Case III PO 7/18

JUDGMENT
ON BEHALF OF THE REPUBLIC OF POLAND

5 December 2019

The Supreme Court composed of:

Judge of the Supreme Court Piotr Prusinowski (Chairman)
Judge of the Supreme Court Bohdan Bieniek (Reporting Judge)
Judge of the Supreme Court Dawid Miąsik

in the appeal case filed by A. K.
against a resolution of the National Council of the Judiciary of 27 July 2018,
after a private session of the Chamber of Labour Law and Social Security
held on 5 December 2019,

1. dismisses the request of the President of the Disciplinary Chamber of the Supreme Court of 10 October 2018 for the case to be referred to the Disciplinary Chamber according to its jurisdiction;

2. annuls the resolution of the National Council of the Judiciary of 27 July 2018 concerning continued execution of the office of a judge of the Supreme Administrative Court by A.K.

JUSTIFICATION

In its resolution of 27 July 2018, the National Council of the Judiciary issued a negative opinion concerning continued execution of the office of a judge of the Supreme Administrative Court by A.K.

The resolution was appealed by A.K., judge of the Supreme Administrative Court. He referred to an infringement of the second paragraph of Article 19(1) TEU and the second paragraph of Article 47 of the Charter of Fundamental Rights (“CFR”), which establish the principle of effective legal protection and consequently prohibit arbitrary

retirement of a judge merely by virtue of turning 65 years. Furthermore, the appellant referred to an infringement of Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (EU Official Journal, Special edition in Polish: Chapter 05 Volume 04 p. 79).

Furthermore, the appellant requested a referral for a preliminary ruling concerning the interpretation of the second paragraph of Article 19(1) TEU and Article 47 CFR in conjunction with Article 9(1) of Council Directive 2000/78/EC, specifically, whether Article 47 CFR in conjunction with Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation should be interpreted in such a way that, if an appeal is lodged with the court of last instance of a Member State based on alleged discrimination against a judge of that court on the ground age together with a request for a provisional measure against the contested instrument, that court must, in order to grant protection to the eligible person under Union law by issuing a provisional measure under national law, refuse to apply provisions of national law which grant the exclusive jurisdiction in the case subject to the appeal to a unit of that court which is inactive in the absence of appointed judges?; and whether the interpretation of the second sentence of Article 19(1) TUE and Article 47 CFR is prevented where a judge of the Supreme Administrative Court who has turned 65 years retires although retirement was mandatory only at the age of 70 when that judge took the position of judge of the Supreme Administrative Court, unless the President acting as an executive body approves, at the request of that judge, his continued execution of the function of judge of the Supreme Administrative Court after the age of 65, where the decision of the President is not bound by binding criteria but merely passed upon asking the opinion of the National Council of the Judiciary whose members (judges) are appointed by the Sejm from amongst candidates proposed by at least 25 judges or at least 2,000 citizens, and the final list of candidates, which is jointly approved by the Sejm, is first drawn up by a Sejm committee, which significantly extends the influence of the Parliament over the National Council of the Judiciary and affects its independence? The appeal also included a request for suspension of the enforceability of the resolution of the National Council of the Judiciary.

The Supreme Court determined the following facts of the case:

A.K. is a judge of the Supreme Administrative Court. He had turned 65 years at the effective date of the Act of 8 December 2017 on the Supreme Court (*Journal of Laws* of 2018, item 5, as amended, the "ASC"). According to Article 111(1) ASC (in the previous wording), applicable to judges of the Supreme Administrative Court by reference made in Article 49 of the Act of 25 July 2002 – Law on the Common Court System (consolidated text: *Journal of Laws* of 2018, item 2107), judges of the Supreme Court who turn 65 years on or before the effective date of the Act or will turn 65 years within three months after the effective date of the Act shall retire as of the day following the lapse of three months after the effective date of the Act unless they submit a declaration and a certificate referred to in Article 37(1) within one month after the effective date of the Act and the President of the Republic of Poland approves their continued execution of the office of judge of the Supreme Court. The provisions of Article 37(2-4) shall apply accordingly.

The appellant submitted the relevant declaration of his intention to remain in office as well as a health certificate. The President of the Republic of Poland requested an opinion the National Council of the Judiciary (the "Council" or the "NCJ") concerning his continued execution of that office. The Council issued a resolution (known as an opinion) which was negative in view of the interest of the judiciary and compelling public interest, including rational management of the human resources of the Supreme Administrative Court and the needs arising from the workload of the chambers of the Supreme Administrative Court.

A.K. lodged an appeal directly with the Labour Law and Social Security Chamber of the Supreme Court since, according to information available to him, the Council would not forward judges' appeals against negative resolutions (opinions) to the Supreme Court. At the time of the appeal, the Disciplinary Chamber of the Supreme Court was in fact inactive.

The announcement of the President of the Republic of Poland of 24 May 2018 concerning vacant positions of judges of the Supreme Court announced 16 vacant positions of judges of the Supreme Court in the Disciplinary Chamber (Monitor Polski – Official Gazette of the Republic of Poland of 2018, item 633). At its sessions held on 23, 24, 27 and 28 August 2018, the NCJ closed a competition for the vacant positions of judges. Of 16 vacant positions in the Disciplinary Chamber, it nominated 12 persons and submitted the requests for their appointment to the President of the Republic of Poland,

who appointed 10 persons to those positions in a decision dated 19 September 2018. According to public information, prior to the appointment, five of them were prosecutors, two were judges, two were legal counsels, and one was a researcher. Only new judges of the Supreme Court, rather than existing judges of the Supreme Court, are eligible for appointment to the Disciplinary Chamber. It should be recalled that prior to the effective date of the ASC, a division of the Criminal Chamber handled disciplinary cases, which were adjudicated by a randomly appointed formation of the Supreme Court.

The Order of the President of the III Division of the Labour Law and Social Security Chamber of 13 August 2018 requested the Council to provide documentation concerning the contested resolution.

In response, in its letter of 30 August 2018 (received on 5 September 2018), the National Council of the Judiciary replied that it would not provide any documents as it had taken no steps within the jurisdiction of the Labour Law and Social Security Chamber of the Supreme Court.

On 3 October 2018, the Council submitted its reply to the appeal of A.K., requesting that it be dismissed in its entirety.

In his letter of 10 October 2018, the President of the Supreme Court heading the Disciplinary Chamber requested the Labour Law and Social Security Chamber of the Supreme Court to immediately refer the appeal to the Disciplinary Chamber in accordance with Article 200 of the Code of Civil Procedure.

The decision of the Labour Law and Social Security Chamber of the Supreme Court of 24 October 2018 postponed the examination of that request until case C-585/18 pending before the Court of Justice of the European Union is closed.

Under the Act of 21 November 2018 amending the Act on the Supreme Court (*Journal of Laws*, item 2507), which took effect on 1 January 2019, judges of the Supreme Court and judges of the Supreme Administrative Court were reinstated in office by operation of the law on the same terms and conditions as those applicable before the effective date of the ASC and their term of office was considered to run without interruption.

Considering the positions of the parties and the connection between the case and Union law (discrimination on the ground of age), as well as the fact that disputes concerning the application of Union law should remain within the exclusive jurisdiction of a body which is an independent and impartial court or tribunal, the Supreme Court decided at a session held on 30 August 2018 to refer the following questions for a

preliminary ruling to the Court of Justice of the European Union according to Article 267 TFEU: (1) On a proper construction of the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 CFR, is a newly created chamber of a court of last instance of a Member State which has jurisdiction to hear an action by a national court judge and which must be composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts (the National Council of the Judiciary), which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, an independent court or tribunal within the meaning of EU law? (2) If the answer to the first question is negative, should the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 CFR, be interpreted as meaning that a chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court and is seised of an appeal in a case falling within the scope of EU law should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?

The Supreme Court requested the Court of Justice to apply the expedited procedure and, according to Article 388(1) in conjunction with Article 398^{21} of the Code of Civil Procedure and Article 44(3) of the Act of 12 May 2011 on the National Council of the Judiciary (consolidated text: *Journal of Laws* of 2018, item 389, as amended), suspended the enforceability of the contested resolution (opinion) and stayed the proceedings.

The Court of Justice of the European Union accepted the case, assigned it number C-585/18, and combined it with other requests of the Supreme Court for a preliminary ruling (C-624/18 and C-625/18).

The judgment of the Court (Grand Chamber) of 19 November 2019 in combined cases C-585/18, C-624/18 and C-625/18 was as follows: (1) It is no longer necessary to answer questions referred by the Labour Law and Social Security Chamber of the Supreme Court (Poland) in Case C-585/18 or the first question referred by the same court in Cases C-624/18 and C-625/18; (2) the answer to the second and third questions referred by the referring court in Cases C-624/18 and C-625/18 is as follows: Article 47 CFR 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 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 abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.

(evidence: documents on file in case III PO 7/18; facts known to the court and facts in the public domain)

The Supreme Court considered the following:

1. The appeal is admissible. The case touches upon fundamental rights arising from the administration of justice, in particular from the perspective of rights of individuals claiming genuine legal protection and the right to a fair trial. For those reasons, it is necessary to clarify various issues concerning how this right is exercised in a European Union Member State.
2. At the outset, it should be stressed that it is an uncontestable power of the national legislature to freely regulate the operating framework for the judiciary and to define the objectives to be pursued with new legal instruments. Those powers include modifications to the organisation of the Supreme Court, reorganisation of the model of disciplinary proceedings, and the setting of new standards for the retirement of judges. Evidently, new standards and procedures must respect the citizens' right to

a fair trial before an independent court or tribunal in compliance with the principles of the rule of law.

3. From the perspective of Union law, Member States have unrestricted powers to organise their own judiciary systems. Therefore, participation of executive bodies in the appointment of judges is not ruled out *a priori*. According to Article 179 of the Constitution of the Republic of Poland, judges are appointed by the President of the Republic of Poland, on a proposal of the National Council of the Judiciary, for an indefinite period. Therefore, there may be an area of the judiciary where measures taken by executive bodies under the Constitution and statutes do not amount to an infringement of the principle of independence of courts and judges (cf. judgment of the Constitutional Tribunal of 15 January 2009, K 45/07, OTK-A 2009 No. 1, item 3).

4. However, the unrestricted powers of the Member States to define the organisation of national courts do not imply their completely arbitrary power to organise the judiciary given that, by virtue of EU accession, the Member States subscribe to common values which need to be respected if the Union is to be a common legal space. Therefore, whenever Member States exercise their sovereign powers, they must conform to universal principles arising from Union law and international treaties, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms made in Rome on 4 November 1950 (*Journal of Laws* of 1993, No. 61, item 284, as amended, the “Convention”), as reflected in national constitutions.

5. Furthermore, it should be noted that the principles of a democratic state ruled by law lead to the division of powers enshrined in Article 10 of the Constitution of the Republic of Poland. Its objectives include, among others, protection of human rights by preventing any of the authorities from abusing its powers (cf. judgment of the Constitutional Tribunal of 9 November 1993, K 11/93, OTK 1993 No. 2, item 37). Alongside Article 10 of the Constitution of the Republic of Poland, Article 173 of the Constitution imposes a standard emphasising the separation and independence of courts and tribunals “from other authorities”. The same is emphasised by the Constitutional Tribunal, which found in its judgment of 19 July 2005 (K 28/04, OTK-A 2005 No. 7, item 81) that while an intersection or overlap is typical of the system or relations between the legislature and the executive, it is essential for justice to be administered solely by courts, free of intervention or participation of the other branches (cf. J. Oniszczuk, *Konstytucja RP w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2000, p. 190). The Constitutional Tribunal stressed that

separation and its importance to the national legal system in its judgment of 7 November 2013 (K 31/12, OTK-A 2013 No. 8, item 121), where it found that the extent of interference by other branches must not infringe on the adjudicating activity of the courts and judges, which is independent. Enshrined in the Constitution, that separation requires that the legislature or the executive not have the decisive (exclusive) powers in the recruitment of judges; should those branches seek to play a bigger role in the nomination of candidates for judges or in the retirement of judges, it is a constitutional right of such individuals to enjoy effective legal protection preventing the formation of bodies that would not be independent within the meaning of the Constitution of the Republic of Poland, Union law, and the Convention. The principle of separation of courts from other bodies is thus enforced at two levels: that of organisation and that of powers. The level of powers implies that, given the exclusive power of courts to administer justice, the administration of justice must not be delegated to other branches (cf. M. Masternak-Kubiak [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. M. Haczkowska (ed.), LEX 2019). That separation follows from a special connection between the judiciary and the protection of the rights and freedoms of individuals (cf. judgment of the Constitutional Tribunal of 21 November 1994, K 6/94, OTK 1994 No. 2, item 39). The norms defined in the Constitution of the Republic of Poland, other than that under Article 10, which refer to the status of judiciary bodies (courts and tribunals) should always be interpreted in such a way that ensures their adequacy with respect to the overarching principle of the separation and mutual balance of powers (cf. W. Sokolewicz: “Konstytucyjna realizacja władzy sądowniczej”, [in:] *Konstytucja – ustrój, system finansowy państwa*, Warszawa 1999, p. 152).

