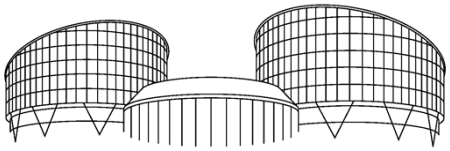

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ADVANCE PHARMA SP. Z O.O v. POLAND

(Application no. 1469/20)

JUDGMENT

Art 6 (civil) ● Tribunal established by law • Manifest breaches, following legislative reform, in appointment to Supreme Court's Civil Chamber of judges who examined the applicant company's civil appeal ● Application of three-step test formulated in *Guðmundur Andri Ástráðsson v. Iceland* [GC] ● Lack of independence of National Council of the Judiciary from legislature and executive ● President of Poland's appointment of judges to the Chamber despite stay of the implementation of the applicable resolution pending judicial review and legislature's intervention in appointment process by extinguishing effects of that review ● No remedies to challenge alleged defects

STRASBOURG

3 February 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Advance Pharma sp. z o.o v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ksenija Turković, President,
Krzysztof Wojtyczek,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, judges,

and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 1469/20) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Advance Pharma sp. z o.o ("the applicant company"), on 2 December 2019;

the decision to give notice to the Polish Government ("the Government") of the complaint that the applicant company's case was not dealt with by an "independent and impartial tribunal established by law" in breach of Article 6 § 1 of the Convention and to declare inadmissible the remainder of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant company;

the comments submitted by the Association "Lawyers for Poland", the Polish Commissioner for Human Rights, the Helsinki Foundation for Human Rights and the Polish Judges Association "Iustitia", who were granted leave to intervene by the President of the Section;

Having deliberated in private on 14 December 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant company had its cassation appeal (*skarga kasacyjna*) examined by the Civil Chamber of the Supreme Court in a panel composed of three judges newly appointed through the procedure involving the National Council of the Judiciary (the "NCJ") as established in 2018. It complained that the Civil Chamber that had dealt with its case had not been an "independent and impartial tribunal established by law" and alleged a breach of Article 6 § 1 of the Convention.

THE FACTS

2. The applicant company's registered office is in Warsaw. It was represented by Mr D. Gliński, the Chairman of the Board. The applicant

company had been granted legal aid in the proceedings before the Court and was represented by Ms M. Gąsiorowska and Ms J. Metelska, lawyers practising in Warsaw.

3. The Polish Government ("the Government") were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

I. THE BACKGROUND TO THE CASE

A. National Council of the Judiciary

4. The National Council of the Judiciary (*Krajowa Rada Sądownictwa*, hereinafter "the NCJ") is a body which was introduced in the Polish judicial system in 1989, by the Amending Act of the Constitution of the Polish People's Republic (*ustawa z dnia 7 kwietnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej*).

5. Its organisation was governed by the 20 December 1989 Act on the NCJ as amended and superseded on several occasions (*ustawa z dnia 20 grudnia 1989 r. o Krajowej Radzie Sądownictwa*). The second Act on the NCJ was enacted on 27 July 2001. Those two Acts provided that the judicial members of the Council were to be elected by the relevant assemblies of judges at different levels, and from different types of court, within the judiciary.

6. The 1997 Constitution of the Republic of Poland provides that the purpose of the NCJ is to safeguard the independence of courts and judges (see paragraph 95 below). Article 187 § 1 governs the composition of its twenty-five members: seventeen judges (two sitting *ex officio*: the First President of the Supreme Court, the President of the Supreme Administrative Court and fifteen judges elected from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts); four Members of Parliament chosen by the *Sejm*; two members of the Senate; the Minister of Justice, and one person indicated by the President of the Republic of Poland ("the President" or "the President of Poland").

7. The subsequent Act of 12 May 2011 on the National Council of the Judiciary (*Ustawa o Krajowej Radzie Sądownictwa* – "the 2011 Act on the NCJ"), in its wording prior to the amendment which entered into force on 17 January 2018, provided that judicial members of this body were to be elected by the relevant assemblies of judges at different levels within the judiciary (see paragraph 98 below).

B. Legislative process

8. As part of the general reorganisation of the Polish judicial system prepared by the government, the *Sejm* enacted three new laws: the 12 July 2017 Law on amendments to the Act on the Organisation of Ordinary Courts

and certain other statutes (*Ustawa o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw,* "Act on the Ordinary Courts"), the 12 July 2017 Amending Act on the NCJ and certain other statutes (*Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw*) and the 20 July 2017 Act on the Supreme Court (*Ustawa o Sądzie Najwyższym*).

9. The 12 July 2017 Law on amendments to the Act on the Ordinary Courts was signed by the President of Poland on 24 July 2017 and entered into force on 12 August 2017.

10. On 31 July 2017 the President vetoed two acts adopted by the *Sejm*: one on the Supreme Court and the Amending Act on the NCJ. On 26 September 2017 the President submitted his proposal for amendments to both acts. The bills were passed by the *Sejm* on 8 December and by the Senate on 15 December 2017. They were signed into law by the President on 20 December 2017.

C. New National Council of the Judiciary

1. Election of the new members of the NCJ

11. The Amending Act on the NCJ and certain other statutes of 8 December 2017 (*ustawa z dnia 8 grudnia 2017 o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw*, "the 2017 Amending Act") entered into force on 17 January 2018 (see paragraphs 7 above and 99 below).

12. The 2017 Amending Act granted to the *Sejm* the competence to elect judicial members of the NCJ for a joint four-year term of office (section 9a(1) of the 2011 Act on the NCJ, as amended by the 2017 Amending Act). The positions of the judicial members of the NCJ who had been elected on the basis of the previous Act were discontinued with the beginning of the term of office of the new members of the NCJ (section 6). The election of new judicial members of the NCJ required the majority of 3/5 of votes cast by at least half of the members of the *Sejm* (section 11d(5)). The candidates for the NCJ were to present a list of support from either 2,000 citizens or twenty-five judges (section 11a).

13. On 5 March 2018 a list of fifteen judges, candidates for the NCJ, was positively assessed by the Commission of Justice and Human Rights of the *Sejm*.

14. On 6 March 2018 the *Sejm*, in a single vote, elected fifteen judges as new members of the NCJ.

15. On 17 September 2018 the Extraordinary General Assembly of the European Network of Councils for the Judiciary (ENCJ) decided to suspend the membership of the new NCJ. The General Assembly found that the NCJ no longer met the requirements of being independent from the executive and the legislature in a manner which ensured the independence of the Polish

judiciary (see also paragraph 223 below). On 28 October 2021 the NCJ was expelled from the ENCJ (see paragraph 225 below).

2. Non-disclosure of endorsement lists

16. On 25 January 2018 a Member of Parliament ("MP"), K.G.-P., asked the Speaker of the *Sejm* (*Marszalek Sejmu*) to disclose the lists, containing names of persons supporting the candidates to the NCJ, which had been lodged with the *Sejm*. The MP relied on the Act on Access to Public Information (*ustawa o dostępie do informacji publicznej*). Her request was dismissed on 27 February 2018 by the Head of the Chancellery of the *Sejm* (*Szef Kancelarii Sejmu*). The MP appealed.

17. On 29 August 2018 the Warsaw Regional Administrative Court (*Wojewódzki Sąd Administracyjny*) gave judgment in the case (no. II SA/Wa 484/18). The court quashed the impugned decision. It considered that domestic law had not allowed any limitation of the right of access to public information in respect of attachments to the applications lodged by candidates for the NCJ containing lists of judges who had supported their candidatures. The lists of judges supporting candidates for the NCJ had to be considered as information related to the exercise of a public office by judges. The publication of endorsement lists signed by judges had to be preceded by the removal of their personal registration numbers (PESEL) as the number had not related to the exercise of public office by judges.

18. The Head of the Chancellery of the *Sejm* lodged a cassation appeal against the judgment.

19. On 28 June 2019 the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) dismissed the cassation appeal (I OSK 4282/18). The court agreed with the conclusions of the Regional Administrative Court. It found that the attachments to the applications of candidates to the NCJ in the form of lists of citizens and lists of judges supporting the applications had fallen within the concept of public information. The limitation of this right to public information in relation to the lists of judges supporting the applications of candidates for the NCJ could not be justified by the reason that this information was related to the performance of public duties by judges. The court held that access to the list of judges supporting the applications of candidates for the NCJ should be made available after prior anonymisation of the judges' personal registration numbers (PESEL).

20. On 29 July 2019 the Head of the Personal Data Protection Office (*Prezes Urzędu Ochrony Danych Osobowych* – "UODO") decided that the endorsement lists should remain confidential and should not be published (two decisions were issued on that day, one initiated *ex officio* and one upon the application of Judge M.N., a member of the NCJ).

21. Appeals against the decisions of the Head of UODO were lodged by the Commissioner of Human Rights, the MP K.G.-P. and a foundation, F.C.A. On 24 January 2020 the Warsaw Regional Administrative Court

quashed the decisions of 29 July 2019 (II SA/Wa 1927/19 and II SA/Wa 2154/19). The court referred to findings contained in the final judgment of the Supreme Administrative Court of 28 June 2018 which had not been enforced to date (see paragraph 19 above).

22. On 14 February 2020 the lists of persons supporting candidates to the NCJ were published on the *Sejm*'s website.

D. The Supreme Court

1. *New Chambers*

23. The Act on the Supreme Court of 8 December 2017 ("the 2017 Act on the Supreme Court") modified the organisation of that court by, in particular, creating two new Chambers: the Disciplinary Chamber (*Izba Dyscyplinarna*) and the Chamber of Extraordinary Review and Public Affairs (*Izba Kontroli Nadzwyczajnej i Spraw Publicznych*; see paragraph 102 below).

24. The Disciplinary Chamber of the Supreme Court became competent to rule on cases concerning the employment, social security and retirement of judges of the Supreme Court (the 2017 Act on the Supreme Court, section 27(1)). The Disciplinary Chamber of the Supreme Court was composed of newly elected judges; those already sitting in the Supreme Court were excluded from it (section 131).

25. The Chamber of Extraordinary Review and Public Affairs became competent to examine extraordinary appeals (*skarga nadzwyczajna*), electoral protests and protests against the validity of the national referendum, constitutional referendum and confirmation of the validity of elections and referendums, other public law matters, including cases concerning competition, regulation of energy, telecommunications and railway transport and cases in which an appeal had been lodged against a decision of the Chairman of the National Broadcasting Council (*Przewodniczący Krajowej Rady Radiofonii i Telewizji*), as well as complaints concerning the excessive length of proceedings before ordinary and military courts and the Supreme Court (section 26).

2. *Appointments of judges*

(a) Act announcing vacancies at the Supreme Court

26. On 24 May 2018 the President announced sixteen vacant positions of judges of the Supreme Court in the Disciplinary Chamber (*obwieszczenie Prezydenta*, *Monitor Polski* – Official Gazette of the Republic of Poland of 2018, item 633). By the same act the President announced other vacant positions at the Supreme Court: twenty in the Chamber of Extraordinary Review and Public Affairs, seven in the Civil Chamber and one position in the Criminal Chamber.

27. At its sessions held on 23, 24, 27 and 28 August 2018, the NCJ closed competitions for vacant positions of judges at the Supreme Court.

(b) Disciplinary Chamber

28. On 23 August 2018 the NCJ issued a resolution (no. 317/2018) recommending twelve candidates for judges of the Disciplinary Chamber and submitted the requests for their appointment to the President.

29. On 19 September 2018 the President decided to appoint ten judges, from among those recommended by the NCJ, to the Disciplinary Chamber of the Supreme Court. On 20 September 2018 the President handed the letters of appointment to the appointed judges and administered the oath of office to them.

(c) Chamber of Extraordinary Review and Public Affairs

30. On 28 August 2018 the NCJ issued a resolution (no. 331/2018) recommending twenty candidates to be appointed as judges of the Chamber of Extraordinary Review and Public Affairs and submitted the requests for their appointment to the President. Secondly, the NCJ decided not to recommend other candidates who had applied for the post at the Chamber of Extraordinary Review and Public Affairs.

Some non-recommended candidates appealed against that resolution to the Supreme Administrative Court which, on 27 September 2018, stayed its implementation (see paragraphs 37-38 below).

31. On 10 October 2018, while the appeals were pending, and in spite of the Supreme Administrative Court's decision to stay the implementation of resolution no. 331/2018, the President of Poland handed the letters of appointment to nineteen appointed judges and administered the oath of office to them. The twentieth candidate to be appointed, Judge A.S., was appointed by the President on 30 January 2019 after he had relinquished a foreign nationality. On 20 February 2019 the President handed him the letter of appointment and administered the oath of office.

(d) Criminal Chamber

32. On 24 August 2018 the NCJ issued a resolution (no. 318/2018) recommending one candidate for the position of judge of the Criminal Chamber of the Supreme Court.

33. On 10 October 2018 the President decided to appoint one judge to the Criminal Chamber as recommended by the NCJ on 24 August 2018. On the same day the President handed the letter of appointment to the appointed judge and administered the oath of office to him.

(e) Civil Chamber

34. On 28 August 2018 the NCJ issued a resolution (no. 330/2018) recommending seven candidates to sit as judges of the Civil Chamber of the Supreme Court. The judges recommended by the NCJ included T.S., J.M-K, and K.Z., who dealt with the applicant company's case (see paragraph 93 below). The NCJ decided not to recommend other candidates.

Some non-recommended candidates appealed against that resolution to the Supreme Administrative Court which, on 27 September 2018, stayed its implementation (see paragraphs 44-45 below).

35. On 10 October 2018 while the appeals were pending, and in spite of the Supreme Administrative Court's decision to stay the implementation of resolution no. 330/2018, the President of Poland decided to appoint the candidates recommended by the NCJ. On the same day the President handed them the letters of appointment and administered the oath of office to them.

3. Appeals against the NCJ resolutions recommending judges for appointment to the Supreme Court

(a) Disciplinary Chamber

36. On 25, 27 September and 16 October 2018 the Supreme Administrative Court dismissed requests lodged by various appellants to stay the implementation (*o udzielenie zabezpieczenia*) of the NCJ's resolution no. 317/2018 recommending candidates for appointment to the Disciplinary Chamber (see paragraph 28 above). The court noted that the NCJ resolution of 23 August 2018 had been delivered to the candidate G.H. on 14 September 2018, and he had lodged his appeal with the Supreme Administrative Court on 17 September 2018. However, on 19 September 2019 the President had appointed the judges recommended by the NCJ. NCJ resolution no. 317/2018 had therefore been enforced, which precluded any stay of implementation.

(b) Chamber of Extraordinary Review and Public Affairs

37. On various dates, some candidates who had not been recommended by the NCJ for appointment to the Chamber of Extraordinary Review and Public Affairs lodged appeals with the Supreme Administrative Court against NCJ resolution no. 331/2018 of 28 August 2018 (see also paragraph 30 above).

38. On 27 September 2018 the Supreme Administrative Court (case no. II GW 28/18) gave an interim order staying the implementation of that resolution in its entirety, that is to say both in the part recommending twenty candidates to the Chamber of Extraordinary Review and Public Affairs and in part not recommending other candidates, including the appellant K.L.

39. On 22 November 2018 the Supreme Administrative Court stayed the examination of the appeals lodged against NCJ resolution no. 331/2018 pending the examination of its request for a preliminary ruling (*pytanie*

prejudycjalne) to the Court of Justice of the European Union ("CJEU") in the context of another NCJ resolution (resolution no. 330/2018; request for a preliminary ruling made by Supreme Administrative Court of 21 November 2018; the CJEU Case C-824/18, *A.B. and Others*; see paragraphs 48 and 206 below).

40. On 21 September 2021 the Supreme Administrative Court gave judgments in six cases where appeals had been lodged by unsuccessful candidates against NCJ resolution no. 331/2018. The court firstly decided to annul NCJ resolution no. 331/2018 in the part concerning the recommendation of twenty candidates for appointment to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court (*uchylił w całości*, case no. II GOK 10/18). As regards the part of resolution no. 331/2018 concerning the NCJ's refusal to recommend certain other candidates, the Supreme Administrative Court annulled it in so far as it concerned the appellants (see also case nos. II GOK 8/18, 11/18, 12/18, 13/18, 14/18).

(c) Criminal Chamber

41. On various dates, some candidates who had not been recommended by the NCJ for appointment to the Criminal Chamber lodged appeals with the Supreme Administrative Court against NCJ resolution no. 318/2018.

42. On 25 September 2018 the Supreme Administrative Court (case no. II GW 22/18) stayed the implementation of the NCJ resolution of 24 August 2018 (no. 318/2018; see paragraph 32 above) recommending one candidate to the Criminal Chamber of the Supreme Court and not recommending other candidates, including the appellant C.D.

43. On 6 May 2021 the Supreme Administrative Court gave two judgments (cases nos. II GOK 6/18 and 7/18). The court firstly decided to annul NCJ resolution no. 318/2018 in the part concerning the recommendation of one candidate for appointment to the Criminal Chamber of the Supreme Court (*uchylił w całości*). As regards the part of resolution no. 318/2018 concerning the NCJ's refusal to recommend certain other candidates, the Supreme Administrative Court annulled it in so far as it concerned the appellants (see also paragraphs 165-168 below).

(d) Civil Chamber

(i) Appeals and stay of implementation of the NCJ's resolutions

44. On various dates, some candidates who had not been recommended by the NCJ for appointment to the Civil Chamber lodged appeals with the Supreme Administrative Court against NCJ resolution no. 330/2018 (see paragraph 34 above).

45. On 27 September 2018 the Supreme Administrative Court (case no. II GW 27/18) gave an interim order staying the implementation of that

resolution in its entirety, that is to say both in the part recommending seven candidates for appointment to the Civil Chamber of the Supreme Court and in the part not recommending other candidates, including the appellant I.J.

The court also noted that the NCJ had never transferred to the Supreme Administrative Court the appeal lodged by the appellant on 20 September 2018 although it had been obliged to do so under the law.

(ii) Case of A.B. (II GOK 2/18)

46. On 1 October 2018 Mr A.B. lodged an appeal against the NCJ's resolution of 28 August 2018 (no. 330/2018; see paragraph 34 above) which recommended seven candidates for judges to the Civil Chamber of the Supreme Court and decided not to recommend other candidates, including the appellant. On the same date the appellant asked for an interim measure to stay the implementation of the resolution.

47. On 8 October 2018 the Supreme Administrative Court (case no. II GW 31/18) stayed the implementation of the impugned resolution. The court also noted that A.B.'s appeal of 1 October 2018 against the resolution had never been transmitted by the NCJ to the Supreme Administrative Court.

48. In a request of 21 November 2018, supplemented on 26 June 2019 the Supreme Administrative Court applied to the CJEU for a preliminary ruling to and the latter gave judgment on 2 March 2021 (*A.B. and Others*, Case C-824/18; see also paragraphs 46-52 and 209 below).

49. On 6 May 2021 the Supreme Administrative Court gave judgment (case no. II GOK 2/18). On the same day it also ruled on three other cases (see paragraph 165 below). The court annulled (*uchylił w całości*) NCJ resolution no. 330/2018 in the part concerning the recommendation of seven candidates for appointment to the Civil Chamber of the Supreme Court. In consequence, the part of NCJ resolution no. 330/2018 recommending three judges who had sat in the applicant company's case, and on the basis of which they had been appointed by the President on 10 October 2018, was annulled.

As regards the part of resolution no. 330/2018 concerning the NCJ's refusal to recommend certain other candidates, the Supreme Administrative Court annulled it in so far as it concerned the appellant A.B. (see also paragraphs 165-168 below).

50. In the judgment, the Supreme Administrative Court held, pursuant to the CJEU judgments of 19 November 2019 and 2 March 2021 (see paragraphs 206 and 209 below), that the NCJ did not offer guarantees of independence from the legislative and executive branches of power in the process of appointment of the judges (see paragraph 166 below).

51. The court also noted that it did not appear that the NCJ – a body constitutionally responsible for safeguarding the independence of judges and courts – had been fulfilling these duties and respecting the positions presented by national and international institutions. In particular, it had not opposed actions which did not comply with the legal implications resulting from the

interim order of the CJEU of 8 April 2020 (C-791/19; see paragraph 211 below). The actions of the NCJ in the case under consideration also showed that it had intentionally and directly sought to make it impossible for the Supreme Administrative Court to carry out a judicial review of the resolution to recommend (and not to recommend) candidates to the Civil Chamber of the Supreme Court. The NCJ transferred the appeal lodged by A.B. on 1 October only on 9 November 2019, while in the meantime it had transmitted the resolution to the President for him to appoint the recommended candidates.

52. Lastly, the Supreme Administrative Court agreed with the interpretation of the Supreme Court presented in the judgment of 5 December 2019 and the resolution of 23 January 2020 (see paragraphs 110-124 and 127-142 below), that the President's announcement of vacancies at the Supreme Court (see paragraph 26 above) necessitated, for it to be valid, a countersignature of the Prime Minister.

E. The CJEU judgment of 19 November 2019 (Joined Cases C-585/18, C-624/18, C-625/18)

53. In August and September 2018 the Labour and Social Security Chamber of the Supreme Court made three requests to the CJEU for a preliminary ruling. The opinion of Advocate General Tanchev in those cases, delivered on 27 June 2019, analysed the qualifications required by the NCJ with reference to the Court's case-law and concluded that the Disciplinary Chamber of the Polish Supreme Court did not satisfy the requirements of judicial independence (see paragraph 204 below).

54. The CJEU delivered a judgment on 19 November 2019 in which it considered that it was for the national court, i.e. the Supreme Court, to examine whether the Disciplinary Chamber of the Supreme Court was an impartial tribunal. The CJEU clarified the scope of the requirements of independence and impartiality in the context of the establishment of the Disciplinary Chamber so that the domestic court could itself issue a ruling (see paragraph 206 below).

F. The Supreme Court's rulings

1. Judgment of 5 December 2019

55. On 5 December 2019 the Chamber of Labour and Social Security of the Supreme Court issued the first judgment in cases that had been referred for a preliminary ruling to the CJEU (case no. III PO 7/18; see paragraph 110 below). The Supreme Court concluded that the NCJ was not an authority that was impartial or independent from legislative and executive branches of power. Moreover, it concluded that the Disciplinary Chamber of the Supreme

Court could not be considered a court within the meaning of domestic law and the Convention.

2. Resolution of 8 January 2020

56. On 8 January 2020, in response to the above judgment of the Chamber of Labour and Social Security, the Chamber of Extraordinary Review and Public Affairs of the Supreme Court issued a resolution in which it interpreted the consequences of the CJEU judgment narrowly (I NOZP 3/19, see paragraph 125 below). The Chamber found that a resolution of the NCJ recommending to the President candidates for the post of judge could be quashed upon an appeal by a candidate only in situations where the appellant proved that the lack of independence of the NCJ had adversely affected the content of the impugned resolution, or provided that the appellant demonstrated that the court had not been independent or impartial according to the criteria indicated in the CJEU judgment. In respect of the latter, the Chamber stressed that the Constitution had not allowed for a review of the effectiveness of the President's decision concerning the appointment of judges. When dealing with such appeals the Supreme Court was bound by the scope of the appeal and had to examine whether the NCJ had been an independent body according to the criteria determined in the CJEU judgment 19 November 2019 (in paragraphs 134-144 thereof).

3. Resolution of 23 January 2020

57. On 23 January 2020 three joined Chambers of the Supreme Court issued a joint resolution (see paragraph 127 below). The court agreed with the assessment in the judgment of 5 December 2019 that the NCJ had not been an independent and impartial body and that this had led to defects in the procedures for the appointment of judges carried out on the basis of the NCJ's recommendations. With respect to the Chamber of Extraordinary Review and Public Affairs, the Supreme Court noted in particular that it was composed solely of judges who were newly appointed through the procedure involving the NCJ as established under the 2017 Amending Act. Moreover, this Chamber was the only body competent to examine appeals against the resolutions of the NCJ concerning the recommending of judges to all courts in Poland (see paragraph 141 below). In consequence, according to the resolution, court formations including Supreme Court judges appointed in the procedure involving the NCJ were unduly composed within the meaning of the relevant provisions of the domestic law.

G. Constitutional Court

1. Case concerning CJEU interim order of 8 April 2020 (case no. P 7/20)

58. On 9 April 2020 the Disciplinary Chamber of the Supreme Court made a request to the Constitutional Court seeking a ruling on the constitutionality of the interim measures order issued by the CJEU on 8 April 2020 (suspending the operation of the Disciplinary Chamber in respect of disciplinary cases against judges; see also paragraph 211 below).

59. On 11 May 2021 the Polish Commissioner for Human Rights, who had meanwhile joined the proceedings, asked the Constitutional Court to exclude Judge J.P. from sitting in the case. The Commissioner relied on the Court's judgment in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (no. 4907/18, 7 May 2021), and argued that Judge J.P. had been elected in breach of an identical fundamental rule applicable to the election of the Constitutional Court, as had been the case of Judge M.M. (see paragraph 155 below). Accordingly, the Constitutional Court, sitting in a composition including Judge J.P., could not be considered a "tribunal established by law" within the meaning of Article 6 of the Convention.

60. On 15 June 2021 the Constitutional Court dismissed the Commissioner's request for the exclusion of Judge J.P. With respect to the Court's judgment in *Xero Flor w Polsce sp. z o.o.,* cited above, the Constitutional Court held:

> "2.2. In the opinion of the Constitutional Court, the judgment of the ECtHR of 7 May 2021, to the extent to which it refers to the Constitutional Court, is based on theses testifying to a lack of knowledge of the Polish legal order, including fundamental systemic assumptions determining the position, system and role of the Polish Constitutional Court. In this respect, it was issued without legal basis, exceeding the ECtHR's jurisdiction, and constitutes an unlawful interference in the domestic legal order, in particular in issues which are outside the ECtHR's jurisdiction; for these reasons it must be regarded as an inexistent judgment (*sententia non existens*)."

61. On 14 July 2021 the Constitutional Court gave judgment, sitting in a composition of five judges including Judge J.P. In its operative part the court held:

> "Article 4(3), second sentence, of the [TEU] in conjunction with Article 279 of the [TFEU] – in so far as the Court of Justice of the European Union *ultra vires* imposes obligations on the Republic of Poland as an EU Member State, by prescribing interim measures pertaining to the organisational structure and functioning of Polish courts and to the mode of proceedings before those courts – is inconsistent with Article 2, Article 7, Article 8(1) and Article 90(1) in conjunction with Article 4(1) of the Constitution of the Republic of Poland, and within this scope it is not covered by the principles of precedence and direct application set in Article 91(1)-(3) of the Constitution."

2. Case concerning constitutionality of European Union law (case no. K 3/21)

62. On 29 March 2021 the Prime Minister referred the following request to the Constitutional Court:

> "Application to examine the compatibility of:
>
> (1) the first and second paragraphs of Article 1, in conjunction with Article 4(3) of the Treaty on European Union of 7 February 1992, hereinafter 'TEU', understood as empowering or obliging a law-applying body to derogate from the application of the Constitution of the Republic of Poland or ordering it to apply legal provisions in a manner inconsistent with the Constitution of the Republic of Poland, with Article 2; Article 7; Article 8 § 1 in conjunction with Article 8 § 2, Article 90 § 1 and Article 91 § 2; and Article 178 § 1 of the Constitution of the Republic of Poland;
>
> (2) Article 19(1), second subparagraph, in conjunction with Article 4(3) TEU, interpreted as meaning that, for the purposes of ensuring effective legal protection, the body applying the law is authorised or obliged to apply legal provisions in a manner inconsistent with the Constitution, including the application of a provision which, by virtue of a decision of the Constitutional Court, has ceased to be binding as being inconsistent with the Constitution , with Article 2; Article 7; Article 8 § 1 in conjunction with Article 8 § 2 and Article 91 § 2; Article 90 § 1; Article 178 § 1; and Article 190 § 1 of the Constitution of the Republic of Poland;
>
> (3) Article 19(1), second subparagraph, in conjunction with Article 2 TEU, interpreted as empowering a court to review the independence of judges appointed by the President of the Republic of Poland and to review a resolution of the National Council of the Judiciary concerning an application to the President of the Republic of Poland for appointment of a judge, with Article 8 § 1 in conjunction with Article 8 § 2, Article 90 § 1 and Article 91 § 2; Article 144 § 3 (17); and Article 186 § 1 of the Constitution of the Republic of Poland."

63. On 17 May 2021 the Commissioner for Human Rights joined the proceedings. He considered that the first two issues should not be examined by the Constitutional Court at all, and as regards the third, that it should request the CJEU for a preliminary ruling. The Commissioner further referred to the context of the Prime Minister's request to the Constitutional Court, namely the CJEU's judgment of 2 March 2021 and the Supreme Administrative Court's judgment of 6 May 2021 (see paragraphs 165-168 and 207-209 below).

64. On 13 July 2021 the Constitutional Court held the first hearing. On 14 July 2021 the court decided to hear the case in its full composition.

65. On 25 August 2021 the Commissioner asked the Constitutional Court to exclude Judge M.M. from examining the case as well as Judges J.P. and J.W. against whom the same challenges as to the legality of their election to the Constitutional Court had been made. The Commissioner pointed to the fact that the judgment in the case of *Xero Flor w Polsce sp. z o.o.,* cited above, had become final and that its execution was an obligation incumbent on all State authorities, including the Constitutional Court.

66. On 7 October 2021 the Constitutional Court delivered its judgment. It held that various provisions of EU law were incompatible with the Polish Constitution. The operative part of the judgment stated as follows[1]:

> "1. Article 1, first and second paragraphs, in conjunction with Article 4(3) of the Treaty on European Union ... – in so far as the European Union, established by equal and sovereign States, creates 'an ever closer Union among the peoples of Europe', the integration of whom – brought about on the basis of EU law and through the interpretation of EU law by the Court of Justice of the European Union – enters 'a new stage' in which:
>
> (a) the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties;
>
> (b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application;
>
> (c) the Republic of Poland may not function as a sovereign and democratic State,
>
> – is inconsistent with Article 2, Article 8 and Article 90 § 1 of the Constitution of the Republic of Poland.
>
> 2. Article 19(1), second sub-paragraph, of the Treaty on European Union
>
> – in so far as, for the purpose of ensuring effective legal protection in the areas covered by EU law, it grants domestic courts (ordinary courts, administrative courts, military courts, and the Supreme Court) the competence to:
>
> (a) bypass the provisions of the Constitution in the course of adjudication,
>
> – is inconsistent with Article 2, Article 7, Article 8 § 1, Article 90 § 1 and Article 178 § 1 of the Constitution;
>
> (b) adjudicate on the basis of provisions which are not binding, having been repealed by the *Sejm* and/or found by the Constitutional Court to be inconsistent with the Constitution,
>
> – is inconsistent with Article 2, Article 7, Article 8 § 1, Article 90 § 1 and Article 178 § 1, and Article 190 § 1 of the Constitution.
>
> 3. Article 19(1), second subparagraph, and Article 2 of the Treaty on European Union – in so far as, for the purpose of ensuring effective legal protection in the areas covered by EU law and of ensuring the independence of judges – they grant domestic courts (ordinary courts, administrative courts, military courts, and the Supreme Court) the competence to:
>
> (a) review the legality of the procedure for appointing a judge, including the review of the legality of the act in which the President of the Republic appoints a judge,
>
> – are inconsistent with Article 2, Article 8 § 1, Article 90 § 1 and Article 179, in conjunction with Article 144 § 3 (17) of the Constitution;
>
> (b) review the legality of the National Council of the Judiciary's resolution to refer a motion to the President of the Republic for the appointment of a judge,

[1] The translation is based on the English version of the judgment published on the Constitutional Court's website, edited by the Court's Registry:
Trybunał Konstytucyjny: Ocena zgodności z Konstytucją RP wybranych przepisów Traktatu o Unii Europejskiej (trybunal.gov.pl)

– are inconsistent with Article 2, Article 8 § 1, Article 90 § 1 and Article 186 § 1 of the Constitution;

(c) determine the defectiveness of the process for appointing a judge and, as a result, to refuse to regard a person appointed to judicial office in accordance with Article 179 of the Constitution as a judge,

– are inconsistent with Article 2, Article 8 § 1, Article 90 § 1 and Article 179, in conjunction with Article 144 § 3 (17) of the Constitution."

3. Case concerning constitutionality of Article 6 of the Convention (case no. K 6/21)

67. On 27 July 2021 the Minister of Justice / Prosecutor General referred the following request to the Constitutional Court:

"Application to examine the compatibility of:

1. Article 6 § 1, first sentence, of the [Convention] to the extent in which the term 'tribunal' used in that provision includes the Constitutional Court of the Republic of Poland, with Article 2, Article 8 paragraph 1, Article 10 paragraph 2, Article 173 and Article 175 paragraph 1 of the Constitution of the Republic of Poland;

2. Article 6 paragraph 2., and Article 6 paragraph 1, first sentence, of the Convention referred to in paragraph 1, to the extent to which it identifies the guarantee arising therefrom to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his civil rights and obligations or of any criminal charge against him, with the competence of the Constitutional Court to adjudicate upon the hierarchical compliance with provisions and normative acts stipulated in the Constitution of the Republic of Poland, and thereby makes it possible to subject proceedings before the Constitutional Court to the requirements resulting from Article 6 of the Convention, with Article 2, Article 8 paragraph 1, Article 79 paragraph 1, Article 122 paragraph 3 and 4, Article 188 points 1-3 and 5 and Article 193 of the Constitution of the Republic of Poland;

3. Article 6, paragraph 1, first sentence, of the [Convention] to the extent that it encompasses the review by the European Court of Human Rights of the legality of the process of appointment of Constitutional Court judges in order to determine whether the Constitutional Court is an independent and impartial court established by law, with Article 2, Article 8, paragraph 1, Article 89, paragraph 1, point 3 and Article 194, paragraph 1 of the Constitution of the Republic of Poland."

68. On 17 August 2021 the Commissioner for Human Rights joined the proceedings and made a request to the Constitutional Court to discontinue the proceedings. He argued that the request of the Minister of Justice / Prosecutor General had clearly been prompted by the Court's judgment in the case of *Xero Flor w Polsce sp. z o.o.* (cited above).

69. On 24 November 2021 the Constitutional Court delivered its judgment. It held that Article 6 § 1 of the Convention was incompatible with various provisions of the Constitution. The operative part of the judgment stated as follows:

"1. The first sentence of Article 6 § 1 of [the Convention] ... , in so far as the term 'tribunal' used in that provision includes the Constitutional Court, is incompatible with

Article 173 in conjunction with Article 10 § 2, Article 175 § 1 and Article 8 § 1 of the Constitution of the Republic of Poland.

2. The first sentence of Article 6 § 1 of the Convention referred to in paragraph 1, in so far as it confers on the European Court of Human Rights competence to assess the legality of the election of judges to the Constitutional Court, is incompatible with Article 194 § 1 in conjunction with Article 8 § 1 of the Constitution."

70. On the same day the Secretary General of the Council of Europe, Marija Pejčinović Burić, made the following statement in response to the Constitutional Courts judgment:

"All 47 Council of Europe member states, including Poland, have undertaken to secure the rights and freedoms set out in the European Convention on Human Rights, as interpreted by the European Court of Human Rights. Member states are also obliged to implement the European Court's judgments.

Today's judgment from the Polish Constitutional [Court] is unprecedented and raises serious concerns. We will carefully assess the judgment's reasoning and its effects."

On 7 December 2021 the Secretary General of the Council of Europe, acting in accordance with Article 52 of the Convention, made a request to the Polish Minister of Foreign Affairs, Mr Zbigniew Rau, to furnish explanations in connection with the Constitutional Court's judgment of 24 November 2021.

Article 52 of the Convention provides as follows:

"On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention."

The Secretary General's cover letter, in so far as relevant, read as follows:

"I should like to refer to Article 52 of the European Convention on Human Rights, which states that "on receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention."

I hereby avail myself of the competencies conferred on me by that provision and have the honour to request that your Government furnish the explanations called for the in the appendix.

I would be grateful to receive these explanations no later than 7 March 2022."

