter as does the national law, whose violation was referred to as the grounds of the appeal and when the possibility exists to apply EU law directly or if there is a need to interpret provisions of the national law in line with EU law. Such friendly interpretation is also permitted because in appeal proceedings against KRS resolutions the Supreme Court applies regulations on the cassation appeal *mutatis mutandis*.

44. A KRS resolution on presenting the President of the Republic of Poland a candidate for the office of judge may be set aside within the scope of the appeal. It could happen when a resolution is appealed against and has not come into force entirely (Article 398^{13} § 1 CCP in connection with Article 44(3) in connection with Article 43(2) of the Act on KRS). If a resolution is not appealed against within the proper time-limit, then by operation of law it comes into force and may, but does not have to, be grounds for the President of the Republic of Poland to exercise his prerogative referred to in Article 179 of the Constitution of the Republic of Poland. The Supreme Court does not have and should not have the power to act *ex officio*, despite the principle of accusatorial procedure and disposition.

45. Fundamental assumptions underlying the adopted model of review of KRS resolutions by the Supreme Court require participants of the nomination proceedings to be necessarily active. This is because the adopted model of reviewing resolutions by the Supreme Court relies on the cassation model and fully corresponds to the systemic characteristics and the framework of operation of the KRS and the Supreme

Court laid down in the Constitution of the Republic of Poland and in statutes. The nature of the cassation model is universal, adequately serves to carry out constitutional and legislative tasks and competencies of the Supreme Court in matters falling under its competencies, including in matters relating to EU law (cf. T. Ereciński, J. Gudowski, *System Prawa Procesowego Cywilnego, vol. III part 2, Środki zaskarżenia*, ed. J. Gudowski, Warsaw 2013, pp. 884-1086). The adopted model of review of KRS resolutions implements the principle of the procedural autonomy of Member States, which is not repealed by the principle of effectiveness of EU law.

46. Defects of a resolution resulting from the KRS's lack of independence cannot be identified with the non-existence of a resolution or its invalidity by operation of the law itself, or the invalidity of proceedings before the KRS. An irregularity arising from the KRS's lack of independence should not be identified with invalidity in the meaning of provisions of administrative law (Article 156 of the Code of Administrative Procedure), since in proceedings before the Council, in line with Article 2 of the Act on KRS, provisions of the Code of Administrative Procedure do not apply. There are also no grounds to apply provisions of the Civil Code (e.g. Article 58 of the Civil Code), since this legislative act "regulates civil law relations between natural and legal persons." (Article 1). Definitely the adoption by the KRS of resolutions on presenting to the President of the Republic of Poland candidates for the office of judge does not fall within the sphere of "civil law relations" because it is a constitutional act.

47. The Supreme Court in the bench of seven judges stresses that also the regulation of Article 379 CCP cannot be grounds for accepting that a KRS resolution or proceedings before the Council are in certain cases invalid. First, pursuant to Article 44(3) of the Act on KRS, in proceedings before the Supreme Courts concerning an appeal against a KRS resolution, CCP provisions concerning the cassation application apply. Hence, CCP provisions are applicable to proceedings before the Supreme Court, but do not introduce additional grounds for irregularity of resolutions or proceedings before the KRS. Regulation of Article 44(1) of the Act on KRS, which lays down the grounds for irregularity of a resolution is autonomous and exhaustive. Hence, there are no grounds even to apply *mutatis mutandis* Article 379 CCP that lays down additional grounds for repealing (irregularity) a KRS resolution.

In this scope, Article 398^{13} § 1 CCP *in fine* does not apply to proceedings before the Supreme Court. Second, the fact that proceedings were invalidated does not mean that the ruling (the act that ends proceedings) is invalid, only that it can be appealed against on account of the fact that procedural regulations were violated. In other words, even the application of Article 379 CCP to proceedings before the KRS would not lead to the conclusion that the resolution was “invalid”, but only to an effect in the form of the invalidity of proceedings before the Council. The argument about applying Article 379 CCP to Council resolutions would have led to the unacceptable conclusion that if a KRS resolution may be considered invalid pursuant to Article 379 CCP, then the Council – by wanting to protect itself against invalidity of proceedings – should proceed in such a way as not to violate this provision of law. This would mean that Article 379 CCP sets inviolable standards of procedure before the KRS. This would lead to a totally baseless conclusion that supposedly Article 379 CCP was applicable to proceedings before the Council by operation of Article 44(3) of the Act on KRS in connection with Article 389^{13} § 1 CCP.