6. What is key is Article 45(1) of the Constitution of the Republic of Poland which provides that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Article 45(1) of the Constitution of the Republic of Poland is particularly relevant mainly because those provisions define the necessary characteristics of a court and a judge. Judicial independence, protected under Article 178 of the Constitution of the Republic of Poland, is the key requirement and guarantee of the proper administration of justice. It implies the right and duty of a judge to adjudicate exclusively under the Constitution of the Republic of Poland, international law and statutes, according to his own conscience and conviction. In negative terms, as

stressed in legal theory, judicial independence amounts to the prohibition of any pressure or non-procedural influence being exerted upon judges in their adjudicating function by anyone, in particular the other branches of power, other authorities or organisations, the media, superiors, and any other persons ("external independence", cf. A. Górski, *Prawo o ustroju sądów powszechnych. Komentarz*, LEX 2013). It follows that justice may only be administered if judicial independence is its inalienable component. The administration of justice is not merely defined by the substantive scope of adjudicating functions but, first and foremost, by the type and nature of safeguards accompanying such functions which are encapsulated in judicial independence, i.e., among others the absence of subordination to any official hierarchy as well as the guarantee of not being removed from office (cf. judgment of the Constitutional Tribunal of 12 December 2001, SK 26/01, OTK 2001 No. 8, item 258).

7. The aforementioned requirement of "mutual balance of powers" should be understood as a requirement for each body to have all authority vested in it by virtue of its "essence". To that extent, the Supreme Court follows the principle of justice and considers that, if the key function of the Supreme Court is to administer justice in the ways and within the limits defined in the norms of jurisdiction, then all formalised methods designed to ensure the consistency of the case law must be rejected as long as they are contradictory to the requirements of fair justice, in particular the principle of judicial independence, the right to interpret regulations free of institutional restriction and to apply them depending on the circumstances of the case (cf. resolution of the full formation of the Supreme Court 5 May 1992, Pr 5/92, OSNKW 1993 No. 1–2, item 1). While it is the power of the legislature, in substantive terms, to make law or, in other words, to pass statutes of a generally unrestricted subjective scope (which represents the minimum exclusive powers of the Parliament), it is the responsibility of the Supreme Court to definitively resolve legal disputes by interpreting regulations for the purposes of case law. For those reasons, and in line with the judgment of the CJEU of 19 November 2019, it is the responsibility of the Supreme Court to make a comprehensive assessment whether the standard ensuring the right to a fair trial by an independent court is met.

8. It is unquestionable under Union law that the requirement of judicial independence is part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights of individuals derived from EU law will

be protected (cf. para. 40 of the judgment of the Court of Justice of the European Union of 25 July 2018, C-216/18). In the Strasbourg system, the concept of independent court assumes the existence of procedural guarantees which separate the judiciary and the other powers. Under Article 6(1) of the Convention, courts must be independent. The concepts of independence and impartiality are closely linked and may require joint examination (cf. judgment of the European Court of Human Rights of 9 January 2013, Olexandr Volkov vs. Ukraine, application no. 21722/11).

9. The aforementioned systems mutually overlap and complement each other. Consequently, their requirements must be considered jointly in the administration of justice. Only such decoding of the standard ensures maximum protection of rights of individuals under national standards. It should also be noted that membership of the European Union requires that instruments implemented by the national legislature do not lead to judgments of national courts being challenged on grounds of the Convention or Union law. Hence, the great importance of mutual recognition of legally valid judgments. The system can only work if effective judicial review is exercised by independent courts (cf. CJEU judgment of 27 February 2018, C-64/16). As a result, measures taken by the national legislature to achieve the desired objective are reviewed by courts to establish their compatibility with Union and international law.

10. Measures taken by the national legislature may also be reviewed by the Constitutional Tribunal where the underlying normative instruments are in conflict with the principles and values enshrined in the Constitution of the Republic of Poland (cf. M. Florczak-Wątor, “Możliwość kontrolowania przez Trybunał Konstytucyjny swobody ustawodawcy w zakresie realizacji norm programowych”, *Przegląd Sejmowy* 2009 No. 4, pp. 111-126). However, the case in question does not concern any derogation from norms defined by statute (their annulment), which is not a power vested in the Supreme Court, but rather the enforcement of a standard which may be upheld either by application of Union law and disapplication of statutory provisions which are in conflict with Union law or by application of the Constitution of the Republic of Poland in an interpretation of national law in line with Union law.

11. Constitutional principles (Article 2) are applied when adjudicating a civil case (Article 1 of the Code of Civil Procedure), which has long been considered manifestly admissible according to legal theory (cf. A. Mączyński: “Bezpośrednie stosowanie Konstytucji przez sądy”, *Państwo i Prawo* 2000 No. 5, pp. 3-14; S. Wronkowska: “W

sprawie bezpośredniego stosowania Konstytucji", *Państwo i Prawo* 2001 No. 9, pp. 3-23; B. Nita: "Bezpośrednie stosowanie Konstytucji a rola sądów w ochronie konstytucyjności prawa", *Państwo i Prawo* 2002 No. 9, pp. 36-46; R. Balicki: "Bezpośrednie stosowanie Konstytucji", *Krajowa Rada Sądownictwa* 2016 No. 4, pp. 13-19; W. Sanetra: "Bezpośrednie stosowanie Konstytucji RP przez Sąd Najwyższy", *Przegląd Sądowy* 2017 No. 2, pp. 5-29). As a result, alongside a statutory norm, a constitutional norm is also applied as an interpretative directive, which supports an interpretation of statutes in line with the Constitution and, consequently, in line with Union law and the Convention. Legal theory refers to this as interpretative co-application as a form of direct application of the Constitution of the Republic of Poland (cf. M. Haczkowska, "Zasada bezpośredniego stosowania Konstytucji w działalności orzeczniczej sądów", *Przegląd Sejmowy* 2005 No. 1, pp. 57-63 and the bibliography cited therein). That reaffirms the principle of supremacy of the Constitution, which protects human rights and freedoms and is primarily safeguarded by judicial review of the constitutionality of norms exercised by a body that is independent of and separate from the executive and the legislature. In European legal culture, constitutional judiciary has since its origin been conceived as a means of protecting individuals against the "tyranny of the majority" and a guarantee of the supremacy of law above power. After the experience of totalitarian government, there can be no doubt that even a democratically elected parliament has no power to pass decisions in conflict with the constitution, even if they are to be justified by the abstractly understood good of the nation. Thus, the constitution imposes substantive and procedural bounds upon any decisions of public authorities (cf. judgment of the Constitutional Tribunal of 9 December 2015, K 35/15, OTK-A 2015 No. 11, item. 186).

12. It should be stressed once again that the independence of courts and judges constitutes an essential component of the right to a fair trial, represents the incontrovertible gist of that rights, and serves as one of the general principles of Union law. The principle of rule of law is linked to those rules. The combination of those three values sets the argumentative perspective defined in legal theory and case law. For any rule to be considered a legal principle, it must be absolutely clear that it concerns generally accepted values reflected in high-ranking normative texts which are synonymous to non-legal rules. Thus, principles (cardinal laws) define the substantive limits of other norms and regulations and determine the meaning of

diverse notions (cf. also M. Kordela, *Zasady prawa, Studium teoretycznoprawne*, Wydawnictwo Naukowe UAM, Poznań 2014 pp. 17 *et seq.*). The aforementioned principles are universal; they clearly derive from the constitutional traditions common to the EU Member States and international treaties binding them.

13. In view of their position is the system of sources of law, principles play a key role. If a legal norm is to be interpreted in the context of restrictions of rights of individuals (refusal of effective legal protection), such interpretation must not be limited to the literal effect of the letter of the law (the ASC or regulations concerning the National Council of the Judiciary). Hence, if a party to the proceedings raises the argument of an alleged conflict, the court must decide whether the provision of law complies with the standards derived from the aforementioned principles of law. Constitutional standards and Union standards deploy vague notions and remain largely abstract. Thus, their scope cannot be decoded merely by analysing the text of the norm. Only specific court decisions can develop criteria which constitute a schema. This could be seen as a mechanism of genuine meaning of a law (the norms it contains) which emerges only in its application. When the body that applies the law derives from it such content that cannot be reconciled with the norms, principles or values enshrined in the Constitution of the Republic of Poland, the law must in the first place be interpreted in line with the Constitution, Union law or the Convention in order to determine the proper understanding of the law. Its interpretation is an immanent property of the administration of justice, which cannot infringe on the fundamental rights and freedoms and must aim to safeguard the right to a fundamental quality of the legal process: the right to a fair trial by an independent court.

14. If the adjudicating court believes that a specific provision of national law infringes on those principles, that court must decide whether the law complies with the standards derived from the fundamental rights of individuals. In the case in question, the applicant extensively highlighted that issue by referring to applicable Union law and the need to define the proper pattern of action. Thus, the national court must identify potential conflicts between solutions derived from the norms of national law, Union law and the Convention and prevent any infringement of Union law of Convention standards caused by the application of national law. Article 91(3) of the Constitution of the Republic of Poland directly requires any Polish court to do so. After all, irrespective of the final solution to the issue under national law, a party may raise the same arguments before the European Court of Human Rights which, if it finds a

violation of the Convention regarding the right to a fair trial by an independent court, will challenge national law irrespective of patterns followed by courts and the constitutional tribunal. The same is true where claims are raised for damages against the national legislature due to the adoption of a law in conflict with Union law. Such conflict may be avoided if instruments derived from Union law are applied, specifically, the principle of mutual trust which requires, with regard to the area of freedom, security and justice, each of the Member States to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (cf. CJEU judgment of 10 November 2016, C-452/16).

15. In its consideration of potential conflicts between the provisions of the ASC and Union and Convention standards, the Supreme Court recognises that, until recently, the status of courts of Member States was not reviewed against the qualities (conditions) required by the standard. However, according to the case law of the European Court of Human Rights (cf. judgment of 9 January 2013, Olexandr Volkov vs. Ukraine, application no. 21722/11), procedural rules of appointment to the office of a judge are designed to ensure the proper administration of justice and compliance with the principle of legal certainty, and that litigants must be entitled to expect those rules to be applied. The principle of legal certainty applies not only in respect of litigants but also in respect of the national courts. Reference should also be made to the judgment of the European Court of Human Rights of 30 November 2010 (Henryk and Ryszard Urban vs. Poland, application no. 23614/08). The applicants alleged that their case had not been heard by an “independent tribunal” as the district court was composed of a junior judge appointed by the Minister of Justice. The Court found that the junior judge lacked the independence required by Article 6(1) of the Convention, the reason being that she could have been removed by the Minister of Justice at any time during her term of office and that there were no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister. The Court considered the hypothetical aspects and stressed that the potential possibility (by itself) of arbitrary intervention in independent decisions of the court is sufficient to vitiate the independence of the court (cf. also judgments of 3 March 2005, Brudnicka vs. Poland, application no. 54723/00; 19 April 1994 r., Van der Hurk vs. the Netherlands, application no. 16034/90). In that connection, the Constitutional Tribunal (judgment of 24 October 2007, SK 7/06, OTK-A 2007 No. 9, item 108) considered that Article 6 of the Convention is one of the key sources of international

law binding on Poland to the extent of the organisation and operation of the judiciary. That judgment alone imposes an obligation to consider whether a court is properly appointed, and it refers to specific shortcomings. Legal theory considers the effect of such shortcomings on the right to a trial by an independent court (cf. R. Lawson: "Ochrona niezawisłości sądownictwa – możliwości i ograniczenia Europejskiej Konwencji Praw Człowieka", Part 1, *EPS* 2018 No. 8, pp. 4-11).

16. According to the CJEU case law, judicial independence is key to ensure the right to effective legal protection in the fields covered by Union law (cf. judgments of 27 February 2018, C-64/16; 25 July 2018, C-216/18). Furthermore, certain factual and legal circumstances originating from the changes to the Polish judiciary initiated in 2015 combined with the opened infringement procedure concerning the rule of law (Commission proposal of 20 December 2017 under Article 7(1) TEU), the steps taken by the Venice Commission (opinion of 11 December 2017 on the Draft Act amending the Act on the National Council of the Judiciary and the ASC, and on the Act – Law on the Common Court System), and Commission applications to the CJEU and the CJEU judgments (C-64/16, C-619/18), requests for a preliminary ruling filed by courts of other Member States (Înalta Curte de Casație și Justiție of 13 May 2019, C-547/19: Must Article 2 of the Treaty on European Union, Article 19(1) thereof and Article 47 CFR be interpreted as precluding the intervention of a constitutional court as regards the way in which a supreme court has interpreted and applied infra-constitutional legislation in the activity of establishing panels hearing cases?; the request of 5 February 2019, C-83/19, concerning measures necessary to ensure effective legal protection, that is to say, guarantees of an independent disciplinary procedure for Romanian judges, by eliminating all risks of political influence over the conduct of those procedures), require the Supreme Court as the court of last instance of a Member State to refer questions for a preliminary ruling of 30 August 2018 and to consider the Union standard when adjudicating in the case in question. It should also be noted that Article 47 CFR and Article 6 of the Convention apply in disputes concerning judges, that is to say, any and all disputes including those concerning recruitment (appointment), the professional career (promotion), movement to another court, and retirement or removal from office (cf. R. Lawson: "Ochrona niezawisłości sądownictwa – możliwości i ograniczenia Europejskiej Konwencji Praw Człowieka", Part 2, *EPS* 2018 No. 9, pp. 12-18; ECtHR judgment of 25 September 2018, Denisov vs. Ukraine, application no. 76639/11).