The request, which was appended to the above letter, read as follows:

"Request for an explanation in accordance with Article 52 of the European Convention on Human Rights

The Secretary General of the Council of Europe,

Referring to Poland's engagements under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention") and its additional Protocols;

Referring further to Article 6, paragraph 1 of the Convention, as interpreted by the long-standing case-law of the European Court of the Human Rights, according to

which, in the determination of his civil rights and obligations or of any criminal charge against him, the High Contracting Parties shall secure to everyone within their jurisdiction a fair hearing by an independent and impartial tribunal established by law;

Recalling that under Article 32 of the Convention, the European Court of Human Rights has exclusive competence to authoritatively interpret the Convention;

Considering recent developments in the domestic law, notably the judgment of the Constitutional Court of 24 November 2021 in the case K 6/21;

Acting in accordance with Article 52 of the Convention;

Invites the Republic of Poland

to furnish explanations concerning the manner in which the internal law ensures the effective implementation of Articles 6 and 32 of the Convention following the judgment of the Constitutional Court of 24 November 2021 in the case K 6/21."

4. Pending case (legal question referred by the Civil Chamber of the Supreme Court)

71. On 4 November 2021 a bench of three judges of the Civil Chamber of the Supreme Court composed of Judges J.G., T.S. and K.Z. decided to put a legal question to the Constitutional Court. The request, in its relevant part, reads as follows (points 2-15 omitted):

"1. Is the second subparagraph of Article 19(1) of the Treaty on European Union, interpreted as meaning that the court with jurisdiction to hear an appeal against a resolution of the National Council of the Judiciary concerning a motion for submission of a candidate for appointment to the office of judge of the Supreme Court to the President of the Republic of Poland may, in order to ensure effective legal protection in areas falling within the scope of European Union law, annul that resolution after appointment by the President of the Republic of Poland of the person designated in that resolution to hold office as judge, on the basis of provisions which, prior to the delivery of the judgment, had ceased to be binding pursuant to a judgment of the Constitutional Court and, consequently, render that appointment ineffective, is compatible with: Article 2, Article 7, Article 8 § 1, Article 45 § 1, Article 173, Article 175 § 1, Article 178 § 1, Article 179 and Article 190 § 1 of the Constitution of the Republic of Poland."

5. Pending case concerning constitutionality of Article 6 of the Convention (case no. K 7/21)

72. On 9 November 2021 the Minister of Justice/Prosecutor General referred a new request to the Constitutional Court concerning the issue of the "carrying out, by national or international courts pursuant to Article 6 § 1 of the Convention, of a review of the compatibility with the Constitution and the Convention of laws concerning the organisation of the judiciary, the jurisdiction of courts and the law on the National Council of the Judiciary". The request stated as follows:

"Application for examination of the compatibility of the first sentence of Article 6 § 1 of the [Convention], in so far as:

(a) it allows the European Court of Human Rights to create, under national law, a judicially protected subjective right of a judge to hold an administrative function within the organisational structure of the ordinary courts of the Republic of Poland [and whether it is thus compatible] with Articles 8 § 1, 89 §§ 1, 2 and 176 § 2 of the Constitution of the Republic of Poland;

(b) the notion 'tribunal established by law', contained in this provision, does not take into account the universally binding provisions of the Constitution of the Republic of Poland and laws or the final and universally binding judgments of the Polish Constitutional Court which constitute the basis for establishing a court, contrary to Article 89 § 1 point 2, Article 176 § 2, Article 179 in conjunction with Article 187 § 1 in conjunction with Article 187 § 4 and Article 190 § 1 of the Constitution of the Republic of Poland;

(c) allows for a binding assessment by national or international courts of the compatibility with the Constitution of the Republic of Poland and the said Convention of laws concerning the organisation of the judiciary, the jurisdiction of courts and the Act on the National Council of the Judiciary, in order to establish whether the condition of a 'court established by law' under Article 188 § 1 of the Constitution of the Republic of Poland is fulfilled."

H. Other recent developments

1. The Supreme Court

(a) First President's orders

73. On 5 August 2021 the First President of the Supreme Court issued two orders: the first one made in connection with the judgment of the CJEU of 15 July 2021 *(C-791/19) (no. 90/2021)* and the second on laying down rules on the procedure for keeping court files, registration, assignment of cases to judges and appointment of the members of the bench in certain cases (no. 91/2021). The term of validity of both orders was set at no later than 15 November 2021.

The first order stipulated that new disciplinary cases concerning judges, after being registered, would be kept in the registry of the First President of the Supreme Court, and not transmitted to the Disciplinary Chamber. As regards the cases that had already been introduced, the President of the Supreme Court who directs the work of the Disciplinary Chamber, was invited to "consider asking the judges (or court formations) to whom those cases had been assigned to consider, in the exercise of their independence, refraining from dealing with them".

For the cases that had not yet been assigned it would be for the President of the Supreme Court who directs the work of the Disciplinary Chamber to decide whether to keep them at his registry without assigning them[2].

[2] Pursuant to section 20 of the 2017 Act on Supreme Court the powers of the First President of the Supreme Court are limited with regard to the Disciplinary Chamber. They are either exercised by the President of the Disciplinary Chamber (i.e. the President of the Supreme

The second order provided for a similar solution but with respect to a different type of cases, i.e. those concerning permission to prosecute or detain on remand judges and assessors (*asesor sądowy* – junior judges), as well as those concerning labour and social security disputes and retirement of Supreme Court judges. The last provision of the order stipulated:

> "The provisions of the order shall apply until the Court of Justice of the European Union delivers its final judgment in Case C-204/21 or until the introduction into the Polish legal order of amendments rendering ineffective the order of the Vice-President of the Court of Justice of 14 July 2021 (C-204/21R), but no longer than until 15 November 2021."

(b) Criminal Chamber's rulings

(i) Case no. I KZ 29/21

74. On 16 September 2021 the Supreme Court, sitting in the composition of three judges of the Criminal Chamber, gave a decision (*postanowienie*; case no. I KZ 29/21) in which it quashed the previous decision of the Supreme Court and remitted the case to the same court. The case concerned a request for re-opening of criminal proceedings, lodged by a convicted person, which had been rejected by the Supreme Court sitting as a single judge on 16 June 2021.

In the ruling of 16 September 2021 the Supreme Court held that the court dealing with the case had been unduly composed within the meaning of Article 439 § 1 of the Code of Criminal Procedure (see paragraph 96 below) because the judge had been appointed by the President of Poland upon a recommendation of the NCJ as established under the 2017 Amending Act. In reaching this conclusion, the Supreme Court applied the Supreme Court's resolution of 23 January 2020 and relied on the Court's judgment in the case of *Reczkowicz v. Poland* (no. 43447/19, 22 July 2021).

The court also analysed the Constitutional Court's judgment of 20 April 2020 (case no. U 2/20) holding that the Supreme Court's resolution of 23 January 2020 had been incompatible with the Constitution. In view of the fact that the panel of the Constitutional Court had included two judges, including Judge M.M., who were elected in the procedure found to have been in breach of Article 6 § 1 of the Convention in the Court's judgment in *Xero Flor w Polsce sp. z o.o.* (cited above), the Supreme Court concluded that the judgment of 20 April 2020 had no legal effects within the meaning of Article 190 of the Constitution and was not binding on the Supreme Court. The Supreme Court concluded:

> "Consequently, the necessity of meeting the Convention standard of fair trial in terms of access to an independent and impartial tribunal established by law requires, in application of Article 91 section 2 of the Polish Constitution, a refusal to apply the

Court who directs the work of that Chamber) or by the First President of the Supreme Court in agreement with the President of the Disciplinary Chamber.

provisions of Article 29 § 2 and 3 of the Act on the Supreme Court and, as a further consequence, quashing the decision appealed against, so that in further proceedings the convicted person is entitled to guarantees under Article 6(1) ECHR. It should be borne in mind that the said provisions of Article 29 § 2 and 3 of the Supreme Court Act are now also covered by the protective order of the CJEU of 14 July 2021 in Case C-204/21 R (point d of the order). That order is effective and must be respected by the Supreme Court, and the judgment of the Constitutional Court in case P 7/20 of 15 July 2021 is affected by the same defect as the judgment in case U 2/20 ..., and therefore for this reason alone – as discussed above – it does not have the effect envisaged in Article 190(1) of the Constitution of the Republic of Poland."

(ii) Case no. V KZ 47/21

75. On 29 September 2021 the Supreme Court, sitting in the composition of three judges of the Criminal Chamber gave a decision (case no. V KZ 47/21) in which it quashed the previous decision of the Supreme Court of 8 September 2021. The case concerned imposition of detention on remand on an accused.

The Supreme Court established that there had been two grounds for quashing the impugned decision; the first linked to legal requirements for imposition of detention on remand, the second pertaining to the incorrect composition of the Supreme Court, in breach of Article 439 § 1 of the Code of Criminal Procedure (see paragraph 96 below), because the judges previously sitting in the case had been appointed upon a recommendation of the NCJ, as established under the 2017 Amending Act. The second ground of appeal had been of an absolute character and had to be examined by the court of its own motion, even if it had not been raised by a party. The court reiterated that the interpretation given by the Supreme Court in its resolution of 23 January 2020 was binding. The Constitutional Court's judgment of 20 April 2020 (case no. U 2/20) (see paragraph 159 below), holding that the Supreme Court's resolution of 23 January 2020 had been incompatible with the Constitution, could not "influence the obligation to apply" that resolution. In this context, the Supreme Court referred to the Supreme Court's decision of 16 September 2021 (see paragraph 74 above) and relied on the Court's judgment in *Reczkowicz* (cited above). It noted, among other things, that the Constitutional Court had given the judgment of 20 April 2020 sitting in the formation which had included judges appointed contrary to the law. In consequence, that judgment could not be regarded as binding within the meaning of Article 190(1) of the Constitution.

(c) Disciplinary Chamber

76. On 23 September 2021 the Supreme Court sitting in a formation of three judges of the Disciplinary Chamber (J.W., M.B., J.D.) agreed to waive the immunity of the judge of the Supreme Court M.P. (*uchwała o zezwoleniu na pociągnięcie do opowiedzialaności karnej*). The court allowed the judge to be prosecuted for a non-intentional offence pertaining to a manner in which he had dealt with a case in 2019 concerning detention on remand of a defendant. The Supreme Court did not order the suspension of Judge M.P. stating:

> "The offence imputed to Judge M. P. by the [prosecutor] can hardly be regarded as dishonourable or as causing any particular damage to the image of the judiciary, as in the opinion of the Supreme Court it has the character of a 'clerical fault' (*delikt biurowy*) understood as an act resulting not merely from an error or negligence on the part of the perpetrator but also from [behaviour] that is difficult to avoid after years of work: routine, automatic and even standard practice in the clerical work in a court."

2. Supreme Administrative Court

77. On 4 November 2021 the Supreme Administrative Court (case no. III FSK 3626/21) dismissed a cassation appeal lodged by the Head of the Chamber of Fiscal Administration in Warsaw (*Dyrektor Izby Administracji Skarbowej*) in tax proceedings. The court, of its own motion, examined the absolute grounds of appeal (see paragraphs 96 and 97 below); in particular, whether the bench of the Regional Administrative Court (*Naczelny Sąd Administracyjny*), that had dealt with the case at the instance below, had been appointed in accordance with the law. It analysed the case-law of the Court and the CJEU and concluded as follows (references and emphasis omitted):

> "In conclusion, the Supreme Administrative Court held that a judge of an administrative court or a junior judge (*asesor sądowy*) of a regional administrative court, appointed to hold office by the President of Poland, was a judge of the Republic of Poland and a European judge within the meaning of Articles 2 and 19 § 1 of the Treaty on European Union and Article 6 § 1-3 TEU in conjunction with Article 47 of the Charter of Fundamental Rights, and Article 6 § 1 of the Convention, also where the procedure preceding his appointment may have been flawed.
>
> In other words, in terms of EU and Convention standards of the right to a court, it may be concluded that if the adjudicating panel of a regional administrative court includes a judge or junior judge who meets the constitutional standards of independence and impartiality, even if appointed by the President upon a resolution of the National Council of the Judiciary in the composition formed by the [2017 Amending Act], such a court must be considered a European court within the meaning of [the EU law provisions cited above] and Article 6 § 1 of the Convention."

3. Ordinary courts

78. On 24 August 2021 the Częstochowa Regional Court, sitting in a single-judge formation, delivered a judgment (case no. VII Ka 651/21) in a

criminal case, quashing the judgment of the lower court on the ground that that court had been unduly composed within the meaning of Article 439 § 1 of the Code of Criminal Procedure (see paragraph 96 below) because the trial judge had been appointed by the President of Poland upon a recommendation of the NCJ as established under the 2017 Amending Act.

II. THE CIRCUMSTANCES OF THE CASE

79. The applicant company was a distributor for Poland of a dietary supplement, C, intended for men wishing to enhance their sexual performance. The sale of C generated the totality of the company's income, which in 2010 amounted to 20,000,000 Polish zlotys (PLN), approximately 4,800,000 euros (EUR) at the material time.

80. Between 2 and 10 September 2010 the National Pharmaceutical Institute (*Narodowy Instytut Leków*) carried out a control of the product. It concluded that it had been given the appearance of a medicinal product (*produkt leczniczy*) while not actually being one, and that it contained a molecule, S, which had not been listed in the notice as it was an active drug not authorised in dietary supplements.

81. On 10 September 2010 the Main Pharmaceutical Inspector (*Główny Inspektor Farmaceutyczny,* "the Inspector") withdrew C from the market (*wycofanie z obrotu*). This decision was accompanied by an immediate enforceability clause and the applicant company was forced to remove all items from the market. Afterwards the applicant company destroyed all series of C and suspended its activities.

82. In total, the National Pharmaceutical Institute carried out fourteen controls of C. In eight samples it found the presence of molecule S or its derivate (all being active drugs subject to medical prescription). In five other samples other unauthorised molecules were found. One sample contained no undeclared molecules.

83. The applicant company appealed against the Inspector's decision. In the course of the appellate proceedings, on 23 February 2011, the Regional Administrative Court quashed the Main Pharmaceutical Inspector's decision of 10 September 2010 and ordered that it not be enforceable (*uchylona decyzja nie podlega wykonaniu*). The Inspector's cassation appeal was dismissed on 30 August 2012 by the Supreme Administrative Court. The administrative courts considered that the Inspector should have had established whether C had been a dietary supplement or a medicinal product. Moreover, the administrative authorities, when detecting the presence of an active molecule, should have had the pharmacological properties of the product examined, and assessed the actual risks it had posed. The finding of whether C had been a medicinal product or a dietary supplement was of crucial importance as it would determine the competence of the Inspector to deal with the case; the Inspector was competent to deal with medicinal

products and not with purely dietary supplements. Since the Inspector had failed to assess the matter, the impugned decision was in breach of the law and had to be quashed.

84. On 6 November 2013 the Inspector discontinued the proceedings finding that they had lacked any purpose, as all items of C had been destroyed.

85. Between 10 September 2010 and January 2014 the Inspector published on its Internet site the information that the supplement C had been withdrawn from the market.

86. On 20 January 2014 the applicant company lodged a civil claim for payment against the State Treasury under Article 417 1 § 2 of the Civil Code (the value of the claim was set at PLN 32,000,000). The applicant company sought compensation for the actions of the Inspector who had withdrawn the dietary supplement C from the market, leading to the destruction of its stock. Since the Inspector's decision had been quashed by the courts as illegal, the company's action in tort against the State Treasury had a legal basis. Moreover, in spite of the administrative courts quashing the Inspector's decisions, the latter had kept supplement C on its list of unauthorised products. The applicant company was therefore prevented from reintroducing it into the pharmaceutical market.

87. On 8 February 2016 the Warsaw Regional Court dismissed the action. In particular, the court established that the applicant company had not been ordered to destroy all of the stock of C by the decision of 10 September 2010. It had carried out the destruction on its own initiative. Following the destruction of all series of the supplement C, the Inspector had been correct to discontinue the proceedings on 6 November 2013. The court reiterated the conditions for establishing the liability of the State Treasury in tort and concluded that there had been no causal link between an administrative decision contrary to the law and the damage alleged by the applicant company.

88. In particular, the decision of 10 September 2010 had withdrawn the existing series of the supplement C from the market, but it had been open for the applicant company to reintroduce it again afterwards. Moreover, the claimant had failed to prove that it had been impossible to reintroduce the product on the market because the Inspector had left the information about its withdrawal from the market on its Internet site. Furthermore, the court relied on an opinion from the National Pharmaceutical Institute showing that the supplement C had, in fact, been a medicinal product and therefore the Inspector had been competent to withdraw it from the market. Consequently, the decision of the Inspector would have been the same had it proceeded in accordance with the law.

89. Finally, the court considered that the applicant company could not claim damages also because it had acted contrary to the principles of co-existence with others as provided by Article 5 of the Civil Code (*zasady współżycia społecznego*). It underlined that the applicant company had

included in its dietary supplement an active molecule which had serious side effects and contraindications, and should only be dispensed upon prescription by a doctor. The notice of the dietary supplement C did not contain information about the active molecule S in its composition, thus increasing a risk of overdose. The experts clearly established that there had been a direct risk to human health and life from taking the molecule S without medical supervision. The Inspector had therefore acted with the objective of the protection of human health and life.

90. The applicant company appealed.

91. On 30 October 2017 the Warsaw Court of Appeal dismissed the appeal. The court agreed with the assessment and reasoning of the court of first instance.

92. On 5 February 2018 the applicant company lodged a cassation appeal with the Supreme Court.

93. On 25 March 2019 the Supreme Court, sitting in private as a bench of three judges of the Civil Chamber, dismissed the cassation appeal. The bench was composed of Judges T.S., J.M-K, and K.Z. (see paragraph 34 above). The Supreme Court reiterated that the pre-condition for a compensation claim, namely a final administrative decision given in breach of the law, had existed in the case. However, the causal link between that illegal decision and the damage claimed needed to be examined by the civil court. In the present case the existence of a causal link had not been proven.

94. A copy of the judgment was delivered to the applicant company on 10 June 2019.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic Law

1. Constitution of the Republic of Poland

95. The relevant provisions of the Constitution read as follows:

Article 2

"The Republic of Poland shall be a democratic State governed by the rule of law and implementing the principles of social justice."

Article 7

"The organs of public authority shall function on the basis of, and within the limits of, the law."

Article 8 § 1

"The Constitution shall be the supreme law of the Republic of Poland."

Article 10

"1. The system of government of the Republic of Poland shall be based on the separation of, and balance between, the legislative, executive and judicial powers.

2. Legislative power shall be vested in the *Sejm* and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and judicial power shall be vested in courts and tribunals."

Article 32

"1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever."

Article 45 § 1

"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 60

"Polish citizens enjoying full public rights shall have a right of access to public service based on the principle of equality."

Article 79 § 1

"In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations under the Constitution."

Article 91

"1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall take precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws enacted by it shall be applied directly and take precedence in the event of a conflict of laws."

Article 144

"1. The President of the Republic, exercising his constitutional and statutory authority, shall issue Official Acts.

2. Official Acts of the President shall require, for their validity, the signature of the Prime Minister who, by such signature, accepts accountability therefor to the *Sejm*.

3. The provisions of paragraph 2 above shall not relate to:

...

(17) appointing judges;..."

Article 173

"The courts and tribunals shall constitute a separate power and shall be independent of other branches of power."

Article 175 § 1

"The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts."

Article 178

"1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

2. Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties.

3. A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges."

Article 179

"Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary."

Article 180

"1. Judges shall not be removable.

2. Recall of a judge from office, suspension from office, or transfer to another bench or position against his or her will, may only occur by virtue of a court judgment and only in those instances prescribed by statute.

3. A judge may be put on retirement as a result of illness or infirmity which prevents him discharging the duties of his office. The procedure for doing so, as well as for appealing against such decision, shall be specified by statute.

4. A statute shall establish an age limit beyond which a judge shall take retirement. ..."

Article 183 § 1

"The Supreme Court shall exercise supervision over ordinary and military courts in respect of their judgments."

Article 186 § 1

"The National Council of the Judiciary shall safeguard the independence of courts and judges."

Article 187

"1. The National Council of the Judiciary shall be composed as follows:

(1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic;

(2) fifteen judges chosen from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts;

(3) four members chosen by the *Sejm* from among its Deputies and two members chosen by the Senate from among its Senators.

2. The National Council of the Judiciary shall choose, from among its members, a chairperson and two deputy chairpersons.

3. The term of office of those chosen as members of the National Council of the Judiciary shall be four years.

4. The organisational structure, the scope of activity and working procedures of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute."

Article 190

"1. Judgments of the Constitutional Court shall be of universally binding application and shall be final.

2. Judgments of the Constitutional Court regarding matters specified in Article 188 shall be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, *Monitor Polski*.

3. A judgment of the Constitutional Court shall take effect from the day of its publication, however, the Constitutional Court may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Court shall specify a date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.

4. A judgment of the Constitutional Court on the non-conformity with the Constitution, an international agreement or a statute, of a normative act on which a legally binding judgment of a court, a final administrative decision or a settlement of other matters was based, shall be a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.

5. Judgments of the Constitutional Court shall be made by a majority of votes."

Article 194

"1. The Constitutional Court shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.

2. The President and Vice-President of the Constitutional Court shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Court."

Article 195

"1. Judges of the Constitutional Court, in the exercise of their office, shall be independent and subject only to the Constitution.

2. Judges of the Constitutional Court shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of the office and the scope of their duties.

3. Judges of the Constitutional Court, during their term of office, shall not belong to a political party, a trade union or perform public activities incompatible with the principles of the independence of the courts and judges."

2. Relevant provisions of the Code of Criminal Procedure and Code of Civil Procedure

96. Article 439 § 1 of the Code of Criminal Procedure (*Kodeks postępowania karnego*) deals with absolute grounds of appeal (*bezwzględne przyczyny odwoławcze*):

"Regardless of the scope of the appeal and the arguments raised, or the impact of any defects on the content of the ruling, the appellate court shall, at a sitting, revoke the decision appealed against if:

...

(2) the court was unduly composed or any of its members was not present at the entire hearing."

97. Article 379 of the Code of Civil Procedure (*Kodeks postępowania cywilnego*) deals with invalidity of proceedings (*nieważność postępowania*):

"Proceedings shall be *null and void*:

...

(4) if the composition of the adjudicating court was inconsistent with the provisions of the law, or if a judge excluded [from sitting in the case] by virtue of the law took part in the examination of the case;

..."

3. The 2011 Act on the NCJ as in force prior to 17 January 2018

98. The relevant provisions of the 2011 Act on the NCJ as in force until 17 January 2018 (see paragraph 7 above) read:

Section 11

"1. The general assembly of judges of the Supreme Court elects two members of the Council from among the judges of that court.

2. The general assembly of judges of the Supreme Administrative Court, together with the representatives of general assemblies of provincial administrative courts, elects two members of the Council from among the judges of the administrative courts.

3. The meeting of representatives of general assemblies of judges of courts of appeal elects two members of the Council from among judges of the courts of appeal.

4. The meeting of representatives of general assemblies of regional court judges elects eight members of the Council from among their number.

5. The assembly of judges of military courts elects one member of the Council from among its body."

Section 12

"1. General assemblies of judges of Regional Administrative Courts elect two representatives from among their members.

2. Representatives of the general meetings of judges of regional administrative courts are elected at the latest one month before the expiry of the term of office of the Council members, elected from among the judges of the administrative courts. The representatives are elected for a period of four years."

Section 13

"1. General assemblies of judges of courts of appeal elect representatives of general assemblies of judges of courts of appeal from among judges of the courts of appeal in the proportion of one fifth of the number of those judges.

2. The general assemblies of regional judges elect representatives of the general assemblies of regional judges from among their members in the proportion of one fiftieth of the number of regional judges.

3. The election of representatives of the general assemblies shall be carried out at the latest one month before the expiry of the term of office of the members of the Council, elected from among the judges of ordinary courts. The representatives are elected for a period of four years.

4. The Minister of Justice, in agreement with the Chairman of the Council, convenes the meeting of the representatives in order to elect the members of the Council. The Chairman of the Council convenes the meeting of representatives once every two years, and also at the request of one third of the number of representatives or at the request of the Council.

5. The meetings of the representatives evaluate the activity of the members of the Council elected by them, make proposals to the Council concerning its activity and adopt resolutions concerning the problems arising in the activity of the ordinary courts.

6. The meeting of representatives is chaired by the oldest judge in terms of age. The meetings deliberate according to the rules of procedure adopted by them."

4. The 2017 Amending Act and subsequent amendments to the 2011 Act on the NCJ

99. The relevant provisions of the 2011 Act on the NCJ, as amended by the 2017 Amending Act (see paragraph 11 above – *ustawa z dnia 8 grudnia*

2017 o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw) read as follows:

Section 3(1)

"The competences of the Council include:

(1) examining and assessing candidates for holding office as judge of the Supreme Court and as judge in ordinary courts, administrative courts and military courts, and as junior judge in administrative courts;

(2) presenting to the President of the Republic of Poland motions for the appointment of judges of the Supreme Court, ordinary courts, administrative courts and military courts ..."

Section 9a

"1. The *Sejm* shall elect, from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts, fifteen members of the Council for a joint four-year term of office.

2. When making the selection referred to in subsection 1, the *Sejm*, to the extent possible, shall take into account the need for representation of judges of particular types and levels of court in the Council.

3. The joint term of office of new members of the Council elected from among the judges shall begin on the day following that on which they are elected. Members of the Council from the previous term shall perform their duties until the first day of the joint term of office of new members of the Council."

Section 11a

"1. The Speaker of the *Sejm*, not earlier than one hundred and twenty days and not later than ninety days before the expiry of the term of office of the members of the Council elected from among the judges, shall announce in the Official Gazette of the Republic of Poland, *Monitor Polski*, the commencement of the procedure for submitting candidatures for election to the Council.

2. The entities entitled to nominate a candidate for the Council shall be groups of at least:

(1) two thousand citizens of the Republic of Poland who are over eighteen years of age, have full capacity to perform legal acts and enjoy full public rights;

(2) twenty-five judges, excluding retired judges.

3. One application may concern only one candidate for election to the Council. The entities referred to in subsection 2 may submit more than one application.

4. Candidates for election to the Council shall be notified to the Speaker of the *Sejm* within thirty days from the date of the announcement referred to in subsection 1.

5. A candidate's application shall include information about the candidate, the duties and social activities performed to date and other significant events occurring during the candidate's term of office as judge. The application shall be accompanied by the judge's consent to be a candidate.

6. Within three days of receiving a candidate's application, the Speaker of the *Sejm* shall send a written request to the president of the court having jurisdiction in respect of the nominated candidate, and if the application concerns the president of:

(1) a district court, a regional court or a military court - to the president of the higher court;

(2) a court of appeal, district administrative court or military district court – to the vice-president or deputy president of that court – with a request to compile and forward, within seven days of receiving the request, information on the candidate's judicial achievements, including socially significant or precedent-setting judgments, and relevant information on the candidate's judicial culture, primarily disclosed during inspections and lustrations.

7. If the information referred to in subsection 6 is not prepared within the time-limit referred to in that subsection, the Speaker of the *Sejm* shall send a written request to the candidate for election to the Council to have the information prepared by the candidate within seven days of receiving the request of the Speaker of the *Sejm*. The candidate for election to the Council shall forward a copy of the information he or she prepares to the president of the court having jurisdiction in respect of the nominated candidate, the president of the higher court or the vice-president or deputy president of the court of appeal, the regional administrative court or the military regional court, respectively.

8. If the information referred to in subsection 6 is not prepared by the candidate for election to the Council within the time-limit referred to in subsection 7, the Speaker of the *Sejm* shall refuse to accept the application. The decision on that matter, together with the justification, shall immediately be delivered to the proxy and to the candidate for election to the Council.

9. The information referred to in subsection 6 shall be attached by the Speaker of the *Sejm* to the candidate's application."

Section 11d

"1. The Speaker of the *Sejm* shall request the parliamentary groups to indicate, within seven days, their candidates for election to the Council.

2. The parliamentary group shall indicate, from among the judges whose candidatures have been put forward under section 11a, no more than nine candidates for election to the Council.

3. If the total number of candidates indicated by the parliamentary groups is less than fifteen, the Presidium of the *Sejm* shall indicate, from among the candidates nominated under the section 11a procedure, the number of candidates that are lacking up to fifteen.

4. The competent committee of the *Sejm* shall establish the list of candidates by selecting, from among the candidates indicated pursuant to the provisions of subsections 2 and 3, fifteen candidates for election to the Council, with the proviso that the list shall include at least one candidate indicated by each parliamentary group which has been active within sixty days from the date of the first sitting of the *Sejm* during the term of office in which the election is to take place, provided that such candidate has been indicated by the group within the framework of the indication referred to in subsection 2.

5. The *Sejm* shall elect the members of the Council, for a joint four-year term of office, at its next sitting, by a three-fifths majority in the presence of at least one half of the statutory number of Deputies, voting on the list of candidates referred to in subsection 4.

6. In the event of failure to elect members of the Council in accordance with the procedure set forth in subsection 5 the *Sejm* shall elect the members of the Council by an absolute majority of votes cast in the presence of at least a half of the statutory number of members, voting on the list of candidates referred to in subsection 4.

7. If, as a result of the procedure referred to in subsections 1-6, fifteen members of the Council are not elected, the provisions of sections 11a-11d shall apply accordingly."

Section 43

"1. An NCJ resolution shall become final if no appeal lies against it.

2. Unless all the participants in the procedure have challenged the resolution referred to in section 37(1), that resolution shall become final for the part comprising the decision not to present the recommendation for appointment to the office of judge of the participants who did not lodge an appeal, subject to the provisions of section 44(1b)."

100. Section 44 underwent several amendments. Section 44(1a) of the 2011 Act on the NCJ was inserted by an amendment of 8 December 2017 which entered into force on 17 January 2018. Section 44(1b) and (4) were inserted by the amendment of 20 July 2018, which entered into force on 27 July 2018.

Section 44 of the 2011 Act on the NCJ, in the version in force between 27 July 2018 and 22 May 2019, read as follows:

"1. A participant in the procedure may appeal to the Supreme Court on the grounds that the [NCJ] resolution is unlawful, unless separate provisions provide otherwise. ...

1a. In individual cases concerning appointments to the office of judge of the Supreme Court, an appeal may be lodged with the Supreme Administrative Court. In those cases it is not possible to appeal to the [Supreme Court]. An appeal to the [Supreme Administrative Court] may not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when making a decision on the presentation of the recommendation for appointment to the [Supreme Court].

1b. Unless all the participants in the procedure have challenged the resolution [indicated above]... in individual cases concerning appointment to the office of judge of the [Supreme Court], that resolution shall become final in the part containing the decision to present the recommendation for appointment to the [Supreme Court] and in the part comprising the decision not to present the recommendation for appointment to the office of judge of the same court for participants in the procedure who did not lodge an appeal ...

4. In individual cases concerning appointment to the office of judge of the Supreme Court, the annulment by the [Supreme Administrative Court] of the [NCJ] resolution not to present the recommendation for appointment to the office of judge of the [Supreme Court] is equivalent to accepting the candidature of the participant who lodged an appeal in the procedure for the vacant position of judge at the [Supreme Court], for a position for which, on the date of delivery of the [Supreme Administrative Court] judgment, the procedure before the [NCJ] has not ended or, in the absence of such a procedure, for the next vacant position of judge in the [Supreme Court] which is the subject of the announcement."

101. On 25 March 2019 the Constitutional Court declared section 44(1a) unconstitutional and repealed it with effect from 1 April 2019 (case K 12/18; see paragraph 157 below).

Subsequently, section 44 was amended by an Act of 26 April 2019, which entered into force on 23 May 2019 (the Act amending the Act on the NCJ and the Act on the System of Administrative Courts; *ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz ustawy - Prawo o ustroju sądów administracyjnych*), which entered into force on 23 May 2019. Section 44(1b) was repealed and section 44(1) was amended and now states as follows:

> "A participant in the procedure may appeal to the Supreme Court on the grounds that the [NCJ] resolution was unlawful, unless separate provisions provide otherwise. There shall be no right of appeal in individual cases regarding the appointment of Supreme Court judges."

Following the amendment, the Chamber of Extraordinary Review and Public Affairs continues to have exclusive jurisdiction to deal with such appeals.

Furthermore, section 3 of the Act of 26 April 2019 referred to above provides that "the proceedings in cases concerning appeals against NCJ resolutions in individual cases regarding the appointment of Supreme Court judges, which have been initiated but not concluded before this Act comes into force, shall be discontinued by operation of law".

5. The 2017 Act on the Supreme Court

102. The 2017 Act on the Supreme Court entered into force on 3 April 2018 *(ustawa z dnia 8 grudnia 2017 o Sądzie Najwyższym)*.

103. Under Section 29 the judges shall be appointed to the Supreme Court by the President of the Republic acting on a recommendation from the NCJ. Section 30 sets out the conditions which a person must satisfy in order to qualify for the post of judge of the Supreme Court.

104. Section 3 provides for the creation of two new chambers within the Supreme Court: the Disciplinary Chamber (*Izba Dyscyplinarna*) and the Chamber of Extraordinary Review and Public Affairs (*Izba Kontroli Nadzwyczajnej i Spraw Publicznych*).

Other relevant provisions provided as follows.

Section 4

> "The President of the Republic of Poland, after obtaining the opinion of the Supreme Court Board, shall determine by ordinance the rules of procedure of the Supreme Court, in which he shall fix the number of posts of judge of the Supreme Court at not less than 120, including their number in the respective chambers, the internal organisation of the Supreme Court, the rules of internal procedure and the detailed scope and manner of performance of activities by assessors (junior judges), taking into account the need to ensure the efficient functioning of the Supreme Court, its chambers and organs, the

specificity of the proceedings conducted before the Supreme Court, including disciplinary proceedings, and the number and type of cases heard."

Section 26 (1)

"The jurisdiction of the Chamber of Extraordinary Review and Public Affairs shall include examination of extraordinary appeals, examination of election challenges and challenges against the validity of the national referendum and the constitutional referendum, and ascertaining the validity of elections and the referendum, other public law cases, including cases in the field of competition protection, energy regulation, telecommunications and railway transport, and cases in which an appeal has been filed against the decision of the Chairman of the National Broadcasting Council, as well as complaints concerning an excessive length of proceedings before ordinary and military courts and the Supreme Court."

Section 29

"Appointment to judicial office at the Supreme Court shall be carried out by the President of Poland pursuant to a recommendation of the National Council of the Judiciary."

Section 89

"1. An extraordinary appeal (*skarga nadzwyczajna*) may be filed against a final decision of an ordinary court or a military court discontinuing proceedings in a case if it is necessary to uphold the rule of law and social justice and:

(1) the ruling violates the principles or freedoms and rights of a human being and a citizen laid down in the Constitution,

(2) the ruling grossly violates the law through its misinterpretation or misapplication, or

(3) there is an obvious contradiction between significant findings of the court and the content of evidence collected in the case – and the ruling may not be reversed or amended under other extraordinary appeals.

2. An extraordinary appeal may be lodged by the Prosecutor General, the [Polish Commissioner for Human Rights] and, within the scope of his competence, the President of the Office of Prosecutor General of the Republic of Poland, the Children's Rights Ombudsman, the Patient's Rights Ombudsman, the Chairman of the Financial Supervision Authority, the Financial Ombudsman and the President of the Office for Competition and Consumer Protection.

3. An extraordinary appeal shall be lodged within five years from the date on which the decision appealed against has become final, and if a cassation appeal has been lodged – within one year from the date of its examination. It shall be inadmissible to allow an extraordinary appeal to the detriment of the defendant lodged after one year from the date on which the ruling has become final, and if a cassation appeal or appeal in cassation has been lodged – after six months from the date of its examination.

4. If five years have passed since the decision appealed against became final and the decision has had irreversible legal consequences, or the principles of human rights and liberties set forth in the Constitution speak in favour of it, the Supreme Court may confine itself to stating that the decision appealed against was issued in violation of the law and indicating the circumstances due to which it has issued such a decision."