48. It is also not possible to conclude that a KRS resolution or proceedings by operation of law alone are invalid from the wording of Article 21(1) of the Act on KRS, which reads “for Council resolutions to be valid, at least a half of its composition has to be present”. The term “valid” was used in this legislative provision in a specific sense meaning that KRS may adopt resolutions if a specific number of Council members (quorum) is present. It does not mean that a resolution adopted without a quorum is “invalid,” only that it may be appealed against and repealed under Article 44(1) of the Act on KRS as being contrary to the law (cf. judgment of the Supreme Court of 5 November 2019, I NO 117/19). It is also obvious that the legislative provision concerning quorum – Article 21(1) of the Act on KRS – should not be interpreted broadly and substantiate the claim that the part of the KRS that is made up of judges does not exist at all (is not present) because of the procedure used to elect it.

49. The Supreme Court also does not see the possibility of invalidating a KRS resolution or proceedings before the Council because of the general principles of public law. The principle of protecting citizens’ trust in the State and the principle of legal certainty oppose it, not to mention the lack of normative grounds for adopting

such construction. It would be unacceptable to have a situation in which parties to proceedings before the court would be uncertain whether a judge's appointment (his status) was free of error, and the appeal court would be required to examine *ex officio* all the circumstances that could potentially point to systemic irregularities of a body or its practices in order to verify whether a judge's appointment was regular.

50. The case-law of the Supreme Court and the Constitutional Tribunal emphasises that finding a violation by the European Court of Human Rights of the right to court does not justify re-opening civil proceedings (resolution by the Supreme Court sitting in the bench of seven judges of 30 November 2010, III CZP 16/10; judgment of the Constitutional Tribunal of 22 September 2015, SK 21/14). The CJEU judgment of 19 November 2019 does not find at all a violation of the right to court, but only points to a catalogue of circumstances that could be useful in interpreting Article 47 of the Charter. Explanations of Article 47 of the Charter that should be taken into account when interpreting the Charter pursuant to Article 6(1) third paragraph TEU and Article 52(7) of this Charter, paragraphs first and second of Article 47 of the Charter correspond to Article 6(1) and Article 13 of the European Convention on Human Rights (judgment of the Court of Justice of the European Union of 30 June 2016 Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci, C205/15 and the case-law quoted there). It transpires from Article 52(1) of the Charter that the right to effective judicial protection is not an absolute right and may be subject to limitations, specifically in order to protect the rights and freedoms of other individuals (judgment of the Court of Justice of the European Union of 19 December 2019 Umwelthilfe, C-52/18). It is thus obvious that the CJEU judgment of 19 November 2019 cannot represent the grounds for re-opening civil proceedings.

51. Re-opening proceedings has to result from unequivocally specified and strictly interpreted legislative grounds. An ECtHR ruling that finds a violation of Article 6 of the Convention for the Protection of Human Rights is neither (decision of the Supreme Court of 23 October 2008, V CO 28/08). It does not transpire from international law that all standards of the right to court and different forms of irregularities in legal action associated with them have to be identified with legal grounds for re-opening proceedings (cf. judgment of the European Court of Human Rights of 8 July 2003, 15227/03, Lyons versus the United Kingdom; P. *Grzegorczyk,*

Skutki wyroków Europejskiego Trybunału Praw Człowieka w krajowym porządku prawnym, „Przegląd Sądowy” 2006, no. 6, pp. 24-29; T. Zembrzuski, *Wpływ wyroku ETPC na dopuszczalność wznowienia postępowania cywilnego*, „Europejski Przegląd Sądowy” 2009, no. 2, p. 12).