17. The Supreme Court emphasises that any European country which voluntarily joins the EU accepts the common values and agrees to respect them. It is true that, until the adoption of the “17. Declaration concerning primacy” attached to the TFEU, which provides that “in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law,” the primary law of the Union did not explicate the relationship between national law of the Member States and Union law. Consequently, the clarification of any conflicts between Union law and national law became a responsibility of the Court of Justice of the European Union, which considered that “[t]he integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system” (cf. judgment of 15 July 1964, 6/64, p. 1141). The binding effect of Community law cannot differ from Member State to Member State depending on their subsequent national law as that would jeopardise the objectives of the Treaty referred to in Article 4(3) TEU. The principle of primacy was later developed and anchored in the case law of the Court of Justice. The canonical instrument is the CJEU judgment of 9 March 1978 in Simmenthal (106/77, p. 629, para. 24), whereby a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provisions of national legislation, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (cf. also judgments of 19 November 2009, C-314/08; 19 January 2010, C-555/07).
18. The same follows from national law. In its judgment of 10 February 2006 (III CSK 112/05, OSNC 2007 No. 5, item 73), the Supreme Court considered that the duty to give primacy to Union law rests on any adjudicating national court and it is not necessary for the court to await the prior setting aside of a provision of national law that is in conflict with Union law. Consequently, judgments of constitutional courts of the Member States concerning the (un)constitutionality of national laws under the national constitution do not affect the duty of national courts to disapply provisions of

national law that are in conflict with Union law. According to another judgment, the primacy of Union law over national laws (Article 91(2) and (3) of the Constitution of the Republic of Poland) implies that a court of first instance, a court of second instance, or the Supreme Court may, of its own motion, refuse to apply a provision of Polish law if it has no doubts and, if any reasonable doubt remains, refer a request to the Court of Justice (cf. also Resolution of the Supreme Court of 28 April 2010, III CZP 3/10, OSNC 2010 No. 11, item 155, and judgments of the Supreme Court of 8 December 2009, I BU 6/09, OSNP 2011 No. 13-14, item 191; 29 May 2019, III CSK 209/17, LEX No. 2680303).

19. It is also relevant to recall the position of the Constitutional Tribunal. Its judgment of 11 May 2005, K 18/04 (OTK-A 2005 No. 5, item 49) clarifies that the Constitutional Tribunal is not empowered to independently review the constitutionality of primary law of the Union. However, it holds such power with respect to the Accession Treaty as a ratified international treaty (Article 188(1) of the Constitution of the Republic of Poland). Evidently, Article 8(1) of the Constitution of the Republic of Poland expressly grants its provisions the status of “the supreme law of the Republic of Poland.” That regulation is accompanied by the requirement to respect and favour properly drafted provisions of international law binding in the Republic of Poland. The Constitution of the Republic of Poland expressly puts among its guiding principles, right next to Article 8(1), the principle laid down in Article 9, which provides that the Republic of Poland shall respect international law binding upon it. As a legal corollary to Article 9 of Constitution of the Republic of Poland, regulations (provisions) adopted beyond the system of the national (Polish) legislature apply in the territory of the Republic of Poland alongside regulations (provisions) adopted by the national (Polish) legislature. Thus, the Constitution explicitly provides that the legal system of the Republic of Poland consists of multiple components. In addition to legal acts adopted by the national (Polish) legislature, instruments of international law and Union law also apply and have effect in Poland. Furthermore, the Constitutional Tribunal considered that national courts have the right and the duty to refuse to apply national provisions which are in conflict with provisions of Community law. In that case, national courts do not annul such provisions of national law but rather refuse to apply them to the extent that they are under a duty to grant primacy to provisions of Community law (cf. decision of 19 December 2006, P 37/05, OTK-A 2006 No. 11, item 177; judgment of 24 November 2010, K 32/09, OTK-A 2010 No. 9, item 108).

When examining a specific issue, consideration must be given to the difference between the Union's primary law (Treaties) and secondary law (regulations). In its judgment of 27 April 2005 (P 1/05, OTK-A 2005 No. 4, item 42), the Constitutional Tribunal considered itself competent to review the constitutionality of laws implementing the Union's secondary law. However, that is not an issue at stake because, as already mentioned, the case in question touches upon cardinal matters based on the Union's primary law.

20. In view of manifestly untrue, if not intentionally mendacious, statements of public figures and "experts", published following the CJEU judgment of 19 November 2019, concerning the relationship between Union law and national law and the jurisdiction of the Supreme Court to undertake an assessment resulting from that CJEU judgment and to draw the necessary consequences, the Supreme Court additionally clarifies that in case Cordero-Alonso (cf. CJEU judgment of 7 September 2006, C-81/05) the CJEU considered that the compatibility of a provision of national law with the national constitution, declared by the national constitutional court, does not imply its compatibility with Union law. In the case Filipiak, the CJEU found that the deferral of the loss of binding force of a provision of national law held by the national Constitutional Court to be unconstitutional does not affect the refusal of the national court to apply such provision if it considers such provision to be in conflict with Union law (cf. CJEU judgment of 19 November 2009, C-314/08). It follows that where a provision of national law is compatible with the national constitution but it is in conflict with Union law, the refusal to apply such provision of national law raises no controversy or reservation under constitutional law as it does not lead to a judgment that would be in conflict with the constitution. Hence, in the case in question, there is no issue of primacy of the Constitution over Union law or of the role of the Constitutional Tribunal (assuming that it is an independent and impartial court or tribunal) as having the last word in that dispute. Besides, in such cases, the Court of Justice anyway considers that "[r]ules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law" (cf. CJEU judgments of 8 September 2010, C-409/06; 15 January 2013, C-416/10). Consequently, Member States cannot deny an alleged infringement of Union law by claiming that their national provisions, which are in conflict with Union law, are compatible with the constitution (cf. CJEU judgment of 2 July 1996, C-473/93). The primacy of the Constitution over Union law declared by the national constitutional

court does not relieve the Member State from its liability for infringements of Union law.

21. Considering the foregoing, national courts should, and the Supreme Court is under a duty to, determine whether the mechanism of appointment of judges defined in national law is compatible with the Union's primary law, specifically, the right to a fair trial by an independent court. That standard is like an electric fuse which prevents the development of case law in conflict with the fundamental rights and freedoms. It is not enough to write judicial independence into law. It is also necessary to provide safeguards for various aspects of the process of judicial appointment. The right to a fair trial consists of both systemic and procedural components which must jointly guarantee such qualities as independence and impartiality. Any shortcomings at any stage, be they hypothetical (as emphasised from the perspective of the ECtHR case law), may have irreversible consequences of violating the standard and affect individual rights and freedoms. Consequently, requests for a preliminary ruling must be used to prevent that from happening while, on the other hand, ensuring the application of Union law in all Member States and the judicial protection of rights of individuals derived from Union law (cf. CJEU judgments of 6 March 2018, C-284/16; 25 July 2018, C-216/18). Without genuine judicial independence there can be no effective systemic guarantees of a democratic state ruled by law. Judges who are not independent cannot properly resolve conflicts and protect public peace; their judgments, be they objectively correct, will not be accepted by the litigants or the general public (as noted by the Constitutional Tribunal in its judgment of 9 November 1993, K 11/93, OTK 1993 No. 2, item 37).

22. As a result, the request for a preliminary ruling of 30 August 2018 was intended to clarify doubts raised by the referring court in the interpretation of Union law. It is a responsibility of the Court of Justice of the European Union to resolve such doubts concerning the interpretation of Union law and possibly to define a European standard but not to resolve the case in lieu of the national court. While the referring national court resolves an individual case according to the guidance provided in the CJEU judgment, its interpretation of Union law is binding to all Member States and not only Poland; all courts and not only the referring courts; and all bodies and not only courts. It follows that the CJEU judgment of 19 November 2019 implies a distributed review of compliance with the requirements of judicial independence set out in the judgment. Such review is exercised by national courts in different cases,

different instances, and different procedures. While the CJEU directly addressed doubts raised in C-585/18, it is a responsibility of national courts to ensure compliance with the Union standard of independence in any case under examination as the effect of the standard (procedure) provided in the CJEU judgment is binding on the Supreme Court and all other courts and bodies in Poland and the other Member States.

23. The principle of universal effect of the CJEU's interpretation of Union law follows from the nature and function of the preliminary ruling procedure and the autonomy of Union law in respect of national law (cf. P. Dąbrowska, *Skutki orzeczenia wstępnego Europejskiego Trybunału Sprawiedliwości*, Warszawa 2004; R. Skubisz, E. Skrzydło-Tefelska, "Związanie sądu krajowego wyrokiem Europejskiego Trybunału Sprawiedliwości Wspólnot Europejskich, wydanym na podstawie art. 234 Traktatu o Wspólnocie Europejskiej" [in:] L. Leszczyński (ed.), *Prawne problemy członkostwa Polski w Unii Europejskiej*, Lublin 2005, pp. 61-72; P. Dąbrowska-Kłosińska: "Skutki wyroków prejudycjalnych Trybunału Sprawiedliwości Unii Europejskiej w postępowaniu przed sądami krajowymi w świetle orzecznictwa Trybunału i prawa Unii Europejskiej" [in:] A. Wróbel (ed.), *Zapewnienie skuteczności orzeczeń sądów międzynarodowych w polskim porządku prawnym*, Warszawa 2011, pp. 391-418). It is also reaffirmed in the CJEU case law (cf. for instance the judgment of 27 March 1980, 61/79; 4 June 2009, C-8/08) and in the case law of the Supreme Court (judgment of 10 April 2019, II UK 504/17, LEX No. 2642811; decision of the formation of seven judges of the Supreme Court of 2 August 2018, III UZP 4/18, OSNP 2018 No. 12, item 165).

24. To discuss further issues and to narrow them down to the effect of the CJEU judgment of 19 November 2018, C-585/18, it should be stressed that the judgment resolves the following matters. First, whether national courts have jurisdiction to determine whether a case has been examined or is to be examined by a body which is independent of the legislature and the executive within the meaning of Union law. Calling a body a court does not make it a court within the meaning of Union law.

25. Second, it is an indispensable part of the determination whether a body called a court is a court that is independent of the legislature and the executive within the meaning of Union law to determine whether it was appointed with the participation of a body that is the guardian of judicial independence, genuinely performing its functions in a way that ensures the proper safeguards of independence from the legislature and

the executive. Two auxiliary criteria should be considered in this regard. The first one, external in nature, requires that the body exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (cf. CJEU judgment of 27 February 2018, C- 64/16, para. 44, and the case law cited therein). The second one, internal in nature, relates to the concept of impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (cf. CJEU judgment of 25 July 2018, C-216/18 PPU, para. 65, and the case law cited therein). Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (cf. CJEU judgment of 19 September 2006, C-506/04, para. 53, and the case law cited therein; CJEU judgment of 25 July 2018, C-216/18 PPU, para. 66, and the case law cited therein).

26. Third, the letter of the law is not decisive for the determination whether a body such as the new National Council of the Judiciary is sufficiently independent of the executive and the legislature. What is key is the practice and the complex context of the legal and factual environment in which such body exercises its constitutional powers.

27. Fourth, the fact that the President of the Republic of Poland nominates judges for office at the request of the new National Council of the Judiciary concerning such appointment does not relieve any court from the duty to determine whether the court so appointed is a court within the meaning of Union law, the Convention or national law (Article 45 of the Constitution of the Republic of Poland). Such determination does not concern the validity (effect) of the nomination by the President of the Republic of Poland but rather the perception of the court formed with the participation of the new National Council of the Judiciary as independent of the legislature and the

executive. The fact that the decision of the President of the Republic of Poland appointing (retiring) judges cannot be appealed does not affect the fact that applicable provisions at this time fail to ensure effective judicial review of resolutions of the National Council of the Judiciary.