Section 97

"1. If the Supreme Court detects an obvious violation of the law when examining a case, regardless of its other prerogatives, it shall give a finding of error to the relevant court. Before issuing a finding of error, it must inform the judge or the judges of the adjudicating panel of the possibility of submitting written explanations within seven days. The detection of an error and the issuance of a finding of error shall not affect the outcome of the case. ...

3. Whenever a finding of error is issued, the Supreme Court may file a request for a disciplinary case to be examined by a disciplinary court. The disciplinary court of first instance shall be the Supreme Court."

6. The 2019 Amending Act

105. On 20 December 2019 the *Sejm* passed the Act Amending the Act on the Organisation of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts (*ustawa o zmianie ustawy - Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym, oraz niektórych innych ustaw*, "the 2019 Amending Act"). The 2019 Amending Act, which entered into force on 14 February 2020, introduced new disciplinary offences and sanctions for judges, including for questioning the lawfulness of judicial appointments made with the participation of the new NCJ. The law has been dubbed the "Muzzle Act" ("*ustawa kagańcowa*").

106. Under section 10 of the 2019 Amending Act – a transitional provision – the Act also applies to cases which were subject to examination by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, initiated and not concluded by a final decision, before the date of entry into force of this Act.

107. The 2019 Amending Act introduced a number of amendments to the 2017 Act on the Supreme Court, among others the following:

Section 26 [3]

"2. It shall be within the jurisdiction of the Chamber of Extraordinary Review and Public Affairs to hear motions or declarations for the exclusion of a judge or for the designation of the court before which the proceedings are to be held, involving a plea of lack of independence of the court or lack of independence of the judge. The court examining the case shall immediately forward the motion to the President of the Chamber of Extraordinary Review and Public Affairs for further proceedings under rules laid down in separate provisions. The forwarding of the motion to the President of the Chamber of Extraordinary Review and Public Affairs shall not stay the course of the pending proceedings.

3. The motion referred to in subsection 2 shall be left without consideration if it concerns the determination and assessment of the legality of the appointment of a judge or his authority to perform judicial duties.

4. The jurisdiction of the Chamber of Extraordinary Review and Public Affairs shall include consideration of complaints about the determination of the unlawfulness of a

[3] Paragraphs 2-6 added by the 2019 Amending Act

final decision of the Supreme Court, ordinary courts, military courts and administrative courts, including the Supreme Administrative Court, if the unlawfulness consists in challenging the status of the person appointed to the office of judge who issued the decision in the case.

5. The proceedings in cases referred to in subsection 4 shall be governed by the relevant provisions on establishing the unlawfulness of final judgments, and in criminal cases by the provisions on the resumption of judicial proceedings concluded with a final judgment. It is not necessary to establish probability or damage caused by the issuance of the decision which is the subject of the complaint.

6. The complaint about the unlawfulness of a final decision, referred to in subsection 4 may be lodged with the Supreme Court's Chamber of Extraordinary Review and Public Affairs, bypassing the court which issued the decision appealed against, and also in the event that the party does not make use of the legal remedies to which it is entitled, including an extraordinary appeal to the Supreme Court."

Section 27 (1)

"The following cases shall fall within the jurisdiction of the Disciplinary Chamber:

1a) cases concerning the authorisation to open criminal proceedings against judges, assessors (junior judges), prosecutors and assistant prosecutors, or to remand them in custody."

Section 29

"1. A judge of the Supreme Court is a person appointed to that office by the President of the Republic of Poland who took the oath before the President of the Republic of Poland.

2. In the course of the activities of the Supreme Court or its bodies, it is not permitted to question the legitimacy of courts and tribunals, constitutional State bodies or bodies constituted for the scrutiny and protection of the law.

3. The Supreme Court or another body of power may not ascertain or assess the legality of the appointment of a judge or the power to exercise judicial functions derived from it."

Section 72

"1. A judge of the Supreme Court shall be disciplinarily liable for official (disciplinary) misconduct, including:

(1) an obvious and gross violation of the law;

(2) acts or omissions which may prevent or significantly obstruct the functioning of the judicial body;

(3) actions that question the existence of the official relationship of a judge, the effectiveness of his or her appointment or the constitutional authority of the Republic of Poland;

(4) public activity incompatible with the principles of independence of courts and independence of judges;

(5) violation of the dignity of office."

Section 82

"...

(2) The Supreme Court, when examining a case in which there is a legal issue concerning the independence of a judge or the independence of a court, shall postpone its examination of the case and present the issue to the full Chamber of Extraordinary Review and Public Affairs of the Supreme Court for determination.

(3) If the Supreme Court, when dealing with the motion referred to in section 26(2), has serious doubts as to the interpretation of the provisions of law which are to form the basis of its decision, it may postpone the examination of the motion and present the legal issue for decision to the full Chamber of Extraordinary Review and Public Affairs of the Supreme Court.

(4) In adopting the resolution referred to in paragraphs 2 or 3, the Chamber of Extraordinary Review and Public Affairs shall not be bound by a resolution of another composition of the Supreme Court, even if it has the force of a principle of law.

(5) A resolution of the full Chamber of Extraordinary Review and Public Affairs of the Supreme Court adopted pursuant to paragraphs 2 or 3 shall be binding on all the formations of the Supreme Court. Any waiver of a resolution having the force of a principle of law shall require a new decision by resolution of the plenary Supreme Court, for the adoption of which the presence of at least two-thirds of the judges of each chamber is required. The provision of Article 88 shall not apply."

108. The 2019 Amending Act introduced amendments to the Act on the Ordinary Courts. The following provisions were amended, among others:

Section 42a

"(1) In the course of the activities of courts or judicial bodies, it shall not be permissible to question the legitimacy of courts and tribunals, constitutional State bodies and bodies constituted for the scrutiny and protection of the law.

(2) It shall not be permissible for an ordinary court or other authority to determine or assess the lawfulness of the appointment of a judge or the authority arising from such appointment to perform judicial tasks."

Section 107

"1. A judge shall be disciplinarily liable for official (disciplinary) offences, including:

(1) an obvious and gross violation of the law;

(2) acts or omissions which may prevent or significantly obstruct the functioning of the judicial authority;

(3) actions that question the existence of the official relationship of a judge, the effectiveness of his or her appointment or the constitutional authority of the Republic of Poland;

(4) public activity incompatible with the principles of independence of courts and independence of judges;

(5) violation of the dignity of office."

109. The following amendment was introduced into the 22 July 2002 Act on Organisation of Administrative Courts (*prawo o ustroju sądów administracyjnych*), among others:

Section 5

"1a. In the course of the activities of the administrative court or its organs, it shall not be permissible to question the legitimacy of courts and tribunals, State constitutional bodies and bodies constituted for the scrutiny and protection of the law.

1b. It shall be inadmissible for an administrative court or other authority to determine or assess the lawfulness of the appointment of a judge or the authority arising from that appointment to perform judicial functions."

B. Domestic Practice

1. The Supreme Court's case-law

(a) Judgment of 5 December 2019 (case no. III PO 7/18)

110. On 5 December 2019 the Supreme Court, sitting in the Labour and Social Security Chamber, gave judgment in the first of three cases that had been referred for a preliminary ruling to the Court of Justice of the European Union ("CJEU"), the subject of a judgment of 19 November 2019 (case C-585/18; see paragraph 55 above and paragraphs 204-206 below). The case concerned an appeal lodged by A.K, a judge of the Supreme Administrative Court, which concerned a resolution given by the NCJ on 27 July 2018 not recommending him to continue serving as a judge beyond the currently applicable retirement age of sixty-five.

111. As regards its jurisdiction to examine the compatibility of domestic laws with European Union ("EU") law, and its role as a court applying EU binding legislation, the Supreme Court noted as follows[4]:

"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 Court but, as a condition of Union accession, with any Polish court examining a case falling within an area covered by Union law."

112. As regards the Constitutional Court's judgment of 20 June 2017 (see paragraph 152 below), the Supreme Court held:

[4] The translation is based on the English version of the judgment published on the Supreme Court's website, edited by the Court's Registry: http://www.sn.pl/aktualnosci/SiteAssets/Lists/Komunikaty_o_sprawach/AllItems/III-PO-0007_18_English.pdf

"33 ... In that judgment, the [Constitutional Court] called into question its earlier position taken in the judgment of 18 July 2007, K 25/07 ..., to the effect that NCJ members must be judges elected by other judges. This implies that, in the absence of any amendment to the Constitution, the Constitutional Court not so much changed its position as regards appointment to 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 Court 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 ... One should also consider information in the public domain, including statements of those members of the Constitutional Court, concerning various dependencies and informal relations with politicians, which implies that the Constitutional Court cannot be considered to safeguard independence in the exercise of its constitutional powers (Article 195 of the Constitution of the Republic of Poland)."

113. As regards the standards set out in the preliminary ruling of the CJEU, the Supreme Court held, in so far as relevant, as follows:

"35. The CJEU judgment of 19 November 2019 sets a standard which includes a comprehensive assessment of safeguards of the right to a fair hearing 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, as relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter of Fundamental Rights (judgment in C-585/18, §§ 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, § 146) ...

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 evidential 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."

114. The Supreme Court further underlined its role as an EU court implementing the CJEU judgment:

"39. ...[T]he 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 Court by the Constitution of the Republic of Poland and the Act on the Constitutional Court."

115. With respect to the circumstances surrounding the setting-up of the new NCJ and the role of the Constitutional Court's judgment of 20 June 2017 in that context, the Supreme Court noted:

"40. [As regards the circumstances under which the Council was established], 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 [2017 Amending Act]. As intended by the legislature, the new provisions were to ensure conformity with the Constitution of the Republic of Poland in connection with the Constitutional Court judgment of 20 June 2017 (K 5/17...), pursuant to which section 11(2-4) and section 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 Court '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 that court: 16 December 2015, K 34/15 ...; 9 March 2016, K 47/15 ...; 11 August 2016, K 39/16 ..."

116. With respect to the change in the manner of election of the fifteen judicial members of NCJ the Supreme Court held:

"43. The mechanism for electing NCJ members was considerably modified pursuant to [the 2017 Amending Act]. Pursuant to section 1(1), the *Sejm* shall elect fifteen Council members for a joint four-year term of office from among judges of the Supreme Court, ordinary 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 court to be represented on the Council. Notably, the provisions of the Constitution of the Republic of Poland have not been amended in respect of NCJ membership or NCJ member appointment. This means that a statute could only lawfully amend the manner of election of Council members (judges) by judges rather than introducing a procedure whereby NCJ judicial members are 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, thus reflecting the Council's status and mandate, and those 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 on 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. Since the *Sejm* and the Senate are responsible for 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 adhered to, in support of the process of rationalising the parliamentary governance system."

117. As regards the submission of candidatures, candidate endorsement lists, the election to the NCJ and the non-disclosure of the endorsement lists, the Supreme Court held:

"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 endorsement lists that were apparently offered to candidates by judges. To date, it has not been verified whether new Council members were lawfully nominated as candidates, or who endorsed them. Relevant documents have not been disclosed yet, despite the relevant judgment of the Supreme Administrative Court of 28 June 2019, OSK 4282/18 ... It is common knowledge that the enforcement of the judgment has faced an obstacle in a decision issued by the Chair of the Personal Data Protection Authority on 29 July 2019 on the initiative of a new NCJ member. Consequently, it has come to pass that a body of the judiciary responsible for a review of administrative authorities has in effect itself fallen under the review of the latter. The failure to implement the Supreme Administrative Court's judgment justifies an assumption that the content of the lists of endorsement for individual judicial candidates for 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 judges 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 the 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 among the general public as to the Council's independence from 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 ...

48. Such circumstances preclude the notion of representativeness stipulated in Article 187 § 2 of the Constitution of the Republic of Poland...."

118. The Supreme Court further pointed out that some members of the NCJ had become beneficiaries of the Government's reorganisation of the judiciary:

"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 ... The general public may also learn of various dependencies between elected judges – new Council members and the executive branch ..."

119. As regards the manner in which the NCJ exercised its constitutional duty of safeguarding the independence of the judiciary, the Supreme Court made the following findings:

"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 render its independence from 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).

The Supreme Court further emphasises that Council members have publicly demanded that disciplinary action be taken against judges filing preliminary rulings ...; have challenged the right to file preliminary rulings ... and have challenged the necessity of 'apologising to justices for corruption comments."

120. The Supreme Court reached the following conclusion as regards the NCJ:

"60. On the basis of an overall assessment of the above circumstances, the Supreme Court concludes that, as of this day, the National Council of the Judiciary does not provide sufficient guarantees of independence from the legislative and executive authorities in the judicial appointment procedure."

121. This conclusion was the starting point for its assessment of whether the Disciplinary Chamber could be considered an "independent and impartial tribunal established by law":

"61. The foregoing is the point of departure for assessing whether the Disciplinary Chamber of the Supreme Court (hereinafter 'IDSN') is an impartial and independent tribunal within the meaning of Article 47 of the Charter and Article 6 of the Convention, and ... although this is not expressly assessed in the present case, whether it can be [considered] a court pursuant to domestic law. As in the case of the NCJ, only the cumulative fulfilment of the conditions indicated by the Court of Justice of the EU may lead to certain negative consequences in the assessment of the status of the IDSN as a court.

...

64. Firstly, the 'IDSN' was created from scratch. For the purposes of the present case, it must be emphasised that, in accordance with the applicable section 79 of [the 2017 Act on the Supreme Court] it became competent in labour and social security legal matters concerning judges of the Supreme Court and matters concerning the retirement of judges of the Supreme Court. In this area, previously, the ordinary courts and the Labour, Social Security, and Public Affairs Chamber (now the Labour and Social Security Chamber) were competent. It should be noted that [the 2017 Act on the Supreme Court] introduced a change which deprived judges of the Supreme Court of the right to two-instance court proceedings. At present, an appeal may be lodged only with another panel of the Disciplinary Chamber ..."

122. The Supreme Court noted who had been appointed as judges to this Chamber:

"66... it should be noted that only persons with very strong connections to the legislative or executive power have been elected to the IDSN, and this, in turn, may raise objective doubts for individuals with regard to the obligation to secure the right to an independent and impartial tribunal....It should be recalled that persons appointed to the Chamber are those who were previously subordinate to the executive power or who, in the course of the crisis concerning the rule of law covered by the procedure under Article 7 [TEU], acted on instructions from or in a manner consistent with the expectations of the political authorities. Selecting only such candidates as judges of the Supreme Court does not guarantee their independence and thus does not allow for the constitution of an independent court. Among the elected members of the Disciplinary Chamber are: the director of a department in the State Prosecutor's Office; a deputy regional prosecutor in the Regional Prosecutor's Office (appointment in 2016); the director of the legislative office of the National Institute of Remembrance (IPN); the prosecutor of the State Prosecutor's Office, who accused judges of corruption but ultimately the proceedings in this case were discontinued; the former governor and adviser to the Speaker of the *Sejm*; a person known in the legal community exclusively for his activity in the mass media and social media, who in recent times has repeatedly expressed his unequivocal political sympathies; a prosecutor whose procedural actions were found to have violated Article 3 of the Convention (prohibition of torture) as a result of a settlement before the Court (application no. 32420/07)."

123. The Supreme Court also examined the appointment process and considered that there had been no effective appeal procedure against the resolutions of the NCJ recommending the judges. It held as follows:

"67. Fourthly, the conditions of the competition procedure were changed in the course of that procedure. [The amendments to the domestic law] removed the obligation on the person seeking a recommendation by the NCJ to submit the required documents (professional experience, academic achievements, opinions of superiors, recommendations, publications, opinion of the collegium of the competent court and

> the assessment of the competent assembly of judges). Such documents may be crucial when there are more candidates for a judicial post than places. This was the case for candidates to the Disciplinary Chamber, where over 90 candidates applied for sixteen seats. ... the amendment further introduced the principle that if resolutions in individual cases concerning appointment to the Supreme Court are not challenged by all participants to the proceedings, it becomes final in the part concerning the decision to present a motion for appointment to the office of judge of the Supreme Court. This type of solution eliminates the possibility of an effective appeal of a candidate against a resolution of the NCJ to the relevant court ...
>
> ...
>
> 72. ...Currently, the legislator has abandoned the aforementioned standards of non-binding substantive scrutiny of candidates for the position of a judge of the Supreme Court by the community of judges of the Supreme Court. If one combines this procedure (elimination of the Supreme Court from participation in the procedure for filling the posts of its judges) with the 'new' solutions serving to select members of the National Council of the Judiciary, it becomes clear that assessment of the independence and impartiality of the composition of the new chamber of the Supreme Court thus selected, measured – as the CJEU indicates – by the 'conviction of an individual', is problematic."

124. The Supreme Court reached the following conclusion regarding the Disciplinary Chamber:

> "79. In sum, each of the circumstances presented, when assessed alone, is not conclusive of a failure to comply with the standard of Article 47 of the [Charter of Fundamental Rights of the European Union] (Article 6 of the Convention in conjunction with Article 45 § 1 of the Polish Constitution). However, when all these circumstances are put together – the creation of a new organisational unit in the Supreme Court from scratch, staffing of this unit exclusively with new persons with strong connections to the legislative and executive powers and who, prior to their appointment, were beneficiaries of the changes to the administration of justice, and were selected by the NCJ, which does not act in a manner independent of the legislature and the executive, and its broad autonomy and competences taken away from other courts and other chambers of the Supreme Court – it follows clearly and unequivocally that the Disciplinary Chamber of the Supreme Court is not a tribunal within the meaning of Article 47 of the Charter, Article 6 of the Convention and Article 45 § 1 of the Polish Constitution"

In view of the above conclusions, the Supreme Court decided not to transfer the case to the Disciplinary Chamber of the Supreme Court and quashed the resolution of the NCJ given in the case:

> "88. In conclusion, the Supreme Court holds that the National Council of the Judiciary in its current composition is not an impartial body and is not independent of the legislative and executive powers and therefore the resolution adopted by it should be quashed. Accordingly, the Supreme Court has decided as set out in the operative part of the ruling."

(b) Resolution of 8 January 2020 (case no. I NOZP 3/19)

125. On 8 January 2020 the Chamber of Extraordinary Review and Public Affairs of the Supreme Court issued a resolution in a composition of seven

judges (*uchwała;* see paragraph 56 above). The Chamber held in the operative part of the resolution as follows:

> "I. The Supreme Court, in reviewing an appeal against a resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland, examines – upon the grounds for the appeal and within its scope – whether the National Council of the Judiciary is an independent body according to the criteria as determined in the judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others versus the Supreme Court*, paragraphs 139-144.
>
> II. The Supreme Court sets aside, within the scope of the appeal, a resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland, provided that an appellant proves that the lack of independence on the part of the National Council of the Judiciary did affect the content of such a resolution or provided that – having regard to the constitutional prohibition of reviewing the effectiveness of the act of appointment to the office of judge by the President of the Republic of Poland, as well as the constitutional relationship resulting therefrom – the appellant will demonstrate the circumstance indicated in paragraph 125, or jointly the circumstances listed in paragraphs 147-151 of the judgment referred to in point I of the resolution, indicating that the court on whose bench such a judge will sit will not be independent and impartial."

The Supreme Court underlined that in Poland the judges were appointed by the President who, "when appointing a judge, ensures the necessary democratic legitimacy for such judge and the legitimacy of the entire judiciary". Furthermore, it stated:

> "32. The examination of the binding force or the effectiveness of a constitutional act to appoint a judge issued by the President of the Republic of Poland and the resulting constitutional relationship that binds the judge to the Republic of Poland through the President of Poland – separate from a labour-law relationship – is not allowed in any proceedings before the court or other State body...
>
> 33. Invalidity of proceedings can be caused by circumstances following an act of appointment of a judge, or circumstances that are external to the constitutional relationship that binds a judge to the Republic of Poland, through the President of the Republic of Poland. Hence, infringements by a judge can take on such a dimension that proceedings will be affected by an error of invalidity. In extreme cases, they could also constitute separate grounds for a judge's disciplinary responsibility.
>
> 36. To allow for an examination of the binding force or effectiveness of the constitutional relationship that binds a judge to the Republic of Poland, represented by the President as the highest representative and guarantor of the continuity of State authority (Article 126(1) of the Constitution of the Republic of Poland) would have violated the principle of the tripartite system of separation of powers and would have led to circumventing absolutely binding regulations, which precisely specified the judicial review procedure, in respect of the appointment process, before the Supreme Court. It could also lead to challenging the validity of Supreme Court judgments delivered in proceedings concerning appeals against [NCJ] resolutions. No third party has a legal interest or legitimacy to initiate such proceedings."

(c) Rulings of 15 January 2020 (case nos. III PO 8/18 and III PO 9/18)

126. On 15 January 2019 the Supreme Court gave two rulings in two remaining cases that had been referred for a preliminary ruling to the CJEU (cases C-624/18, C-625/18). The court decided not to transfer the cases to the Disciplinary Chamber of the Supreme Court and remitted them for consideration to the District Court. The Supreme Court ruled that the Disciplinary Chamber was not an independent and impartial tribunal, given the conditions of its creation, the scope of its powers, its composition and the involvement of the NCJ in its constitution.

(d) Resolution of 23 January 2020 (case no. BSA I-4110-1/20)

127. In the wake of the Supreme Court's judgment of 5 December 2019, and the resolution of 8 January 2020 by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court (see paragraphs 110-125 above), the First President of the Supreme Court decided that it was necessary to issue an interpretative resolution in a formation of the joined Chambers of that court "to resolve divergences in the interpretation of the law existing in the case-law of the Supreme Court concerning the legal question" arising in connection with the interpretation of the CJEU judgment of 19 November 2019. On 23 January 2020 the joined Chambers of the Supreme Court (fifty-nine judges of the Civil, Criminal and Labour and Social Security Chambers) issued an interpretative resolution on a request from the First President of the Supreme Court. It concluded that, as a result of the 2017 Amending Act, the NCJ was no longer independent and that a judicial formation including a person appointed as a judge on the recommendation of the NCJ was contrary to the law. These conclusions, in so far as relevant, read as follows[5]:

> "1. A court formation is unduly composed within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure, or a court formation is inconsistent with the provisions of law within the meaning of Article 379 § 4 of the Code of Civil Procedure, also where the court includes a person appointed to the office of judge of the Supreme Court on the recommendation of the National Council of the Judiciary in accordance with the [2017 Amending Act].
>
> 2. A court formation is unduly composed within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure, or a court formation is inconsistent with the provisions of law within the meaning of Article 379 § 4 of the Code of Civil Procedure, also where the court includes a person appointed to the office of judge of an ordinary or military court on the recommendation of the National Council of the Judiciary formed in accordance with the [2017 Amending Act], if the deficiency of the appointment process leads, in specific circumstances, to a violation of the guarantees of independence and impartiality within the meaning of Article 45 § 1 of the Constitution

[5] The translation is based on the English version of the judgment published on the Supreme Court website, edited by the Registry of the Court:
http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf

of the Republic of Poland, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 § 1 of the [Convention].

3. The interpretation of Article 439 § 1 (2) of the Code of Criminal Procedure and Article 379 § 4 of the Code of Civil Procedure provided in points 1 and 2 above shall not apply to judgments given by courts before the date hereof and judgments to be given in proceedings pending at the date [of the present resolution] under the Code of Criminal Procedure before a given court formation.

4. Point 1 [above] shall apply to judgments issued with the participation of judges appointed to the Disciplinary Chamber of the Supreme Court under [the 2017 Act on the Supreme Court] irrespective of the date of such judgments."

128. The Supreme Court's resolution contained an extensive reasoning, the relevant parts of which are rendered below.

129. The Supreme Court first defined the scope of the resolution. It held, in so far as relevant:

"11... in the present resolution, the Supreme Court must address the question whether participation in a formation of an ordinary court, a military court or the Supreme Court, ..., of a person appointed as a judge by the President of the Republic of Poland following the procedure defined in the [2017 Amending Act] causes a breach of the standards of independence and impartiality of the court which would be inadmissible under Article 6 § 1 of the Convention, Article 45 § 1 of the Constitution of the Republic of Poland, and Article 47 of the Charter and, if that is the case, it must define the procedural effect on the administration of justice under such circumstances ...

To determine under Article 6 § 1 [of the Convention] and Article 47 of the Charter that a case is heard by a court which is impartial and independent, established by law, it is necessary to examine the process of judicial appointment in the national judicial system in order to establish whether judges can adjudicate independently and impartially ..."

130. The Supreme Court reiterated the fundamental rules for appointment of judges in Poland:

"31. In the light of Article 179 of the Constitution of the Republic of Poland, the President of the Republic of Poland appoints to the office of judge not just anyone, at his sole discretion as to the candidate's qualifications and ability to hold office, but exercises that power on a motion of the [NCJ]. Therefore, a motion of the [NCJ] is a condition *sine qua non* for effective appointment. Moreover, a motion concerning a judicial appointment cannot be lodged by anyone except a body acting as the [NCJ], not only in name but based on the procedure of its appointment and the conditions under which it exercises its powers (decision of the Constitutional Court of 23 June 2008, 1 Kpt 1/08)."

131. As regards a breach of Article 187 § 1 (2) of the Constitution, resulting from the change to the appointment process in respect of fifteen judicial members of the NCJ, the Supreme Court held:

"31. ... New members of the [NCJ] were appointed by the *Sejm* of the Republic of Poland in accordance with [the 2017 Amending Act] which stood in conflict with Article 187 § 1 (2) of the Constitution of the Republic of Poland. That provision removed the requirement for judges sitting as members of the [NCJ] to be appointed by judges, ... The Constitution does not allow for that power to be implicitly granted to

Parliament. After [the 2017 Amending Act], fifteen members of the [NCJ] who were judges were appointed by the *Sejm* of the Republic of Poland for a joint four-year term of office (section 9a(1) of [the 2011 Act on the NCJ as amended by the 2017 Amending Act]). None of them is a judge of the Supreme Court, as is required under Article 187 § 1 (2) of the Constitution of the Republic of Poland.

In view of the procedure of appointment of judges to the [NCJ] under [the 2017 Amending Act], the judiciary no longer has control over the membership of the [NCJ] or, indirectly (in connection with amendments of other systemic provisions), over which candidates are proposed to the President for appointment to the office of judge of an ordinary court, a military court, the Supreme Court, or an administrative court. The [NCJ] is dominated by political appointees of the majority in the *Sejm*. Following the appointment of 15 judges to sit as members of the [NCJ] by the *Sejm*, as many as 21 out of the 25 members of the [NCJ] are political appointees of both Houses of Parliament. Following the appointment of judges to the [NCJ], judges sitting as members of the [NCJ] no longer represent judges of the Supreme Court, judges of ordinary courts, administrative courts, or military courts, as required under Article 187 § 1 (2) of the Constitution of the Republic of Poland. Judges sitting as members of the [NCJ] by political appointment have no legitimacy as representatives of the judicial community, who should have authority and remain independent of political influence. That has largely weakened the role of the [NCJ] as a guardian of the independence of courts and judges."

132. As regards a breach of Articles 10 § 1, 173 and 178 and 187 §§ 1 and 3 of the Constitution, the Supreme Court held:

"31. ...The provisions of the [2017 Amending Act] governing the appointment of judges to the [NCJ] are inconsistent with the principle of division and balance of powers (Article 10 § 1 of the Constitution of the Republic of Poland) and the principle of separation and independence of courts (Article 173 of the Constitution of the Republic of Poland) and independence of judges (Article 178 of the Constitution of the Republic of Poland). The principle of separation of the judiciary is of crucial relevance in this context. According to that principle, based on the division and balance of powers, the legislature and the executive may interfere with the functioning of the judiciary only to the extent allowed by the Constitution of the Republic of Poland, that is, where expressly provided for in the Constitution. With respect to the National Council for the Judiciary, the principle of separation implies that the legislature and the executive may influence the membership and functioning of the National Council for the Judiciary only to the extent expressly provided for by the Constitution of the Republic of Poland (Article 187 § 1 (1) *in fine*, Article 187 § 1 (3)-(4)). Consequently, in determining the system, responsibilities and rules of procedure of the [NCJ] (Article 187 § 4 of the Constitution of the Republic of Poland), the legislature cannot exercise the power to appoint judges to sit as members of the [NCJ], which is not provided for in the Constitution of the Republic of Poland because its power to appoint members of the [NCJ] are defined in the Constitution (Article 187 § 1 (3) of the Constitution of the Republic of Poland).

The termination of the mandate of previous members of the [NCJ] and the appointment of new members of the [NCJ] in accordance with the Act of 8 December [2017] amending the Act on the [NCJ] raises serious doubts as to compliance with Article 187 §§ 1 and 3 of the Constitution of the Republic of Poland and, consequently, doubts as to the legality of the [NCJ] and the appointment of candidates to the post of judge with the participation of the [NCJ]."

133. The Supreme Court further analysed the procedure of election of judicial members of the NCJ and held, in so far as relevant, as follows:

> "Shaped by [the 2017 Amending Act], the procedure for the election of judges to that body resulted in the judicial authority losing any influence over its composition, and thus indirectly – also in connection with the amendments to other systemic laws – also on the candidates presented to the President for appointment to the position of ordinary court judge, military court judge, Supreme Court judge and administrative court judges. The National Council of the Judiciary has been dominated by politically elected members of the parliamentary majority. After the selection by the *Sejm* of fifteen judges as members of the National Council of the Judiciary, as many as twenty-one of the twenty-five persons comprising the Council come from the political nomination of both chambers of Parliament. As a result of the election of judges to the National Council of the Judiciary, the judges sitting on that body ceased to be a group representing judges of the Supreme Court, ordinary courts, administrative courts and military courts, as provided by Article 187 § 1 (2) of the Constitution. The judges sitting on it as a result of political nomination were not therefore given a mandate to represent the judiciary, a task which should be entrusted to persons enjoying authority and independence from political influence. This has resulted in a fundamental weakening of the role of the National Council of the Judiciary as a guardian of the independence of courts and judges."

134. In respect of the endorsement lists for candidates for the NCJ, the Supreme Court observed:

> "32. The [2017 Amending Act] changed the procedure for the appointment of judges sitting as members of the [NCJ] as follows. Authorisation to nominate a candidate to serve as member of the Council shall be granted to a group of at least: (1) two thousand citizens of the Republic of Poland who are over 18 years of age, have full legal capacity and enjoy full public rights; (2) twenty-five judges other than retired judges ...
>
> Endorsement lists presented by judges running as candidates for the [NCJ] had to be signed not just by anyone, but by judges.... A request for information concerning persons who signed the lists of endorsement of judges running as candidates to the [NCJ], according to regulations governing access to public information, confirmed as legitimate by a legally binding judgment of the National Administrative Court of 28 June 2019, I OSK 4282/18, dismissing a cassation appeal of the Head of the Chancellery of the *Sejm* of the Republic of Poland concerning the judgment annulling the decision on the extent of refusal to disclose such information, has been disregarded by the Head of the Chancellery of the *Sejm* of the Republic of Poland and the Speaker of the *Sejm*, who have refused to comply with the legally valid judgment. That state of affairs has prevailed to date ...
>
> According to a published statement of [Judge M.N.], appointed as a member of the [NCJ], he signed his own endorsement list. According to a published statement of four judges, [Judge M.N.] used withdrawn endorsements to run as a candidate for the [NCJ]. The endorsements were withdrawn long before the list was verified and used in a vote; the Speaker of the *Sejm* was given advance notice of the circumstance (on 25 January 2018). ... If candidates for the [NCJ] signed each other's endorsement lists, that is indicative of the scale of endorsement for the members of the [NCJ] in the judicial community ..."

135. As regards a breach of Article 144 § 2 of the Constitution in that the President's act announcing vacant positions in the Supreme Court was issued without a countersignature of the Prime Minister, the Supreme Court held:

> "34. Section 31(1) of [the 2017 Act on the Supreme Court] deprived the First President of the Supreme Court of the power to announce vacant positions of judges of the Supreme Court and vested that power in the President of the Republic of Poland. The new legal power is not enumerated in Article 144 § 3 of the Constitution of the Republic of Poland as one of the 30 prerogatives; therefore, it is evident that the publication in *Monitor Polski* [Official Gazette] of an announcement concerning the number of vacant judicial positions in chambers of the Supreme Court requires a countersignature of the Prime Minister. Under Article 144 § 2 of the Constitution of the Republic of Poland, official acts of the President other than the prerogatives shall require, for their validity, the countersignature of the Prime Minister. The power to announce vacant judicial positions in the Supreme Court vested in the President of the Republic of Poland under the 2017 Act on the Supreme Court cannot be considered a prerogative derived from the prerogative of appointing judges (Article 144 § 3 (17) of the Constitution of the Republic of Poland) ... Such a defective announcement by the President of the Republic of Poland could not initiate a non-defective procedure of appointment for judicial positions at the Supreme Court ..."

136. As regards the fact that the President of Poland proceeded with the appointments to the Supreme Court notwithstanding pending appeals against the NCJ's resolutions recommending candidates, the Supreme Court found as follows:

> "35. The requirement of holding a competition procedure before the [NCJ] for the selection of a candidate for the office of a judge to be presented to the President of the Republic of Poland not only creates conditions of fair competition for candidates for public office but, in particular, ensures that the office goes to the person best positioned to hold it.
>
> The [Act of 20 July 2018 amending the Act on Organisation of Ordinary Courts] eliminated the requirement for the [NCJ] to consider, when drawing up a list of candidates recommended for appointment to the office of a judge, opinions on candidates issued by panels of the relevant courts and appraisals issued by relevant general assemblies of judges. That was a reaction to the behaviour of judicial self-government bodies which refused to exercise their powers in defective proceedings before the [NCJ]. Instead of eliminating the broadly criticised defects of the system it had devised, the legislature decided to eliminate from the system the last options of participation in the procedure of judicial appointments previously left for judicial self-government bodies.
>
> [Section 44 of the 2011 Act on the NCJ as in force after of 27 July 2018], without formally eliminating the option for participants in the competition procedure for the office of judge of the Supreme Court to lodge an appeal on grounds of an unlawful resolution of the [NCJ], provides that, unless a resolution in an individual case concerning appointment to the office of judge of the Supreme Court is appealed against by all participants in the procedure, it becomes legally valid ... All resolutions of the [NCJ] naming candidates for the office of a judge of the Supreme Court were appealed. The [NCJ] ignored the appeals and presented selected candidates for judicial positions to the President of the Republic of Poland ... As the resolutions were appealed against, the vacant judicial positions were filled defectively and the fitness of candidates for office was in fact never duly checked ...

Despite the pending judicial review of the resolutions of the [NCJ] concerning all candidates for the Supreme Court and despite the decisions of the Supreme Administrative Court suspending the effect of the resolutions concerning the candidates for the Civil Chamber, the Criminal Chamber, and the Chamber of Extraordinary Review and Public Affairs, being aware of the effect of his decisions that would be difficult to reverse *de lege lata*, the President of the Republic of Poland presented appointments to the persons named in the resolutions of the [NCJ] and the appointees accepted the appointments."

137. As regards the question whether the NCJ had been duly appointed, the Supreme Court concluded as follows:

"36. ... The President appoints judges, but he does so not just at any time or at his own discretion but on a motion of the [NCJ]. No appointment may be granted to anyone who is not concerned by such motion (cf. the decision of the Constitutional Court of 23 June 2008, Kpt 1/08).

The minimum conditions for the exercise of the prerogative in question by the President of the Republic therefore require that his action be initiated by a duly constituted and composed body having the status of the National Council of the Judiciary. Since [entry into force of the 2017 Amending Act and the 2017 Act on the Supreme Court], the [NCJ] has not been duly appointed under the Constitution of the Republic of Poland; consequently, the [NCJ] could not exercise its powers, which the President of the Republic of Poland should have determined before exercising his prerogative. Persons named in the lists of recommendations drawn up in a defective procedure of appointment for judicial positions cannot be considered to have been candidates for office duly presented to the President of the Republic of Poland whom the President is competent to appoint to the office. Even assuming that the issuance of letters of appointment to such persons renders them formally appointed to the office of judge, it is necessary to determine whether and to what extent such persons may exercise judicial functions, so that the requirement of impartiality and independence of a court administering justice is not thereby infringed."