52. Article 45(1) of the Act on KRS creates an autonomous basis for re-examination of a case that ended with a resolution of the Council by the Council itself. As the Supreme Court explained in reasons for the judgment of 22 November 2013, III KRS 224/13, the institution of re-examining a case, which is regulated by Article 45(1) of the Act on KRS, is similar to the institution of re-opening proceedings. However, because the application of the Code of Administrative Procedure regulations was explicitly excluded by law and no references were made to the provisions of the Civil Procedure Code, in proceedings before the KRS, the regulation found in Article 45 should be regarded as separate from the norms of these acts and at the same comprehensive.

53. The Supreme Court in the bench of seven judges has found that Article 45(2) of the Act on KRS excludes resumption of proceedings after a judge has been appointed by the President of the Republic of Poland. This position of the legislator is based on consistent case-law of the Constitutional Tribunal, according to which even serious irregularities in the nomination procedure do not justify resuming proceedings after the President of the Republic of Poland appoints a candidate to hold the office of judge, because a resumption of proceedings would violate the Constitution of the Republic of Poland (cf. judgments of the Constitutional Tribunal of: 29 November 2007, SK 43/06; 27 May 2008, SK 57/06).

54. Likewise there is no connection between systemic defects in the normative model of the institution of assessors and the grounds for re-opening civil proceedings or proceedings before the KRS. “It would be a mistake to try to see an analogy with the situation of a ruling being handed down by the wrong body, a badly legitimised or a badly staffed body” (judgment of the Constitutional Tribunal sitting in full bench of 24 October 2007, SK 7/06). As the full bench of the Constitutional Tribunal has emphasised, an organ’s defective shape due to the lack of attributes of independence required by the Constitution does not necessarily point to the unconstitutionality of the substance of a judicial decision or of the procedure applied to deliver it. Values

associated with the feature of being final speak are in favour of protecting such KRS resolutions. When unconstitutionality concerns systemic provisions of law, there are no grounds to re-open proceedings, whose unconstitutional systemic norm was *conditio sine qua non*. For the same reason the Court decided not to bestow the privilege of benefits even on entities that have successfully lodged a constitutional complaint (judgment of the Constitutional Tribunal of 24 October 2007, SK 7/06).

55. The appellant's argument that the KRS's lack of independence affected the contents of the appealed resolution determines the duty to set it aside. Pursuant to the CJEU judgment, the KRS's lack of independence is so important that it must be considered as autonomous grounds for revoking the KRS resolution. The Supreme Court does not exclude using presumptions of facts on this level. They will appear useful especially when the lack of independence of the KRS affecting the contents of a resolution could be due to the fact opinions of the relevant assemblies, councils and inspectors referred to in Article 35(2) of the Act on KRS were completely ignored. Moreover, the appellant's use of presumptions of facts can be justified when the appellant proves that the produce of appointing members to the Council lacked transparency. However, if the appellant fails to show any real influence of the Council's dependence on the executive or the legislature on the contents of the resolution or if a contest for the judgeship is won by a person who possesses objectively speaking high ethical and merit-based qualifications, and guarantees due administration of justice, then there will be no grounds for finding that the Council resolution has violated the law and for setting it aside. Not every decision made by the National Council for the Judiciary affects court, judicial and assessor's independence (cf. reasons for the judgment of the Supreme Court of 5 December 2019, III PO 7/18).

X.

56. If proceedings that permit an examination of the nomination process are taking place before the Supreme Court on appeal from a resolution of the National Council for the Judiciary (Article 44(1) and Article 44(3) of the Act on KRS), then a judicial review of KRS resolutions by the Supreme Court must be shaped in such a way as to ensure that EU law is fully effective. In aiming for such judicial review, KRS