28. According to para. 145 of the CJEU judgment of 19 November 2019, effective judicial review should cover, 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 of a candidate presented to the President of the Republic of Poland by the Council with a request of judicial appointment. That aspect of the examination of the influence of the National Council of the Judiciary over the appointment of an independent and impartial court highlighted by the CJEU clearly implies that a decision of the President of the Republic of Poland may be considered to be final only if prior judicial review of the National Council of the Judiciary is ensured; only then (if such review is exercised or the time limit for appeals against a resolution of the National Council of the Judiciary lapses) may the candidate be considered to be properly (lawfully) presented to the President of the Republic of Poland with a request for appointment and legally nominated by the Head of State for office. Otherwise, in the absence of prior judicial review before the nomination by the President of the Republic of Poland, the appointment by the President of the Republic of Poland could be “non-compliant”. Such non-compliance would violate the right to a fair trial within the meaning of Article 47 CFR, Article 6 of the Convention and consequently also Article 45(1) of the Constitution of the Republic of Poland: in the light of the Union and Convention standard, the right to a fair trial requires that the court be composed of a properly appointed judge, that is to say, a judge appointed in accordance with provisions of national law compatible with the constitutional, Convention and Union standard applicable in the State. According to the European Court of Human Rights (cf. judgment of 12 March 2019, Guðmundur Andri Ástráðsson vs. Iceland, application no. 26374/18; 14 June 2011, Sevanstyanov vs. Russia, application no. 75911/01; 25 October 2011, Richert vs. Poland, application no. 54809/07), any non-compliance in the process of judicial appointment is relevant and should be identified and considered.

29. Fifth, it follows directly from the judgment in question that the determination whether a court formed with the participation of the new Council meets the requirements of the right to effective legal protection within the meaning of Article 47 CFR and,

consequently, Article 6(1) of the Convention and Article 45 of the Constitution of the Republic of Poland, implies the jurisdiction of a court which does not have the jurisdiction to examine the case under national law to examine it or to refer it to another court with jurisdiction (where the court with jurisdiction is the court with jurisdiction under the provisions effective prior to the entry into force of the regulations vesting jurisdiction in the court whose status is to be examined).

30. Sixth, the Court of Justice considered that, as the case in question concerns an area covered by Union law, the Union standard applies directly while the case law of the national constitutional court does not affect the application of the test defined in the CJEU judgment of 19 November 2019 by the court. That is clearly explicated in the aforementioned Cordero Alonso rule defined by the Court of Justice in its judgment of 7 September 2006, C-81/05. According to that rule, where provisions of national law are covered by an area of Union law, they must respect the fundamental rights guaranteed by the Court. That rule also applies where a judgment of the national constitutional court concerns the compatibility of national law with a constitutional principle consistent with a general principle of Union law (the same is true with regard to equivalent fundamental rights). According to the Court of Justice, provisions of national law which are compatible with the national constitution in that the statutory prohibition of a certain action is laid down in a constitutional provision (e.g., prohibition of the military service of women in Germany, cf. judgment of 11 January 1998, C-285/98) may be considered incompatible with Union law.

31. It should be stressed once again that there is no conflict of values between the Constitution of the Republic of Poland and Union law or the Convention in the case in question because the right to a fair trial by an independent court is a shared value common to all those systems of law. Hence, there is no divergence such that the Constitution of the Republic of Poland would prohibit anything that would be required under Union law. Only then would there be a conflict between the Constitution and Union law, and the primacy of the Constitution or Union law would have to be determined. As a result, judgments of the national Constitutional Tribunal which find a provision to be compatible with the Constitution do not stand in the way of any measures necessary to ensure compliance with Union law in the national legal system because it follows from the Constitution of the Republic of Poland that they are such an obstacle. If a provision of national law is compatible with the Constitution, that does not prevent any other norm from being compatible with the Constitution, a

norm that is compatible with a directive of Union law or international law that the Supreme Court is empowered and required to respect under Article 91(3) of the Constitution of the Republic of Poland (cf. L. Morawski: *Zasady wykładni prawa*, Toruń 2006, pp. 26-127).

32. It must be stressed that Article 91(3) of the Constitution of the Republic of Poland directly empowers the Supreme Court to examine the compatibility of statutes such as the ASC and the Act on the National Council of the Judiciary with Union law. That provision directly implies with no reservation or limitation that statutes have to be compatible with Union law and the Convention, and not the other way around. The jurisdiction to review the compatibility of statutes with Union law rests, according to the Constitution of the Republic of Poland, not with the Constitutional Tribunal but, as a condition of Union accession, with any Polish court examining a case falling within an area covered by Union law.

33. The foregoing is relevant considering the judgment of the Constitutional Tribunal concerning the existing model of appointment of members of the National Council of the Judiciary (cf. judgment of 20 June 2017, K 5/17, OTK-A 2017, item 48). In that judgment, the Tribunal challenged its earlier position taken in the judgment of 18 July 2007, K 25/07 (OTK-A 2007 nr 7, item 80), whereby NCJ members must be judges elected by other judges. This implies that, in the absence of any amendment to the Constitution, the Constitutional Tribunal not so much changed its position as regards the appointment of the NCJ (judgment in K 5/17 vs. judgment in K 25/07) as created a divergence in its case law regarding systemic issues of fundamental importance to the enforcement of the right to a fair trial enshrined in the national constitution and fundamental obligations of Member States of the European Union as a Union (community) of law. In that context, the two judgments of the Constitutional Tribunal are evidently in conflict with each other. The interpretation offered in K 5/17 is not supported by legal theory, which considers that judgment to be a manifestation of a constitutional crisis as it was passed by a formation that included two members appointed to non-vacant positions of judges (cf. M. Radajewski, “Glosa do wyroku z dnia 20 czerwca 2017 r., K 5/17”, *Państwo i Prawo*, 2018 No. 3, pp. 132-139). One should also consider information in the public domain, among others statements of those members of the Constitutional Court, concerning various dependencies and informal relations with politicians, which implies that the Constitutional Tribunal cannot be considered to safeguard independence in the exercise of its constitutional

powers (Article 195 of the Constitution of the Republic of Poland).

34. Further to the foregoing, the principles of Union law (alongside the principles enshrined in the Convention) need to be evoked in order to develop a standard defining a transparent model of independent court, regardless of the current position of the Constitutional Tribunal on that matter. Poland is bound by Union principles as a Member State and by Convention principles under international law. Those principles are in no conflict with the constitutional standard (Article 45 of the Constitution of the Republic of Poland) which draws upon both those standards; the Republic of Poland recognises judgments of the ECtHR which find violations of the right to a fair trial under Article 6(1) of the Convention, whose immanent component is the right to a fair trial by an independent and impartial court (cf. judgment of 25 October 2011, Richert vs. Poland, application no. 54809/07; 12 April 2018, Chim i Przywieczerski vs. Poland, applications no. 36661/07 and 38433/07).

35. The CJEU judgment of 19 November 2019 sets a standard which includes a comprehensive assessment of safeguards of the right to a fair trial by an independent and impartial court. Such assessment follows a two-step rule: (a) assessment of the degree of independence enjoyed by the National Council of the Judiciary in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered to ensure the independence of the courts and of the judiciary, relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 CFR (judgment in C-585/18, para. 139-140); (b) assessment of the circumstances in which the new judges of the Disciplinary Chamber of the Supreme Court were appointed and the role of the Council in that regard (judgment in C-585/18, para. 146).

36. The Supreme Court notes that the test defined in the CJEU judgment of 19 November 2019 for the overall assessment of the independence of a national body with jurisdiction in cases where Union law requires effective judicial review is based on the criteria of assessment listed by the Supreme Court in its decision of 30 August 2018 (III PO 7/18, LEX No. 2542293). It should be recalled that the decision of the Supreme Court did not call on the Court of Justice to declare the Disciplinary Chamber of the Supreme Court a “non-court” within the meaning of Union law; rather, it referred the question whether a body whose members are appointed with the participation of a body such as the National Council of the Judiciary, which no longer

provides the guarantee of independence of the legislature or the executive following the 2018 modifications to the principles of appointment of its members who are judges, is a court within the meaning of Union law.

37. Following the guidance provided in the CJEU judgment of 19 November 2019, C-585/18, one should in the first place consider the circumstances concerning the National Council of the Judiciary. That assessment requires no evidentiary proceedings; in any case, such proceedings would be beyond the remit of the Supreme Court and consist in the consideration of positions that are publicly known and available to all parties to the proceedings.

38. With respect to the National Council of the Judiciary, the CJEU judgment of 19 November 2019 requires the examination of the following: (-) the objective circumstances in which that body was formed; (-) the means by which its members have been appointed; (-) its characteristics; (-) whether the three aforementioned aspects 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.

39. At the outset of such assessment, the Supreme Court categorically declares (once again) that, acting as a Union court in the enforcement of the CJEU judgment of 19 November 2019, it does not examine the constitutionality of the provisions of the Act on the National Council of the Judiciary in the wording effective as of 2018 but their compatibility with Union law. The Supreme Court has the jurisdiction to undertake such examination not only in the light of uniform well-established case law (cf. CJEU judgment of 7 September 2006, C-81/05) but also under the unequivocal powers vested in it by the Constitution which require no complex interpretation in the case in question. Article 91(3) of the Constitution of the Republic of Poland provides clearly and beyond any doubt: “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.” Furthermore, the examination of how the applicable provisions governing the functioning of the Council and its practice in the performance of functions under the Constitution of the Republic of Poland and provisions of national law influence the fulfilment of the requirements of independence and impartiality under Union law by a court formed with the participation of the Council represents a typical judicial

examination of certain facts and provisions of law. It should be recalled once again that such examination is completely unrelated to the jurisdiction vested in the Constitutional Tribunal by the Constitution of the Republic of Poland and the Act on the Constitutional Tribunal.

40. In terms of the circumstances of forming the Council, one should bear in mind the shortened term of the previous Council (a constitutional body pursuant to Article 187(3) of the Constitution of the Republic of Poland): Article 6 of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other laws (*Journal of Laws* of 2018, item 3). As intended by the legislature, the new provisions were intended to ensure conformity with the Constitution of the Republic of Poland in connection with the Constitutional Tribunal judgment of 20 June 2017 (K 5/17, OTK-A 2017, item 48), pursuant to which Article 11(2-4) and Article 13(3) of the NCJ Act are in breach of the Constitution to the extent that they provide for the individual term of office for Council members who are judges. To that end, the Supreme Court concludes that the referenced Constitutional Tribunal "judgment" was issued with the participation of judges elected in breach of Article 190(1) of the Constitution of the Republic of Poland, as ascertained under the following judgments of the Tribunal: 16 December 2015, K 34/15 (OTK-A 2015 No. 11, item 185); 9 March 2016, K 47/15 (OTK-A 2018, item 31); 11 August 2016, K 39/16 (OTK-A 2016, item 71). Furthermore, the Constitutional Tribunal's argument concerning the objective of harmonisation of the term of office for all Council members is indefensible on grounds of Article 194(1) of the Constitution of the Republic of Poland. The provision references the individual election process of Council justices rather than their individual term of office. While one is a function of the other, the intent behind the provision was also to prohibit electing justices *en bloc*, which fully justifies its wording, different to that of Article 187(3) of the Constitution of the Republic of Poland, whereas its consistent use would translate into term of office uniformity for all members, also of the Monetary Policy Council, for example, as Article 227 of the Constitution of the Republic of Poland does not stipulate their individual election process. The Constitutional Tribunal understood that the Council member election term is to be aligned with the term of office of the *Sejm*. This means that under Article 187(3) of the Constitution of the Republic of Poland, the Constitution aligns the term of office of the NCJ with the term of office of the *Sejm*, in analogy to the State Tribunal. Such thesis cannot be reliably justified: had this been its intended purpose,

Article 187(3) of the Constitution of the Republic of Poland would have been drafted in analogy to Article 199(1) of the Constitution. Yet, since the two provisions employ different phrasing (“four years” vs. “the term of office of the Sejm”), their respective meanings ought to be different on the assumption that the law (Constitution) is rational. There are no other arguments to justify such differentiation for other reasons. Consequently, it ought to be assumed that the systemic interpretation that the Tribunal attempted to reference contradicts its statements (see M. Radajewski: “Glosa do wyroku z dnia 20 czerwca 2017 r.”, K 5/17, *Państwo i Prawo*, 2018 No. 3, pp. 132-139). Clearly, the intent of afore-quoted comments is not to contest the currently prevalent norm but rather to appraise the independence of the Council in light of the circumstances of its forming. The foregoing leads to the conclusion that the term of office of former National Council of the Judiciary members was terminated by the legislature pursuant to a judgment of the national Constitutional Tribunal, issued by a formation contradicting the constitutional standard arising from the Tribunal’s case law.