138. The Supreme Court also made the following observations regarding political influence on the election of the NCJ members:

"38. The procedure for appointment to the office of judge has a part26(10icular bearing on whether the court comprised of such appointees may be considered an impartial and independent tribunal in a given case. Any criteria of appointment other than substantive ones would suggest that the judge is affiliated with a political option or group. The more political the appointment procedure, i.e., the more the appointment decision comes directly from politicians or representatives of political authorities, the less transparent and more arbitrary, or even unlawful, the decision-making procedure will be. That seriously, and irreversibly, undermines the trust of the general public in a judge as an independent person free of external influence and pressure or the willingness to show gratitude to such groups.

Consequently, individual judges in the system of the judiciary could become permanently identified with specific political groups or groups of interest ('our judges' v. 'their judges') and their legitimacy would be contested by each new parliamentary majority. That is clearly in conflict with the individual's right to hearing of his case by an independent court as the stability of court decisions would hinge on changes of the country's political majority.

In this context, it should be noted that, according to the official statement of the Minister of Justice issued in the legislative procedure on 15 January 2020 at the Senate of the Republic of Poland, the membership of the [NCJ] was determined in such a way as to ensure that it was comprised of persons loyal to the parliamentary majority (the political group represented by the Minister of Justice): 'each group could propose judges they are accountable for. We have proposed judges who we thought were willing to co-operate with the judicial reform' – transcript of the third session of the Senate of the Republic of Poland of the 10th term, 15 January 2020).

Consequently, appointments granted by the [NCJ] are systemically not independent of political interest, affecting the fulfilment of the objective criteria of impartiality and independence by persons appointed to the office of a judge on the motion of the [NCJ]. In other words, because the [NCJ] has been politicised, competitions for judicial positions are very likely to be decided not based on substantive criteria but depending on political loyalties or support for the reform of the judiciary pursued by the parliamentary majority in conflict with the Constitution of the Republic of Poland ...

39. Significant influence exerted by the Minister of Justice, who is also Prosecutor General, on the membership of the [NCJ] (confirmed in his aforementioned official statement in the Senate of the Republic of Poland) and consequently on decisions of that body concerning judicial appointments, undermines the objective conditions of impartiality in cases where a person so appointed for the position of a judge were to participate in the court formation while the Prosecutor General or the public prosecutor's office headed by the Prosecutor General were a party to such proceedings.

40. Defective competitions for the office of a judge carried out by the [NCJ], which is structurally no longer independent, took place under conditions of long-term intentional steps taken by representatives of the executive and the legislature seeking to generally undermine trust in the courts, their impartiality and independence ..."

139. As regards the lack of independence of the NCJ, the Supreme Court fully endorsed the conclusions in the judgment of 5 December 2019 and held:

"42. The formation of the Supreme Court passing the present resolution fully shares the position presented in the judgment of the Supreme Court of 5 December 2019, III PO 7/18 to the effect that the [NCJ] so formed is not an independent body but a body subordinated directly to political authorities. Consequently, competitions for the office of judge carried out by the [NCJ] have been and will be defective, creating fundamental doubts as to the motivation behind motions for the appointment of specific individuals to the office of a judge. That notwithstanding, in view of factual and legal obstacles aiming to prevent the elimination of doubts as to the legality of the appointment of individual members of the [NCJ], up to and including unlawful refusal to comply with court judgments, the stability and legality of decisions of the [NCJ] may be permanently contested, becoming an object of political dispute, which calls into question the neutrality of persons appointed by the [NCJ]."

140. With respect to the consequences of the finding that the NCJ had not been an independent body in the process of appointment of judges to different courts, the Supreme Court held:

"45. Lack of independence of the [NCJ] leads to defectiveness in the procedure of judicial appointments. However, such defect and its effect undermining the criteria of independence and impartiality of the court may prevail to a different degree. First and foremost, the severity and scope of the procedural effect of a defective judicial appointment varies depending on the type of the court and the position of such court in

the organisation of the judiciary. The status of a judge of an ordinary court or a military court is different from the status of a judge of the Supreme Court....The severity of irregularities in competition procedures for the appointment of judges of ordinary and military courts and judges of the Supreme Court, since the normative changes implemented in 2017, has varied; however, it was definitely more severe in the case of appointments for judicial positions in the Supreme Court"....

141. As regards the Chamber of Extraordinary Review and Public Affairs, it noted:

"45. The severity of irregularities in competition procedures for appointment of judges of ordinary and military courts and judges of the Supreme Court, since the normative changes implemented in 2017, has varied; however, it was definitely more severe in the case of appointments for judicial positions in the Supreme Court ...

Persons who applied for appointment to the position of judge of the Supreme Court, being lawyers with an understanding of the applicable law and the capability to interpret it, must have been aware of the fundamental doubts concerning the new procedures for the appointment to the office of judge of the Supreme Court and the status and membership of the National Council for the Judiciary as a body participating in the procedure of judicial appointment. Those persons were also aware that resolutions of the National Council for the Judiciary presenting them as candidates to the President of the Republic of Poland had been appealed against by other participants of the competitions to the Supreme Administrative Court. Candidates for the Civil Chamber, the Criminal Chamber, and the Chamber of Extraordinary Review and Public Affairs knew that the Supreme Administrative Court had suspended the effect of the resolutions of the National Council for the Judiciary concerning them, and yet they accepted appointment to the position of judge of the Supreme Court ...

It should be noted that, due to the organisation of the Supreme Court defined in the 2017 Act on the Supreme Court, the Chamber of Extraordinary Review and Public Affairs is composed exclusively of judges appointed in the new competitions. The fact that the Chamber is composed exclusively of such judges, i.e., all (20) vacancies in the Chamber have been filled, implies that no other judge can now be transferred to that Chamber. As a result, a pre-emptive motion for recusal of a judge of that Chamber gives no guarantee that the matter will be heard objectively because such motion will be examined by judges appointed in the same defective procedure, affected by the potential argument that they lack independence and impartiality to the same extent as the judge concerned by the motion. They would not be interested in determining to what extent the defective procedure (assuming that they acknowledge such defect, cf. resolution of a formation of seven judges passed on 8 January 2020, I NOZP 3/19) affects the perception of their own independence and impartiality. Judges appointed in such competitions have adjudicated cases concerning themselves, in breach of the statutory requirement to withdraw *ex proprio motu* from the hearing of a case which personally concerns them (cf. for instance the aforementioned resolution of 8 January 2020, I NOZP 3/19).

It is also relevant to note that the exclusive jurisdiction of the Chamber of Extraordinary Review and Public Affairs includes hearing appeals against resolutions of the [NCJ] concerning candidates for the office of a judge of ordinary, military and administrative courts. As a result, a Chamber which is comprised entirely of defectively appointed judges reviews the appointment of other judges on the application of a [NCJ] formed in the same way."

142. In its final remarks, the Supreme Court referred, among other things, to the current situation of the Polish judiciary:

> "59. The current instability of the Polish judiciary originates from the changes to the court system over the past years, which are in breach of the standards laid down in the Constitution, the EU Treaty, the Charter of Fundamental Rights, and the European Convention on Human Rights.
>
> The *Leitmotif* of the change was to subordinate judges and courts to political authorities and to replace judges of different courts, including the Supreme Court. That affected the appointment procedure of judges and the bodies participating in the procedure, as well as the system for the promotion and disciplining of judges. In particular, a manifestly unconstitutional attempt was made to remove some judges of the Supreme Court and to terminate the mandate of the First President of the Supreme Court, contesting the legitimacy of the Supreme Court.
>
> The systemic changes caused doubts about the adjudicating legitimacy of judges appointed to the office in the new procedures. The political motivation for the changes jeopardised the objective conditions necessary for courts and judges to be perceived as impartial and independent. The Supreme Court considers that the politicisation of courts and their subordination to the parliamentary majority in breach of constitutional procedures establishes a permanent system where the legitimacy of individual judges and their judgments may be challenged with every new political authority. That notwithstanding, the politicisation of courts departs from the criteria of independence and impartiality of courts required under Union law and international law, in particular Article 47 of the Charter and Article 6 § 1 [of the Convention].
>
> That, in turn, causes uncertainty about the recognition of judgments of Polish courts in the Union space of freedom, justice and security. Even now courts in certain EU Member States refuse to co-operate, invoking violation of standards, and challenge judgments of Polish courts. It should be noted that a resolution of the Supreme Court cannot mitigate all risks arising in the functioning of the Polish judiciary at the systemic level. In fact, that could only be done by the legislature if it restored regulations concerning the judiciary that are consistent with the Constitution of the Republic of Poland and Union law.
>
> The Supreme Court may, at best, take into consideration such risks and the principles of stability of the case-law and legal certainty for individuals in its interpretations of provisions which guarantee that a judgment in a specific case will be given by an impartial and independent court. In its interpretation of the regulations governing criminal and civil proceedings, referred by the First President of the Supreme Court, the Supreme Court considered the effect of the judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18, as well as the obligation to identify such legislative instruments in the legal system which would guarantee that a judgment will be issued by an impartial and independent tribunal despite doubts arising from a range of systemic changes affecting the status of judges."

The Supreme Court concluded the resolution as follows:

> "60. ... It should be stressed that, pursuant to Article 91 § 3 of the Constitution of the Republic of Poland, 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 take precedence in the event of a conflict of laws. That concerns in particular the Charter of Fundamental Rights. Consequently, in the event of a conflict of laws with norms arising from such legal act, Polish courts are required to disregard such laws in adjudicating.

In this context, it is important to quote once again *in extenso* the principle reiterated on many occasions in the case-law of the Court of Justice of the European Union ...: 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.' That is because a 'national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently' (judgment of March 1977, C-106/77).

Therefore, a law or decision of any national body cannot prevent Polish courts from applying European Union law, prohibit an interpretation of Polish law in line with European Union law, or especially impose any restrictions or sanctions on judges who, exercising their judicial power and acting as a court, respect the obligations arising from the European Union membership of the Republic of Poland.

If, however, the Constitution of Poland, in particular Article 179, which provides that judges shall be appointed by the President of the Republic of Poland on a motion of the [NCJ], is found to prevent review of the independence and impartiality of a court adjudicating in a given case, then the Polish Constitution would be in fundamental conflict with Article 47 of the Charter. In the territory of the European Union, the independence and impartiality of courts must be genuine; and their independence and impartiality cannot be uncontestably decreed by the mere fact of appointment to the office of judge by the President of the Republic of Poland."

143. In the wake of the resolution, the Ministry of Justice published a statement on its website which, in its verbatim (emphasis included) English version, read as follows:

"Statement on the resolution of the Supreme Court

The resolution of the Supreme Court of 23 January 2020 is ineffective. It was passed in gross violation of law. It violates Article 179, Article 180(1) and Article 10 of the Polish Constitution. Contrary to the applicable statutory provisions, the Supreme Court adopted a resolution in proceedings regarding the challenge of the status of judges appointed with the participation of the current National Council of the Judiciary (KRS).

These proceedings were suspended by law on 22 January 2020 upon initiating a dispute of competence between the Supreme Court and the *Sejm* and the President of the Republic of Poland before the Constitutional [Court]. Before the Constitutional [Court]'s ruling, no action is allowed to be taken in the matter concerned. The resolution of the Supreme Court is therefore invalid by law.

Pursuant to the Act on the Organisation of the Constitutional [Court] and the Mode of Proceedings before the Constitutional [Court], if a dispute of competence is initiated, the proceedings before the Supreme Court are suspended by law. All actions of the Court during the suspension are invalid. Before the Constitutional [Court]'s ruling, no action is allowed to be taken in the matter concerned. A party to a dispute is not allowed to judge for itself whether a dispute has actually occurred. Pursuant to the Constitution, this right is vested only in the Constitutional [Court].

The essence of such as dispute is that no Court can examine, let alone question judicial appointments or act that govern the status of judges and the manner in which candidates are selected. Therefore, the Supreme Court cannot encroach upon the competences of the National Council of the Judiciary, the President of the Republic of Poland or the *Sejm*, and, pursuing this line, even the competencies of the Constitutional [Court] itself, which has already dealt with the case of the National Council of the Judiciary and declared the current wording of the Act to be in accordance with the Constitution.

The suspension of the proceedings before the Supreme Court was also necessary because a case regarding the provision of the Code of Civil Procedure to which the resolution refers (i.e. Article 379(4) of the Code of Civil Procedure) is being heard before the Constitutional [Court].

A resolution adopted by three chambers of the Supreme Court is unlawful and, as such, produces no legal effects. The Supreme Court is not authorised to examine and assess whether the fact that a judge appointed by the President of the Republic of Poland at the request of the National Council of the Judiciary after 2018 sits on common [*sic*] court, military court or Supreme Court invalidates the proceedings. Consequently, no authority, including a judicial one, can question the appointment and investiture of a judge.

In addition, following the effective date the Act of 20 December 2019 on Guaranteeing Constitutional Order in the Administration of Justice and Improving the Work of Courts, the resolution of the Supreme Court will become even more irrelevant. Indeed, the new Act eliminates recent doubts about the possibility of questioning the status of judges appointed by the President of the Republic of Poland. It declares inadmissibility of such actions, in accordance with the jurisprudence of the Supreme Administrative Court and the Constitutional [Court].

Office of Communication and Promotion

Ministry of Justice."

(e) Case of W. Ż.

144. Mr W.Ż. is a judge at the Cracow Regional Court. On 27 August 2018 the President of that court decided to transfer W.Ż. from his second-instance post to a first-instance civil division of the court. W.Ż. was a member and spokesperson of the "old" NCJ and had publicly criticised the reorganisation of the judicial system in Poland carried out by the ruling party. He considered his transfer to be a *de facto* demotion and appealed against this decision to the NCJ.

145. On 21 September 2018 the NCJ issued a resolution in which it decided to discontinue the proceedings in W.Ż.'s case. He lodged a further appeal with the Supreme Court's Chamber of Labour and Social Security.

146. In view of the fact that his appeal had been transferred to the Chamber of Extraordinary Review and Public Affairs, on 14 November 2018 W.Ż. requested the exclusion of all judges of that Chamber from the examination of his case. He argued that, given its systemic framework and the manner in which its members had been elected by the "new" NCJ, which had been established contrary to the Constitution, the Chamber of

Extraordinary Review and Public Affairs could not examine his appeal impartially and independently in any composition that included its members.

147. On 8 March 2019 the Chamber of Extraordinary Review and Public Affairs, sitting in a single-judge formation, namely Judge A.S., dismissed the appeal lodged by W.Ż. against the NCJ resolution as inadmissible in law (case no. I NO 47/18). Judge A.S. had not had the case file at his disposal (as it had meanwhile been transmitted to the Civil Chamber) and the proceedings concerning the exclusion of all judges of the Chamber of Extraordinary Review and Public Affairs were pending at that time.

148. On 20 March 2019 the Civil Chamber of the Supreme Court (case no. III CO 121/18) adjourned the examination of W.Ż.'s motion for exclusion of judges and decided to seek clarification of a legal question (*przedstawić do rozstrzygnięcia zagadnienie prawne*) from a chamber of seven judges of the Supreme Court. The Supreme Court underlined that the implementation of NCJ resolution no. 331/2018 had been stayed on 27 September 2018 and numerous appeals had been lodged against it. Nevertheless, the President of Poland handed the letters of appointment to the candidates recommended by the NCJ on 10 October 2018 (and in case of A.S. on 20 February 2019; see also paragraphs 31 and 38 -40 above). The Supreme Court formulated the following questions which needed clarification:

> "1. Whether a decision rejecting an appeal lodged with the Supreme Court against a resolution of the NCJ – made by a single judge who had been appointed to perform the duties of judge of the Supreme Court despite the fact that the resolution of the NCJ recommending that person to be appointed as judge of the Supreme Court had already been appealed against and the relevant proceedings before the Supreme Administrative Court had not been completed prior to the handing thereto of the letter of appointment – exists in the legal and procedural sense and brings to an end the proceedings initiated by the lodging of that appeal.
>
> 2. Is it of significance for the resolution of the question referred to in point 1 that the Supreme Administrative Court before the handing of the letter of appointment to the office of judge of the Supreme Court [to the person recommended by the NCJ] stayed the implementation of the resolution of the NCJ on the basis of section 388(1) in conjunction with section 398(21) [of the Code of Civil Procedure] and section 44(3) of the 2011 Act on the NCJ?"

149. On 21 May 2019 the Civil Chamber of the Supreme Court gave a decision on the questions referred to above (III CZP 25/19) and made a request for a preliminary ruling to the CJEU. The request was transmitted to the CJEU on 26 June 2019 (see paragraph 207 below).

The Supreme Court referred the following question to the CJEU:

> "Should Articles 2, 6(1) and (3) and the second subparagraph of Article 19(1) [TEU], in conjunction with Article 47 [of the Charter of Fundamental Rights] and Article 267 [TFEU], be interpreted as meaning that a court composed of a single person who has been appointed to the position of judge in flagrant breach of the laws of a Member State applicable to judicial appointments – which breach included, in particular, the appointment of that person to the position of judge despite a prior appeal to the competent national court [the Supreme Administrative Court] against the resolution of

a national body [NCJ], which included a recommendation for the motion for the appointment of that person to the position of judge, notwithstanding the fact that the implementation of that resolution had been stayed in accordance with national law and that proceedings before the competent national court (Supreme Administrative Court) had not been concluded before the delivery of the appointment letter – is not an independent and impartial tribunal previously established by law within the meaning of EU law?"

In its reasoning the Supreme Court considered that A.S. had been appointed as a judge of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court in flagrant breach of the domestic law concerning the appointment of judges. In this respect the Supreme Court held:

"22. In so far as it is relevant to the legal issue considered by the enlarged composition of the Supreme Court, the infringement consisted primarily in the fact that A.S. was appointed by the President of the Republic of Poland to the office of judge of the Supreme Court despite the fact that other participants in the appointment procedure had previously challenged NCJ resolution no. 331/2018, which included the motion for his appointment, before the Supreme Administrative Court and that the proceedings before that Court had not been concluded before the delivery to him of the act of appointment.

23. Under Article 179 of the Constitution, judges in Poland are appointed by the President of the Republic of Poland, on the motion of the National Council of the Judiciary, for an indefinite period. There must be an interaction – in chronological terms – between the two constitutional organs of the State, which complement each other [references to the Constitutional Court's case-law omitted]. The motion of the National Council of the Judiciary is not an opinion, but has constitutive significance, since it is only after it has been submitted to the President of the Republic he can exercise his prerogative to appoint the person recommended in the motion to perform the office of judge ...

26. The President of the Republic of Poland may not appoint a participant in the appointment procedure to the office of judge not only when there is no motion of the National Council of the Judiciary at all, but also when such a motion has been formulated, i.e. the appropriate resolution of the Council has been adopted, but the legal existence of that motion, contained in the resolution, remains suspended as a result of an appeal against the resolution and thus subjecting it to judicial review in accordance with the provisions of the Act. In a situation where, before the act of appointment to the office of judge of the Supreme Court was handed to the participant in the appointment procedure the resolution comprising the motion for his appointment was appealed to the Supreme Administrative Court, the legal existence of the resolution became dependent on the decision of that court. The upholding of the appeal could result in a subsequent lack of the prerequisite for appointment to the office of judge, so as long as the proceedings before the Supreme Administrative Court were not concluded, there were no conditions for the President of the Republic of Poland to exercise his constitutional prerogative to appoint to the office of judge in the absence of a solid basis on which to exercise this prerogative.

This assumption is not undermined by the provisions which shape, in an exceptional manner, the scope and the moment at which a resolution of the National Council of the Judiciary becomes final in the event that such resolution has not been challenged by all the participants in the appointment procedure (section 44 (1b) of the Act on the NCJ) and which define the effect of overturning a challenged resolution on the refusal to present a motion for appointment to the office of judge of the Supreme Court

(section 44 (4) of the Act on the NCJ). From the moment a resolution of the National Council of the Judiciary was challenged, it was exclusively for the Supreme Administrative Court to assess whether there were grounds for revoking the resolution, as well as to what extent - within the limits of the challenge - any revocation of the resolution would take place. The Supreme Administrative Court could use various methods of interpretation to resolve doubts concerning the interpretation of section 44 (1b) and section 44 (4) of the 2011 Act on the NCJ, including a pro-constitutional and pro-EU interpretation, using the legal instruments available to it. These efforts were undertaken by the Supreme Administrative Court, as demonstrated in the decision of the Supreme Administrative Court of 21 November 2018 (para. 6), in which that Court referred questions as to the regulations contained in section 44(1b) and 44(4) of the 2011 Act on the NCJ for a preliminary ruling concerning, in particular, the compatibility with the relevant EU legislation (Case C-824/18)."

The Supreme Court considered that there had been a breach of Article 176 of the Constitution in the appointment procedure of A.S. to the Chamber of Extraordinary Review and Public Affairs, which consisted in the following elements:

"28. ... First, the President of the Republic of Poland appointed A.S. to the office of judge of the Supreme Court in a situation in which the legal existence of the NCJ's resolution No 331/2018, which included the motion for his appointment, was not permanent. The condition – functionally understood – that the appointment to the office of judge should be made at the motion of the National Council of the Judiciary was not fulfilled; such a request must not only exist, but must also have a permanent legal existence that cannot be challenged.

Secondly, the appointment was in fact made on the assumption that NCJ Resolution no. 331/2018 would not be overturned by the Supreme Administrative Court as a result of judicial review. Such an appointment did not meet the requirement for the appointment of a judge for an indefinite period, as it was conditional. Should the resolution of the National Council of the Judiciary be overturned as a result of its judicial review, resulting in the subsequent removal of the prerequisite for appointment in the form of the Council's motion, the appointment to the office of judge would also subsequently cease to exist, with it being a separate issue whether that effect would operate *ex tunc* or *ex nun*c.

29. Furthermore, the principle of the division and balance of powers (Article 10 paragraph 1 of the Constitution) together with the principle of legalism (Article 7 of the Constitution) have been violated. According to these principles, the organs of each authority must act within their own scope [of competence], respect the scope of competence of the other authorities and not encroach - without grounds - into the scope of competence of another authority. In view of the constitutional position of the Supreme Administrative Court as an organ of the judiciary, the powers conferred upon it by law to review - in the case under consideration - the legality of resolutions of the National Council of the Judiciary and the need to respect the future outcome of proceedings before that court ..., the prerogative of the President of the Republic of Poland to appoint to the office of judge could not be exercised before the conclusion of the proceedings before that court. By the fact that the act of appointment was handed down before the Supreme Administrative Court had completed its review of the resolution of the National Council of the Judiciary, there was interference by the executive power in the sphere reserved for that court. The President of the Republic of Poland exercised his prerogative before the Supreme Administrative Court had determined the outcome of the challenge to the resolution, without waiting for the

judicial assessment of the arguments raised against the resolution, although they were well known and very serious (para. 31).

30. The fact that the President of the Republic of Poland appointed A.S. to the office of judge of the Supreme Court not only notwithstanding the challenge to resolution of the NCJ no. 331/2018 covering the application for his appointment and the failure to conclude the proceedings before the Supreme Administrative Court until the time of his appointment, but also in defiance of an earlier decision of that court of 27 September 2018 in which the implementation of the resolution in question was suspended (para. 4), is also an important circumstance in the case. The suspension of the implementation of the resolution of the National Council of the Judiciary was an additional circumstance which meant that the resolution could not constitute an effective motion for appointment to the office of judge in terms of Article 179 of the Constitution. The order suspending the implementation of the resolution, as formally final and binding, was binding on the participants in the proceedings before the Supreme Administrative Court, this Court and other courts (including the Supreme Court), as well as other state authorities (including the National Council of the Judiciary and the President of the Republic of Poland) and public administration bodies ... Thus, there was a clear disregard of the final court decision by the President of the Republic of Poland, as well as by A.S., who accepted the appointment letter despite the decision."

The Supreme Court further stated that the breaches of the domestic law established above had been flagrant not only because they had touched upon fundamental and constitutional principles but also because of their intentional character, meaning that their purpose was to render meaningless the judicial review by the Supreme Administrative Court of resolution no. 331/2018:

"32. Firstly, the appointment of A.S. to perform the duties of judge of the Supreme Court took place despite the fact that the challenge to the resolution and the doubts raised against it were widely known. The President of the Republic of Poland did not withhold his appointment until the proceedings before the Supreme Administrative Court had been concluded, the doubts had been clarified by that court, and the legality of NCJ resolution no. 331/2018 had been finally determined.

Secondly, underlying the exercise of the prerogative by the President of the Republic of Poland in the circumstances was the assumption presented in the judiciary that the appointment to the office of judge by the President of the Republic of Poland could not be challenged in any way, including through the courts ... The exercise of the prerogative was to lead to irreversible legal consequences in the form of an effective appointment to the office of judge, even if the appointment procedure turned out to be flawed.

33. The breaches referred to in the present case, and their gross and intentional nature, are part of a broader context of actions taken in Poland to prevent judicial review of resolutions of the National Council of the Judiciary concerning the presentation to the President of the Republic of Poland of motions for appointment to the office of judge of the Supreme Court taken after the entry into force of the Act on the Supreme Court."

The Supreme Court concluded that the finding that the appointment of A.S. to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court was made in gross violation of Polish law might justify the conclusion that the participation of such a person in a judicial formation made it impossible to consider a panel of judges comprising that person to be a court or tribunal established by law within the meaning of European Union

law and the Convention. In that regard, the Supreme Court relied on the Court's judgment in *Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18, 12 March 2019).

The CJEU delivered its judgment on 6 October 2021 (see paragraph 216 below).

2. The Constitutional Court's case-law

(a) Judgment of 18 July 2007 (case no. K 25/07)

150. On 18 July 2007 the Constitutional Court reviewed, on an application from the NCJ, the constitutionality of two provisions added to the 2001 Act on the Ordinary Courts by the Act of 16 March 2007 amending the Act on the NCJ of 2001, which had introduced the rule of *incompatibilitas* for the position of a member of the NCJ with the position of president or vice-president of an ordinary court. The first of the impugned provisions (section 25a) stipulated (1) that a judge elected as member of the NCJ could not be appointed to the post of president or vice-president of a court, and (2) that the appointment to such post is terminated on election to the NCJ. The second of the impugned provisions (section 5) extended the rule included in section 25a to judges sitting as members of the NCJ during their term of office. The Constitutional Court held that both provisions were incompatible with Article 187 § 1 (2) of the Constitution, and that the second of these provisions was also incompatible with Article 2 of the Constitution.

As regards the constitutional position of the NCJ, the Constitutional Court held that it was a constitutional collegial State authority whose functions were related to judicial power. The relevant part of the judgment read:

> "In vesting the Council with competences relating to the protection of the independence of courts and judges, the Constitution also introduced the mechanism protecting the independence of the Council. Article 187 § 1 of the Constitution provides that the composition of the Council is mixed: it connects representatives of the judiciary (with compulsory participation of Presidents of the Supreme Court and the Supreme Administrative Court), representatives of the executive (the Minister of Justice and a person appointed by the President of the Republic) as well as four MPs and two senators. The [1997] Constitution introduced – in comparison to earlier provisions of constitutional rank – constitutional rules concerning the composition of the Council, specified the term of office of its members and the manner of their appointment or election. In the composition of the Council the Constitution gave a significant majority to elected judges of the ordinary, administrative and military courts and judges of the Supreme Court. The regulations concerning election of judges to the Council are of constitutional rank and of particular constitutional significance, since their status *de facto* determines the independence of this constitutional organ and the effectiveness of the Council's work."

The Constitutional Court also held that the members of the NCJ should be judges and elected by judges:

> "4. The Constitution regulates directly in Article 187 § 1 (2) the principle of election of judges to the NCJ, determining in that way the personal composition of the NCJ. It

explicitly prescribes that judges – elected by judges – could be members of the NCJ, without stipulating other additional conditions that would have to be met for them to sit in the NCJ. The election is made from among four groups of judges mentioned in Article 187 § 1 (2) of the Constitution. The Constitution does not provide for a removal of the [judicial members of the NCJ], stipulating their four-year term of office in the NCJ. The election procedure set out in the [2001] Act on the NCJ ... falls within the boundaries laid down in Article 187 § 1 (2) of the Constitution, fulfilling the principle of election of judges by judges. ...”

(b) Judgment of 20 June 2017 (case no. K 5/17)

151. On 11 April 2017 the Prosecutor General, who at the same time holds the position of Minister of Justice, asked the Constitutional Court to examine the compatibility with the Constitution of several provisions of the Act on the NCJ in force at the material time.

152. On 20 June 2017 the Constitutional Court gave judgment in the case. It held that the provisions regulating the procedure for electing members of the NCJ from among judges of the ordinary courts and of administrative courts[6] were incompatible with Article 187 § 1 (2) and § 4 in conjunction with Article 32 of the Constitution. The impugned provisions introduced an unjustified differentiation with regard to the election of judges of the respective levels of the ordinary and administrative courts to the NCJ and did not provide equal opportunities in respect of standing for election to the NCJ. The Constitutional Court found that the impugned provisions treated unequally judges of district and regional courts in comparison with judges of courts of appeal, as well as judges of district courts in comparison with judges of the regional courts. The same applied to judges of the regional administrative courts in comparison with judges of the Supreme Administrative Court.

153. Secondly, the Constitutional Court held that section 13(3) of the 2011 Act on the NCJ, interpreted in the sense that the terms of office of members of the NCJ elected from among judges of ordinary courts was individual in character, was incompatible with Article 187 § 3 of the Constitution.

154. In its general observations, the Constitutional Court noted that the NCJ was a constitutional body tasked with protecting the independence of courts and judges. It also noted that the NCJ was not a judicial authority, and thus the constitutional standards relevant for courts and tribunals were not applicable to the NCJ. Nor should the NCJ be regarded as part of judicial self-governance. The mixed composition of the Council made it an organ ensuring the balance of – and cooperation between – the different powers. With regard to the election of judicial members of the NCJ, the Constitutional Court held, in so far as relevant:

[6] Section 11(3) and (4) in conjunction with section 13(1) an (2) as well as section 11(2) in conjunction with section 12(1) of the 2011 Act on the NCJ (see paragraph 98 above).

> "The Constitutional Court in its current composition does not agree with the [Constitutional Court's] position adopted in the judgment [of 18 July 2007,] no. K 25/07 that the Constitution specifies that [judicial] members of the NCJ shall be elected by judges. Article 187 § 1 (2) of the Constitution only stipulates that these persons [judicial members of the NCJ] are elected from among judges. The Constitution did not specify who should elect those judges. Thus, the question of who can be elected as member of the NCJ follows from the Constitution, but it is not specified how judicial members of the Council are to be elected. These matters were delegated to statutory regulation. There is no obstacle for election of judges to the NCJ by judges. However, one cannot agree with the assertion that the right to elect [judicial members of the NCJ] is vested solely in assemblies of judges. While Article 187 § 1 (3) of the Constitution clearly indicates that MPs are elected to the NCJ by the *Sejm* and senators by the Senate, there are no constitutional guidelines in respect of judicial members of the NCJ. This means that the Constitution does not determine who may elect judges to the NCJ. For this reason, it should be noted that this question may be differently regulated within the limits of legislative discretion."

The Constitutional Court concluded:

> "...The legislator has quite broad freedom in shaping the NCJ system, as well as the scope of its activities, the mode of work and the manner of election of its members. However, the legislator's competence is not unlimited.
>
> Its limits are determined by:
>
> firstly, the Council's task, i.e. in acting to safeguard the independence of courts and independence of judges;
>
> secondly, the constitutionally determined composition of the Council: while a statute may regulate the manner of election of Council members, it may not modify its personal component set out in Article 187 § 1 of the Constitution ..."

155. The bench included Judge M.M. as judge rapporteur. The issue whether a bench of the Constitutional Court including Judge M.M. was a "tribunal established by law" was raised in the case of *Xero Floor w Polsce sp. z. o.o. v. Poland* (cited above).

(c) Judgment of 25 March 2019 (case no. K 12/18)

156. On 2 November 2018 the NCJ lodged a request with the Constitutional Court to examine compliance with the Constitution of the provisions of the 2011 Act on the NCJ as amended by the 2017 Amending Act.

157. On 25 March 2019 the Constitutional Court gave judgment confirming compliance with Articles 187 § 1 (2) and § 4, in conjunction with Articles 2, 10 § 1 and 173 and 186 § 1 of the Constitution, of section 9a of the 2011 Act on the NCJ, as amended by the 2017 Amending Act, concerning the manner of appointment of the NCJ's judicial members by the *Sejm*.

Secondly, the court held that section 44(1a) of the 2011 Act on the NCJ, as amended by the 2017 Amending Act, concerning the procedure for judicial review of individual resolutions of the NCJ on the selection of judges,

refusing to appoint the candidates, was incompatible with Article 184 of the Polish Constitution.

(d) Judgment of 20 April 2020 (case no. U 2/20)

158. On 24 February 2020 the Prime Minister (*Prezes Rady Ministrów*) referred to the Constitutional Court the question of the compatibility of the Supreme Court's resolution of 23 January 2020 with several provisions of the Polish Constitution, the Charter of Fundamental Rights of the European Union and the Convention.

159. On 20 April 2020 the Constitutional Court issued judgment declaring that the Supreme Court's resolution of 23 January 2020 was incompatible with Articles 179, Article 144 § 3 (17), Article 183 § 1, Article 45 § 1, Article 8 § 1, Article 7 and Article 2 of the Constitution, Articles 2 and 4(3) of the Treaty on European Union (TEU) and Article 6 § 1 of the Convention. It held, in particular, that decisions of the President of Poland on judicial appointments may not be subject to any type of review, including by the Supreme Court. The judgment was given by a Constitutional Court's panel including Judge M.M. It was published in the Official Gazette on 21 April 2020. The court held (references omitted), in particular:

> "...The four editorial divisions of the Supreme Court's resolution, which constitute the entirety of the subject under review, introduce and regulate a normative novelty (unknown to other legal acts of the Republic of Poland, in particular the Constitution) consisting in the fact that ordinary courts, military courts and the Supreme Court may control and restrict a judge's right to adjudicate solely on the basis of the fact of his or her appointment by the President on a motion of the NCJ, whose members, who are judges, were elected by the *Sejm*, and not by judicial bodies ...
>
> The contested resolution of the Supreme Court is incompatible with Article 179 of the Constitution because it undermines the character of that provision as an independent basis for the effective appointment of a judge by the President on a motion of the NCJ, and thus as an independent, complete and sufficient legal regulation enabling the exercise by the President of the powers indicated in that provision.
>
> The contested resolution of the Supreme Court is incompatible with Article 144 § 3 (17) of the Constitution because it cannot be reconciled with the essence of the President's prerogative to appoint judges within the Republic of Poland. The President's prerogative is not subject to review in any manner whatsoever, and therefore, it may not be subject to any limitation or narrowing of interpretation within the content of an act of secondary legislation ..."

160. As regards Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention the Constitutional Court held, in so far as relevant (references omitted):

> "In particular, the contested resolution of the Supreme Court is incompatible with Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention because, in its content, it infringes the standard of independence of a court and of a judge which, according to the case-law of the CJEU, has two aspects. The first – external – aspect of the judge's independence presupposes that the court, in its adjudication, performs its

tasks completely independently, without being subject to any official hierarchy or subordinated to anyone, and does not receive orders or instructions from any source whatsoever, such that it is protected from interference and external pressure that might compromise the independence of its members (judges) when they examine cases. The content of the impugned resolution of the Supreme Court granting to some judges the right to decide that other judges appointed by the President have, *de facto*, the status of retired judges *ab initio* cannot be reconciled with the standard as outlined above, resulting from all the indicated relevant standards. As the CJEU points out, the second – internal – aspect of the independence of a judge - is linked to the concept of impartiality and concerns an unbiased dissociation from the litigants, and their respective interests, in relation to a dispute before the court. This factor requires [of a judge] the observance of objectivity and the absence of any interest in the resolution of the dispute, apart from the strict application of the law. This aspect excludes a procedure generally questioning a judge's right to adjudicate by other judges and verifying the regularity of the procedure preceding the appointment of a judge by the President as a basis for a general objection to such a judge's right to adjudicate. An unbiased dissociation of a judge from a dispute is possible only where any conclusions of the court leading to the resolution of a case are based on respect for the Constitution as a foundation. Such aspect of the judge's independence excludes the content of the court's judgment from being made dependent on the need to choose between a constitutional provision and the content of a [law] that is in conflict with the Constitution, but which – as a result of a statutory regulation – could in all likelihood constitute a ground for challenging the judgment before a higher court. For that reason, the content of the impugned resolution of the Supreme Court cannot be reconciled with Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention."