resolutions adopted in situations specified in paragraphs 147-151 in connection with paragraph 145 of the CJEU judgment (cf. above paragraphs 4 and 15) should be eliminated. The obligation to set aside the resolution of the National Council for the Judiciary under conditions laid down in paragraphs 147-151 of the Court of Justice judgment of 19 November 2019 settles the matter of actions for voidness contrary to Article 44(1) sentence 2 of the Act on KRS. It follows from Article 47 of the Charter that an effective judicial review of KRS resolutions should cover resolutions containing requests for the appointment of Supreme Court judges. In the opinion of the Supreme Court, the conflict between Article 44(1) sentence 2 of the Act on KRS with Article 47 of the Charter should be eliminated by acting pursuant to Article 91(2) of the Constitution of the Republic of Poland. The possibility of appealing against a KRS resolution cannot be ruled out as being inadmissible. Such interpretation is supported by the circumstance that in light of the case-law of the Constitutional Tribunal, the regulation of Article 44(1) sentence 2 of the Act on KRS is secondarily unconstitutional. The Constitutional Tribunal has already explained that non-appealability of a KRS resolution in an individual case, containing a request to appoint a candidate for the office of judge violates Article 45(1) of the Constitution of the Republic of Poland (cf. judgment of the Constitutional Tribunal of 27 May 2008, SK 57/06; as well as judgments of the Constitutional Tribunal of: 29 November 2007, SK 43/06). An analysis of the CJEU judgment leads to the same conclusion (paragraph 145).

In addition, accepting that resolutions containing a request to present a candidate for appointment to the Supreme Court may be appealed against raises doubts whether they can be appealed against as final or non-final resolutions. The Constitutional Tribunal sitting in full bench, in its judgment of 19 February 2003, P 11/02, found Article 393^4 § 2 CCP to violate Article 45(1) of the Constitution of the Republic of Poland. It pointed out that the moment a ruling becomes final is an issue of fundamental importance from the point of view of the protection of individual interests and as such has to be regulated in a way that leaves no doubts as to interpretation. These observations also apply to KRS resolutions.

57. The Supreme Court finds that a KRS resolution may be appealed against within the scope determined by the public interest. The resolution of 15 May 2014, III

CZP 88/13 delivered by the Supreme Court sitting in the bench of seven judges and made by the Court into a legal principle, noted that a premise of the admissibility of an appeal in civil proceedings is a legal interest and gravamen, and this also holds true when provisions of the law do not explicitly state this term. At the same time, the Supreme Court noted that the public interest may justify exceptions from this rule. The Supreme Court did not explain how and in what scope the public interest impacts the appealability of a KRS resolution. The Supreme Court in the bench of seven judges takes the position that the regulations of Article 47 of the Charter, Article 19 TEU and the principle of effective judicial protection impact the determination of the scope of the appeal against a KRS resolution. The constitutional nature of the cases on appeal against KRS resolutions explains the reason why it should be accepted that the scope of the appeal is determined not only by the appellant's own, current and actual interest, but also the public interest. Consideration for the objective interest of the administration of justice involving the lack of judicial appointments for persons who do not guarantee due administration of justice, independence and impartiality supports the argument that – whenever the appellant can demonstrate the circumstance that the KRS lacks independence or the circumstances referred to in paragraph 125 of the CJEU judgment or jointly the circumstances referred to in paragraphs 147-151 of the CJEU judgment – the Supreme Court should repeal a KRS resolution not only in the part that adversely affects the appellant i.e. in part paragraph II concerning the appellant, but also in the part presenting a request to appoint counter-candidates, i.e. in paragraph I. The Supreme Court would not only set aside a resolution with respect to persons who are not covered by the request for appointment and who did not lodge an appeal, because under Article 43(2) of the Act on KRS, this part of the resolution becomes final when the deadline for the application expires.

However in cases concerning contests for more or the same number of judges' positions as there are candidates, where the public interest, especially as defined in the CJEU judgment, does not stand in the way of this, in accordance with general principles of civil procedure, the admissibility of an appeal should be made dependent on the gravamen of the party appealing against a resolution. It should also be recognised that a candidate who was not covered by the request for appointment

cannot demand the KRS resolution to be set aside in the part covering such candidate covered by such request (judgments of the Supreme Court of: 27 March 2019, I NO 59/18; 29 July 2019, I NO 89/19).

XI.