41. Secondly, the manner of appointing Council members ought to be duly analysed. As the matter has been summarily omitted in the public debate, the analysis should commence with a brief historical outline of the systemic model of electing NCJ members. The issue of appointing members of the National Council of the Judiciary was already discussed during the “roundtable” talks attended by legal experts. The report of the sessions of the Law and Court Reform Team reads that all NCJ justices shall be elected by general assemblies of individual courts (Attachment No. 2 of 17 March 1989). The NCJ Act of 20 December 1989 (*Journal of Laws* of 1989, No. 73, item 435, as amended) stipulated that the *Sejm* shall elect Council members from among its members, the Senate – from among senators, and general assemblies of individual courts of all levels – from among judges. Such Council member election mechanism had prevailed as of the effective date of the Constitution of the Republic of Poland of 2 April 1997 (*Journal of Laws* of 1997, No. 78, item 483); pursuant to its Article 186, the Constitution regulated the NCJ’s status as a constitutional body (“The National Council of the Judiciary shall safeguard the independence of courts and judicial impartiality”). Article 187 of the Constitution of the Republic of Poland describes NCJ membership and provides that it shall comprise, *ex officio,* the First President of the Supreme Court, the President of the Supreme Administrative Court, and the Minister of Justice, as well as an individual appointed by the President of the

Republic of Poland; the Council shall further comprise fifteen members elected from among justices of the Supreme Court, common courts, administrative courts and military courts, as well as four and two members elected by the *Sejm* from among its members and the Senate from among senators, respectively (Article 187). Decisions made during sessions of the Subcommittee for Law Protection Institutions and Judiciary Bodies (such as that of 7 December 1994 held as part of the Constitutional Committee of the National Assembly) take on special importance: the model of electing Council members was debated, justices being duly entrusted with the task of electing some of the above. The intent to entrust the process of electing NCJ members to the judicial community only was expressed in particular during a session of the Constitutional Committee of the National Assembly on 13 November 1996 (see *Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego* (KKZN) No. XXIV, and the debate held during the Committee's session on 5 September 1995, *Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego*, No. XXIV). Such state of affairs can be corroborated by a joint statement of Professor A. Zoll and Professor A. Strzembosz, published by *Rzeczpospolita* on 7 March 2018; the authors accentuated that concepts tabled by the "Solidarity" during the 1980s have been incorporated into the Constitution of the Republic of Poland. The process of the judiciary appointing judges as Council members seemed obvious: only a majority judicial presence on the Council would safeguard the independence of the judiciary from the legislature and the executive. Both authors of the said statement had already then emphasised that the NCJ in its current form – appointed in its new formation – does not have the qualities and competencies bestowed upon it pursuant to the Constitution of the Republic of Poland; consequently, its resolutions are invalid by nature. Similar comments were offered by Professor M. Gutowski and Professor P. Kardas (see *Dziennik Gazeta Prawna*, 8 March 2018).

42. In implementing constitutional assumptions, the NCJ Act of 27 July 2001 (uniform text: *Journal of Laws* of 2010, No. 11, item 67) continued the mechanism of Council members who are judges being elected exclusively by judges. Also, the Act on the National Council of the Judiciary of 12 May 2011 (original wording, *Journal of Laws* of 2011, No. 126, item 714) adopted an analogous Council member election mechanism (Article 9). Thus established Council membership was considered a logical outcome of the Council being entrusted with the task of safeguarding the independence of courts and judges (cf. L. Garlicki, "Uwaga 3 do art. 187" [in:] L.

Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej*, *Komentarz*, Vol. II, Warsaw 2001, pp. 6-7).

43. The mechanism of electing NCJ members was considerably modified pursuant to the amendment of 8 December 2017 of the Act on the National Council of the Judiciary (*Journal of Laws* of 2017, item 3). Pursuant to Article 1(1), the *Sejm* shall elect fifteen Council members for a joint four-year term of office from among judges of the Supreme Court, common courts, administrative courts, and military courts. When making its choice, the *Sejm* shall – to the extent possible – recognise the need for judges of diverse types and levels of courts to be represented on the Council. Notably, the provisions of the Constitution of the Republic of Poland have not been amended to the extent of NCJ membership or NCJ member appointment. This means that an act of law could only lawfully amend the manner of Council members (judges) being elected by judges rather than introducing a procedure of NCJ judicial members being elected by the legislature. The aforementioned amendment to the NCJ Act passed jointly with the new Act on the Supreme Court provides a solution whereby the legislature and the executive – regardless of the long statutory tradition of a part of the Council members being elected by judges themselves, in reflection of the Council's status and mandate, and of the judiciary recognised as a power separate from other authorities under the Constitution of the Republic of Poland – gain a nearly monopolistic position in deciding the NCJ membership. Today, the legislature is responsible for electing 15 members of the NCJ who are judges, with another 6 NCJ members being parliamentary representatives (4 and 2 of whom are elected by the *Sejm* and the Senate, respectively). The new mechanism of electing NCJ members who are judges has resulted in the decision to appoint as many as twenty-one of the twenty-five (84 %) of Council members lying with both parliamentary houses. Furthermore, the Minister of Justice and a representative of the President of the Republic of Poland are *ex officio* Council members: consequently, twenty-three of the twenty-five Council members are ultimately appointed by authorities other than the judiciary. This is how the division and balance of the legislative, executive, and judiciary branches have been distorted, while having been duly described under Article 10 of the Constitution of the Republic of Poland as a foundation of a democratic state of law model (Article 2 of the Constitution of the Republic of Poland).

44. The Council is a constitutional body; the very fact that it does not have a counterpart

in all EU Member States does not translate into the possibility of forming or shaping it arbitrarily as its operational framework has been laid out in the Constitution and further restrictions arise from the right to a fair trial as stipulated by European Union standards. The Council does not exercise judicial power, neither is it (in view of its membership) a corporate self-governing body; it is a mixed authority. Legal doctrine offers a position that a literal interpretation of the provision of the Constitution of the Republic of Poland stipulating that the National Council of the Judiciary includes "fifteen members elected from among the judiciary" (Article 187(2)(2) of the Constitution of the Republic of Poland) would prove counter-constitutional, should it result in concluding that judicial members shall not be elected by judges. This would mean that the process of constructing a constitutional norm ignored the Council's duties as specified in the Constitution, including the safeguarding of the independence of courts and judges (Article 186(1) of the Constitution of the Republic of Poland), and ignored Article 173, pursuant to which courts are a power "independent and separate from other branches" (see R. Piotrowski: *Sędziowie i granice władzy demokratycznej w świetle Konstytucji RP*, *RPEiS* 2018 No. 1). It should further be noted that the phrase "the National Council of the Judiciary shall have a membership of" as applied in the Constitution ought to be interpreted as a defined phrase (*definiendum*); components indicative of the equivalence of the *definiendum* include the fact that Article 187(1)(2) and (3) of the Constitution of the Republic of Poland specifies the electing body as well as the number of seats assigned thereto for election. This means that electing bodies are listed linearly with the use of direct designates (*Sejm*, Senate: item (3)). Such mechanism seems natural since a given right is assigned to a specific entity stipulated in a content unit. Conversely, the case of electing judges (item (2)) is much more complex: a single body cannot elect Council members as this would become an *a priori* contradiction to its representative nature. In this case, judges are elected from among judges of different levels: the process thus involves a higher number of authorised units (respective assemblies of judges). Furthermore, the phrasing clarifying the notion (intent) behind the defined phrase (*definiensa*) employs another grammar formula: "elected from among judges". The preposition conjoined with the noun in the plural (judges) lays out a directional and communicational formula which points to a choice made by a specific, though directly unnamed, group of authorised individuals. A clearly legible arrangement determines the given norm, regulating the authority of a

pre-specified entity. Since the *Sejm* and the Senate are charged with electing from among their respective members, judges representing various levels shall elect Council members from among individuals applying as candidates. In consequence, the checks and balances rule anchored in Article 10 of the Constitution of the Republic of Poland will also be conformed to, in support of the process of rationalising the parliamentary governance system (for more on the subject, see J. Szymanek: "Racjonalizacja parlamentarnego systemu rządów", *Przegląd Sejmowy* 2007 No. 1, pp. 35-64).

45. The Supreme Court's appraisal in acting on the binding legal interpretation expressed in the CJEU's judgment of 19 November 2019 attaches considerable importance to the process of electing present-day Council members. With regard to this particular matter, the point at issue concerns the lists of endorsement allegedly offered to candidates by judges. To date, it has not been verified whether new Council members were lawfully nominated as candidates, and who endorsed them. Relevant documents have not been disclosed yet despite the respective judgment of the Supreme Administrative Court of 28 June 2019, OSK 4282/18 (*LEX* No. 2694019). It is common knowledge that the enforcement of the judgment has faced an obstacle in a decision issued by the President of the Personal Data Protection Authority on 29 July 2019 on initiative of a new NCJ member. Consequently, it has come to pass that a body of the judiciary charged with a review of administrative authorities has in effect itself fallen under the review of the latter. The failure to implement the SAC's judgment justifies an assumption that the content of the lists of endorsement for individual judicial candidates to the NCJ corroborates the dependence of candidates on the legislature or the executive.

46. The Supreme Court further concludes that it is common knowledge that the public had been informed of judicial candidates to the Council having been recommended by presidents of district courts appointed by the Minister of Justice; other justices were recommended by judges dependent on (reporting to) candidates in managerial positions in courts of higher instance; judicial Council candidates were also recommended by the plenipotentiary of the Institute of the Judiciary at the Ministry of Justice; last but not least, some candidatures were submitted by next of kin; candidates recommended other candidates; some of the elected members of the future Council were Ministry of Justice employees. All these facts prove that the executive branch – acting through its direct or indirect subordinates – had stood

behind the majority of recommendations for NCJ judicial member candidatures. Such circumstances accompanying the process of electing current Council members may well raise doubts in the general public as to the Council's independence of the executive.

47. Furthermore, persons submitting endorsement forms would withdraw them before the expiry of the candidature submission term; at least one new NCJ member had endorsed his/her own application. On a related note, one might reference the Council's resolution passed later (on 21 September 2018), wherein it was concluded that a judge applying for promotion would be excluded from the vote taken by a body responsible for appraising his/her application. Such development reveals double standards respectively applied to Council members (lower standards, allowing self-endorsement, in one case at least) and non-NCJ member justices (higher standards: reasonable decision to exclude an individual from voting on his/her candidature).
48. Such circumstances preclude the notion of representativeness stipulated in Article 187(2) of the Constitution of the Republic of Poland. Since the Constitution provides for a broad judicial community representation, the intent behind such solution would be for elected individuals to warrant adjudication experience at different levels of the judiciary. This would guarantee Council membership to include persons familiar with current issues of the judiciary: in view of the Council's mandate, members will be presented with an opportunity of actively joining the related change mechanism, their experience supporting expected reforms. Conversely, seconding justices to the Ministry of Justice removes them from adjudication duties, and all current problems faced by the judiciary. This means that judges charged with the safeguarding of judicial independence were endorsed only thanks to the influence of the executive.
49. Practice also shows that elected Council members have directly benefitted from recent changes. They have been appointed to managerial positions at courts whose presidents and vice-presidents have been dismissed *ad hoc*, or applied for promotion to a court of higher instance (see *Dziennik Gazeta Prawna,* 18 June 2018). The general public may also learn of various dependencies between elected judges – new Council members and the executive branch (https://oko.press/powiazania-z-ministrem-ziobra-ma-12-z-15-czlonkow-neo-NCJ-ujawniamy/; https://oko.press/bedzie-resortowa-rada-sadownictwa-zamiast-NCJ-drugi-kandydat-zwiazany-ministerstwem-ziobry-dostal-niego-awans-publikujemy-sylwetki/; https://pomorska.pl/wszyscy- kandydaci-

NCJ-powiazani-z-ministrem-ziobra-powstala-mapa- zaleznosci/ar/12948861; http://wyborcza.pl/7,75398,23092719,oto-przyszli- sedziowie-NCJ-sklad-nowej-rady-jest-juz-przesadzony.html).