(e) Decisions of 28 January and 21 April 2020 (case no. Kpt 1/20)

161. The Speaker of the *Sejm* referred a question to the Constitutional Court as to whether there was a "conflict of competence between the *Sejm* and the Supreme Court and between the President of Poland and the Supreme Court".

162. On 28 January 2020 the Constitutional Court issued an interim decision (*postanowienie*), whereby it suspended the implementation of the Supreme Court's resolution of 23 January 2020 (see paragraph 127 above) and suspended the prerogative of the Supreme Court to issue resolutions concerning the compatibility with national or international law or the case-law of international courts of the composition of the NCJ, the procedure for presenting candidates for judicial office to the President of Poland, the prerogative of the President to appoint judges and the competence to hold judicial office of a person appointed by the President of Poland upon recommendation of the NCJ.

163. On 21 April 2020 the Constitutional Court gave a decision, finally ruling on the matter of the "conflict of competence". Both the interim measure and the final ruling were given by the Constitutional Court sitting in a formation which included Judge M.M. The Constitutional Court decided to:

"1. Resolve the conflict of competence between the Supreme Court and the *Sejm* of the Republic of Poland as follows[7]:

(a) The Supreme Court – also in connection with a ruling of an international court – has no jurisdiction to make a 'law-making interpretation' (*wykładnia prawotwórcza*) of legal provisions, by means of [a resolution] which leads to modification in the legal situation regarding the organisational structure of the judiciary;

(b) pursuant to Article 10, Article 95(1), Article 176(2), Article 183(2) and Article 187(4) of the Constitution of the Republic of Poland, the introduction of any modification within the scope specified in point 1(a) shall be within the exclusive competence of the legislature.

2. Resolve the conflict of competence between the Supreme Court and the President of the Republic of Poland as follows:

(a) under Article 179 in conjunction with Article 144 § 3 (17) of the Constitution, an appointment of a judge constitutes the exclusive competence of the President of the Republic of Poland, which he exercises upon the request of the National Council of the Judiciary personally, irrevocably and without any participation or interference of the Supreme Court;

(b) Article 183 of the Constitution does not provide that the Supreme Court has jurisdiction to oversee the President of the Republic of Poland in his exercise of the competence referred to in Article 179 in conjunction with Article 144 § 3 (17) of the Constitution including [the Supreme Court's jurisdiction] to give a binding interpretation of legal provisions to specify prerequisites for the President's effective exercise of the said competence."

164. The Constitutional Court held, in so far as relevant:

"... The Constitution in Article 144 § 3 (17) defines the prerogative of the President – his personal power to appoint judges. And Article 179 of the Constitution provides that judges are appointed by the President, on a motion of the NCJ, for an indefinite period.

The Constitutional Court upholds the view expressed earlier that 'judges are appointed by the President, on a motion of the NCJ, for an indefinite period of time'. The Constitution identifies two entities involved in the judicial appointment procedure – the President and the NCJ. The judicial appointment procedure under the Constitution thus involves cooperation between two bodies, one of which has a direct mandate from the public, and the other – due to the participation of, *inter alia*, MPs and senators - has an indirect mandate ..., although it should be noted that there are only six MPs and senators in the 25-member NCJ (four MPs and two senators). Under Article 144 § 3 (17) of the Constitution, the power to appoint judges belongs to those official acts of the President which, in order to be valid, do not require the countersignature of the Prime Minister (the so-called prerogative). ... By vesting the power to appoint judges in the President, the Constitution thus adopts a system of judicial appointment, albeit of a limited nature. Although judicial appointments do not require countersignature, the constitutional requirement of a motion of the NCJ significantly restricts the President's freedom of action in this situation. The President may not appoint every person who meets the requirements for election to the judiciary, but only a person whose candidature has been considered and indicated by the NCJ. ... In the light of the prevailing views of legal scholars, there is no doubt that, although the President's

[7] The translation is based on the text available on the Constitutional Court's website, edited by the Court's Registry.

> freedom of action is limited to taking a stance on the candidate proposed by the NCJ, the fact that the competences concerning appointment of judges have been made into a prerogative emphasises that the President is not legally obliged to grant the NCJ's motion. ... The power to appoint judges is, under Article 144 § 3 (17) of the Constitution, a prerogative of the President, that is, his personal prerogative, which in order to be valid does not require the signature of the Prime Minister. As such, it remains within the President's exclusive competence and responsibility, although this does not mean that he may act entirely freely - he is bound by the principles and values expressed in the Constitution, the observance of which, pursuant to Article 126 § 2 of the Constitution, he is obliged to ensure. The prerogative regarding the appointment of judges is specified in Article 179 of the Constitution. This provision, stipulating that judges shall be appointed by the President on the motion of the NCJ, for an indefinite period, precisely defines the competences of both the President and the NCJ. It is for the NCJ to submit a motion for the appointment of judges (identification of candidates for specific judicial positions)."

3. The Supreme Administrative Court's case-law

165. On 6 May 2021 the Supreme Administrative Court gave judgments in five cases (nos. II GOK 2/18; II GOK 3/18; II GOK 5/18; II GOK 6/18 and II GOK 7/18). In the first three judgments, including the case of *A.B. v. the NCJ* (no. II GOK 2/18) the Supreme Administrative Court decided to annul NCJ resolution no. 330/2018 in the part concerning the recommendation of seven candidates for appointment to the Civil Chamber of the Supreme Court. In the last two judgments it decided to annul NCJ resolution no. 318/2018 in the part concerning the recommendation of one candidate for appointment to the Criminal Chamber of the Supreme Court (see paragraphs 43 and 49 above).

The court held that the NCJ did not offer sufficient guarantees of independence from the legislative and executive powers and that the President of Poland's announcement of vacant positions in the Supreme Court in May 2018 (see paragraph 26 above), as having been done without the Prime Minister's countersignature, was contrary to Article 144 § 2 of the Constitution and had resulted in a deficient procedure for judicial appointments. All the judgments contain identical reasoning.

166. In particular, the Supreme Administrative Court considered, in application of the CJEU judgments of 19 November 2019 and 2 March 2021 (see paragraphs 206 and 209 below), that the decisive elements justifying the conclusion as to the NCJ's lack of independence were as follows:

(a) The current NCJ had been constituted as a result of the premature termination of the terms of office of former members of the NCJ.

(b) In contrast to the former legislation under which fifteen judicial members of the NCJ had been elected by their peers directly, they were currently elected by the *Sejm;* as a result, the number of the NCJ's members directly originating from or appointed by political authorities was twenty-three, out of twenty-five members; also, there were no representatives of the

Supreme Court or administrative courts, as required by Article 187 § 2 of the Constitution, and 14 of its judicial members had come from ordinary courts.

(c) The potential for irregularities that could adversely affect the process of appointment of certain members of the NCJ; it was noted that in practice some members had supported their own candidatures, that some candidates had supported each other, and that there had clearly been political factors behind their choice, for instance political loyalty to the legislative power.

(d) The manner in which the current NCJ carried out its constitutional duty to safeguard the independence of courts and judges; on this point it was noted that the NCJ's activity had been in stark contrast to what would be expected of such a body, as confirmed by the 2018 decision of the ENCJ, suspending the NCJ's membership for its non-compliance with the ENCJ rule of independence from the executive (see also paragraph 223 below).

The Supreme Administrative court accepted – as did the CJEU in the above-mentioned judgments – that while each element taken in isolation might not necessarily lead to that conclusion, their combination and the circumstances in which the NCJ had been constituted raised doubts as to its independence.

In that regard, the Supreme Administrative Court stated that it fully and unreservedly shared the Supreme Court's assessment of those elements and circumstances in its judgment of 5 December 2019 (see also paragraph 110 above).

It was further noted that since many members of the NCJ had recently been promoted to posts of president and vice-president of courts, the entire body had to be regarded as strictly and institutionally subordinate to the executive, represented by the Minister of Justice. The degree of dependence on the executive and legislature was such that it could not be irrelevant in assessing the ability of the judges selected by it to meet the objective requirements of independence and impartiality required by Article 47 of the Charter of Fundamental Rights (see paragraph 192 below). Such composition of the NCJ undermined its ability to perform effectively its primary function of safeguarding the independence of judges and courts.

167. As to other details of the NCJ's activities, the court found that there was no appearance that the NCJ – a body constitutionally responsible for safeguarding the independence of judges and courts – had been fulfilling these duties and respecting positions presented by national and international institutions. In particular, it had not opposed the actions which did not comply with the legal implications resulting from the interim order of the CJEU of 8 April 2020 (C-791/19; see paragraph 211 below).

The actions of the NCJ in the case under consideration also showed that it had intentionally and directly sought to make it impossible for the Supreme Administrative Court to carry out judicial review of the resolution to recommend (and not to recommend) candidates to the Civil Chamber of the Supreme Court. The NCJ referred the appeal lodged by A.B. on 1 October

only on 9 November 2019 while in the meantime it had transmitted the resolution to the President for him to appoint the recommended candidates.

168. Lastly, as regards the precondition of the Prime Minister's countersignature for the 2018 President of Poland's act of announcement of vacant positions at the Supreme Court (see paragraph 26 above), the Supreme Administrative Court agreed with the interpretation of the Supreme Court given in the judgment of 5 December 2019 and the resolution of 23 January 2020 (see paragraphs 110 and 127 below), that this act required for its validity a countersignature of the Prime Minister. It stressed that Article 144 § 3 of the Constitution did not mention that power among the explicit, exhaustively enumerated prerogatives of the President that did not require the countersignature for their validity. Since this provision laid down the President's exclusive prerogatives, all other acts being subject to the Prime Minister's countersignature, it had to be interpreted strictly. Nor could it be said that the act of announcement of vacant positions in the Supreme Court could be derived from the President's power to appoint judges under Article 144 § 3 (17) of the Constitution since the exercise of any derived power not requiring the countersignature must be necessary for the proper accomplishment of the main prerogative.

Before the entry into force of the 2017 Act on the Supreme Court, the competence to announce vacant positions in the Supreme Court belonged to the First President of the Supreme Court, and this in no way affected the President of Poland's power to appoint judges to the Supreme Court. Consequently, a decision to announce vacant positions in the Supreme Court did not constitute an act which was necessary for the exercise of the President of Poland's prerogative to appoint the judges; conversely, it could constitute an instrument of discretionary power to influence the time when, if at all, vacant positions in the Supreme Court would be filled.

169. The Supreme Administrative Court further stated:

> "9. It should also be emphasised and clarified that the consequences of the ruling in this case do not relate to the validity and effectiveness of presidential acts of appointment to the office of judge of the Supreme Court made on the basis of recommendations submitted by the NCJ in the resolution under review.
>
> In the current legal situation, such acts are not subject to judicial review and are not revocable ..."

II. INTERNATIONAL MATERIAL

A. United Nations

170. The United Nations (UN) Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of

29 November 1985 and 40/146 of 13 December 1985, provide as follows, in so far as relevant:

> "10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.
>
> ...
>
> 19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."

171. On 5 April 2018 the UN Special Rapporteur on the Independence of Judges and Lawyers, Mr Diego García–Sayán, submitted a report on his mission to Poland (UN Human Rights Council, document A/HRC/38/38/Add.1). The relevant parts of the report's conclusions and recommendations read as follows:

> "IV. Conclusions
>
> ...
>
> 74. After having successfully 'neutered' the Constitutional [Court], the Government has undertaken a far-reaching reform of the judicial system. Between May and December 2017, the ruling majority has adopted three acts that introduce broad changes to the composition and functioning of ordinary courts, the Supreme Court and the National Council of the Judiciary. Each of these acts presents a number of concerns as to its compliance with international legal standards but, taken together, their cumulative effect is to place the judiciary under the control of the executive and legislative branches.
>
> 75. The Special Rapporteur warns Polish authorities that the implementation of this reform, undertaken by the governing majority in haste and without proper consultation with the opposition, the judiciary and civil society actors, including the Office of the [Polish Commissioner for Human Rights], risks hampering the capacity of judicial authorities to ensure checks and balances and to carry out their essential function in promoting and protecting human rights and upholding the rule of law.
>
> V. Recommendations
>
> ...
>
> 84. The Special Rapporteur recommends that [the 2017 Act on the Supreme Court] be amended to bring it into line with the Constitution and international standards relating to the independence of the judiciary and the separation of powers. ...
>
> (f) Reviewing the vast *ratione materiae* jurisdiction of the Chamber of Extraordinary Chamber and the Disciplinary in line with the recommendations of the European Commission, the Venice Commission and OSCE/ODIHR.
>
> 85. The Special Rapporteur recommends that [the 2017 Amending Act] be amended to bring it into line with the Constitution and international standards relating to the independence of the judiciary and the separation of powers. In particular, the Special Rapporteur recommends:
>
> (a) Removing the provisions concerning the new appointment procedure for the judicial members of the National Council of the Judiciary and ensuring that the 15 judicial members of the Council are elected by their peers. ..."

B. The Organization for Security and Cooperation in Europe (OSCE)'s Office for Democratic Institutions and Human Rights (ODIHR)

1. Opinion of 5 May 2017

172. The final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland (JUD-POL/305/2017-Final) of 5 May 2017, reads, in so far as relevant, as follows:

> "13. While the OSCE/ODIHR recognizes the right of every state to reform its judicial system, any judicial reform process should preserve the independence of the judiciary and the key role of a judicial council in this context. In this regard, the proposed amendments raise serious concerns with respect to key democratic principles, in particular the separation of powers and the independence of the judiciary, as also emphasized by the UN Human Rights Committee in its latest Concluding Observations on Poland in November 2016. The changes proposed by the Draft Act could also affect public trust and confidence in the judiciary, as well as its legitimacy and credibility. If adopted, the amendments could undermine the very foundations of a democratic society governed by the rule of law, which OSCE participating States have committed to respect as a prerequisite for achieving security, justice and stability....
>
> 17. In light of the potentially negative impact that the Draft Act, if adopted, would have on the independence of the Judicial Council, and as a consequence of the judiciary in Poland, the OSCE/ODIHR recommends that the Draft Act be reconsidered in its entirety and that the legal drafters not pursue its adoption."

2. Opinion of 13 November 2017

173. The 13 November 2017 opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017), (JUD-POL/315/2017), reads, in so far as relevant:

> "2.1. The New [Chamber of Extraordinary Review and Public Affairs] and Extraordinary Appeals
>
> 22. Article 1 par 1 (b) of the Draft Act introduces a completely new jurisdiction for the Supreme Court, by which it will "exercise extraordinary review over final judicial decisions to ensure the rule of law and social justice by hearing extraordinary [appeals]". This so-called "extraordinary appeal" (in Polish "*skarga nadzwyczajna*"), will fall within the jurisdiction of the newly established Extraordinary Review and Public Affairs Chamber. ...
>
> 23. Pursuant to Article 25 of the Draft Act, the new [Chamber of Extraordinary Review and Public Affairs] will have jurisdiction to hear "extraordinary [appeals]", but also electoral disputes and disputes against the validity of elections and referendums. Its jurisdiction will also cover other matters of public law (including competition protection, energy, telecommunications and rail transport regulation cases) and appeals against decisions by the President of the National Broadcasting Council and against resolutions of the National Council of the Judiciary, as well as complaints concerning overly lengthy proceedings before common and military courts. This means that the newly established Chamber would take over part of the jurisdiction of the Supreme Court currently falling within the ambit of the work of the Labour Law, Social Security

and Public Affairs Chamber, i.e. "public affairs" matters, including adjudication upon the validity of presidential and parliamentary elections, elections to the European Parliament, and national referenda and referenda concerning constitutional amendments (Article 1 par 3).

24. Pursuant to Article 1 par 1 (b) and Article 91 pars 2-3 of the Draft Act, the [Chamber of Extraordinary Review and Public Affairs] will have appellate jurisdiction over final decisions of the other Supreme Court chambers, as a result of the wide scope of "extraordinary appeals" (see Sub-Section 2.1.2 *infra*). This *de facto* confers a higher or special status to this chamber compared to the others....

2.1.6. Conclusion

57. In light of the foregoing, the introduction of this extraordinary review of final court decisions raises serious prospects of incompatibility with key rule of law principles, including the principle of *res judicata* and the right to access justice. It also runs the risk of potentially overburdening the Supreme Court, while conferring upon the other branches of government an influence over the judiciary that runs counter to the principles of judicial independence and separation of powers. It is thus recommended to remove the provision for extraordinary [appeals] from the Draft Act as being inherently incompatible with international rule of law and human rights standards. As mentioned above, the same goals of protecting the rule of law and social justice could be achieved through the proper use of already available general or cassation appeals to ensure the rectification of judicial errors or other deficiencies before judgments become final and enforceable."

C. Council of Europe

1. The European Charter on the Statute for Judges

174. The relevant extract from the European Charter on the Statute for Judges of 8-10 July 1998[8] reads as follows:

"2. **SELECTION, RECRUITMENT, INITIAL TRAINING**

2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them ...

2.2. The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties."

175. In its Explanatory Memorandum, the European Charter on the Statute for Judges provides, among other things, as follows:

"1.1 The Charter endeavours to define the content of the statute for judges on the basis of the objectives to be attained: ensuring the competence, independence and impartiality which all members of the public are entitled to expect of the courts and

[8] Adopted by participants from European countries and two judges' international associations, meeting in Strasbourg on 8-10 July 1998 (meeting organised under the auspices of the Council of Europe), endorsed by the meeting of the Presidents of the Supreme Courts of Central and Eastern European countries in Kyiv on 12-14 October 1998, and again by judges and representatives from Ministries of Justice from 25 European countries, meeting in Lisbon on 8-10 April 1999.

judges entrusted with protecting their rights. The Charter is therefore not an end in itself but rather a means of guaranteeing that the individuals whose rights are to be protected by the courts and judges have the requisite safeguards on the effectiveness of such protection.

These safeguards on individuals' rights are ensured by judicial competence, in the sense of ability, independence and impartiality ..."

2. Committee of Ministers

176. The Recommendation adopted by the Committee of Ministers on 17 November 2010 (CM/Rec(2010)12) on "Judges: independence, efficiency and responsibilities" provides, in so far as relevant, as follows:

"**Chapter I – General aspects**

Judicial independence and the level at which it should be safeguarded

...

3. The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.

4. The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law.

Chapter VI - Status of the judge

Selection and career

44. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.

...

46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.

47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.

48. The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made."

The Explanatory Memorandum to this recommendation further provides as follows:

"13. The separation of powers is a fundamental guarantee of the independence of the judiciary whatever the legal traditions of the member states."

3. The Council of Europe Commissioner for Human Rights

177. The Council of Europe Commissioner for Human Rights, Ms Dunja Mijatović, carried out a visit to Poland from 11 to 15 March 2019. In her report following the visit, published on 28 June 2019, she stated as follows:

"1.2 CHANGES AFFECTING THE NATIONAL COUNCIL FOR THE JUDICIARY

14. In March 2018, in a vote boycotted by the parliamentary opposition, the *Sejm* elected the new judicial members of the [NCJ], thereby terminating the mandate of the sitting members of the Council. Thirteen of the newly elected members were judges from district (first-instance) courts, and one each from a regional court and a regional administrative court. Three of them had been previously seconded to the Ministry of Justice, while seven had previously been appointed by the Minister of Justice as presidents or vice-presidents of ordinary courts (cf. paragraph 40 of section 1.5 below). An informal survey conducted in December 2018 showed that about 3,000 Polish judges considered that the newly constituted Council was not performing its statutory tasks, while 87% of those who participated believed the body's new members should all be made to resign. In September 2018, the General Assembly of the ENCJ made the unprecedented decision to suspend the membership of the Poland's [NCJ] and stripped it of its voting rights, finding that it no longer fulfilled the requirement of independence from the executive and the legislature.

...

1.2.1 CONCLUSIONS AND RECOMMENDATIONS

18. The Commissioner recalls that councils for the judiciary are independent bodies that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system (paragraph 26 of the aforementioned recommendation of the Committee of Ministers CM/Rec(2010)12). She considers that the collective and individual independence of the members of such bodies is directly linked, and complementary to, the independence of the judiciary as a whole, which is a key pillar of any democracy and essential to the protection of individual rights and freedoms.

19. The Commissioner considers that serious concerns remain with regard to the composition and independence of the newly constituted [NCJ]. She observes that under the new rules, 21 out of the 25 members of the body have been elected by Poland's legislative and executive powers; this number includes the body's 15 judicial members, who have been elected by the *Sejm*.

20. The Commissioner considers that entrusting the legislature with the task of electing the judicial members to the [NCJ] infringes on the independence of this body, which should be the constitutional guarantor of judicial independence in Poland. She considers that the selection of members of the judiciary should be a decision process independent of the executive or the legislature, in order to preserve the principles of separation of powers and the independence of the judiciary, and to avoid the risk of undue political influence.

1.3.2 THE SUPREME COURT'S COMPOSITION AND NEW CHAMBERS

25. The new legislation referred to in paragraph 22 above created two new special chambers of the Supreme Court: a Disciplinary Chamber, to adjudicate cases of judicial misconduct, and a Chamber of Extraordinary [Review] and Public Affairs, tasked with hearing cases concerning the validity of general elections or disputes regarding television and radio licensing....

26. Despite being nominally positioned within the organisational structure of the Supreme Court, the Disciplinary Chamber, unlike that Court's other chambers, is virtually exempt from the oversight of the Supreme Court's First President. It notably has a separate chancellery and budget; moreover, the earnings of judges sitting on the Disciplinary Chamber are 40% higher than those of their fellow judges in other chambers of the Supreme Court....

29. The Commissioner was informed that similarly to the newly composed [NCJ], many of the newly appointed members of the Disciplinary Chamber were former prosecutors or persons with links to the Minister of Justice (Prosecutor-General). Apparently, some of the new appointees have experienced a very rapid career progression, made possible by new rules governing judicial promotions; one had reportedly been a district court judge merely three years prior to his appointment to the Supreme Court....

52. In tandem with the sweeping changes described in the previous sections, government officials in Poland have openly assailed the judiciary in order to justify the reforms being undertaken. In a speech delivered in July 2017, the former Prime Minister called Poland's judiciary the 'judicial corporation', claiming that 'in everybody's immediate surrounding there is someone who has been injured by the judicial system'. In an op-ed published in the Washington Examiner in December 2017, the current Prime Minister argued that the Polish judiciary was a legacy of Communist system, characterised by 'nepotism and corruption'; that judges demanded '[b]ribes (...) in some of the most lucrative-looking cases'; and that the courts generally worked to benefit the wealthy and the influential. The Prime Minister later made similar statements in other contexts, including in a speech given at a US university in April 2019. Other members of the ruling party called judges 'a caste' or 'a group of cronies'. The current head of the political cabinet in the chancellery of the Prime Minister publicly implied that former judge-members of the National Council of the Judiciary 'were hiding gold in their gardens and it is unclear where the money came from'. In support of the government's reform of the judiciary, in September 2017 the government-controlled 'Polish National Foundation' initiated a two-month campaign called 'Fair Courts'. The campaign's cost, estimated to amount to EUR 2.8 million, was cosponsored by a dozen or so of the largest state-owned companies. Using large black-and-white billboards, television commercials and a website, the campaign conveyed a negative image of judges, labelling them as 'a special caste', and portraying them as incompetent or indulging in unseemly or illegal behaviour, such as drunkenness, corruption, or petty theft ...

1.6.1 CONCLUSIONS AND RECOMMENDATIONS

61. The Commissioner regrets that the reform of the judiciary was accompanied by a publicly-financed campaign to discredit judges, as well as by a series of negative statements regarding the Polish judiciary made by high ranking Polish officials. She recalls that members of the executive and the legislature have a duty to avoid criticism of the courts, judges and judgments that would undermine the independence of or public confidence in the judiciary, in accordance with paragraph 18 of the Committee of Ministers' recommendation CM/Rec(2010)12. In view of the highly stigmatising and

harmful effect of statements such as the ones quoted above (in paragraph 52), the Commissioner urges the Polish authorities to exercise responsibility and lead by example in their public discourse, rather than using their powerful platform to tarnish the judiciary as a whole or to unduly attack the reputation of individual judges."

4. Parliamentary Assembly of the Council of Europe

(a) Resolution 2188 (2017)

178. On 11 October 2017 the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 2188 (2017) entitled "New threats to the rule of law in the Council of Europe Member States". The Polish authorities were called upon to refrain from conducting any reform which would put at risk respect for the rule of law, and in particular the independence of the judiciary, and, in this context, to refrain from amending the 2011 Act on the National Council of the Judiciary in a way that would modify the procedure for appointing judges to the Council and would establish political control over the appointment process for judicial members.

(b) Resolution 2316 (2020)

179. On 28 January 2020 PACE decided to open its monitoring procedure in respect of Poland, which is the only member State of the Council of Europe, among those belonging to the European Union, currently undergoing that procedure. In its Resolution 2316 (2020) of the same date entitled "The functioning of democratic institutions in Poland", the Assembly stated:

"7. The Assembly lauds the assistance given by the Council of Europe to ensure that the reform of the justice system in Poland is developed and implemented in line with European norms and rule of law principles in order to meet their stated objectives. However, it notes that numerous recommendations of the European Commission for Democracy through Law (Venice Commission) and other bodies of the Council of Europe have not been implemented or addressed by the authorities. The Assembly is convinced that many of the shortcomings in the current judicial system, especially with regard to the independence of the judiciary, could have been addressed or prevented by the implementation of these recommendations. The Assembly therefore calls upon the authorities to revisit the total reform package for the judiciary and amend the relevant legislation and practice in line with Council of Europe recommendations, in particular with regard to:

...

7.2. the reform of the National Council of the Judiciary, the Assembly expresses its concern about the fact that, counter to European rule of law standards, the 15 judges who are members of the National Council of the Judiciary are no longer elected by their peers but by the Polish Parliament. This runs counter to the principle of separation of powers and the independence of the judiciary. As a result, the National Council of the Judiciary can no longer be seen as an independent self-governing body of the judiciary. The Assembly therefore urges the authorities to reinstate the direct election, by their peers, of the judges who are members of the National Council of the Judiciary; ...

7.4. the reform of the Supreme Court... The composition and manner of appointment of the members of the disciplinary and extraordinary appeals chambers of the Supreme

Court, which include lay members, in combination with the extensive powers of these two chambers and the fact that their members were elected by the new National Council of the Judiciary, raise questions about their independence and their vulnerability to politicisation and abuse. This needs to be addressed urgently."

(c) Resolution 2359 (2021)

180. On 26 January 2021 PACE adopted Resolution 2359 (2021) entitled "Judges in Poland and in the Republic of Moldova must remain independent". The Assembly called on the Polish authorities to:

"14.2. review the changes made to the functioning of the Constitutional [Court] and the ordinary justice system in the light of Council of Europe standards relating to the rule of law, democracy and human rights; following the findings of the Venice Commission included in its Opinion No. 977/2020 of 22 June 2020 concerning in particular the amendments to the Law on the Ordinary Courts introduced since 2017, it would be advisable to:

14.2.1. revert to the previous system of electing judicial members of the National Council of the Judiciary or adopt a reform of the justice system which would effectively ensure its autonomy from the political power;

14.2.2. review the composition, internal structure and powers of the Disciplinary Chamber and the Chamber of Extraordinary [Review] and Public Affairs of the Supreme Court;

14.2.3. review the procedure for the election of the First President of the Supreme Court;

14.2.4. reinstate the powers of the assemblies of judges with respect to the appointment, promotion and dismissal of judges,

14.3. refrain from taking any legislative or administrative measures or other initiatives which might pose a risk to the rule of law and, in particular, to the independence of the judiciary;

14.4. co-operate fully with Council of Europe organs and bodies, including the Venice Commission, and with the institutions of the European Union, on issues related to justice reform;

14.5. institute a constructive and sustainable dialogue on justice reform with all stakeholders, including opposition parties, representatives of the judiciary, bar associations, civil society and academic experts."

5. The Venice Commission

(a) Report on Judicial Appointments

181. In its Report on Judicial Appointments (CDL-AD(2007)028), adopted at its 70th Plenary Session (16-17 March 2007), the European Commission for Democracy Through Law ("Venice Commission") held as follows (footnotes omitted):

"3. International standards in this respect are more in favour of the extensive depolitisation of the [judicial appointment] process. However no single non-political 'model' of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary....

5. In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.

6. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.

7. In Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the type of judges to be appointed....

Direct appointment system

13. In the direct appointment system the appointing body can be the Head of State. This is the case in Albania, upon the proposal of the High Council of Justice; in Armenia, based on the recommendation of the Judicial Council; in the Czech Republic; in Georgia, upon the proposal of the High Council of Justice; in Greece, after prior decision of the Supreme Judicial Council; in Ireland; in Italy upon the proposal of the High Council of the Judiciary; in Lithuania, upon the recommendations submitted by the "special institution of judges provided by law"; in Malta, upon the recommendation of the Prime Minister; in Moldova, upon proposal submitted by the Superior Council of Magistrates; in the Netherlands at the recommendation of the court concerned through the Council for the Judiciary; in Poland on the motion of the National Council of the Judiciary in Romania based on the proposals of the Superior Council of Magistracy; in the Russian Federation judges of ordinary federal courts are appointed by the President upon the nomination of the Chairman of the Supreme Court and of the Chairman of the Higher Arbitration Court respectively - candidates are normally selected on the basis of a recommendation by qualification boards; in Slovakia on the basis of a proposal of the Judiciary Council; in Ukraine, upon the proposal of the High Council of Justice.

14. In assessing this traditional method, a distinction needs to be made between parliamentary systems where the president (or monarch) has more formal powers and (semi-) presidential systems. In the former system the President is more likely to be withdrawn from party politics and therefore his or her influence constitutes less of a danger for judicial independence. What matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it. As long as the President is bound by a proposal made by an independent judicial council (see below), the appointment by the President does not appear to be problematic."

(b) Opinion on the Draft [2017 Amending Act], on the Draft [2017 Act on the Supreme Court] proposed by the President of Poland and on the Act on the Organisation of Ordinary Courts

182. The Opinion on the Draft [2017 Amending Act], on the Draft [2017 Act on the Supreme Court] proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts adopted by the Venice Commission at its 113th Plenary Session on 11 December 2017 (Opinion No. CDL-AD(2017)031), read, in so far as relevant, as follows:

"17. In the past decades many new European democracies created judicial councils – compound bodies with functions regarding the appointment, training, promotion and discipline of judges. The main function of such a body is to ensure the accountability of the judiciary, while preserving its independence. The exact composition of the judicial councils varies, but it is widely accepted that at least half of the council members should be judges elected by their peers. The Venice Commission recalls its position expressed in the Rule of Law Checklist, in the Report of the Judicial Appointments and in the Report on the Independence of the Judicial System (Part I: The Independence of Judges) to the effect that "a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself"....

A. The Draft Act on the National Council of the Judiciary

...

1. New method of election of 15 judicial members of the NCJ

...

24. [The draft 2017 Amending Act] is at odds with the European standards (as far as those countries which have a judicial council are concerned), since the 15 judicial members are not elected by their peers, but receive their mandates from Parliament. Given that six other members of the NCJ are parliamentarians, and four others are *ex officio* members or appointed by the President of the Republic (see Article 187 § 1 of the Constitution), the proposed reform will lead to a NCJ dominated by political nominees. Even if several 'minority candidates' are elected, their election by Parliament will inevitably lead to more political influence on the composition of the NCJ and this will also have immediate influence on the work of this body, which will become more political in its approach ...

B. The Draft Act on the Supreme Court

...

1. Creation of new chambers

...

36. In principle, the Venice Commission sees no difficulty with the division of chambers with specialised jurisdiction within a supreme court. However, in the case of Poland, the newly created Chamber of Extraordinary [Review] and Public Affairs (hereinafter – the 'Extraordinary Chamber') and Disciplinary Chamber are worth particular mention. These two chambers will have special powers which put them over and above the other chambers. They will also include lay members who will be selected by the Senate and appointed on the benches on a case-by-case basis by the First President of the SC.

37. The Extraordinary Chamber will be *de facto* above other chambers because it will have the power to review any final and legally binding judgment issued by the 'ordinary' chambers (Articles 25 and 86). In addition, this chamber will be entrusted with the examination of politically sensitive cases (electoral disputes, validation of elections and referendums, etc.), and will examine other disputes between citizens and the State.

38. The Disciplinary Chamber will also be given special status in the sense that it will have jurisdiction over disciplinary cases of judges of 'ordinary' chambers (Article 26), and will deal with the cases of excessive length of proceedings in other chambers of the SC. It will also be competent to deal with other disciplinary cases which may fall within the jurisdiction of the SC. That being said, the Venice Commission sees a greater

justification for the creation of a special disciplinary chamber entrusted with the competency to deal with disciplinary cases of the SC judges, by comparison with the creation of the Extraordinary Chamber...

40. The Draft Act proposes to create new chambers, which will be headed by largely autonomous office-holders. The heads of those two new chambers will be appointed directly by the President of the Republic under special rules, and will have a comparable legitimacy with the First President. In respect of the Disciplinary Chamber the First President will have very few powers, which weakens his role within the SC, foreseen by the Constitution. Furthermore, by virtue of their special competencies, the two chambers will be *de facto* superior to other, "ordinary" chambers of the SC. Establishing such hierarchy within the SC is problematic. It creates "courts within the court" which would need a clear legal basis in the Constitution, since the Constitution only provides for one SC, its decision being final.

...

6. Cumulative effect of the proposed amendments

89. The proposed reform, if implemented, will not only threaten the independence of the judges of the Supreme Court, but also create a serious risk for the legal certainty and enable the President of the Republic to determine the composition of the chamber dealing with the politically particularly sensitive electoral cases. While the Memorandum speaks of the 'de-communization' of the Polish judicial system, some elements of the reform have a striking resemblance with the institutions which existed in the Soviet Union and its satellites ...

92. These two chambers [the Disciplinary Chamber and the Extraordinary Chamber] will have a special status: while notionally they are a part of the SC, in reality they are above all other chambers. Hence, there is a risk that the whole judicial system will be dominated by these new judges, elected with the decisive influence of the ruling majority. Moreover, their powers will extend even back in time, since the "extraordinary [review]" powers will give the Extraordinary Chamber the possibility to revive any old case decided up to twenty years ago ...

95. In sum, the two Draft Acts put the judiciary under direct control of the parliamentary majority and of the President of the Republic. This is contrary to the very idea of separation of powers, proclaimed by Article 10 of the Polish Constitution, and of the judicial independence, guaranteed by Article 173 thereof. Both principles form also an integral part of the constitutional heritage of all European states governed by the rule of law. The Venice Commission, therefore, urges the Polish authorities to subject the two Draft Acts to a deep and comprehensive revision.

IV. Conclusions

130. Several key aspects of the reform raise particular concern and call for the following recommendations:

A. The Presidential Draft Act on the National Council of the Judiciary

- The election of the 15 judicial members of the National Council of the Judiciary (the NCJ) by Parliament, in conjunction with the immediate replacement of the currently sitting members, will lead to a far reaching politicisation of this body. The Venice Commission recommends that, instead, judicial members of the NCJ should be elected by their peers, as in the current Act.

B. The Presidential Draft Act on the Supreme Court

- The creation of two new chambers within the Supreme Court (Disciplinary Chamber and Extraordinary Chamber), composed of newly appointed judges, and entrusted with special powers, puts theses chambers above all others and is ill-advised. The compliance of this model with the Constitution must be checked; in any event, lay members should not participate in the proceedings before the Supreme Court;

- The proposed system of the extraordinary review of final judgments is dangerous for the stability of the Polish legal order. It is in addition problematic that this mechanism is retroactive and permits the reopening of cases decided long before its enactment (as from 1997);

- The competency for the electoral disputes should not be entrusted to the newly created Extraordinary Chamber; ...