58. The Supreme Court concludes that the circumstance pointed out by the CJEU in paragraph 125 of the judgment constitutes autonomous grounds for setting aside a KRS resolution by the Supreme Court. It should be recognised as disqualifying a candidate from holding the office of judge. This means the lack of both ethical and characterological qualifications – vulnerability to influence or activity that weakens independence – and also having work relations or informal relations justifying doubts about respect for values invoked in Article 47 of the Charter. In the opinion of the Supreme Court, internal independence, understood as a judge's personal attitude, is the nucleus of the guarantee of judicial independence (cf. P. Wiliński, P. Karlik, commentary to Article 178, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP. Tom II. Komentarz do art. 87-243*, Warsaw 2016, p. 1013). The literature on the subject shows that internal independence in essence means that judges have to be psychologically and intellectually self-reliant – "think and act independently" meaning be guided by one's own knowledge, life and professional experience, one's own conscience, one's one sense of justice. Independence is a conscious choice to rely on one's own labour, one's own intellectual effort to establish the facts, to find an adequate provision of law that should be applied, to interpret such provision of law taking into account all possible interpreting variations, decoding the legal norm while accounting for not only the literal sense of the provision, but also the underlying axiology – a judge performs all these actions himself, when he is the only adjudicating judge hearing a case, or with other judges who sit with him in court, but then only with their participation, without any outside interference. Hence, a judge's impartiality is an intellectual attitude in that sense that it is a conscious effort to free oneself of all prejudices, sympathies and antipathies towards the parties, to examine and rule on cases solely based on their merits. In intentionally choosing the values that an independent judge adheres to when ruling, the judge's character, attitude and ethical and moral values, including courage, honesty, and integrity help. So one might

say that it is up to the judges themselves to be independent. A judge with character is independent, a judge who does not have it, is not independent (K. Gonera, *Niezależność i niezawisłość sędziowska jako podstawa państwa prawa. Wewnętrzna (intelektualna) niezależność sędziego,* [in:] T. Wardyński, M. Niziołek (ed.), *Niezależność sądownictwa i zawodów prawniczych,* Warszawa 2009, pp. 90-91 and 93).

XII.

59. It transpires from the CJEU judgment that the Supreme Court is the direct addressee of the duties enumerated in it. The Supreme Court, when reviewing appeals against KRS resolutions, should watch over the effective implementation of the constitutional requirements and of EU law. However, there is no doubt that other bodies, including the KRS, are also required to implement EU law. Also the President of the Republic of Poland can – going further than the minimum required by EU law – guarantee that the nominating process runs properly. The Supreme Court, in the reasons for the judgment of 5 December 2019, III PO 7/18 noted that the KRS recommended to the President of the Republic of Poland appointing “a person, who did not meet the formal criteria (lack of required seniority), and a person with respect to whom a final judgment was delivered by a disciplinary court” (paragraph 70). However, the Supreme Court did not draw attention there to the fact that the President of the Republic of Poland refused to appoint these persons. Thus, the Supreme Court in the bench of seven judges concludes that the model of appointing judges that is defined by the Constitution effectively ensures the implementation of EU law.

60. The Supreme Court underlines that the aim of the adopted resolution is to resolve doubts regarding the impact the CJEU judgment of 19 November 2019 exerts on the model of review exercised by the Supreme Court adjudicating in the Extraordinary Control and Public Affairs Chamber within the limits set in Article 26 of the Act on the Supreme Court. On account of its specific nature, the court of last instance is also required to rule, within these limits, on legal issues that raise serious doubts. No other organ can release the Supreme Court from this duty.

61. The Supreme Court, in adopting this resolution, also recognised that the CJEU judgment sets a precedent. It develops a new interpretation of EU law, one that enters deeply into the constitutional matter of Member States. Therefore, in carrying out the obligations that arise from it in the Polish constitutional order, the Supreme Court took into consideration the CJEU case-law, which provides that Member States are not required to stop applying national regulations of procedural law if they want to examine and set aside a final court decision, if it transpires that such decision violates EU law. Stability of law and of legal relations as well as the normal administration of justice make it important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (judgment of the Court of Justice of the European Union of 16 March 2006, C-234/04, *Rosmarie Kampferer versus Schank & Schick GmbH*; cf. also: judgments of the Constitutional Tribunal of: 29 November 2007, SK 43/06; 27 May 2008, SK 57/06).

Having regard for the aforementioned circumstances, the Supreme Court has resolved as first above written.