50. The fourth test component is the important assessment of how the body performs its constitutional duty to safeguard the independence of courts and judges; and how it performs its competencies, and in particular whether it proceeds in a manner that could make its independence of the legislature and the executive doubtful from the vantage point of a member of the public. With regard to the aforementioned premises, the following arguments ought to be raised: the National Council of the Judiciary failed to take action in defence of the independence of the Supreme Court or of the Court's judges after the coming into force of the Act on the Supreme Court and an attempt to force the Court's judges into retirement (see the CJEU's judgment of 24 June 2019, C-619/18). At the time of those changes, the Council issued an opinion to the effect that the current First President of the Supreme Court – despite her constitutionally guaranteed term of office terminating in 2020 – shall not be considered an active justice and shall no longer be holding the office (National Council of the Judiciary opinion of 27 July 2018, No. WO 401- 14/18, full text available at: http://NCJ.gov.pl/pl/dzialalnosc/opinie-i- stanowiska/f,205,opinie-i-stanowiska-2018-r/756,24-27-July/5443,stanowisko- krajowej-rady-sadownictwa-z-dnia-27-lipca-2018-r-nr-wo-401-1418). Information concerning the current Council membership was published on the Council's website at the time, the box next to the position of the First President of the Supreme Court remaining vacant. This means that the Council had not *in gremio* accepted the President's constitutional six-year term of office (Article 183(3) of the Constitution of the Republic of Poland); at the time of its commencement, there were no obstacles to the First President holding her office in line to which she was appointed by the President of the Republic of Poland, or to the EU standard expressed in the CJEU's judgment of 6 November 2012 in case C-286/12. The Supreme Court further emphasises that Council members have publicly demanded that disciplinary action be taken against judges filing preliminary rulings (e.g., decision of 2August 2018, III UZP 4/18, https://www.rp.pl/Sedziowie-i-sady/308299974-Czlonek-NCJ-chce-dyscyplinarek-dla-sedziow-za-pytania-do-CJEU.html); challenged the right to file preliminary rulings (see *wPolityce* of 7 August 2018 – interview with the Chairman of the NCJ); and challenged the necessity of "apologising to justices for corruption comments" (communication by the Polish

Press Agency of 1 May 2019 – Chairman of the NCJ: the Prime Minister does not have to apologise for his comment concerning judges). Conversely, whenever the public opinion raised accusations against Council members (see opinions of 14 October 2019, No. WO 401-16/19; 17 October 2019, No. WO 401-15/19 in connection with the opinion of the Bureau of the National Council of the Judiciary of 22 August 2019 concerning an organised campaign of insinuations and accusations targeting judges – comments by NCJ judicial members – the so-called "hate speech affair"), reaction was immediate.

51. Two opinions will be discussed to specify positions taken by the Council. The opinion of 13 July 2018 (No. WO 401-13/18) concerning systemic changes to the Supreme Court document reads: "the National Council of the Judiciary is concerned to have recorded consecutive cases of certain judges disseminating false information on systemic changes to the judiciary *(…),* and wishes to recall that in its ruling of 24 June 1998 (K 3/98), the full formation of the Constitutional Tribunal chaired by Marek Safjan ruled unambiguously that systemic changes lowering the retirement age for judges do not constitute a breach of constitutional standards". Such postulate is tantamount to a ban on criticising any changes introduced – even though all accusations were objective in nature and highlighted the contradiction between specific solutions and the Constitution; the legislature ultimately withdrew the proposed solutions. The Council has also completely ignored an EU standard, applicable in parallel to constitutional norms (CJEU's judgment of 6 November 2012, C-286/12). The referenced judgment of the Constitutional Tribunal was referenced selectively for the exclusive purpose of enhancing the justifiability of proposed changes. In justification of the judgment, the Tribunal admitted that the age limit introduced for judges in active service at the time did not eliminate the maximum (and uniformly established) age limit (70 years of age), upon reaching which a justice shall be obliged to retire. Conversely, the introduction of a supplementary age limit (65 years of age), upon reaching which a justice would be required to seek consent from the National Council of the Judiciary to remain in office, while establishing a certain measure of flexibility, is also based on an age criterion. The fundamental question was whether such measure of flexibility can in any way be reconciled with the principle of judicial impartiality. It would be manifestly unacceptable if – in an analogy to the times of the People's Republic of Poland – consent for an extension

of remaining in judicial office were to be issued by a political body (Minister of Justice) operating outside the organisation of the judiciary. Nonetheless, the constitutionality of the stipulation in question was resolved on the grounds of provisions warranting access to a fair trial to all concerned in order to determine the lawfulness of the Council's decisions.

52. Yet, under the current circumstances (of the appellant in the case in question), the Council assumed a contradicting position in accepting the inaccessibility of access to a fair trial once its external will has been expressed in an opinion the Council has deemed final. This excerpt alone is detrimental to the fairness of the aforementioned opinion as it emphasises an anticipation of suggestions arising from the content of changes with no reflection concerning the subjection of the process to the mechanism stipulated under Article 45 of the Constitution of the Republic of Poland, as the intended effect of such measures was to remove a considerable group of judges from adjudication duties on the basis of vague premises. Notably, the Council has refused to submit its files to the court or to justify its position; combined with the previous forms of action taken by the Council, such behaviour implies a significant lowering of operational standards with the intent to only represent positions aligned with those of the legislature and the executive.

53. The opinion of the National Council of the Judiciary of 27 July 2018 (No. WO 401-14/18) concerning the situation at the Supreme Court reads: "an analysis of the entirety of provisions of the Constitution of the Republic of Poland and of the Act on the Supreme Court leads to a conclusion that only a Supreme Court justice in active service may hold the office of the First President of the Supreme Court." It is commonly known that the legislature withdrew the original version of changes to the Supreme Court, having concluded that robust legal arguments exist against the termination of the constitutionally guaranteed term of office of the First President of the Supreme Court, said withdrawal preceding case examination by the Court of Justice of the EU. However, the Council's position remained unchanged and uncorrected. As the Council takes a specific position referencing the "analysis of the entirety of provisions of the Constitution and the Act on Supreme Court", it may be reasonably assumed that such position had been taken – according to regular legal practice – upon a variety of interpretation methods applying to regulations in dispute having been considered, with the analysis in question (as a sum of varied beliefs) externalising a transparent mechanism of Council procedures. It is symptomatic that

the same opinion also reads: “bestowing a broader-than-national dimension upon the debate is not conducive to preserving proper authority of the judiciary”. The phrasing of the conclusion hints at an assumption that there are no grounds for filing for preliminary rulings with the intent to determine a procedural standard, which is well-established in the Strasbourg order: the right to a fair trial by an independent court. Following the logic of the Council, clarifying the issue at national level will in no way contribute to the authority of the judiciary, especially once individuals begin filing for proceedings before the European Court of Human Rights pursuant to Article 6 of the Convention, and once their claims are recognised as justified (relevant examples quoted in the first section of the justification).

Consequently, also in this matter the Council has decided to “speak the language of the legislature and the executive”. While it goes without saying that the intent behind the case is not for the Council to become an “advocate of the judicial community”, principles are at stake: any action to terminate the term of office of a judge or force him/her into retirement without the right to effective judicial review should trigger a different reaction of an authority charged with safeguarding of the independence of courts and judges. Let the aforementioned arguments be supplemented by the fact that the collaboration of national judges with European Union bodies, in particular the European Commission and the CJEU, is seen by the NCJ as an exacerbating circumstance for an individual applying for a judicial vacancy at a court of higher instance (see https://www.iustitia.pl/dzialalnosc/informacje-oswiadczenia/uchwaly/2436-uchwala-zarzadu-oddzialu-ssp-iustitia-w-warszawie-z-dnia-14-07-2018-r). A position expressed by a new Council member merits attention: the NCJ member claimed that a need has arisen to appoint judges with a new attitude, their mentality subservient to the State and the Nation (https://wpolityce.pl/polityka/370026-stanislaw-piotrowicz-nam-bardzo-zalezy-na-tym-by-zmienic-nastawienie-sedziow-do-spoleczenstwa-potrzebni-sa-ludzie-o-nowej-mentalnosci). On social media (Twitter), a Council justice “reported as ordered” to another Council member elected by the *Sejm* (see M. Gałczyńska, Onet, 19 March 2019). At the nomination procedure stage, the Council recommended for nomination to the Council by the President of the Republic of Poland a candidate convicted by a final disciplinary judgment (see *Rzeczpospolita*, 4 September 2018). Last but not least, disciplinary action was taken against justices for application of EU law, also following the CJEU’s judgment of 19 November 2019; the Council has not

responded with an appeal to cease such proceedings.

54. Combining the foregoing with, e.g., the Ministry of Justice freezing recruitment to fill judicial position vacancies (see dziennik.pl, 4 November 2016 – 500 positions) despite systemic issues concerning the exercising of the right to have one's case examined within a reasonable timeframe, the fact of recruitment for judicial position vacancies having been frozen and unblocked by the Minister of Justice only once the new Council had begun working may only be explained with the executive branch's aspirations to gain influence over judicial nominations and promotions after having seized control of a body equipped by the Constitution of the Republic of Poland with the exclusive right to submit judicial position candidatures for appointment to the President of the Republic of Poland.

55. Following the CJEU's judgment, at the session of 19-22 November 2019, the National Council of the Judiciary elected another three individuals to be presented to the President of the Republic of Poland as candidates for judicial positions at the Supreme Court, including a judge of the District Court seconded to the Ministry of Justice and serving as director of the Department of Human Resources and Common and Military Court Organisation at the Ministry of Justice (Ł. Woźnicki: "TSUE? KRS nie słucha i obsadza SN", *Gazeta Wyborcza*, 22 November 2019). In 2018, the nominated judge submitted the candidature of a current National Council of the Judiciary member.

56. The final component of assessing the election mechanism and activities of the Council, impacting how the Council is perceived by an average citizen expecting his or her case to by examined by an independent and impartial court, involves opinions passed by national and European institutions associated with the judiciary. Cases in point include Supreme Bar Council resolutions No. 67/2018 of 5 March 2018 and No. 45/2018 of 29 August 2018; resolution No. 7 of the Bar Association in Warsaw Assembly of 21 April 2018; letter of appeal of the Polish Bar Association and the National Chamber of Legal Advisers to the President of the Republic of Poland of 23 August 2018; opinion of Law Faculty deans of 17 July 2017 concerning the *Sejm* draft of the Act on the Supreme Court; opinion of the Research, Studies, and Legislation Centre of the National Chamber of Legal Advisers of 18 July 2017 concerning the *Sejm* draft of the Act on the Supreme Court; opinion of the Bureau of the National Chamber of Legal Advisers of 13 July 2017; declaration of the European Bars Federation of 2 July 2018

(http://www.ohchr.org/EN/Issues/Judiciary/Pages); opinion of the International Bar Association's Human Rights Institute (IBAHRI) of 3 July 2018; statement of the President of the CCBE of 10 July 2018 concerning the situation in Poland; statement of 3 July 2018 declaration of Hilarie Bass, President of the American Bar Association – all of which point to major concerns as to the compatibility of rules currently followed in Poland when electing individuals to judicial positions, including Supreme Court judges, with the principles of independence of courts and judges. Resolutions of general assemblies of judges merit a mention, as well (including resolutions of the Assembly of Representatives of the Katowice Appellate Courts of 14 January 2019, the General Judicial Assembly of the Kielce District of 27 February 2019, the Assembly of Representatives of the Warsaw Appellate Courts of 29 August 2019, the Assembly of Representatives of the Gdańsk Appellate Courts of 6 September 2019 the, Assembly of Judicial Representatives of the District Court in Warsaw of 12 September 2019, the General Judicial Assembly of the Białystok Appellate Courts of 25 November 2019, the Assembly of Representatives of the Wrocław Appellate Courts of 29 November 2019, and the General Judicial Assembly of the Olsztyn District of 2 December 2019).

57. One might also reference a communication by the Polish Press Agency (of 18 February 2019) to the effect that nearly 87% of surveyed judges believing that the National Council of the Judiciary should resign; such are the findings of a judicial opinion poll organised by the Forum for Judicial Co-operation. According to over 90% of respondents, the NCJ is not performing its constitutional duties with due diligence.
58. To complete the picture, the Council has been operating without internal regulations for the past ten months, which may impact the appraisal of the lawfulness of the Council's resolutions (*Dziennik Gazeta Prawna*, 24 January 2019).
59. The Supreme Court further accentuates that when engaging in the performance of its duties, the National Council of the Judiciary did not consider positions presented by supreme judicial instances with regard to changes in its operational system (see Supreme Court decisions of 28 March 2019, II KO 154/18, unpublished; 21 May 2019, III CZP 25/19, *OSNC* 2019 No. 10, item 99; 12 June 2019, II PO 3/19, *LEX* No. 2684153; and Supreme Administrative Court decision of 26 June 2019, II GOK 2/18, *LEX* No. 2687377).
60. In view of the overall appraisal of all circumstances listed, the Supreme Court concludes that as of this day, the National Council of the Judiciary does not secure

sufficient guarantees of independence of the legislature and the executive in the judicial appointment procedure. The status of junior judges (“assessors”) remains a separate matter, beyond the scope of the issue under examination, in view of the Council’s marginal role in the process of appointing judicial applicants to junior judge positions. In such cases, Council competencies are limited to the option of filing objections with regard to a junior judge candidate (Article 33a(14) of the Act on the National School of the Judiciary and Public Prosecution of 23 January 2009, consolidated text: *Journal of Laws* of 2019, item 1042). The decisive factors include the outcome of the judicial examination and the list of junior judge position vacancies open to judicial applicants taking such examination, drafted by the Minister of Justice. The objection process is subject to judicial review.

61. The aforementioned statement is a point of departure for assessing whether the Disciplinary Chamber of the Supreme Court (hereinafter referred to as “DCSC”) is an independent and impartial court or tribunal as defined under Article 47 CFR and Article 6 of the Convention, and – on a related note, albeit that is not an issue in the case in question – whether it may be defined as a court or tribunal pursuant to national law. As in the case of the NCJ, the process of assessing the DCSC’s status as a court may produce negative outcomes only once all criteria listed by the Court of Justice of the EU have been fulfilled.