131. The Venice Commission stresses that the *combination* of the changes proposed by the three documents under consideration, and of the 2016 Act on Public Prosecutor's Office amplifies the negative effect of each of them to the extent that it puts at serious risks the independence of all parts of the judiciary in Poland."

(c) Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe

183. The Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Amendments to the Law on the Ordinary Courts, the [2017 Act on the Supreme Court], and some other laws adopted on 16 January 2020 and endorsed by the Venice Commission on 18 June 2020 by written procedure replacing the 123rd Plenary Session (Opinion No. 977/2020), reads, in so far as relevant, as follows:

"10. The simultaneous and drastic reduction of the involvement of judges in the work of the [NCJ], filling the new chambers of the Supreme Court with newly appointed judges, mass replacement of court presidents, combined with the important increase of the powers of the President of the Republic and of the Minister of Justice/Prosecutor General – and this was the result of the 2017 reform – was alarming and led to the conclusion that the 2017 reform significantly reduced the independence of the Polish judiciary vis-à-vis the Government and the ruling majority in Parliament ...

V. Conclusions

61. Other solutions have to be found. In order to avoid further deepening of the crisis, the Venice Commission invites the Polish legislator to seriously consider the implementation of the main recommendations contained in the 2017 Opinion of the Venice Commission, namely:

• to return to the election of the 15 judicial members of the National Council of the Judiciary (the NCJ) not by Parliament but by their peers;

• to significantly revise the composition and internal structure of the two newly created 'super-chambers', and reduce their powers, in order to transform them into normal chambers of the Supreme Court;

• to return to the pre-2017 method of election of candidates to the position of the First President of the Supreme Court, or to develop a new model where each candidate proposed to the President of the Republic enjoys support of a significant part of the Supreme Court judges;

• to restore the powers of the judicial community in the questions of appointments, promotions, and dismissal of judges; to ensure that court presidents cannot be appointed."

6. Consultative Council of European Judges

(a) The 2007 Opinion

184. In Opinion no. 10 (2007) of 23 November 2007 on "the Council for the Judiciary at the service of society" the Consultative Council of European Judges ("CCJE") made the following relevant observations:

"15. The composition of the Council for the Judiciary shall be such as to guarantee its independence and to enable it to carry out its functions effectively.

16. The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided.

17. When the Council for the Judiciary is composed solely of judges, the CCJE is of the opinion that these should be judges elected by their peers.

18. When there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers....

III. C. 1. Selection of judge members

25. In order to guarantee the independence of the authority responsible for the selection and career of judges, there should be rules ensuring that the judge members are selected by the judiciary.

26. The selection can be done through election or, for a limited number of members (such as the presidents of Supreme Court or Courts of appeal), *ex officio.*

27. Without imposing a specific election method, the CCJE considers that judges sitting on the Council for the Judiciary should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels.

28. Although the roles and tasks of professional associations of judges and of the Council for the Judiciary differ, it is independence of the judiciary that underpins the interests of both. Sometimes professional organisations are in the best position to contribute to discussions about judicial policy. In many states, however, the great majority of judges are not members of associations. The participation of both categories of judges (members and non-members of associations) in a pluralist formation of the Council for the Judiciary would be more representative of the courts. Therefore, judges' associations must be allowed to put forward judge candidates (or a list of candidates) for election, and the same arrangement should be available to judges who are not members of such associations. It is for states to design an appropriate electoral system including these arrangements."

(b) Magna Carta of Judges

185. The Magna Carta of Judges (Fundamental Principles) was adopted by the CCJE in November 2010. The relevant paragraphs read as follows:

"**Rule of law and justice**

1. The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.

Judicial Independence

2. Judicial independence and impartiality are essential prerequisites for the operation of justice.

3. Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.

4. Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment.

Guarantees of independence

5. Decisions on selection, nomination and career shall be based on objective criteria and taken by the body in charge of guaranteeing independence....

Body in charge of guaranteeing independence

13. To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions."

(c) The 2017 Opinion

186. In its 12 October 2017 "Opinion of the CCJE Bureau following the request of the Polish National Council of the Judiciary to provide an opinion with respect to the Draft Act of September 2017 presented by the President of Poland amending the Act on the Polish National Council of the Judiciary and certain other acts[9]" (CCJE-BU(2017)9REV), the CCJE stated among other things as follows:

"11. Thus, the most significant concerns caused by the adopted and later vetoed act on the Council related to:

- the selection methods for judge members of the Council;

- the pre-term removal of the judges currently sitting as members of the Council;

- the structure of the Council.

12. Out of these concerns, the only significant change in the present draft presented by the President of Poland is the requirement for a majority of 3/5 in the *Sejm* for electing 15 judge members of the Council. However, this does not change in any way

[9] For the legislative process and the President's proposal regarding amendments see paragraphs 8 and 10 above.

the fundamental concern of transferring the power to appoint members of the Council from the judiciary to the legislature, resulting in a severe risk of politicised judge members as a consequence of a politicised election procedure. This risk may be said to be even greater with the new draft, since it provides that if a 3/5 majority cannot be reached, those judges having received the largest number of votes will be elected.

15. In addition, the CCJE Bureau recalls that the OSCE/ODIHR adopted its Final Opinion on 5 May 2017 on the previous draft, underlining that "the proposed amendments would mean, in brief, that the legislature, rather than the judiciary would appoint the fifteen judge representatives to the Judicial Council and that legislative and executive powers would be allowed to exercise decisive influence over the process of selecting judges. This would jeopardize the independence of a body whose main purpose is to guarantee judicial independence in Poland

F. Conclusions

20. The Bureau of the CCJE, which represents the CCJE members who are serving judges from all Council of Europe member States, reiterates once again that the Draft Act would be a major step back as regards judicial independence in Poland. It is also worrying in terms of the message it sends about the value of judges to society, their place in the constitutional order and their ability to provide a key public function in a meaningful way.

21. In order to fulfil European standards on judicial independence, the judge members of the National Council of the Judiciary of Poland should continue to be chosen by the judiciary. Moreover, the pre-term removal of the judges currently sitting as members of the Council is not in accordance with European standards and it endangers basic safeguards for judicial independence.

22. The Bureau of the CCJE is deeply concerned by the implications of the Draft Act for the principle of the separation of powers, as well as that of the independence of the judiciary, as it effectively means transferring the power to appoint members of the Polish National Council of the Judiciary from the judiciary to the legislature. The CCJE Bureau recommends that the Draft Act be withdrawn and that the existing law remain in force. Alternatively, any new draft proposals should be fully in line with the standards of the Council of Europe regarding the independence of the judiciary."

(d) The 2020 Report

187. In its "Report on judicial independence and impartiality in the Council of Europe member States (2019 edition)" of 30 March 2020 (9 CCJE-BU(2020)3) the CCJE made the following observations, among other things:

"17. The ECtHR and the CCJE have recognised the importance of institutions and procedures guaranteeing the independent appointment of judges. The CCJE has recommended that every decision relating to a judge's appointment, career and disciplinary action be regulated by law, based on objective criteria and be either taken by an independent authority or subject to guarantees, for example judicial review, to ensure that it is not taken other than on the basis of such criteria. Political considerations should be inadmissible irrespective of whether they are made within Councils for the Judiciary, the executive, or the legislature".

7. *GRECO*

188. In the light of the judicial reform of 2016-2018 in Poland, GRECO, Group of States against Corruption, decided at its 78th Plenary meeting (4-8 December 2017) to apply its *ad-hoc* procedure to Poland.

(a) Rule 34 Report of June 2018

189. As a result, GRECO adopted addendum to the Fourth Round Evaluation Report on Poland (Rule 34) at its 80th Plenary Meeting (Strasbourg, 18-22 June 2018). It addressed the following recommendations to Poland. Firstly, to amend the provisions on the election of judges to the NCJ, to ensure that at least half of the members of the NCJ are judges elected by their peers. Secondly to reconsider the establishment of the Chamber of Extraordinary Review and Public Affairs and Disciplinary Chamber at the Supreme Court and to reduce the involvement of the executive in the internal organisation of the Supreme Court. In respect of the structural changes in the Supreme Court and creation of two new Chambers, GRECO stated:

> "31. These structural reforms have been subject to extensive criticism in broad consensus by the international community, including bodies such as the Venice Commission, the Consultative Council of European Judges (CCJE), OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the European Commission. For example, concerns have been raised that the procedure of extraordinary appeals is 'dangerous for the stability of the Polish legal order' and additionally problematic due to its retroactivity, permitting the reopening of cases determined long before the enactment of the LSC, which is not limited to newly established facts. Furthermore, the establishment of the special chambers for extraordinary appeals and for disciplinary matters has been criticised for creating a hierarchy within the court , in that these two chambers have been granted special status and may be seen as superior to the other 'ordinary chambers': the extraordinary appeals chamber may examine decisions taken by the 'ordinary chambers' of the SC, the disciplinary chamber having jurisdiction over disciplinary cases of judges sitting in the other chambers as well as a separate budget (and, in addition, judges of the disciplinary chamber receive a 40% higher salary). Moreover, the use of lay judges at the SC, which has been introduced as a way of bringing in a 'social factor' into the system, according to the Polish authorities, has also been criticised, partly for being alien to other judicial systems in Europe at the level of supreme courts, but also due to the unsuitability of lay persons for determining significant cases involving legal complexities. The fact that they are elected by the legislature, which has the potential of compromising their independence, is a particular concern in this respect."

(b) Rule 34 Report of December 2019

190. At its 84th Plenary Meeting (Strasbourg, 2-6 December 2019, GrecoRC4(2019)23) GRECO adopted a Second Addendum to the Second Compliance Report including Follow-up to the Addendum to the Fourth Round Evaluation Report (Rule 34) of June 2018. The report was published on 16 December 2019. It concluded that "nothing ha[d] been done to amend the provisions on the elections of members of the National Council of the

Judiciary, which in its current composition [did] not meet Council of Europe standards, to reduce the involvement of the executive in the internal organisation of the Supreme Court [and] to amend the disciplinary procedures applicable to Supreme Court judges".

(c) **Interim compliance report of 22 September 2021**

191. On 22 September 2021 GRECO adopted an Interim Compliance Report assessing measures taken by the Polish authorities to implement the pending recommendations issued in the Fourth Round Evaluation Report on Poland (Rule 34). It considered that its recommendation to amend the provisions on the election of judges to the NCJ, by ensuring that at least half of the members of the NCJ were judges elected by their peers, had not been implemented. With respect to another recommendation, also not implemented, pertaining to the organisation of the Supreme Court and its new chambers GRECO stated:

> "As regards the first part of the recommendation, rather than reconsidering the establishment of the [Chamber of Extraordinary Review and Public Affairs] of the SC as required by the recommendation, GRECO notes that amendments to the Law on the Supreme Court of December 2019 (which entered into force in February 2020...) have expanded the competences of both chambers, with the [Chamber of Extraordinary Review and Public Affairs] now being the only body with the competence to decide on motions challenging the independence and impartiality of judges, with a special competence to overturn decisions of other courts, including other Supreme Court chambers, which contest the legitimacy of other judges (section 26 (2-6) of the Act on the Supreme Court)."

D. European Union

1. European Union law

(a) The Charter of Fundamental Rights of the European Union

192. Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter"), reads, in so far as relevant:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."

(b) Treaty on European Union

193. Article 2 of the Treaty on European Union ("TEU") provides:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are ordinary to the Member States in a society in

which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Article 19(1) TEU reads as follows:

"1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

(c) Consolidated version of the Treaty on the Functioning of the European Union

194. Article 267 of the Consolidated version of the Treaty on the Functioning of the European Union ("TFEU") provides:

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

(d) Council Directive 2000/78/EC

195. Article 9 (1) of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Official Journal L 303, p. 16) concerns the "defence of rights" and reads:

"Member States shall ensure that judicial and/or administrative procedures ... for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

2. The European Commission

(a) Initiation of the rule of law framework

196. On 13 January 2016 the European Commission ("the Commission") decided to examine the situation in Poland under the Rule of Law Framework. The exchanges between the Commission and the Polish Government were

unable to resolve the concerns of the Commission. The Rule of Law Framework provided guidance for a dialogue between the Commission and the member State concerned to prevent the escalation of systemic threats to the rule of law.

197. On 27 July and 21 December 2016 the Commission adopted two recommendations regarding the rule of law in Poland, concentrating on issues pertaining to the Constitutional Court. In particular, the Commission found that there was a systemic threat to the rule of law in Poland, and recommended that the Polish authorities take appropriate action to address this threat as a matter of urgency. The Commission recommended, *inter alia*, that the Polish authorities: (a) implement fully the judgments of the Constitutional Court of 3 and 9 December 2015 which required that the three judges who had been lawfully nominated in October 2015 by the previous legislature be permitted to take up their judicial duties as judges of the Constitutional Court, and that the three judges nominated by the new legislature in the absence of a valid legal basis not be permitted to take up their judicial duties without being validly elected; and (b) publish and implement fully the judgments of the Constitutional Court of 9 March 2016, and ensure that the publication of future judgments was automatic and did not depend on any decision of the executive or legislative powers.

(b) Rule of Law Recommendation (EU) 2017/1520 (third recommendation)

198. On 26 July 2017 the Commission adopted a third *Recommendation regarding the Rule of Law in Poland,* which complemented its two earlier recommendations. The concerns of the Commission related to the lack of an independent and legitimate constitutional review, and the new legislation relating to the Polish judiciary, which would structurally undermine the independence of the judiciary in Poland and would have an immediate and concrete impact on the independent functioning of the judiciary as a whole. In its third recommendation, the Commission considered that the situation whereby there was a systemic threat to the rule of law in Poland, as presented in its two earlier recommendations, had seriously deteriorated. The Commission reiterated that, notwithstanding the fact that there was a diversity of justice systems in Europe, ordinary European standards had been established on safeguarding judicial independence. The Commission observed – with great concern – that following the entry into force of the new laws referred to above, the Polish judicial system would no longer be compatible with European standards in this regard.

(c) Rule of Law Recommendation (EU) 2018/103 (fourth recommendation)

199. On 20 December 2017 the Commission adopted a fourth *Recommendation regarding the rule of law in Poland* finding that the concerns raised in earlier recommendations had not been addressed and the

situation of systemic threat to the rule of law had seriously deteriorated further. In particular, it stated that "the new laws raised serious concerns as regards their compatibility with the Polish Constitution as underlined by a number of opinions, in particular from the Supreme Court, the [NCJ] and the Polish Commissioner for Human Rights". However, as explained in the Rule of Law Recommendation of 26 July 2017, an effective constitutional review of these laws was no longer possible. The Commission stated:

"2.1.3. *The extraordinary appeal*

18. The law introduces a new form of judicial review of final and binding judgments and decisions, the extraordinary appeal. Within three years from the entry into force of the law the Supreme Court will be able to overturn completely or in part any final judgment delivered by a Polish court in the past 20 years, including judgments delivered by the Supreme Court, subject to some exceptions. The power to lodge the appeal is vested in, *inter alia*, the Prosecutor General and the Ombudsman . The grounds for the appeal are broad: the extraordinary appeal can be lodged if it is necessary to ensure the rule of law and social justice and the ruling cannot be repealed or amended by way of other extraordinary remedies, and either it (1) violates the principles or the rights and freedoms of persons and citizens enshrined in the Constitution; or (2) it is a flagrant breach of the law on the grounds of misinterpretation or misapplication; or (3) there is an obvious contradiction between the court's findings and the evidence collected.

19. This new extraordinary appeal procedure raises concerns as regards the principle of legal certainty which is a key component of the rule of law. As noted by the Court of Justice, attention should be drawn to the importance, both for the EU legal order and national legal systems, of the principle of res judicata: 'in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question' . As noted by the European Court of Human Rights, extraordinary review should not be an 'appeal in disguise', and 'the mere possibility of there being two views on the subject is not a ground for re-examination.

20. In its opinion on the draft law on the Supreme Court, the Venice Commission underlined that the extraordinary appeal procedure is dangerous for the stability of the Polish legal order. The opinion notes that it will be possible to reopen any case decided in the country in the past 20 years on virtually any ground and the system could lead to a situation in which no judgment will ever be final anymore.

21. The new extraordinary appeal also raises constitutionality concerns. According to the Supreme Court and the Ombudsman, the law affects the principle of stability of jurisprudence and the finality of judgments, the principle of protecting trust in the state and law as well as the right to have a case heard within a reasonable time.

...

31. Also, the new regime for appointing judges-members of the [NCJ] raises serious concerns. Well established European standards, in particular the 2010 Recommendation of the Committee of Ministers of the Council of Europe, stipulate that 'not less than half the members of [Councils for the Judiciary] should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary. It is up to the Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary. However, where such a Council has been

established, as it is the case in Poland, its independence must be guaranteed in line with European standards.

32. Until the adoption of the law on the [NCJ], the Polish system was fully in line with these standards since the [NCJ] was composed of a majority of judges chosen by judges. Articles 1(1) and 7 of the law amending the law on the [NCJ] would radically change this regime by providing that the 15 judges-members of the [NCJ] will be appointed, and can be re-appointed, by *Sejm*. In addition, there is no guarantee that under the new law *Sejm* will appoint judges-members of the Council endorsed by the judiciary, as candidates to these posts can be presented not only by groups of 25 judges, but also by groups of at least 2 000 citizens. Furthermore, the final list of candidates to which *Sejm* will have to give its approval en bloc is pre-established by a committee of *Sejm*. The new rules on appointment of judges-members of the [NCJ] significantly increase the influence of the Parliament over the Council and adversely affect its independence in contradiction with the European standards. The fact that the judges-members will be appointed by *Sejm* with a three fifths majority does not alleviate this concern, as judges-members will still not be chosen by their peers. In addition, in case such a three fifths majority is not reached, judges-members of the Council will be appointed by *Sejm* with absolute majority of votes.

33. This situation raises concerns from the point of view of the independence of the judiciary. For example, a district court judge who has to deliver a judgment in a politically sensitive case, while the judge is at the same time applying for a promotion to become a regional court judge, may be inclined to follow the position favoured by the political majority in order not to put his/her chances to obtain the promotion into jeopardy. Even if this risk does not materialise, the new regime does not provide for sufficient guarantees to secure the appearance of independence which is crucial to maintain the confidence which tribunals in a democratic society must inspire in the public. Also, assistant judges will have to be assessed by a politically influenced [NCJ] prior to their appointment as judge.

34. The Venice Commission concludes that the election of the 15 judicial members of the National Council of the Judiciary by Parliament, in conjunction with the immediate replacement of the currently sitting members, will lead to a far-reaching politicisation of this body. The Venice Commission recommends that, instead, judicial members of the [NCJ] should be elected by their peers, as in the current Act. It also observed that the law weakens the independence of the Council with regard to the majority in Parliament and contributes to a weakening of the independence of justice as a whole....”

“3. FINDING OF A SYSTEMIC THREAT TO THE RULE OF LAW

38. Consequently, the Commission considers that the situation of a systemic threat to the rule of law in Poland as presented in its Recommendations of 27 July 2016, 21 December 2016, and 26 July 2017 has seriously deteriorated further.

39. The Commission underlines that whatever the model of the justice system chosen, the rule of law requires to safeguard the independence of the judiciary, separation of powers and legal certainty. It is up to the Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary the role of which is to safeguard judicial independence. However, where such a Council has been established by a Member State, as it is the case in Poland where the Polish Constitution has entrusted explicitly the [NCJ] with the task of safeguarding judicial independence, the independence of such Council must be guaranteed in line with European standards. It is with great concern that the Commission observes that as a consequence of the new

laws referred to above, the legal regime in Poland would no longer comply with these requirements."

(d) Reasoned Proposal in Accordance with Article 7(1) TEU Regarding the Rule of Law in Poland

200. On 20 December 2017 the Commission launched the procedure under Article 7(1) TEU. This was the first time the procedure had been used. The Commission submitted a Reasoned Proposal (COM/2017/0360) to the Council of the European Union, inviting it to determine that there was a clear risk of a serious breach by the Republic of Poland of the rule of law, which was one of the values referred to in Article 2 TEU, and to address appropriate recommendations to Poland in this regard. Its relevant parts read as follows:

"(135). The law modifies the internal structure of the Supreme Court, supplementing it with two new chambers. A new [Chamber of Extraordinary Review and Public Affairs] will assess cases brought under the new extraordinary appeal procedure. It appears that this new chamber will be composed in majority of new judges and will ascertain the validity of general and local elections and examining electoral disputes, including electoral disputes in European Parliament elections. In addition, a new autonomous disciplinary chamber composed solely of new judges will be tasked with reviewing in the first and second instance disciplinary cases against Supreme Court judges. These two new largely autonomous chambers composed with new judges raise concerns as regards the separation of powers. As noted by the Venice Commission, while both chambers are part of the Supreme Court, in practice they are above all other chambers, creating a risk that the whole judicial system will be dominated by these chambers which are composed of new judges elected with a decisive influence of the ruling majority. Also, the Venice Commission underlines that the law will make the judicial review of electoral disputes particularly vulnerable to political influence, creating a serious risk for the functioning of Polish democracy ...

5. Finding a clear risk of a serious breach of the values referred to in Article 2 TEU

...

(172). The Commission is of the opinion that the situation described in the previous sections represents a clear risk of a serious breach by the Republic of Poland of the rule of law referred to in Article 2 TEU. The Commission comes to this finding after having considered the facts set out above.

(173). The Commission observes that within a period of two years more than 13 consecutive laws have been adopted affecting the entire structure of the justice system in Poland: the Constitutional [Court], the Supreme Court, the ordinary courts, the [NCJ], the prosecution service and the National School of Judiciary. The ordinary pattern of all these legislative changes is that the executive or legislative powers have been systematically enabled to interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies. The legislative changes and their combined effects put at serious risk the independence of the judiciary and the separation of powers in Poland which are key components of the rule of law. The Commission also observes that such intense legislative activity has been conducted without proper consultation of all the stakeholders concerned, without a spirit of loyal

cooperation required between state authorities and without consideration for the opinions from a wide range of European and international organisations."

201. The procedure under Article 7(1) TEU is still under consideration before the Council of the European Union.

3. The European Parliament

(a) The 2017 Resolution

202. On 15 November 2017 the European Parliament adopted a resolution on the situation of the rule of law and democracy in Poland (2017/2931(RSP)). The resolution reiterated that the independence of the judiciary was enshrined in Article 47 of the Charter and Article 6 of the Convention, and was an essential requirement of the democratic principle of the separation of powers, which was also reflected in Article 10 of the Polish Constitution. It expressed deep concern at the redrafted legislation relating to the Polish judiciary, in particular, its potential to undermine structurally judicial independence and weaken the rule of law in Poland. The Polish Parliament and the Government were urged to implement fully all recommendations of the Commission and the Venice Commission, and to refrain from conducting any reform which would put at risk respect for the rule of law, and in particular the independence of the judiciary. In this respect it called for postponement of the adoption of any laws until a proper assessment had been made by the Commission and the Venice Commission.

(b) The 2020 Resolution

203. The European Parliament's resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach of the rule of law by the Republic of Poland (2017/0360R(NLE)), in so far as relevant, reads as follows:

> **"The composition and functioning of the Disciplinary Chamber and Extraordinary Chamber of the Supreme Court**
>
> [The European Parliament]
>
> 12. Is concerned that the new the Chamber of [Extraordinary Review and Public Affairs] of the Supreme Court (hereinafter the 'Extraordinary Chamber'), the majority of whose members are individuals nominated by the new National Council of the Judiciary and which risks not qualifying as an independent tribunal in the assessment of the Court of Justice of the European Union (hereinafter the 'Court of Justice'), is to ascertain the validity of elections and to examine electoral disputes; notes that this raises serious concerns as regards the separation of powers and the functioning of Polish democracy, in that it makes judicial review of electoral disputes particularly vulnerable to political influence and is capable of creating legal uncertainty as to the validity of such review.
>
> 20. Recalls that, in 2018, two new chambers within the Supreme Court were created, namely the Disciplinary Chamber and the Extraordinary Chamber, which were staffed

with newly appointed judges selected by the new National Council of the Judiciary and entrusted with special powers – including the power of the Extraordinary Chamber to quash final judgments taken by lower courts or by the Supreme Court itself by way of extraordinary review, and the power of the Disciplinary Chamber to discipline other judges of the Supreme Court and of ordinary courts, creating *de facto* a 'Supreme Court within the Supreme Court';

21. Recalls that, in its ruling of 19 November 2019, the Court of Justice, answering a request for a preliminary ruling by the Supreme Court (Labour and Social Security Chamber, hereinafter the 'Labour Chamber') concerning the Disciplinary Chamber, ruled that national courts have a duty to disregard provisions of national law which reserve jurisdiction to hear a case where Union law may be applied to a body that does not meet the requirements of independence and impartiality;

22. Notes that the referring Supreme Court (Labour Chamber) subsequently concluded in its judgment of 5 December 2019 that the Disciplinary Chamber does not fulfil the requirements of an independent and impartial tribunal within the meaning of Polish and Union law, and that the Supreme Court (Civil, Criminal and Labour Chambers) adopted a resolution on 23 January 2020 reiterating that the Disciplinary Chamber is not a court due to its lack of independence and therefore its judgments cannot be considered to be judgments given by a duly appointed court; notes with grave concern that the Polish authorities have declared that those decisions are of no legal significance when it comes to the continuing functioning of the Disciplinary Chamber and the new National Council of the Judiciary, and that the Constitutional [Court] declared the Supreme Court resolution unconstitutional on 20 April 2020, creating a dangerous judiciary duality in Poland in open violation of the primacy of Union law and in particular of Article 19(1) TEU as interpreted by the Court of Justice in that it prevents the effectiveness and application of the Court of Justice's ruling of 19 November 2019 by the Polish courts;

23. Notes the order of the Court of Justice of 8 April 2020 instructing Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber and calls on the Polish authorities to swiftly implement the order; calls on the Polish authorities to fully comply with the order and calls on the Commission to submit an additional request to the Court of Justice seeking that payment of a fine be ordered in the event of persisting non-compliance; calls on the Commission to urgently start infringement proceedings in relation to the national provisions on the powers of the Extraordinary Chamber, since its composition suffers from the same flaws as the Disciplinary Chamber;

The composition and functioning of the new National Council of the Judiciary

24. Recalls that it is up to the Member States to establish a council for the judiciary, but that, where such council is established, its independence must be guaranteed in line with European standards and the Member State's constitution; recalls that, following the reform of the National Council of the Judiciary, which is the body responsible for safeguarding the independence of the courts and judges in accordance with Article 186(1) of the Polish Constitution, by means of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts, the judicial community in Poland was deprived of the power to delegate representatives to the National Council of the Judiciary, and hence its influence on recruitment and promotion of judges; recalls that before the reform, 15 out of 25 members of the National Council of the Judiciary were judges elected by their peers, while since the 2017 reform, those judges are elected by the Polish parliament; strongly regrets that, taken in conjunction with the premature termination in early 2018 of the mandates of

all the members appointed under the old rules, this measure led to a far-reaching politicisation of the National Council of the Judiciary;

25. Recalls that the Supreme Court, implementing the criteria set out by the Court of Justice in its judgment of 19 November 2019, found in its judgment of 5 December 2019 and in its decisions of 15 January 2020, as well as in its resolution of 23 January 2020, that the decisive role of the new National Council of the Judiciary in the selection of the judges of the newly created Disciplinary Chamber undermines the latter's independence and impartiality; is concerned about the legal status of the judges appointed or promoted by the new National Council of the Judiciary in its current composition and about the impact their participation in adjudicating may have on the validity and legality of proceedings;

26. Recalls that the European Network of Councils for the Judiciary suspended the new National Council of the Judiciary on 17 September 2018 because it no longer fulfilled the requirements of being independent of the executive and legislature and initiated the expulsion procedure in April 2020; ...

67. Calls on the Council to resume the formal hearings - the last of which was held as long ago as December 2018 - as soon as possible and to include in those hearings all the latest and major negative developments in the areas of rule of law, democracy and fundamental rights; urges the Council to finally act under the Article 7(1) TEU procedure by finding that there is a clear risk of a serious breach by the Republic of Poland of the values referred to in Article 2 TEU, in the light of overwhelming evidence thereof as displayed in this resolution and in so many reports of international and European organisations, the case law of the Court of Justice and the European Court of Human Rights and reports by civil society organisations; strongly recommends that the Council address concrete recommendations to Poland, as provided for in Article 7(1) TEU, as a follow-up to the hearings, and that it indicate deadlines for the implementation of those recommendations; calls furthermore on the Council to commit to assessing the implementation of these recommendations in a timely manner; calls on the Council to keep Parliament regularly informed and closely involved and to work in a transparent manner, to allow for meaningful participation and oversight by all European institutions and bodies and by civil society organisations; ..."

4. Court of Justice of the European Union

(a) Judgment of the Court of Justice of the European Union (Grand Chamber) of 19 November 2019 (*A.K. and Others*, Independence of the Disciplinary Chamber of the Supreme Court; Joined Cases C-585/18, C-624/18, C-625/18)

204. In August and September 2018, the Labour and Social Security Chamber of the Supreme Court made three requests to the CJEU for preliminary rulings in three cases pending before it. The requests mainly concerned the question whether the newly established Disciplinary Chamber of the Supreme Court of Poland satisfied, in the light of the circumstances in which it was formed and its members appointed, the requirements of independence and impartiality required under Article 47 of the Charter of Fundamental Rights of the European Union. The questions read as follows:

"In Case C-585/18, the questions referred are worded as follows:

'(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 of the [Charter], 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 [NCJ]), 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 of the [Charter of Fundamental Rights], 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 seized 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?'

52. In Cases C-624/18 and C-625/18, the questions referred were worded as follows:

'(1) Should Article 47 of the [Charter], read in conjunction with Article 9(1) of [Directive 2000/78], be interpreted as meaning that, where an appeal is brought before a court of last instance in a Member State against an alleged infringement of the prohibition of discrimination on the ground of age in respect of a judge of that court, together with a motion for granting security in respect of the reported claim, that court — in order to protect the rights arising from EU law by ordering an interim measure provided for under national law — must refuse to apply national provisions which confer jurisdiction, in the case in which the appeal has been lodged, on a chamber of that court which is not operational by reason of a failure to appoint judges to be its members?

(2) In the event that judges are appointed to adjudicate within the chamber with jurisdiction under national law to hear and determine the action brought, 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 of the [Charter], is a newly created chamber of a court of last instance of a Member State which has jurisdiction to hear the case of a national court judge at first or second instance and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts, namely the [NCJ], 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?

(3) If the answer to the second 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 of the [Charter], 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 seized with an appeal in an EU case should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?"

205. On 27 June 2019 Advocate General Tanchev delivered his opinion in which he concluded that the Disciplinary Chamber had not satisfied the requirements of independence set out in Article 47 of the Charter (for the main considerations pertaining to that conclusion see §§ 131-135 of the opinion).

206. On 19 November 2019 the CJEU delivered a preliminary ruling in Joined Cases C-585/18, C-624/18, C-625/18. Recalling that the interpretation of Article 47 of the Charter was borne out by the case-law of the European Court of Human Rights on Article 6 § 1 of the Convention, the Court of Justice reiterated the following principles, considered relevant in this context. It held among many other things as follows:

> "133. ... As far as concerns the circumstances in which the members of the Disciplinary Chamber were appointed, the Court points out, as a preliminary remark, that the mere fact that those judges were appointed by the President of the Republic does not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (see, to that effect, judgment of 31 January 2013, D. and A., C-175/11, EU:C:2013:45, paragraph 99, and ECtHR, 28 June 1984, *Campbell and Fell v. United Kingdom*, CE:ECHR:1984:0628JUD000781977, § 79; 2 June 2005, *Zolotas v. Greece*, CE:ECHR:2005:0602JUD003824002 §§ 24 and 25; 9 November 2006, *Sacilor Lormines v. France*, CE:ECHR:2006:1109JUD006541101, § 67; and 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, § 80 and the case-law cited).
>
> 134. However, it is still necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges (see, by analogy, judgment of 24 June 2019, *Commission v Poland* (*Independence of the Supreme Court*), C-619/18, EU:C:2019:531, paragraph 111).
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> 136. In the present cases, it should be made clear that Article 30 of the New Law on the Supreme Court sets out all the conditions which must be satisfied by an individual in order for that individual to be appointed as a judge of that court. Furthermore, under Article 179 of the Constitution and Article 29 of the New Law on the Supreme Court, the judges of the Disciplinary Chamber are, as is the case for judges who are to sit in the other chambers of the referring court, appointed by the President of the Republic on a proposal of the [NCJ], that is to say the body empowered under Article 186 of the Constitution to ensure the independence of the courts and of the judiciary.
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> 137. The participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective (see, by analogy, judgment of 24 June 2019, *Commission* v. *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 115; see also, to that effect, ECtHR, 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, §§ 81 and 82). In particular, the fact of subjecting the very possibility for the President of the Republic to appoint a judge to the Sąd Najwyższy (Supreme Court) to the existence of a favourable opinion of the [NCJ] is capable of objectively circumscribing the President of the Republic's discretion in exercising the powers of his office.
>
> 138. However, that is only the case provided, *inter alia*, that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal (see, by analogy, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 116).

139. The degree of independence enjoyed by the [NCJ] in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered, under Article 186 of the Constitution, to ensure the independence of the courts and of the judiciary, may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter.

140. It is for the referring court to ascertain whether or not the [NCJ] offers sufficient guarantees of independence in relation to the legislature and the executive, having regard to all of the relevant points of law and fact relating both to the circumstances in which the members of that body are appointed and the way in which that body actually exercises its role.

141. The referring court has pointed to a series of elements which, in its view, call into question the independence of the [NCJ].

142. In that regard, although one or other of the factors thus pointed to by the referring court may be such as to escape criticism per se and may fall, in that case, within the competence of, and choices made by, the Member States, when taken together, in addition to the circumstances in which those choices were made, they may, by contrast, throw doubt on the independence of a body involved in the procedure for the appointment of judges, despite the fact that, when those factors are taken individually, that conclusion is not inevitable.

143. Subject to those reservations, among the factors pointed to by the referring court which it shall be incumbent on that court, as necessary, to establish, the following circumstances may be relevant for the purposes of such an overall assessment: first, the [NCJ], as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time; second, whereas the 15 members of the [NCJ] elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the legislature among candidates capable of being proposed *inter alia* by groups of 2,000 citizens or 25 judges, such a reform leading to appointments bringing the number of members of the [NCJ] directly originating from or elected by the political authorities to 23 of the 25 members of that body; third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed [NCJ].

144. For the purposes of that overall assessment, the referring court is also justified in taking into account the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive.

145. Furthermore, in the light of the fact that, as is clear from the case file before the Court, the decisions of the President of the Republic appointing judges to the Sąd Najwyższy (Supreme Court) are not amenable to judicial review, it is for the referring court to ascertain whether the terms of the definition, in Article 44(1) and (1a) of the Law on the [NCJ], of the scope of the action which may be brought challenging a resolution of the [NCJ], including its decisions concerning proposals for appointment to the post of judge of that court, allows an effective judicial review to be conducted of such resolutions, covering, at the very least, an examination of whether there was no *ultra vires* or improper exercise of authority, error of law or manifest error of assessment (see, to that effect, ECtHR, 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, §§ 25 and 81).

146. Notwithstanding the assessment of the circumstances in which the new judges of the Disciplinary Chamber were appointed and the role of the [NCJ] in that regard, the referring court may, for the purposes of ascertaining whether that chamber and its members meet the requirements of independence and impartiality arising from Article 47 of the Charter, also wish to take into consideration various other features that more directly characterise that chamber.

147. That applies, first, to the fact referred to by the referring court that this court has been granted exclusive jurisdiction, under Article 27(1) of the New Law on the Supreme Court, to rule on cases of the employment, social Security and retirement of judges of the Sąd Najwyższy (Supreme Court), which previously fell within the jurisdiction of the ordinary courts.

148. Although that fact is not conclusive per se, it should, however, be borne in mind, as regards, in particular, cases relating to the retiring of judges of the Sąd Najwyższy (Supreme Court) such as those in the main proceedings, that the assignment of those cases to the Disciplinary Chamber took place in conjunction with the adoption, which was highly contentious, of the provisions of the New Law on the Supreme Court which lowered the retirement age of the judges of the Sąd Najwyższy (Supreme Court), applied that measure to judges currently serving in that court and empowered the President of the Republic with discretion to extend the exercise of active judicial service of the judges of the referring court beyond the new retirement age set by that law.

149. It must be borne in mind, in that regard, that, in its judgment of 24 June 2019, *Commission* v. *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), the Court found that, as a result of adopting those measures, the Republic of Poland had undermined the irremovability and independence of the judges of the Sąd Najwyższy (Supreme Court) and failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

150. Second, in that context, the fact must also be highlighted, as it was by the referring court, that, under Article 131 of the New Law on the Supreme Court, the Disciplinary Chamber must be constituted solely of newly appointed judges, thereby excluding judges already serving in the Sąd Najwyższy (Supreme Court).

151. Third, it should be made clear that, although established as a chamber of the Sąd Najwyższy (Supreme Court), the Disciplinary Chamber appears, by contrast to the other chambers of that court, and as is clear *inter alia* from Article 20 of the New Law on the Supreme Court, to enjoy a particularly high degree of autonomy within the referring court.

171. In the light of all of the foregoing considerations, the answer to the second and third questions referred in Cases C-624/18 and C-625/18 is:

Article 47 of the Charter and Article 9(1) of Directive 2000/78[10] 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 provision. 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

[10] Editorial note: see paragraph 195 above.

prejudicing the trust which justice in a democratic society must inspire in subjects of the law.

It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court). If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the 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."

(b) Judgment of the Court of Justice of the European Union (Grand Chamber) of 2 March 2021 (Case C-824/18)

207. In a request of 21 November 2018, supplemented on 26 June 2019, the Supreme Administrative Court applied to the CJEU for a preliminary ruling in cases involving persons who had applied for a position of judge at the Supreme Court, Civil and Criminal Chambers, but had not obtained a recommendation of the NCJ, which proposed other candidates instead. The first of the referred cases concerned appellant A.B., who had not been recommended to the Civil Chamber of the Supreme Court and who appealed against NCJ resolution no. 330/2018 to the Supreme Administrative Court. In that case the Supreme Administrative Court decided to stay the implementation of the impugned resolution of NCJ (see paragraphs 45-52 and 165-168 above). The questions read, in so far as relevant, as follows:

"1. Should Article 2 TEU, in conjunction with the third sentence of Article 4(3), Articles 6(1) and 19(1) TEU, in conjunction with Article 47 of the Charter and Article 9(1) of Directive 2000/78 and the third paragraph of Article 267 TFEU, be interpreted as meaning that

– an infringement of the rule of law and of the right to an effective remedy and to effective judicial protection occurs in a situation where the national legislature, in granting the right of appeal to a court in individual cases concerning service in the office of judge of the court of last instance of a Member State (the Supreme Court), stipulates that a decision made during the selection procedure preceding the submission of a motion for appointment to the position of judge of [that] court is final and effective where not all parties to the selection procedure have appealed against the decision made with respect to the joint consideration and assessment of all candidates for Supreme Court judges, who also include a candidate not interested in appealing that decision, namely a candidate indicated in the motion for appointment to the aforementioned position, which as a result:

– undermines the effectiveness of the remedy and the competent court's ability to carry out a genuine review of the aforementioned selection procedure?"...

"[Supplementary 1.] Should Article 2 TEU, read in conjunction with the third sentence of Article 4(3), Article 6(1) and Article 19(1) thereof, Article 47 of the Charter, Article 9(1) of Directive 2000/78 and the third paragraph of Article 267 TFEU, be interpreted as meaning that:

– an infringement of the rule of law and of the right of access to the courts and the right to effective judicial protection occurs in a situation where the national legislature

removes from the legal order the relevant provisions concerning the jurisdiction of the Supreme Administrative Court and the right of appeal to that court against the [NCJ] resolutions and also introduces a solution whereby proceedings in the cases concerning those appeals, which have been initiated but not concluded before the date of amendments (derogations) being introduced, are to be discontinued by operation of law, which as a result:

– undermines the right of access to the courts in so far as it relates to the review of the [NCJ] resolutions and the verification of whether the selection procedure in which those resolutions were adopted was properly conducted,...?"

208. On 17 December 2020 Advocate General Tanchev delivered his opinion, providing an interpretation of Article 19(1) TEU in conjunction with Article 267 TFEU (see paragraphs 193 and 194 above). The Advocate General noted as important the findings of the Polish Supreme Court in the series of rulings of 5 December 2019, 15 January and 23 January 2020, which confirmed that the NCJ, in its current composition, had not been impartial and independent of the legislative and executive powers. He also stated, among other things:

"107. The Court has emphasised (44) that '[f]urthermore, in the light of the fact that, as is clear from the case file before the Court, the decisions of the President of the Republic appointing judges to the Sąd Najwyższy (Supreme Court) are not amenable to judicial review, it is for the referring court to ascertain whether the terms of the definition, in Article 44(1) and (1a) of the Law on the [NCJ], of *the scope of the action which may be brought challenging a resolution of the [NCJ], including its decisions concerning proposals for appointment to the post of judge of that court, allows an effective judicial review to be conducted of such resolutions, covering, at the very least, an examination of whether there was no ultra* vires *or improper exercise of authority, error of law or manifest error of assessment* (see, to that effect, ECtHR, 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, §§ 25 and 81) (emphasis added).

108. In the Polish context, the failure to respect the minimum requirements for judicial review set out by the Court in the paragraph above has *a direct impact* on assessing the independence of judges who are appointed.

109. What I find important for the Court to consider here is that whereas certain types of procedure of and rules pertaining to the appointment of judges in Member States (and so also the lack of a judicial remedy in the context of such procedures, as is the case in the main proceedings) may not be questionable under EU law as such, *they may well turn out to be unacceptable when they occur on the basis of a recommendation of a body which is itself manifestly not independent*.

110. First, the [NCJ] resolutions at issue here are essentially administrative decisions, which have legal effects for the candidates for judicial office in question. (45) As with any other intervention by the State, the appointment procedure for judges must be governed by legal rules, respect for which should be subject to review by an independent judicial body.

111. Indeed*, inter alia*, the European Charter on the Statute for Judges (46) enshrines the "right of appeal" of any judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, is threatened or infringed in any way, so that he or she can refer the matter to an independent body as described above. This means that judges are not left defenceless against an infringement

of their independence. The right of appeal is a necessary safeguard because it is mere wishful thinking to set out principles to protect the judiciary unless they are consistently backed with mechanisms to guarantee their effective implementation.

112. The ECtHR has already had an opportunity to confirm, in *Denisov v. Ukraine*, that judicial councils should either comply with the standards found in Article 6 ECHR, or that their decision should be amenable to review by a body that does so comply. The question of compliance with the fundamental guarantees of independence and impartiality may arise if the structure and functioning of a judicial council such as the [NCJ] (*in casu*, acting as a disciplinary body) itself raises serious issues in that regard. ..."

The opinion further read, in so far as relevant:

"129. In the light of the foregoing considerations, I consider ... that, due to the specific circumstances arising in Poland, judicial review of appointment procedures by a court whose independence is beyond doubt is indispensable under the second subparagraph of Article 19(1) TEU in order to maintain the appearance of the independence of the judges appointed in those procedures. This is notably because of the rapid changes in Polish legislative provisions governing judicial review of the [NCJ]'s selection procedures and decisions (that is, in particular, the Law of 26 April 2019), provisions which seem to run counter to the Constitutional Court's case-law (that is, however, a matter for the Polish courts). Those changes give rise to reasonable doubts as to whether the appointment process is currently oriented towards the selection of internally independent candidates, rather than politically convenient ones, for judicial office at such an important and systemic institution as the Supreme Court, the court of last instance. Moreover, the legal literature also points out that it was the well-established case-law of the Constitutional Court before 2015 that the [NCJ]'s appointment procedures and decisions, under the Polish Constitution, had to be amenable to judicial review. In the specific Polish context, judicial review of the [NCJ]'s decision was a significant guarantee for the objectivity and impartiality of appointment procedures and the equal constitutional right of access to public office.

...

132. Hence, '[i]t follows from [the case-law] that an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to *create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system*' (emphasis added).

133. It follows from all the foregoing considerations that the referring court can preserve its competence to rule on the actions in the main proceedings.

134. However, I consider (as does the [Commissioner for Human Rights]) that it is not possible to accept the competence of the national court normally called upon to hear the type of case in the main proceedings, that is, the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court), given that in any case the conditions and circumstances of the judicial appointments to that chamber raise doubts as to its independence and that that chamber has already been held not to constitute an independent court under EU law. Nor do other chambers of that court, to which judges were assigned who were

appointed on the basis of [NCJ] resolutions of the type concerned in the main proceedings, constitute appropriate fora for this case owing to the principle of *nemo judex in causa sua* (no one should be a judge in their own cause).

135. It follows that the action before the referring court is the only judicial procedure which allows the applicants in the main proceedings as candidates to the position of judge to obtain an objective review of the appointment procedure for the Supreme Court *qua* court of last instance within the meaning of Article 267(3) TFEU, which is subject to safeguards resulting from the second subparagraph of Article 19(1) TEU.

136. Given that the answer to the third question is that the referring court can disregard the effects of the Law of 26 April 2019 and declare itself competent to rule on the cases in the main proceedings under the legal framework which was applicable before the adoption of that Law, it is now necessary to turn to the first two questions referred. These focus on the possible conditions imposed by EU law on actions such as those in the main proceedings provided in national law in terms of the principle of effectiveness (first question) and of the principle of equal treatment (second question).

...

146. I consider (as does the referring court) that the remedy available to participants in the procedure who have not been proposed for appointment is completely ineffective as it does not change the legal situation of a candidate who lodges an appeal in the proceedings ending with the [NCJ] resolution that has been set aside. Nor does it allow for a reassessment of that person's application for the vacant judicial position in the Supreme Court if that application was submitted in connection with the announcement of a competition for a specific judicial position. ...

155. Moreover, the principle of effective judicial protection requires that the final decision taken by the court or tribunal, as a result of the above review, is effective and that effectiveness must be guaranteed, lest that decision be illusory.

...

V. Conclusion

...

1. In view of the context and constellation of other elements present in Poland, as pointed out by the referring court (*inter alia*: (a) the Polish legislature amending the national legal framework in order to make infringement actions and preliminary references before the Court become devoid of purpose; (b) that in spite of the fact that the referring court had suspended the [NCJ] resolutions at issue, the President of the Republic proceeded anyway to appoint to the position of judge of the Supreme Court concerned eight new judges proposed by the [NCJ] in the resolutions at issue here; and (c) the Polish legislature, in passing the Law of 26 April 2019, ignored rulings from the Constitutional Court which make clear that there should be judicial review of [NCJ] resolutions such as those in the main proceedings), Article 267 TFEU should be interpreted as precluding a national law such as the Law of 26 April 2019 in that that law decreed that proceedings such as those before the referring court should be discontinued by operation of law while at the same time excluding any transfer of the review of the appeals to another national court or the bringing again of the appeals before another national court;

- the above arising in a context where the national court originally having jurisdiction in those cases has referred questions to the Court of Justice for a preliminary ruling following the successful initiation of the procedure for reviewing the [NCJ] resolutions, undermines the right of access to a court also in so far as, in the individual case pending

before the court (originally) having jurisdiction to hear and determine it, it then denies that court both the possibility of successfully initiating preliminary ruling proceedings before the Court of Justice and the right to wait for a ruling from the Court, thereby undermining the EU principle of sincere cooperation.

The removal of the (right to a) judicial remedy which was until then open in a case such as the one in the main proceedings and, in particular, the application of such a removal to litigants who – much as the applicants in the main proceedings – have already introduced such an action constitutes (in view of the context and constellation of the other elements pointed out by the referring court underlying that elimination) a measure of a nature which contributes to – indeed reinforces – the absence of the appearance of independence and impartiality on the part of the judges effectively appointed within the court concerned as well as the court itself. Such an absence of the appearance of independence and impartiality violates the second subparagraph of Article 19(1) TEU."

209. On 2 March 2021 the CJEU delivered a preliminary ruling. The CJEU noted that under the rules amended in July 2018 it was provided that unless all the participants in a procedure for appointment to a position as judge at the Supreme Court challenged the relevant resolution of the NCJ, that resolution became final. In 2019 the rules were changed again, and it became impossible to lodge appeals in individual cases against decisions of the NCJ concerning the recommendation or non-recommendation of candidates for appointment to judicial positions of the Supreme Court. Moreover, that reform declared such still pending appeals to be discontinued by operation of law, *de facto* depriving the Supreme Administrative Court of its jurisdiction on such matters. In this context the CJEU held as follows:

"113 As regards the disputes in the main proceedings, it should be recalled that appeals have been lodged before the referring court whereby candidates for judicial positions within the Civil and Criminal Chambers of the Sąd Najwyższy (Supreme Court) are challenging resolutions by which the [NCJ] did not accept their applications and submitted to the President of the Republic other candidates for appointment to those positions.

114 In that regard, it is, in the first place, common ground that the Sąd Najwyższy (Supreme Court) and, in particular, its Civil and Criminal Chambers, may be called upon to rule on questions concerning the application or interpretation of EU law and that, as a 'court or tribunal', within the meaning of EU law, they come within the Polish judicial system in the 'fields covered by Union law' within the meaning of the second subparagraph of Article 19(1) TEU, meaning that they must meet the requirements of effective judicial protection (judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 56 and the case-law cited).

115 In the second place, it should be recalled that, to ensure that such bodies are in a position to ensure the effective judicial protection thus required under the second subparagraph of Article 19(1) TEU, maintaining their independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy (judgment of 24 June 2019, *Commission* v. *Poland (Independance of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 57 and the case-law cited).

116 As the Court has repeatedly stated, that requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 5 November 2019, *Commission* v. *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 106 and the case-law cited).

... 24 Having noted that, under Article 179 of the Constitution, the judges of the Sąd Najwyższy (Supreme Court) are appointed by the President of the Republic on a proposal from the KRS, that is to say the body empowered under Article 186 of the Constitution to ensure the independence of the courts and of the judiciary, the Court stated, in paragraph 137 of the judgment in *A.K. and Others*, that the participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective, by circumscribing the President of the Republic's discretion in exercising the powers of his or her office.

125 In paragraph 138 of that judgment, the Court stated, however, that that is only the case provided, *inter alia*, that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal.

126 In that regard, it should be noted that, as the referring court has pointed out, under Article 179 of the Constitution, the act by which the [NCJ] puts forward a candidate for appointment to a position of judge at the Sąd Najwyższy (Supreme Court) is an essential condition for such a candidate to be appointed to such a position by the President of the Republic. The role of the [NCJ] in that appointment process is therefore decisive.

127 In such a context, the degree of independence enjoyed by the [NCJ] in respect of the Polish legislature and the executive in exercising the responsibilities attributed to it may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from EU law (see, to that effect, judgment in *A.K. and Others*, paragraph 139).

128 Similarly, the Court observed, in paragraph 145 of the judgment in *A.K. and Others*, that, for the purposes of that assessment and in the light of the fact that the decisions of the President of the Republic appointing judges to posts at the Sąd Najwyższy (Supreme Court) are not amenable to judicial review, the terms defining the scope of the action which may be brought challenging a resolution of the KRS, including the KRS's decisions concerning proposals for appointment to a post of judge of that court, could also be important and, in particular, the issue whether such an action allows an effective judicial review to be conducted of such resolutions, covering, at the very least, an examination of whether there was no *ultra vires* or improper exercise of authority, error of law or manifest error of assessment.

129 Thus, while the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU, the situation is different in circumstances in which all the relevant factors characterising such a process in a specific national legal and factual context, and in particular the circumstances in which possibilities for obtaining judicial remedies which previously existed are suddenly eliminated, are such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process.

...

136 f the referring court were to conclude that the KRS does not offer sufficient guarantees of independence, the existence of a judicial remedy available to unsuccessful candidates, albeit restricted to what was noted in paragraph 128 of this judgment, would be necessary in order to help safeguard the process of appointing the judges concerned from direct or indirect influence and, ultimately, to prevent legitimate doubts from arising, in the minds of individuals, as to the independence of the judges appointed at the end of that process.

137 The provisions of the Law of 26 April 2019 (i) declared that there was no need to adjudicate in pending disputes such as those in the main proceedings in which candidates for judicial positions at the Sąd Najwyższy (Supreme Court) had, on the basis of the law then in force, lodged appeals challenging resolutions by which the KRS had decided not to put them forward for appointment to those positions, but to put forward other candidates, and (ii) removed any possibility of exercising legal remedies of that kind in the future.

138 It must be observed that such legislative amendments, particularly when viewed in conjunction with all the contextual factors mentioned in paragraphs 99 to 105 and 130 to 135 of this judgment, are such as to suggest that, in this case, the Polish legislature has acted with the specific intention of preventing any possibility of exercising judicial review of the appointments made on the basis of those resolutions of the [NCJ] and likewise, moreover, of all other appointments made in the Sąd Najwyższy (Supreme Court) since the establishment of the [NCJ] in its new composition".

...

156 For the purposes of determining whether national provisions such as those contained in Article 44(1a) to (4) of the [Act on the NCJ] are liable to infringe the second subparagraph of Article 19(1) TEU, it is necessary to point out at the outset, while reiterating all the considerations set out in paragraphs 108 to 136 of this judgment, that, as was already observed in paragraph 129 of this judgment, the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU. However, the position may be different where provisions undermining the effectiveness of judicial remedies of that kind which previously existed, particularly where the adoption of those provisions, considered together with other relevant factors characterising such an appointment process in a specific national legal and factual context, appear such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process....

158 For the reasons stated by that court which have been set out in paragraphs 35 and 37 of this judgment, this is so, in particular, on account of the provisions of Article 44(1b) and (4) of the Law on the [NCJ], from which it follows, in essence, that, notwithstanding the lodging of such an appeal by a candidate who has not been put forward for appointment by the [NCJ], the resolutions of the [NCJ] will always be final as regards the decision contained in those resolutions to put forward candidates for appointment, since those candidates are then liable – as was the case here – to be appointed by the President of the Republic to the positions concerned without waiting for the outcome of that appeal. In those circumstances, it is clear that any annulment of the decision contained in such a resolution not to put forward an applicant for appointment at the end of the procedure initiated by him or her will still have no real

effect on his or her situation as regards the position to which he or she aspired and which will thus already have been filled on the basis of that resolution."

The CJEU ruled in the operative part:

"Where amendments are made to the national legal system which, first, deprive a national court of its jurisdiction to rule in the first and last instance on appeals lodged by candidates for positions as judges at a court such as the Sąd Najwyższy (Supreme Court, Poland) against decisions of a body such as the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) not to put forward their application, but to put forward that of other candidates to the President of the Republic of Poland for appointment to such positions, which, secondly, declare such appeals to be discontinued by operation of law while they are still pending, ruling out the possibility of their being continued or lodged again, and which, thirdly, in so doing, deprive such a national court of the possibility of obtaining an answer to the questions that it has referred to the Court for a preliminary ruling:

...

– the second subparagraph of Article 19(1) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed, by the President of the Republic of Poland, on the basis of those decisions of the Krajowa Rada Sądownictwa (National Council of the Judiciary), to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

Where it is proved that those articles have been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply the amendments at issue, whether they are of a legislative or constitutional origin, and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made."

(c) Judgment of the Court of Justice of the European Union (Grand Chamber) in the case of *Commission v. Poland* of 15 July 2021 (Case C-791/19)

210. The Commission brought proceedings against Poland for failing to fulfil its obligations under the second subparagraph of Article 19(1) TEU and the second and third paragraphs of Article 267 TFEU on account of national measures establishing the new disciplinary regime for the judges of the Supreme Court and the ordinary courts instituted by legislation adopted in 2017. In particular the Commission contended that the Republic of Poland has infringed the second subparagraph of Article 19(1) TEU on four grounds regarding: first, the treatment of the content of judicial decisions as a disciplinary offence; second, the lack of independence and impartiality of the Disciplinary Chamber of the Supreme Court, third, the discretionary power of the President of that Chamber to designate the competent court, which prevents disciplinary cases from being decided by a court established by law;

and, fourth, the failure to guarantee the examination of disciplinary cases within a reasonable time and the rights of the defence of accused judges.

The Commission also claimed that Poland had infringed the second and third paragraphs of Article 267 TFEU because the right of national courts to make a reference for a preliminary ruling was limited by the possible initiation of disciplinary proceedings against judges who exercised that right.

211. On 8 April 2020 the CJEU (Grand Chamber) issued an interim order in a case initiated by the Commission and concerning disciplinary proceedings against judges pending before the Disciplinary Chamber of the Supreme Court. The interim order stated:

> "1. The Republic of Poland is required, immediately and pending delivery of the judgment closing the proceedings in Case C-791/19,
>
> – to suspend the application of the provisions of Article 3(5), Article 27 and Article 73(1) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5), as amended, forming the basis of the jurisdiction of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court) to rule, both at first instance and on appeal, in disciplinary cases concerning judges;
>
> – to refrain from referring the cases pending before the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court) before a panel that does not meet the requirements of independence defined, *inter alia*, in the judgment of 19 November 2019, *A. K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), and
>
> – to inform the European Commission, at the latest one month after being notified of the order of the Court granting the requested interim measures, of all the measures it has adopted in order to comply fully with this order."

212. On 6 May 2021 Advocate General Tanchev delivered his opinion in which he considered the complaints raised by the Commission to be well founded. With respect to the CJEU judgment of 19 November 2019 in the joined cases (see paragraph 206 above) the Advocate General stated:

> "95 ... Indeed, in my view, the judgment in *A.K. and Others* provides strong support for finding that, on the basis of the combination of elements invoked by the Commission and which were examined in that judgment, the Disciplinary Chamber does not meet the requirements of independence and impartiality under the second subparagraph of Article 19(1) TEU. As I concluded in my Opinion in that case, the mandates of the previous [NCJ] members were prematurely terminated and the changes to the method of appointment of the judicial members means that 23 out of 25 [NCJ] members come from the legislative and executive authorities which, taken together, disclose deficiencies that compromise the [NCJ's] independence (See Opinion in *A.K. and Others* (points 131 to 137)."

The opinion concluded with the following proposal to the CJEU:

> "(1) declare that by allowing, pursuant to Article 107(1) of the Law on the ordinary courts and Article 97(1) and (3) of the Law on the Supreme Court, the content of judicial decisions to be treated as a disciplinary offence; by failing to guarantee, pursuant to Articles 3(5), 27 and 73(1) of the Law on the Supreme Court and Article 9a of the Law on the [NCJ], the independence and impartiality of the Disciplinary Chamber; by

granting, pursuant to Articles 110(3) and 114(7) of the Law on the ordinary courts, the President of the Disciplinary Chamber the power to designate the competent disciplinary court of first instance in cases concerning ordinary court judges; by granting, pursuant to Article 112b of the Law on the ordinary courts, the Minister for Justice the power to appoint a Disciplinary Officer of the Minister for Justice and by providing, pursuant to Article 113a of the Law on the ordinary courts, that activities related to the appointment of *ex officio* defence counsel and that counsel's taking up of the defence do not have a suspensive effect on the course of the proceedings and, pursuant to Article 115a(3) of the Law on the ordinary courts, that the disciplinary court is to conduct the proceedings despite the justified absence of the notified accused or his or her defence counsel, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

(2) declare that, by allowing the right of national courts to make a reference for a preliminary ruling to be limited by the possibility of the initiation of disciplinary proceedings, the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU; ..."

213. On 15 July 2021 the CJEU delivered its judgment in which it concluded that the disciplinary regime for judges in Poland was not compatible with EU law. It held that Poland had failed to fulfil its obligations under Article 19(1) TEU by, in particular, "failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, which [was] responsible for reviewing decisions issued in disciplinary proceedings against judges" and "by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts". Secondly, Poland had failed to fulfil its obligations under Article 267 TFEU "by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice of the European Union to be restricted by the possibility of triggering disciplinary proceedings".

(d) Judgment of the Court of Justice of the European Union (Grand Chamber) in the case of *W.Ż.* of 6 October 2021 (Case C-487/19)

214. On 26 June 2019 the Civil Chamber of the Supreme Court lodged a request with the CJEU for a preliminary ruling. The case originated in proceedings brought by Judge W.Ż. seeking the withdrawal of judges of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court (see paragraphs 144 - 149 above).

215. On 15 April 2021 Advocate General Tanchev delivered his opinion, in which he observed as follows:

"39. The referring court has already established that in the appointment procedure by which A.S. was appointed as a judge of the Supreme Court there were flagrant and deliberate breaches of Polish laws relating to judicial appointments. ...

(1) First limb of the question referred: appointment of judges before the Supreme Administrative Court gave a ruling in the pending action attacking [NCJ] resolution No 331/2018

50. The salient point here is whether the fact that there was an ongoing judicial review of [NCJ] resolutions (adopted in the course of the Supreme Court appointment procedure) has (or should have) suspensory effect...

57. In making its assessment the national court will need to have regard to the guidance provided here and in the judgment *A.B. and Others* and to any other relevant circumstances of which it may become aware, taking account, where appropriate, of the reasons and specific objectives alleged before it in order to justify the measures concerned. In addition, the court will need to assess whether national provisions, such as those contained in Article 44(1a) to (4) of the [2011 Act on the NCJ as amended by the 2017 Amending Act], are such as to give rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed on the basis of the [NCJ] resolutions to external factors and, in particular, to the direct or indirect influence of the Polish legislature and executive, and as to their neutrality with respect to any interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law. ...

60. As the [Polish Commissioner for Human Rights] rightly submitted, in accordance with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the appointment process must not give rise to reasonable doubts, in the minds of the subjects of the law, as to the imperviousness of the judges concerned to external factors, once the interested parties are appointed as judges. Therefore, given the key role played by the [NCJ] in the judicial appointment process and the absence of legal review of the decisions of the President of the Republic appointing a judge, it is necessary that effective legal review exists for the judicial candidates. That is particularly the case where, as in this instance, the State, by way of its conduct, is interfering in the process of appointing judges in a manner which risks compromising the future independence of those judges. The required legal review should: (a) happen before the appointment, as the judge is thus protected *a posteriori* by the principle of irremovability; (b) cover at least an *ultra vires* or improper exercise of authority, error of law or manifest error of assessment; and (c) allow clarification of all the aspects of the appointment procedure, including the requirements under EU law, if appropriate, by submitting questions to the Court *inter alia* concerning the requirements stemming from the principle of effective judicial protection. ...

63. As a consequence, the act of appointment as judge of the Supreme Court adopted by the President of the Republic before the Supreme Administrative Court ruled definitively on the action brought against Resolution No 331/2018 of the [NCJ] constitutes a flagrant breach of national rules governing the procedure for the appointment of judges to the Supreme Court, when those rules are interpreted in conformity with applicable EU law (in particular, the second subparagraph of Article 19(1) TEU).

(2) Second limb of the question referred: appointment to the post of judge of the Supreme Court despite the order of the Supreme Administrative Court suspending the implementation of the [NCJ] resolution proposing the appointment of candidates

64. It will ultimately be for the referring court to assess this point on the basis of all the relevant elements, but to my mind the irregularity committed during the appointment of the judge of the CECPA (22) in question (judge A.S.) stems *a fortiori* from the fact that he was appointed within the Supreme Court and within that chamber despite the decision of the Supreme Administrative Court ordering that the implementation of [NCJ] resolution No. 331/2018 be stayed.

65. Therefore, I agree with the referring court and also W.Ż., the [Polish Commissioner for Human Rights] and the Commission that the deliberate and intentional infringement by the executive branch of a judicial decision, in particular a decision of the Supreme Administrative Court ordering interim measures (that is, the order of 27 September 2018) – manifestly with the aim of ensuring that the government has an influence on judicial appointments – demonstrates a lack of respect for the principle of the rule of law and constitutes per se an infringement by the executive branch of 'fundamental rules forming an integral part of the establishment and functioning of that judicial system' within the meaning of paragraph 75 of judgment of 26 March 2020, *Review Simpson and HG v Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232) ('the judgment in *Simpson and HG*'). ...

77. In *Ástráðsson v. Iceland*, the Grand Chamber of the ECtHR – largely upholding the chamber ruling of 12 March 2019 – ruled that, given the potential implications of finding a breach and the important interests at stake, the right to a 'tribunal established by law' should not be construed too broadly such that any irregularity in a judicial appointment procedure would risk compromising that right. The ECtHR thus formulated a three-step test to determine whether irregularities in a judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law: step 1, whether there has been a manifest breach of domestic law (§§ 244 and 245 of that judgment); step 2, whether breaches of domestic law pertained to any fundamental rule of the judicial appointment procedure (§§ 246 and 247); and step 3, whether the alleged violations of the right to a 'tribunal established by law' were effectively reviewed and remedied by the domestic courts (§§ 248 to 252).

78. The above principles apply not only in the case of infringements of provisions governing specifically the appointment procedure *stricto sensu*, but, as the present case shows, they must also apply in the case of disregard of judicial scrutiny introduced in relation to previous acts of appointment having a constitutive character vis-à-vis that appointment (such as [NCJ] resolution No 331/2018 here).

79. As the Commission pointed out, in relation to the rules of appointment of judges, it is not surprising that both the ECtHR (in the judgment of 1 December 2020 *Ástráðsson v. Iceland*, § 247) and the Court (in the judgment in *Simpson and HG*, paragraph 75) make a direct link between the requirement that a tribunal must be established by law and the principle of judicial independence in the sense that it is necessary to examine whether an irregularity committed during the appointment of judges 'create[s] a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned' (*Simpson and HG*, paragraph 75). ...

84. As far as the requirement 'established by law' is concerned, as pointed out by the [Polish Commissioner for Human Rights], the strict respect of appointment rules is necessary, as it gives the appointed judge the feeling that he or she obtained the position purely on the basis of their qualifications and objective criteria and at the end of a reliable procedure, avoiding the creation of any relation of dependence between the judge and the authorities intervening in that appointment. In the present case, the referring court established, in a convincing manner, on the one hand, that the effective legal review of the judicial appointment process constitutes a requirement flowing from the constitutional principles relating to the independence of the judiciary and to the subjective rights of access to a public function and to a court or tribunal and, on the other hand, that the appointment of the judge concerned arose in breach of that effective

legal review and of the judicial decision having suspended the enforceability of [NCJ] resolution No. 331/2018. ...

87. The manifest and deliberate character of the violation of the order of the Supreme Administrative Court staying the implementation of [NCJ] Resolution No. 331/2018, committed by such an important State authority as the President of the Republic, empowered to deliver the act of appointment to the post of judge of the Supreme Court, is indicative of a flagrant breach of the rules of national law governing the appointment procedure for judges.

88. In relation to the criterion of gravity, to my mind, given the general context of the contentious judicial reforms in Poland, the gravity of the breaches in the present case is more serious than the irregularities at issue in Ástráðsson v. Iceland.

89. In any event, the very fact that the President of the Republic paid no heed to the final decision of the Supreme Administrative Court – that is, the administrative court of final instance – ordering interim measures and staying the implementation of [NCJ] Resolution No 331/2018 until that court rules on the main action pending before it, indicates the gravity of the breach that was committed.

90. The Court has already made clear that the respect by competent national authorities of a Member State of interim measures ordered by national courts constitutes 'an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded.'.

(c) Effects on the act of appointment of A.S. to the post of judge of the Supreme Court and/or on the order of 8 March 2019 in the light of the principles of legal certainty and of irremovability of judges.

91. In order to provide the referring court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions, it is necessary also to examine the effects of the finding that A.S. sitting in a single-judge formation may not constitute a tribunal established by law. ...

105. In other words, in the present case, a potential infringement in the case in the main proceedings of the requirement for a tribunal to be previously established by law does not imply that the act of appointment of judge A.S. – the judge who gave the order of inadmissibility – is invalid per se.

106. For the reasons set out above, I propose that the Court should answer the question referred for a preliminary ruling by the Sąd Najwyższy (Supreme Court, Poland) as follows:

The right to a tribunal established by law, affirmed by the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted in the sense that a court such as the court composed of a single person of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court (Poland) does not meet the requirements to constitute such a tribunal established by law in a situation where the judge concerned was appointed to that position in flagrant breach of the laws of the Member State applicable to judicial appointments to the Supreme Court, which is a matter for the referring court to establish. The referring court must, in that respect, assess the manifest and deliberate character of that breach as well as the gravity of the breach and must take into account the fact that the above appointment was made: (i) despite a prior appeal to the competent national court against the resolution of the National Council of the Judiciary, which included a motion for the appointment of that person to the position of judge and which was still pending at the relevant time; and/or (ii) despite the fact that the implementation

of that resolution had been stayed in accordance with national law and those proceedings before the competent national court had not been concluded before the delivery of the appointment letter."

216. On 6 October 2021 the CJEU delivered its judgment. The Polish Supreme Court, as the referring court, was invited to assess whether all the conditions in which the appointment of Judge A.S. had taken place and, in particular, any irregularities which had been committed in the procedure for his appointment were such as to lead to the conclusion that the body in which such a judge, sitting as a single judge, made the order at issue, did not act as an 'independent and impartial tribunal previously established by law, within the meaning of EU law. The CJEU provided the Supreme Court with the following interpretation of EU law as relevant for its assessment:

"141 It follows from the foregoing that, when the appointment of the judge concerned took place, it could not, first of all, be ignored that the effects of Resolution No 331/2018 proposing the appointment of the person concerned had been suspended by a final judicial decision of the Naczelny Sąd Administracyjny (Supreme Administrative Court). Next, it was clear that such a suspension was to apply, in the present case, until the Court ruled on the question referred for a preliminary ruling submitted by the same national court by decision of 22 November 2018 in the case giving rise to the judgment in *A.B. and Others* and that that question specifically concerned whether EU law precluded provisions such as those set out in Article 44(1b) and (4) of the Law on the [NCJ] In those circumstances, it was, finally, also clear that the answer expected from the Court in that case was capable of requiring the Naczelny Sąd Administracyjny (Supreme Administrative Court), in accordance with the principle of the primacy of EU law, to set aside those national provisions and, if necessary, to annul that Resolution of the [NCJ] in its entirety.

142 In that regard, it should be noted that it follows from the Court's case-law that the full effectiveness of EU law requires that a national court seised of a dispute governed by EU law must be able to grant interim relief in order to ensure the full effectiveness of the judgment to be given. If a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice, the effectiveness of the system established by Article 267 TFEU would be impaired (see, to that effect, judgments of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257, paragraphs 21 and 22, and of 9 November 1995, *Atlanta Fruchthandelsgesellschaft and Others (I)*, C-465/93, EU:C:1995:369, paragraph 23 and the case-law cited). The effectiveness of that system would also be compromised if the authority attaching to such interim relief could be disregarded, in particular, by a public authority of the Member State in which those measures were adopted.

143 Thus, the appointment of the judge concerned in breach of the authority attaching to the final order of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 27 September 2018, without awaiting the Court's judgment in the case giving rise to the judgment in *A.B. and Others*, undermined the effectiveness of the system established in Article 267 TFEU. In that regard it is furthermore necessary to note that the Court held, in the operative part of its judgment in *A.B. and Others*, in reliance, in that respect, on the considerations set out in paragraphs 156 to 165 of that judgment that the second subparagraph of Article 19(1) TEU must be interpreted as precluding provisions amending the state of national law in force under which:

– notwithstanding the fact that a candidate for a position as judge at a court such as the Sąd Najwyższy (Supreme Court) lodges an appeal against the decision of a body such as the [NCJ] not to accept his or her application, but to put forward that of other candidates to the President of the Republic, that decision is final inasmuch as it puts forward those other candidates, with the result that that appeal does not preclude the appointment of those other candidates by the President of the Republic and that any annulment of that decision inasmuch as it did not put forward the appellant for appointment may not lead to a fresh assessment of the appellant's situation for the purposes of any assignment of the position concerned, and

– moreover, such an appeal may not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made,

where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those provisions are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed, by the President of the Republic, on the basis of the decisions of the [NCJ] , to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

144 In the same judgment in *A.B. and Others*, the Court likewise held that where it is proved that the second subparagraph of Article 19(1) TEU has been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply those provisions and to apply instead the national provisions previously in force while itself exercising the judicial review envisaged by those latter provisions.