62. It ought to be emphasised yet again that none of the arguments listed below affect the effectiveness of actions taken by the President of the Republic of Poland (nomination acts);as recognised in the national legal system to date (para. 133 of the CJEU’s judgment), this matter is not subject to review. However, that position may be modified in the future, depending on responses to questions referred by the Supreme Court in its decisions of 21 May 2019, III CZP 25/19, and 12 June 2019, II PO 3/19. Notwithstanding the above, it should be forcefully emphasised that the phrase “stipulated by an act of law” covers court formations adjudicating in any case. Consequently, two different aspects are at stake: one that is systemic in nature (the non-contested act of appointment by the President of the Republic of Poland), the other organisational (whether the body thus appointed meets the criteria of an independent and impartial court or tribunal in terms of objective and subjective aspects, from the vantage point of an individual being a party to a case). The case under examination merits appraisal of the organisational aspect.

63. The Supreme Court further accentuates that the assessment below does not concern

the professional competencies of individuals elected to the Disciplinary Chamber as those are not subject to review in the context of securing the right to a fair trial. Chamber members include judges, prosecutors, legal counsels, a notary, and a member of the academia, after all. Yet – and such is the essence of the matter – one needs to ascertain that all substantive conditions and procedural rules concerning their appointment decisions were followed in a manner precluding legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors and its neutrality with respect to the interests before it upon appointment (para. 134 of the CJEU's judgment). The intent extends beyond direct instructions being ruled out, as declared in the European Court's judgment; the focal point remains with more indirect forms of influence potentially crucial to decisions passed by individual judges. Consequently, the aforementioned aspect of independence comes back to light. In reference to a mechanism thus structured and the European Court of Human Rights case law (incidentally, actively used by Polish citizens), the following issues merit raising.

64. Firstly, the DCSC, a body developed from scratch; for purposes of this case, it ought to be emphasised that pursuant to Article 79 of the current Act on the Supreme Court, the Chamber has gained competence in labour law and social security cases pertinent to Supreme Court judges, and in cases of Supreme Court judges' retirement. Common courts and the Chamber of Labour Law, Social Security and Public Affairs (today: Chamber of Labour Law and Social Security) used to have exclusive competencies in both matters. Notably, the amendment to the Act on the Supreme Court deprived Supreme Court judges of the right to two-instance judicial proceedings. Currently, an appeal may only be filed with another Disciplinary Chamber formation. Consequently, individuals adjudicating in the Chamber will face the predicament of assessing their colleagues' rulings. While such procedure does have precedent in national law, it has been reserved for secondary matters, such as the cost of legal proceedings, refusal to appoint or dismissal of a defence lawyer or legal counsel, dismissal of a motion to exclude a judge from proceedings (see Article $394^{2}(1^{1})$ of the Code of Civil Proceedings): incidental and secondary rulings rather than decisions concerning the essence of a dispute. Such competence points to the DCSC's extraordinary and special mandate, breaching *a priori* the constitutional guarantee of two-instance judicial proceedings.

65. Secondly – in the context of changes to the Supreme Court (and the SAC) – it ought to be pointed out that only DCSC members have been given the discretionary right to assess which Supreme Court and SAC judges will be allowed to remain in active service (Article 27(1)(3) of the Act on the Supreme Court). The DCSC may only accept new members elected by the Council, fully dependent on the legislature and the executive; none of the former Supreme Court judges were allowed to join. Such mechanism suggests that the fate of formerly appointed judges (currently: their employment-related rights) shall be exclusively decided by persons appointed by the new NCJ, a body insufficiently independent of the legislature and the executive.

66. Thirdly, it ought to be pointed out that only individuals with very strong connections to the legislature or the executive have been elected to the DCSC, a phenomenon which may raise objective doubts in private individuals with regard to the obligation of providing them with a right to a trial by an independent court or tribunal. A judge deprived of the quality of independence cannot be expected to properly resolve conflicts or safeguard public peace and order. Even if objectively correct, judgments by such judge may prove unacceptable to parties to a dispute or to the general public. Such was the argument raised by the Constitutional Tribunal in its judgment of 9 November 1993 (K 11/93, OTK 1993 No. 2, item 37). A more specific description of the aforementioned parameter merits a reminder that persons formerly subordinate to the executive or persons who, during the rule of law crisis examined under proceedings pursuant to Article 7 TEU, were acting by order or in conformity to expectations of political authorities were appointed to the DCSC. Choosing only such persons as candidates for Supreme Court judges does not in any way guarantee their independence, and thus precludes the establishing of an impartial court. The elected DCSC members include the following: the director of a department at the National Public Prosecution Office; a deputy prosecutor general at a Regional Public Prosecution Office (nominated in 2016); the director of the legislative office of the Institute for National Remembrance; prosecutor of the National Public Prosecution Office who charged judges with corruption, all related proceedings ultimately being dismissed; a former voivode and adviser to the Speaker of the *Sejm*; a person known to the legal circles exclusively for his mass media and social media activity, most recently expressing unambiguous political preferences on multiple occasions; a prosecutor whose procedural decisions were recognised as a breach of Article 3 of the Convention (prohibition of torture) in the course of a settlement before the ECtHR

(application no. 32420/07) (see selected reference materials: M. Jałoszewski: OKO.press of 23 August 2018; A. Łukaszewicz: “Śledczy osądzą sędziów”, *Rzeczpospolita*, 24 August 2018; W. Czuchnowski: “Prokurator od tortur do Sądu Najwyższego”, *Gazeta Wyborcza*, 27 August 2018; P. Słowik: “KRS stawia na prawników po przejściach”, *Dziennik Gazeta Prawna*, 27 August 2018).

67. Fourthly, competition rules were modified mid-procedure. Pursuant to the Act of 20 July 2018 amending the Act on the Common Court System and certain other acts (*Journal of Laws* of 2018, item 1443, hereinafter referred to as “the amending act”), Article 5(3) was expanded to include Article 35(3) of the NCJ Act, removing the obstacle of an individual applying for a nomination failing to submit all documents required (to confirm professional experience, body of academic work, opinion of superiors, recommendations, publications, opinions of the collegiate body of a relevant court, opinion of the relevant assembly of judges) for the purposes of a recommended candidate list. Such documents may be of paramount importance whenever the number of judicial candidates exceeds the number of vacant positions. Such had been the case of the Disciplinary Chamber: over 90 candidates applied for 16 vacancies. Furthermore, Article 5(5) of the amending act introduced a rule of any personal resolution concerning appointment as a Supreme Court judges becoming final to the extent concerning the decision regarding the motion to appoint a given individual as a Supreme Court judge, unless appealed by all participants to the related proceedings. Such solution eliminates the option of filing an effective appeal of the candidate against an NCJ resolution with a competent court of law; even if the appeal is awarded, that will not suspend the procedure of appointment, even if it is found that the appointed candidate does not meet the statutory requirements as opposed to the failed candidate filing an appeal. Previous solutions allowed for the suspension of the appointment of a recommended individual as the related resolution was not considered final. Consequently, the sole intent behind the amendment was to eliminate any form of effective legal protection; the amendment thus remains in contradiction to European Union rules and the constitutional standards of access to public service. In the final analysis, this means that the procedure allows for a candidate elected by the Council to be certain of his/her judicial appointment, whereas potential other candidates have been deprived of any judicial measure to defend their own rights, which in itself emphasises the biased mechanism of determining the Chamber’s membership.

68. Today, the scope of excluding judicial measures is broader. No right of appeal is available in individual cases of appointment of Supreme Court judges, albeit such fundamental right has been preserved for the appointment procedure of common court judges (see Article 44 of the NCJ Act). Such solution gives leeway to the Council, which has thus gained unfettered competence to recommend candidates for judicial positions in a procedure excluded from judicial review.
69. Fifthly, assumptions to the judiciary reform read that “the draft Act on the Supreme Court is a part of an extensive reform of the judiciary, comprising amendments to the Act on the National Council of the Judiciary and the Act on the Common Court System, with the intent to ensure fairness of court rulings and swifter judicial proceedings, and to restore public trust in courts of law. The purpose of the draft specifically targets greater operational efficiency of the Supreme Court and a democratic judicial appointment process. New regulations have been designed to warrant that judicial positions are held by individuals with top professional and ethical qualifications. This is why essential components of the draft include a reform of the disciplinary branch of the judiciary, charged with examining cases involving justices, prosecutors, court bailiffs, notaries, and representatives of other legal professions: to that end, a new and autonomous Disciplinary Chamber shall be established as part of Supreme Court structures. The nature, scope, and considerable volume of systemic changes merit the need for a new act of law to be passed with the intent to regulate all issues of organisation and operation of the Supreme Court, and of proceedings before the same, in a new, conceptually and structurally consistent piece of legislation. Such measure is indispensable in view of the clarity of Polish law, especially with regard to a body of such constitutional importance as the Supreme Court” (see the draft Act on the Supreme Court tabled by the President of the Republic of Poland, file 2003, and the draft amendment to the Act on the Supreme Court tabled by deputies, file 1727, available at www.sejm.gov.pl). While all those objectives listed unquestionably desirable, it ought to be emphasised that the change to the model of appointing Supreme Court judges – despite assurances that persons with top professional qualifications would be chosen – excludes the Supreme Court from the entire procedure, although the presence of the judicial community at the common court level is considerable (General Assembly opinions); the change itself ought to be assessed in a much broader perspective in the context of overall DCSC appraisal.

70. For the sake of a reminder: under the previous model, candidates for judicial positions could be seconded to adjudicate at the Supreme Court (first stage of professional qualifications testing). Most frequently, candidates would be experienced judges recruited from appellate courts. Secondment-based adjudication would conclude with the supervising judge drafting an opinion to assess the candidate's performance, also in consideration of his/her case law work at the seconding institution. The individual was also provided with an opportunity to appear before the assembly of judges of the given Chamber, and then before the General Assembly of Judges of the Supreme Court. Any backing gained during such procedure could be recognised as a component of the Council's recommendation, albeit not necessarily with prevalent importance. The presented procedure allowed for the candidate's overall substantive qualifications to be assessed. In the current legal status (Act on the Supreme Court), the legislature has eliminated the option of candidate appraisal by the Supreme Court (in any form). The initiative of the candidate him- or herself is all that counts: enrolment in the competition procedure only requires a relevant application to be submitted. Consequently, standards have been lowered, as proven by cases of the Council recommending candidates failing to meet formal requirements (insufficient years of service), or persons convicted by a final disciplinary judgment. According to the previous procedure, the application for a Supreme Court judicial vacancy contained a question concerning a disciplinary record, allowing any such candidates to be eliminated.
71. Prior to the Act on the Supreme Court coming into force, once a non-judiciary candidate (in the broad sense) applied for a Supreme Court judicial position, he/she was offered an opportunity to present his/her body of academic work in the course of a presentation before the Chamber he/she was applying for, later also before the General Assembly of Judges of the Supreme Court. Moreover, the procedure involved a discussion to form a general opinion of the candidate; supplementary questions could be asked to verify whether the candidate's academic research field would be of use in the given area of the judiciary: the academic title is of lesser importance than the entire body of work in terms of whether it ties in with fields associated with or useful to practicing law (legislation-related comments, articles, commentaries). In case of other legal professions (prosecutors, legal counsels), the overall professional practice could be appraised to conclude whether the candidate was professionally active and accomplished, or if his/her career had an exclusively

administrative focus.

72. As mentioned above, the opinion of Supreme Court collegiate bodies, while not binding to the National Council of the Judiciary, allowed for an opinion to be formed with regard to a given individual's skills and achievements. The procedure also afforded a guarantee, as it were, that should another candidate be selected, the one believing him- or herself to have *"*higher qualifications*"* could submit the Council's choice to judicial examination. Today, the legislature has abandoned all aforementioned standards of non-binding substantive appraisal of candidates for Supreme Court judicial positions by that Court's judicial community. If this development (the Supreme Court being eliminated from the procedure of appointing candidates for Supreme Court judicial office) is coupled with *"*new*"* solutions in the area of electing National Council of the Judiciary members, it becomes obvious that any assessment of the independence or impartiality of the Supreme Court's newly established Chamber perceived "in the minds of subjects of the law", as the CJEU put it, is highly problematic.

73. Sixthly, the Chamber has been afforded extensive autonomy and a special status as an extraordinary court usually convoked in wartime conditions, and a part of Supreme Court structures in appearance (by name) only. The issue was described in detail in the legal doctrine (W. Wróbel: "Izba Dyscyplinarna jako sąd wyjątkowy w rozumieniu art. 175 ust. 2 Konstytucji", *Palestra* 2019 No. 1, pp. 17-35). The jurisdiction of the DCSC has nothing in common with judicial supervision of common or military courts in the field of adjudication pursuant to Article 183(1) of the Constitution of the Republic of Poland. The Chamber was established as a part of the Supreme Court structure as a first-instance court with the following jurisdiction: (a) disciplinary cases involving Supreme Court judges; (b) labour law and social security cases involving Supreme Court judges; (c) cases of Supreme Court judges' retirement (Article 27(1)(2-3) of the Act on the Supreme Court). Furthermore, the legislature turned the DCSC into a first- and only instance court in cases of appeals against decisions of corporate bodies examining disciplinary cases involving legal professions (Article 27(1)(1b) of the Act on the Supreme Court). Otherwise, the Chamber serves as a second-instance court in disciplinary cases involving common court judges and prosecutors (Article 27(4) of the Act on the Supreme Court). The Chamber's organisational and financial autonomy also exhibits a number of distinctive features, despite being a part of the Supreme Court structure.

74. The DCSC's separate capacity is confirmed by the manifest difference in the workload of persons adjudicating at the institution in comparison with other Chambers. For example, in the period from 1 January to the end of November 2019, 17 adjudicating judges of the Chamber of Labour Law and Social Security issued 2,179 judgments; during the same period, the DCSC issued 344 judgments passed by 10 individuals (source: Supreme Court *Supremus* data base).
75. Seventhly, actions taken by the DCSC itself upon its forming ought to be considered, as well; such activities were intended to cause the withdrawal of referrals for a preliminary ruling; prior to their appointment, persons currently adjudicating at the Chamber publicly criticised questions referred for a preliminary ruling by the Supreme Court. After the CJEU's judgment of 19 November 2019, the Disciplinary Chamber flagrantly continued operating before any decision resolving the matter referred for a preliminary ruling as to its status as a court within the meaning of European Union law.
76. Eighthly, since the aspect of the subjective opinion of parties to a case is recognised as part of the overall assessment, it should be mentioned that in the course of proceeding before the Chamber, judges were found guilty of having passed judgments, or resolving cases independently, incidentally with outcomes different to the expectations of the Minister of Justice. To date, the case law has precluded adjudication duties being classified as disciplinary infringements (see Supreme Court judgment of 15 September 2004, SNO 33/04, *LEX* No. 472142).
77. While the legislature intended to rebuild the model of disciplinary proceedings and modify principles applicable to minor offences, current activities of the Chamber focus on dissuasive action against justices for procedural work. Such practice may be observed within the framework of the judicial error in law procedure regulated in Article 40 of the Act on the Common Court System of 27 July 2001 (consolidated text: *Journal of Laws* of 2019, item 52); other shortcomings may be corrected under the administrative error in law procedure stipulated in Article 37(4) of the Act on the Common Court System. In contrast, disciplinary proceedings were taken against a judge who had waived detention of a juvenile (aged 19) with considerable intellectual disability, deprived of legal defence during questioning by the police and prosecution services, as well as during the detention session of the district court. The judge of a common court was convicted by a final disciplinary judgment of the Disciplinary Chamber for having waived detention of the aforementioned individual (see judgment

of 21 November 2019, II DSS 2/18, unpublished). Another judgment (see judgment of 7 February 2019, I DO 16/19, *LEX* No. 2617327) contested the admissibility of questions referred for a preliminary ruling by the Supreme Administrative Court in case II GOK 2/18 (*LEX* No. 2687377).

78. Ninthly and lastly, the Supreme Court is not bound by the resolution passed by the full formation of the Disciplinary Chamber of the Supreme Court of 10 April 2019, II DSI 54/18 (*LEX* No. 2671023). Pursuant to unambiguous CJEU case law and the principle of primacy of European Union law enshrined in Article 91(3) of the Constitution of the Republic of Poland, regulations such as Article 87(1) of the Act on the Supreme Court cannot be recognised as an obstacle to ensuring the effect of European Union law (see CJEU's judgment of 6 March 2018, C-284/16, para. 33). Consequently, in accordance with the principle of primacy, the Supreme Court does not recognise the aforementioned resolution; as a side comment: the legal basis of said resolution touches on criminal proceedings legislation, which is of no relevance to this matter. The resolution is in manifest contradiction to the rule of *nemo iudex in causa sua.* It may further be emphasised that since the entire Chamber adjudicated on the case, one might well ask a question concerning a major legal matter: in view of the manner in which the body was elected, does it meet the requirements for an independent and impartial court? On the other hand, CJEU's judgment of 19 November 2019 was followed by a statement by Civil Law Chamber judges appointed in 2018 (by the new NCJ) claiming that the CJEU's judgment may be the basis for the Supreme Court's jurisdiction to examine whether the Disciplinary Chamber of the Supreme Court may examine a dispute concerning the application of European Union law in view of objective circumstances under which said Chamber was formed, of its features, and of the manner of electing its members. Aforementioned judges believe that such assessment would allow for a conclusion whether such circumstances may raise doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the influence of the legislature and the executive and its neutrality with respect to the interests before it; only a coincidence of factors listed in para. 143-151 and the existence of other duly proven circumstances may have the effect of undermining trust in the Disciplinary Chamber of the Supreme Court which the judiciary should evoke in any democratic society (para. 153).

79. *Summa summarum*, none of the circumstances described may – when considered

in isolation – determine non-conformity to the standard stipulated under Article 47 CFR (Article 6 of the Convention in conjunction with Article 45(1) of the Constitution of the Republic of Poland). However, all those circumstances combined (creating a new organisational unit at the Supreme Court from scratch; manning it exclusively with new persons with strong connections with the legislature and the executive , who prior to their appointment were beneficiaries of changes to the judiciary; and having these persons elected by the NCJ which failed to act independently of the legislature and the executive autonomy and competencies taken away from other courts and Supreme Court chambers), the conclusion is clear and unambiguous: the Disciplinary Chamber of the Supreme Court is not a court within the meaning of Article 47 CFR, Article 6 of the Convention, and Article 45(1) of the Constitution of the Republic of Poland.

80. In consequence, the position of the appellant is justified: the DCSC's only feature shared by the elected individuals and making them distinct to the general public is that of their support offered formerly to actions of the Minister of Justice / Prosecutor General (Court Watch Foundation report: *Skąd się biorą sędziowie*, p. 52, https://courtwatch.pl/blog/2018/04/26/raport-sad-biora-sie-sedziowie/). The very fact of engaging in public activity immediately prior to securing a judicial appointment does not automatically imply the lack of independence of a court adjudicating with such person participating in its formation. Similarly, not every election by the National Council of the Judiciary determines the overall quality of the appointed court (junior judges are a case in point as their appointment is primarily determined by the outcome of the judicial examination). Nonetheless, it is typical of the process of appointing DCSC members that appointment applications were only filed for candidates with such evident connections. Such situation had never occurred in the course of selecting candidates for post-1990 Supreme Court judicial vacancies. All the above circumstances may justify doubts in the minds of individuals, as to the imperviousness of the DCSC to external factors, in particular, as to the influence of the legislature and the executive and its neutrality with respect to the interests before it, and its failure to display independence and/or impartiality, all of which may undermine the confidence the judiciary should evoke in citizens of democratic societies.

81. An assessment of circumstances concerning the independence and impartiality of the DCSC, a body appointed by NCJ, itself an authority failing to meet its statutory

functions in terms of sufficient independence of the legislature and the executive as required of a body safeguarding the independence of courts and judges, has yielded a decision as specified under item 1 of the judgment. Moreover, in view of the combined negative criteria for case examination by the DCSC, arising from the test prescribed by the Court of Justice of the EU, the case of appellant A.K. should be examined by the Chamber of Labour Law and Social Security of the Supreme Court.

82. Acting as a Union court, the Supreme Court was bound by constitutional duty (Article 91(3) of the Constitution of the Republic of Poland) to refuse to apply the provisions of the Act on the Supreme Court vesting jurisdiction in the DCSC. Furthermore, the Constitution of the Republic of Poland does not in any way make the disapplication of any law contradicting European Union law dependent on a prior judgment of the Constitutional Tribunal.

83. To refer to the judgment of the Court of Justice of the EU: national courts are obliged to interpret national law as closely as possible in compliance with Union law. [The national court is under] a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means. Consequently, the national court has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (see judgment of 24 June 2019, C-573/17, para. 58 and 61, and the case law cited therein).

84. The case law further clarifies that Article 47 CFR is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such (see the following judgments: 17 April 2018, C-414/16, para. 78; 29 July 2019, Torubarov, C-556/17, para. 56). Furthermore, pursuant to Article 9(1) of Directive 2000/78, Member States shall ensure that procedures for the enforcement of obligations under the Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them; the provision expressly confirms the right to an effective legal measure in the area under consideration. In fact, by implementing Directive 2000/78, Member States are obliged to respect Article 47 CFR, and features of the remedy provided for in Article 9(1) of the Directive should be therefore specified in conformity

to Article 47 CFR. On a related note: with regard to Protocol (No. 30) concerning CFR application to Poland and the United Kingdom, the CJEU observed that the Protocol does not concern the second subparagraph of Article 19(1) TEU and also recalled that it does not call into question the applicability of the Charter in Poland, nor is it intended to exempt the Republic of Poland from the obligation to comply with the provisions of the Charter (see the CJEU's judgment of 24 June 2019, Commission v. Poland, C-619/18, para. 53 and the case law cited therein).

85. Ultimately, national provisions of Article 27(1)(3) in conjunction with Article 37(1) and (1a) and Article 111(1) of the Act on the Supreme Court (in its original wording), and Article 49 of the Act on the Administrative Courts System of 25 July 2002, which grant a body which does not have the features listed under Article 47 CFR the jurisdiction to examine a dispute, thus depriving the appellant of an efficient remedy as defined under Article 9(1) of Directive 2000/78, shall be dismissed in accordance with the principle defined under Article 4(3) TEU and the national court shall refrain from their application in order to allow such dispute to be examined by a court meeting all the aforementioned requirements which would have the jurisdiction in the matter at hand if the aforementioned provision did not prevent it, that is, in principle, a court with jurisdiction under provisions applicable prior to the legislative amendment granting such jurisdiction to a body failing to meet the aforementioned requirements (see the CJEU's judgment of 19 November 2019, para. 161-166). Notably, the same conclusions follow from an interpretation of Article 45(1) of the Constitution of the Republic of Poland (safeguarding the right to a trial by an impartial court, and to an effective remedy), which is not in conflict with any of the aforementioned values, since the national and EU (Convention) standards coincide to that extent as their intent is to protect individuals against their claims being examined by a court appointed in a flawed procedure. Such, incidentally, is the purpose of all those rules, namely, to prevent bodies deprived of certain immanent features from examining cases already at the national level, as demonstrated by the extensive case law of the European Court of Human Rights cited in the first part hereof.

86. Moreover, having the appeal examined by the Chamber of Labour Law and Social Security of the Supreme Court rather than by the Disciplinary Chamber protects the Republic of Poland, and thus all citizens and taxpayers, from financial liability for failing to secure the right to a fair trial by a court within the meaning of the ECHR and European Union law as a result of the carelessness of the national legislature which

passed the Act on the Supreme Court and the NCJ Act in breach of international standards.

87. With regard to Article 2(1) of the Act of 21 November 2018 amending the Act on the Supreme Court (*Journal of Laws* of , item 2507, hereinafter referred to as "the amending act"), a judge of the Supreme Administrative Court who retires pursuant to Article 37(1-4) or Article 111(1) or (1a) of the Act on the Supreme Court Act shall be reinstated as of the effective date of said Act to the position held as of the effective date of said Act. Serving in a Supreme Administrative Court position shall be considered uninterrupted. The cited provision introduces a legal fiction to the effect that the appellant has retired and was later reinstated to service. A.K.'s legal interest is thus revealed; in accordance with the right to an effective remedy, A.K. may demand a decision to the effect of never have retired as the resolution (referred to as "opinion") passed by a subordinate body contained no justification or clarification of the criteria for the position concerned. Consequently, only these present proceedings allow for the Council's opinion to be examined, and – in recognition of the interpretation principle *a simile* – to rule in accordance with Article 44(1) of the NCJ Act in conjunction with Article 45(1) of the Constitution of the Republic of Poland and Article 6 of the Convention, as above. Consequently, there were no grounds to pass a judgment pursuant to Article 4 of the amending act. Proceedings as stayed, closing the procedure, if the parties reach an agreement with regard to the subject matter of the dispute, the claims are withdrawn, or a judgment becomes unnecessary. However, such resolution does not apply to instruments which violate the cardinal rights of an individual demanding confirmation of having remained in service, especially in view of underling instruments arising from a breach of non-discrimination rules and of the right to fair trial. As mentioned above, general principles outweigh ordinary rules, be they technical or formal; a declaration clear and unambiguous in the case in question.

88. In summary, the Supreme Court concludes that the National Council of the Judiciary in its current formation is neither impartial nor independent of the legislature or the executive; consequently, the resolution passed by the NCJ must be annulled. The Supreme Court thus ruled as quoted in the sentence of the judgment.