145 In the third place, as is apparent from paragraph 49 of the present judgment, the referring court also expressed, as regards the conditions in which the appointment of the judge concerned took place on the basis of Resolution No 331/2018, doubts concerning the independence of the [NCJ] which proposed the person concerned for that appointment.

146 Those doubts arose, first, from the fact that the ongoing term of office of four years, laid down in Article 187(3) of the Constitution, of certain of the members then composing the [NCJ] had been reduced and, second, that, as a consequence of modifications recently made to the Law on the [NCJ], the 15 members of the [NCJ] acting as judges, who had been previously elected by their peers, were, as regards the new [NCJ], designated by a branch of the Polish legislature with the result that 23 of the 25 members comprising the [NCJ] in that new composition were designated by the Polish executive and legislature or are members of those branches of government.....

152 Viewed together, the circumstances referred to in paragraphs 138 to 151 of the present judgment are, subject to the final assessments to be made, in that regard, by the referring court, such as to lead, on the one hand, to the conclusion that the appointment of the judge concerned took place in clear disregard of the fundamental procedural rules for the appointment of judges to the Sąd Najwyższy (Supreme Court) forming an integral part of the establishment and functioning of that judicial system concerned, within the meaning of the case-law referred to in paragraph 130 of the present judgment."

(e) Pending cases before the Court of Justice of the European Union

(i) Case C-508/19 M.F. v. J.M.

217. On 3 July 2019 the Supreme Court lodged with the CJEU a request for a preliminary ruling concerning the process of judicial appointments to the Disciplinary Chamber of the Supreme Court. The domestic proceedings concerned a District Court judge, M.F., against whom, on 17 January 2019, disciplinary proceedings were instituted. In those proceedings it was alleged that her conduct resulted in overly lengthy proceedings and that she had failed to draw up written grounds for her judgments in a timely manner. On 28 January 2019, J.M., acting as a judge of the Supreme Court performing the duties of the President of the Supreme Court who directed the work of the Disciplinary Chamber, issued an order rendering the disciplinary court competent to hear her case at first instance. M.F. brought an action for a declaratory judgment together with an application for an injunction against J.M., seeking to establish that the latter was not a judge of the Supreme Court because he had not been appointed to the position of judge of the Supreme Court in the Disciplinary Chamber. According to the claimant his appointment on 20 September 2018 was ineffective because he had been appointed: (i) after the selection procedure had been conducted by the NCJ on the basis of an announcement of the President of the Republic of Poland, of 29 June 2018, which had been signed by the President without the countersignature of the Prime Minister; (ii) after the resolution of the NCJ which contained the motion to appoint J.M. to the position of Supreme Court judge in the Disciplinary Chamber had been appealed against to the Supreme Administrative Court on 17 September 2018 by one of the participants in the selection procedure, and before that court had ruled on the appeal. By order of 6 May 2019, the First President of the Supreme Court designated the Labour and Social Security Chamber to hear the case; the latter decided to stay the proceedings and refer questions to the CJEU for a preliminary ruling.

218. On 15 April 2021 Advocate General Tanchev delivered his opinion, in which he observed as follows:

> "22. I consider (as does the [Polish Commissioner for Human Rights]) that the connecting factors between the action in the main proceedings and the EU law provisions raised in the questions referred relate to the fact that a national judge (M.F.) who may rule on the application or interpretation of EU law is asking that she is afforded, in the context of a disciplinary action levelled against her, the benefit of the effective judicial protection guaranteed by Article 19(1) TEU in the light of Article 47 of the Charter. Such protection implies an obligation for the Member States to 'provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions', (3) which means that M.F. has a right to be judged by an independent and impartial court established by law. That also means that the tribunal called upon to rule on her disciplinary procedure cannot be appointed by a judge whose own appointment breached the very same provision of EU law even though he himself gives rulings relating to the application or interpretation of EU law...

26. Indeed, it follows from the order for reference that there were numerous potentially flagrant breaches of the law applicable to judicial appointments in the appointment procedure in respect of J.M.: (i) the procedure was opened without the ministerial countersignature required under the Constitution, which it is claimed renders the procedure void *ab initio*; (ii) it involved the new [NCJ] whose members were appointed under a new legislative process, which is unconstitutional and does not guarantee independence; (iii) there were diverse deliberate impediments to the preliminary judicial review of the act of appointment, as: (a) the [NCJ] deliberately failed to forward the action brought against its resolution to the Supreme Administrative Court, at the same time as it sent it to the President of the Republic, before the deadline to do so before that court expired; (b) the President of the Republic appointed the judges proposed in that resolution before the judicial review of that resolution was closed and without waiting for the answer of the Court of Justice to the questions referred to it in case C-824/18, concerning the conformity of the modalities of that control with EU law. Therefore, the President of the Republic committed a potentially flagrant breach of fundamental norms of national law...

34. Unlike the Commission, I consider that this is an extension of the answer given to the first question and, as follows from my Opinion and from the judgment in A.B. and Others, an executive authority of a Member State is required to refrain from delivering a document of appointment to the position of judge until a national court, taking into account the judgment given by the Court of Justice on the reference for a preliminary ruling, has ruled on the compatibility of national law with EU law with respect to the procedure for appointing members of a new organisational unit in the court of final instance of that Member State. Failure to do so would be an infringement of the principle of effective judicial protection, since at the very least it creates a serious risk that judicial authorities which do not meet EU standards will be established, even if only temporarily. I agree with the [Polish Commissioner for Human Rights] that it would also potentially infringe Articles 4(3) TEU and 267 TFEU, as the President of the Republic would limit the *effet utile* of the preliminary ruling procedure and would circumvent the binding character of the decisions of the Court.

35. National courts should have a remedy to treat as a qualified breach of the principle of effective judicial protection any actions taken by the authorities of a Member State following a request for a preliminary ruling made by a national court where the purpose or effect of such actions might be to nullify or limit the principle of the retroactive (*ex tunc*) effect of preliminary rulings given by the Court.

36. What is important in the context of the present case, and as was pointed out by the referring court, is that the delivery of the document of appointment to the position of judge in the Disciplinary Chamber may constitute an intentional infringement of the principle of effective judicial protection. Moreover, this was, it seems, accompanied by the conviction, stemming from previous national case-law, that the appointment to the position of judge of the Supreme Court is irreversible. As follows from the answer to the first question, that conviction is wrong.

37. In addition, I agree with the referring court that a person appointed to the position of judge of the Supreme Court in such circumstances may well remain dependent on how the authorities involved in his appointment assess his judicial activity during the period in which he performs his judicial mandate. The referring court states that in its view such dependence exists, especially on the executive, that is, the President of the Republic....

39. ...The referring court must, in that respect, assess the manifest and deliberate character of that breach as well as the gravity of the breach and must take into account

> the fact that J.M. was appointed despite a prior appeal to the competent national court against the resolution of the [NCJ], which included a motion for the appointment of that person to the position of judge and which was still pending at the relevant time...
>
> 53. ... In view of the fact that the review of the validity of J.M. (the defendant judge's) appointment cannot be carried out in any other national procedure and that the only possibility to examine that status as judge is in the context of a disciplinary procedure exposing M.F. (the applicant judge) to sanctions which is not compliant with the requirements of the principle of effective judicial protection, the referring court should be able to rule that that appointment did not exist in law even where national law does not authorise it to do so.
>
> 54. In that respect, I consider (as does the [Polish Commissioner for Human Rights]) that the national authorities may not take refuge behind arguments based on legal certainty and irremovability of judges. Those arguments are just a smokescreen and do not detract from the intention to disregard or breach the principles of the rule of law. It must be recalled that law does not arise from injustice (*ex iniuria ius non oritur*). If a person was appointed to such an important institution in the legal system of a Member State as is the Supreme Court of that State in a procedure which violated the principle of effective judicial protection, then he or she cannot be protected by the principles of legal certainty and irremovability of judges."

(ii) Case no. C-204/21 (Commission v. Poland)

219. On 31 March 2021 the European Commission commenced infringement proceedings against Poland in respect of the 2019 Amending Act (see paragraphs 105- 109 above, case no. C-204/21).

220. On 1 April 2021 the Commission made an application for interim measures, asking to the CJEU to order Poland, until it had given a judgment in the case, to suspend the application of several national provisions introduced by the 2019 Amending Act.

221. On 14 July 2021 the Vice-President of the CJEU issued an interim measures order in the case. Poland was required to suspend, *inter alia*, the application of several provisions of the Act on the Supreme Court and the Act on the Organisation of Ordinary Courts, as amended by the 2019 Amending Act, relating to the competences of the Disciplinary Chamber of the Supreme Court. The order stated as follows:

> "The Republic of Poland is required, immediately and pending delivery of the judgment closing the proceedings in Case C-204/21:
>
> (a) to suspend, first, the application of point 1a of Article 27(1) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017, as amended by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws) of 20 December 2019 and other provisions, under which the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) has jurisdiction to adjudicate, at both first instance and second instance, on applications for authorisation to initiate criminal proceedings against judges or trainee judges, place them in provisional detention, arrest them or summon them to appear before it, and second, the effects of the decisions already adopted by the Disciplinary Chamber on the

basis of that article which authorise the initiation of criminal proceedings against or the arrest of a judge, and to refrain from referring cases covered by that article to a court which does not meet the requirements of independence defined, in particular, in the judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982);

(b) to suspend the application of points 2 and 3 of Article 27(1) of the Law on the Supreme Court, as amended, on the basis of which the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court) has jurisdiction to adjudicate in cases relating to the status of judges of the Sąd Najwyższy (Supreme Court) and the performance of their office, in particular in cases relating to employment and social security law and in cases relating to the compulsory retirement of those judges, and to refrain from referring those cases to a court which does not meet the requirements of independence defined, in particular, in the judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982);

(c) to suspend the application of points 2 and 3 of Article 107(1) of the ustawa – Prawo o ustroju sądów powszechnych (Law relating to the organisation of the ordinary courts) of 27 July 2001, as amended by the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, and of points 1 to 3 of Article 72(1) of the Law on the Supreme Court, as amended, which allow the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union;

(d) to suspend the application of Article 42a(1) and (2) and of Article 55(4) of the Law relating to the organisation of the ordinary courts, as amended, of Article 26(3) and Article 29(2) and (3) of the Law on the Supreme Court, as amended, of Article 5(1a) and (1b) of the ustawa – Prawo o ustroju sądów administracyjnych (Law relating to the organisation of the administrative courts) of 25 July 2002, as amended by the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, and of Article 8 of the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, in so far as they prohibit national courts from verifying compliance with the requirements of the European Union relating to an independent and impartial tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights;

(e) to suspend the application of Article 26(2) and (4) to (6) and Article 82(2) to (5) of the Law on the Supreme Court, as amended, and of Article 10 of the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, establishing the exclusive jurisdiction of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court) to examine complaints alleging lack of independence of a judge or a court; and

(f) to communicate to the European Commission, no later than one month after notification of the order of the Court ordering the interim measures sought, all the measures adopted in order to comply in full with that order."

222. On 27 October 2021 the Vice-President of the CJEU issued another interim measures order in the case (C-204/21 R). Poland was required to pay the European Commission a periodic penalty payment of

1,000,000 euros (EUR) per day, from the date of notification of the order, until such time as that Member State complied with the obligations arising from the order of the Vice-President of the Court of 14 July 2021 (see paragraph 221 above), or, if it failed to comply, until the date of delivery of the judgment closing the proceedings in the case.

E. European Network of Councils for the Judiciary

223. On 16 August 2018 the European Network of Councils for the Judiciary (ENCJ) adopted its "Position Paper of the Board of the ENCJ on the membership of the [NCJ] of Poland" and formulated a proposal to suspend the NCJ's membership. Accordingly, on 17 September 2018, the Extraordinary General Assembly of the ENCJ decided to suspend the membership of the Polish NCJ (see paragraph 15 above). The relevant parts of the Position Paper read as follows:

> "The present law concerning the [NCJ] came into effect in January 2018. The essence of the reform is that the judicial members of the [NCJ] are no longer elected by their peers but are instead appointed by Parliament. Judges may be appointed by Parliament if they are supported by 25 judges or a group of 2000 citizens. The Board considers that this is a departure from the ENCJ standard that judges in a council should be elected by their peers. Although, non-compliance with this standard does not automatically imply that a council is not independent from the executive, in the case of the Polish Council the Board finds so many additional circumstances that it has reached the conclusion that the [NCJ] is no longer independent from the executive. These circumstances include the following:
>
> - The law on the [NCJ] is part of an overall reform to strengthen the position of the executive, infringing very seriously the independence of the judiciary;
>
> - The reasons given for these reforms are not convincing to the Board;
>
> - It is not clear to the Board whether, and if so, in what way the reforms should and will contribute to the official goals of the government on the subject of the alleged corruption, inefficiency and communist influence;
>
> - The reforms are not the fruit of the required involvement of the judiciary in the formation and implementation of plans for reform;
>
> - The term of office of four of the sitting [NCJ]-members has been shortened;
>
> - In the selection process of a judicial member of the [NCJ] the lists of supportive judges are not made public, and so it cannot be checked whether the list consists primarily of judges seconded to the Ministry of Justice, or of the same 25 judges for every candidate; The judicial members of the [NCJ] have not published the list of supporting judges themselves, but they have instead provided the ENCJ only with a list showing the number of judges they were supported by;
>
> - The associations of judges informed the Board that four of the present judicial members were until shortly before their election as member of the [NCJ] seconded to the Ministry of Justice; They also informed the Board that five of the members of the [NCJ] were appointed president of a court by the Minister of Justice shortly before their election as members of the [NCJ], using a law mentioned in paragraph 4.3;

- Thirdly, they informed the Board that a majority of the members of the [NCJ] (14 out of 25) are either a member of the Law and Justice Party, a member of the government or are chosen by Parliament on the recommendation of the Law and Justice Party. The [NCJ] decides by simple majority;

- The judicial members of the [NCJ] support all the justice reforms from the government, although they admit that the majority of the judges are of the opinion that the reforms are in violation of the Constitution and are infringing the independence of the judiciary;

- Several members of the [NCJ] expressed the opinion that judges who publicly speak out against the reforms and/or speak out in defence of the independence of the judiciary should be disciplined because of unlawful political activity;

- The [NCJ] does not speak out on behalf of the judges who defend the independence of the judiciary. For example: the judges in Krakow were publicly called criminals by the Prime Minister of Poland, and the [NCJ] did not object to it. The same goes for the [NCJ]'s attitude concerning the position of the First President of the Supreme Court;

- A large portion of the 10,000 Polish judges believe that the [NCJ] is politicised.

In short: The Board considers that the [NCJ] is no longer the guardian of the independence of the judiciary in Poland. It seems instead to be an instrument of the executive.

6. Conclusion

The Board considers that the [NCJ] does not comply with the statutory rule of the ENCJ that a member should be independent from the executive.

The Board believes that the [NCJ] is no longer an institution which is independent of the executive and, accordingly, which guarantees the final responsibility for the support of the judiciary in the independent delivery of justice.

Moreover, the Board feels that actions of the [NCJ] or the lack thereof, as set out in paragraph 5, are constituting a breach of the aims and objectives of the network, in particular the aim of improvement of cooperation between and good mutual understanding amongst Councils for the Judiciary of the EU and Candidate Member States in accordance with article 3 of the Statutes.

7. Proposal of the Board

In the circumstances, the Board proposes to the General Assembly, convening in Bucharest on the 17th September 2018, that the membership of the [NCJ] be suspended.

With this measure, the ENCJ sends a clear message to the Polish government and the Polish judges that the ENCJ considers that the [NCJ] is no longer independent from the executive.

By suspension – and not expulsion - the ENCJ also intends to express an open mind for the possibility for improvement on the topic of judicial independence in Poland. In this way it can continue to monitor the situation concerning the Rule of Law in Poland, for instance as to the disciplinary actions against judges who oppose the reforms.

The Board sincerely hopes that the time will come when the suspension can be lifted, but that will only be when the principle of judicial independence is properly respected in Poland."

224. On 27 May 2020 the Executive Board of the ENCJ adopted a "Position Paper of the board of the ENCJ on the membership of the [NCJ]

(expulsion)". In that paper the Board set out the reasons for its proposal to the General Assembly to expel the NCJ from the network. The relevant parts of the paper read as follows:

> "... the Executive Board is of the opinion that the situation has not improved from 17 September 2018 until now, but has deteriorated on several issues.
>
> First. The relations between the [NCJ] and the Minister of Justice are even closer than suspected in the position paper of 16 August 2018. At the meeting of November 2019 the [NCJ] did not criticize the government at all. After enormous pressure, the lists of judges who supported the present members of the [NCJ] as candidates (a minimum of 25 supporting judges was required to be appointed), show support by a narrow group of judges associated with the Minister of Justice, including 50 judges seconded to the ministry. One candidate was appointed without the required minimum of 25 signatures from judges.
>
> Secondly. The [NCJ] openly supports the Executive and Legislature in its attacks on the independence of the Judiciary, especially by means of disciplinary actions. The answers of the [NCJ] in the letter of 13 March 2020 on these points strengthen the Executive Board in its opinion. In the answer to question 1, the [NCJ] acknowledges that 49 judges supporting the appointment of members of the [NCJ] were seconded to the Ministry of Justice, and thus cannot be viewed as independent from the ministry for the purposes of the ENCJ. In the answer to question 2, the [NCJ] acknowledges that many signatures of judges supporting the candidacy of member N. had been withdrawn before the election, thus casting doubt on the validity of his election, yet he continues to fulfil the role of a validly elected member of the council. In the answer to question 3, the [NCJ] only reiterates that it is not its task to monitor the declarations of the Minister of Justice and does not deny that the Minister of Justice has said in the Senate that he proposed judges to be appointed in the [NCJ] who, in his opinion, were ready to cooperate in the reform of the Judiciary. This amounts to a failure to promote the independence of the council and its members from the executive. In the answer to question 4, the [NCJ] argues that the members of the [NCJ] are not the representatives of judges, which is incompatible with the ENCJ Budapest Declaration 2008 that judicial members of a council must act as the representatives of the entire judiciary. The letter of 20 May 2020 makes no convincing argument against the conclusion that the [NCJ] does not fulfil the requirement of being independent of the executive.
>
> On the basis of both its actions and its responses the Executive Board concludes that the [NCJ] is still not independent of the Executive and the Legislature.
>
> ...
>
> 10. Conclusion of the Executive Board
>
> First. The Board considers that the [NCJ] does not comply with the statutory rule of the ENCJ that a member should be independent from the executive.
>
> Second. The Board considers that the [NCJ] is in blatant violation of the ENCJ rule to safeguard the independence of the Judiciary, to defend the Judiciary, as well as individual judges, in a manner consistent with its role as guarantor, in the face of any measures which threaten to compromise the core values of independence and autonomy.
>
> Third. The Board considers that the [NCJ] undermines the application of EU Law as to the independence of judges and tribunals, and thus its effectiveness. In doing so, it acts against the interests of the European Area of freedom, security and justice, and the values it stands for ...."

> "11. Proposal of the Executive Board
>
> In the circumstances, the Board proposes to the General Assembly, convening as soon as possible as the Covid-19 pandemic allows it, that the [NCJ] be expelled as a member of the network.
>
> With this measure, the ENCJ sends a clear message to the Polish government and the Polish judges that the ENCJ considers that the [NCJ] is no longer a member of the European family of Members and Observers who believe in, and support the European Area of freedom, security and justice, and the values it stands for.
>
> The ENCJ wants to make absolutely clear that it remains very much committed to the independence of the Polish Judiciary, our Colleague European Union Judges, and that it will continue to cooperate with all the judicial associations in order to defend and restore the independence of the Polish judiciary as soon as possible. Once a Council of the Judiciary in Poland again believes in and acts in support of the values of the ENCJ, the ENCJ will be happy to welcome any such Council back as a member."

225. On 28 October 2021 the ENCJ Extraordinary General Assembly at a meeting in Vilnius, Lithuania, decided to expel the NCJ from the organisation (see also paragraph 15 above). The ENCJ noted that, after its decision of 16 September 2018 to suspend the NCJ's membership, it had remained in contact with the NCJ and was monitoring the situation. However, no improvements in the functioning of the NCJ had been noted and the situation had further deteriorated. The decision stated, among other things, as follows:

> "It is a condition of ENCJ membership that institutions are independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice.
>
> The ENCJ has found that that the [NCJ] does not comply with this statutory rule anymore. The [NCJ] does not safeguard the independence of the Judiciary, it does not to defend the Judiciary, or individual judges, in a manner consistent with its role as guarantor, in the face of any measures which threaten to compromise the core values of independence and autonomy."

THE LAW

I. PRELIMINARY REMARKS

226. The present case belongs to a group of ninety-four currently pending applications against Poland, lodged in 2018-2022, concerning various aspects of the reorganisation of the Polish judicial system initiated in 2017 (see also paragraphs 1-168 above). As of the date of adoption of the present judgment the Court has given notice of twenty-three applications to the Polish Government, in accordance with Rule 54 § 2 (b), and delivered four judgments, of which three are final (see *Xero Flor w Polsce sp. z o.o.,* cited above; *Broda and Bojara v. Poland*, nos. 26691/18 and 27367/18, 29 June 2021; *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021; and *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021, not final).

The Chamber of the First Section of the Court has also decided that all the current and future applications belonging to that group should be given priority, pursuant to Rule 41.

In most cases the applicants' complaints either relate to the issue of whether the newly established chambers of the Supreme Court have attributes required of a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention, or to the questions linked with the jurisdiction of the Disciplinary Chamber in disciplinary proceedings concerning judges, prosecutors and members of the legal profession. Some cases also concern allegations that judicial formations including judges of other chambers of the Supreme Court and the ordinary courts appointed by the President of Poland following a recommendation from the "new" NCJ, as composed by virtue of the 2017 Amending Act, fail to meet the requirements of a "tribunal established by law".

There are also two cases concerning a premature termination of the term of office of judicial members of the "old" NCJ under the 2017 Amending Act and allegations of a breach of Article 6 § 1 of the Convention on account of the lack of access to a court to contest their dismissal from the "old" NCJ, in breach of Article 6 of the Convention. On the date of adoption of the present judgment one of those cases – *Grzęda v. Poland* (no. 43572/18) – is pending before the Grand Chamber of the Court.

227. Having regard to the variety of legal and factual issues arising in the above group of cases, the Court would emphasise at the outset that its task in the present case is not to consider the legitimacy of the reorganisation of the Polish judiciary as a whole but, as it has done in the previous similar cases, to assess the circumstances relevant for the process of appointment of judges to the Civil Chamber of the Supreme Court in the procedure involving the NCJ established under the 2017 Amending Act (see *Reczkowicz,* § 177; and *Dolińska-Ficek and Ozimek*, § 213, both cited above; see also paragraphs 99-101 above and paragraph 228 below).

However, given that the Court's assessment of the procedure for judicial appointments involving the NCJ, which is at the heart of the complaints in the present case, will have direct consequences for other Polish cases – whether pending or liable to be lodged in the future – the Court will consider the possible implications of the present judgment for applications raising similar issues (see paragraphs 363-366 below).

II. MATERIAL BEFORE THE COURT

228. The Court further notes that it is a matter of common knowledge that the reorganisation of the judiciary in Poland initiated by the Government in 2017 and implemented by the successive amending laws (see paragraphs 8-25 above) has, since then, been the subject not only of intense public debate in Poland and at European level but also of numerous proceedings before the

Polish courts and the CJEU, of other actions before the European Union's institutions, including the procedure under Article 7(1) TEU before the European Commission, of European Parliament resolutions, of the PACE monitoring procedure and its resolutions, and of various reports of the Council of Europe's bodies, the UN, the OSCE/ODIHR and the ENCJ (see paragraphs 170-225 above). In view of the foregoing, the Court in its examination of the case will take into account the submissions of the parties and the third-party interveners and evidence produced by them in support of their arguments, and will also take judicial notice of the material available in the public domain, as summarised above and in so far as relevant for the determination of the applicant's complaints alleging a breach of Article 6 § 1 of the Convention in that it did not have its case heard by an impartial and independent tribunal established by law.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO A TRIBUNAL ESTABLISHED BY LAW

229. The applicant company complained under Article 6 § 1 of the Convention that the formation of the Civil Chamber of the Supreme Court, which had dealt with its case, had not been a "tribunal established by law" within the meaning of that provision. Article 6 § 1 of the Convention, in its relevant part, reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

A. Admissibility

1. Exhaustion of domestic remedies

(a) The parties' submissions

(i) The Government

230. The Government raised a preliminary objection of non-exhaustion of domestic remedies. They submitted that the applicant company had not provided the Polish authorities with an opportunity of addressing, and thereby potentially remedying, the alleged violations of the Convention. In particular, the applicant company had failed to lodge a constitutional complaint with the Constitutional Court which would have provided the national authorities with an opportunity to examine its complaint under Article 6 § 1 of the Convention.

231. In the Government's opinion, a constitutional complaint would have been an adequate and effective domestic remedy that would have enabled it to challenge the provisions of the domestic law that had shaped the

composition of the Supreme Court examining its case. The Government relied on the Court's case-law according to which a constitutional complaint should be considered a remedy satisfying the requirements of Article 35 § 1 of the Convention, in particular the decision in *Szott-Medyńska v. Poland* (no. 47414/99, 9 October 2003). They noted that the applicant company had obtained an "individual decision" in its case – a judgment which allegedly violated the Convention, and which had been adopted in a direct application of possibly unconstitutional provisions of the national legislation. There existed adequate measures of revision of such a judgment once it had been deemed unconstitutional by the Constitutional Court. Had the applicant company brought a successful constitutional complaint it would have been possible for it to request re-opening of the proceedings under Article 401^1 of the Code of Civil Procedure. Furthermore, the applicant company would have also been entitled to compensation under Article 417^1 § 1 of the Civil Code for damage caused by unconstitutional laws.

232. According to the Government, in a constitutional complaint the applicant company should have challenged, *inter alia*, section 29 of the 2017 Act on the Supreme Court and section 3(1) (1) and (2) of the 2011 Act on the NCJ as amended by the 2017 Amending Act. The Government stated that the application of the above-mentioned provisions could have been claimed to be unconstitutional by the applicant company, given that under Article 45 § 1 of the Constitution everyone had the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. The above provisions provided for a comparable level of protection to that of Article 6 § 1 of the Convention.

(ii) The applicant company

233. The applicant company disagreed. It argued, first, that the Government had failed to provide any examples showing the effectiveness of a constitutional complaint in cases concerning the appointment of persons to judicial positions after the entry into force of the 2017 Amending Act. Moreover, they had failed to demonstrate that the applicant company by lodging a constitutional complaint would be able to secure adequate redress in respect of its individual situation.

234. Secondly, the applicant company pointed to the constitutional crisis affecting the Constitutional Court in its current composition. This issue had been the subject of the case in *Xero Flor w Polsce sp. z o.o*. (cited above) where the Court had held that Polish law had been breached in the process of election of several judges to the Constitutional Court. Those breaches of the domestic law had been found to be of a fundamental character and the actions of the legislature and the executive had been considered an unlawful external influence on the Constitutional Court. The applicant company pointed out that the Court had concluded that the Constitutional Court had not been a "tribunal established by law". Consequently, a complaint to the

Constitutional Court could not be regarded as an adequate and effective remedy offering reasonable prospects of success and capable of providing redress in respect of the applicant company's complaints.

235. Thirdly, the applicant company submitted that the constitutionality of the amendments to the domestic law, which had resulted in the judges appointed to the Supreme Court not constituting a tribunal established by law, had already been examined by the Constitutional Court in its current composition. In particular, the Constitutional Court, in its judgment of 20 June 2017 (K 5/17), had departed from the previous ruling of 18 June 2007 to the effect that the judicial members of the NCJ should be elected by the judges themselves. As the Court held in *Xero Flor w Polsce sp. z o.o.* (cited above), the 2017 judgment had been given by the Constitutional Court composed of judges elected in a procedure that had been vitiated by grave irregularities. Furthermore, the Constitutional Court, in its ruling of 21 April 2020 concerning the "conflict of competence", held that the President of Poland had the power to appoint judges upon the recommendation of the NCJ and such appointment was final.

236. The applicant company underlined that the current crisis in Poland was one of a systemic nature and that there was a real risk that proceedings before the Constitutional Court would have been incompatible with the Convention standards and basic principles of the rule of law. It also argued that it should not be required to use remedies which were contrary to Convention standards. It stressed that there was no procedure under Polish law that would allow a party to challenge the alleged defects in the appointment of the Supreme Court judges who had dealt with the applicant company's cassation appeal.

(b) The Court's assessment

237. In support of their preliminary objection the Government referred to two specific legal provisions whose application, in their view, could have been challenged as unconstitutional by the applicant company (see paragraph 232 above). They relied, in particular, on section 29 of the 2017 Act on the Supreme Court stipulating that "appointment to a judicial office at the Supreme Court shall be carried out by the President of Poland pursuant to a recommendation of the National Council of the Judiciary" and section 3(1) (1) and (2) of the 2011 Act on the NCJ (as amended by the 2017 Amending Act), which defined the NCJ's competences as, *inter alia*, "examining and assessing candidates for judicial office in the Supreme Court" and "presenting to the President of the Republic of Poland motions for appointment of judges of the Supreme Court" (see paragraphs 99 and 103 above).

The applicant company, for its part, maintained that the amendments to Polish legislation, including systemic defects in the procedure for judicial appointments to the Supreme Court under the 2017 Act on the Supreme

Court, involving the NCJ as established under the 2017 Amending Act, had already been examined by the Constitutional Court and deemed constitutional. It pointed to the Constitutional Court's judgments of 20 June 2017 and 21 April 2020 (see paragraphs 233-235 above).

238. With respect to the Government's submissions the Court notes that in their observations relating to the merits (see paragraph 308 below) they nonetheless asserted that the reform of the NCJ and the Supreme Court had been implemented in accordance with the Constitution and national legislation and that the 2017 Amending Act had been introduced to implement the Constitutional Court's judgment of 20 June 2017 (K 5/17).

It further observes that one of the central issues in the present case concerns the applicant company's allegation that there has been a manifest breach of the domestic law that fundamentally affected the procedure of judicial appointment to the Civil Chamber of the Supreme Court on account of the participation in that procedure of the newly established NCJ. After the entry into force of the 2017 Amending Act and the 2017 Act on the Supreme Court, both the Constitutional Court and the Supreme Court gave several rulings in that context, expressing conflicting views as to the lawfulness of the appointment of judges recommended by the NCJ, the independence of that body and the independence of judges so appointed (see paragraphs 110-142 and 151-164 above; see also *Reczkowicz,* cited above, §§ 227-230). In view of the foregoing, the Court finds that the question of the effectiveness of a constitutional complaint to the Constitutional Court, directed against provisions that formed the legal basis for the impugned judicial appointments, should be joined to the merits and examined at a later stage.

2. Conclusion on admissibility

239. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions before the Court

(a) The parties

(i) The applicant company

240. The applicant company submitted that its case had been heard by a bench of three judges of the Civil Chamber of the Supreme Court appointed in the procedure involving the new NCJ, a body which had not offered any guarantees of independence or impartiality. The entire appointment procedure had been neither transparent nor independent and was not subject to judicial review. For that reason, its cassation appeal had not been heard by

an "independent and impartial tribunal established by law", thus entailing a breach of Article 6 § 1 of the Convention.

241. It explained that the reorganisation of the justice system in Poland, in particular the amendments introduced to the 2011 Act on the NCJ and the 2017 Act on the Supreme Court, had caused much controversy and sparked an international outcry. Domestic legal organisations and the academic community had protested against those amendments, arguing that they had not been compliant with the rule of law or the right to a fair trial before an independent court. In addition, international organisations had issued opinions, reports, resolutions and recommendations negatively assessing the reorganisation, to mention only various bodies of the United Nations, the Council of Europe and the European Union as well as the United States House of Representatives Committee on Foreign Affairs. On 17 September 2018 the Polish NCJ had been suspended from the ENCJ. Several of those bodies had considered that the reform of the NCJ had brought this institution under the control of the executive, this being incompatible with the principles of the independence of the judiciary. For instance, on 16 January 2020 the Venice Commission had recommended, among other things, to "restore the powers of the judicial community in the questions of appointments, promotions and dismissal of judges".

242. The applicant company underlined that, in accordance with the Court's case-law, in particular the judgment in *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, 1 December 2020), a court must always be "established by law". It was also inherent in the very notion of a "tribunal" that it must be composed of judges selected on the basis of merit; that is to say, judges who fulfilled the requirements of technical competence and moral integrity. The higher a tribunal was situated in the judicial hierarchy the more demanding the applicable selection criteria should be. In the light of its case-law, the Court was called upon to examine whether the domestic law had been complied with. In the applicant company's opinion, there had been clear and fundamental breaches of domestic laws in the process of appointment of new judges to the Civil Chamber. Those breaches concerned fundamental principles of the procedure for appointing judges.

243. In the present case, the long series of irregularities which had resulted in the situation where the Civil Chamber's judges, who had examined the applicant company's case, was not a "tribunal established by law" had started with the structural changes to the NCJ's composition effected by the 2017 Amending Act. Contrary to the Constitution, which set forth that the *Sejm* should only select four members of the NCJ, the 2017 Amending Act had entrusted the *Sejm* with the election of fifteen additional members, from among judges, who had so far been elected by their peers. As a result, the legislative and executive branches of power had granted themselves a quasi-monopoly to appoint the members of the NCJ in that they were to appoint twenty-three out of twenty-five members. This was in clear disregard

of the Constitutional Court's judgment of 18 July 2007 (K 25/07) which had confirmed the interpretation of the Constitution to the effect that that the judicial members of the NCJ were to be elected by their peers. The legislature had further decided to terminate prematurely the four-year term of the judicial members of the "old" NCJ; this issue having been the subject of pending applications before the Court, *Grzęda* v. *Poland* (no. 43572/18) and *Żurek v. Poland* (no. 39650/18).

Referring to the judgment of the Constitutional Court of 20 June 2017 (K 5/17) relied on by the Government, the applicant company noted that it had created divergence in that court's case-law regarding systemic issues of fundament importance. That judgment had been given in a composition including judges elected to the Constitutional Court in breach of Article 190 of the Polish Constitution and Article 6 § 1 of the Convention, as held in *Xero Flor w Polsce sp. z o.o.* (cited above), § 291.

244. With respect to the first step of the test as set out in the *Guðmundur Andri Ástráðsson* judgment, the applicant company considered that several flagrant violations of Polish law had been clearly established. The deficiencies in the appointment of the Supreme Court's judges, including the judges who had dealt with the applicant company's case, were due to unconstitutional legislative amendments, the composition of the NCJ and the sham nature of the process for selecting judges to sit in that Chamber. The process for the appointment of judges to the Supreme Court had been intentionally regulated and implemented in an unlawful manner. For forty-four vacant positions announced at the Supreme Court, only 216 candidates had applied. The new NCJ had been composed in an unconstitutional manner and had not offered guarantees of impartiality or independence. The procedure had been carried out in order to meet the expectations of the authorities and fulfil their objective of gaining influence on future judicial decisions. The irregularities in the process of appointments to the Supreme Court had been of such gravity as to justify the conclusion that it should be considered null and void and unacceptable *ab initio*.

Moreover, while initially an appeal against a NCJ resolution recommending judges to the Supreme Court had been possible, such possibility had been removed by the Act of 20 July 2018 amending several statutes and the subsequent amendments introduced by the Act of 26 April 2019. The exclusion of any judicial review of the NCJ resolutions amounted to a violation of a constitutional obligation, incumbent on the State authorities, to provide such review.

Another flagrant violation of the domestic law had occurred when the procedure had been initiated by an act of the President of Poland without the requisite countersignature of the Prime Minister.

245. The applicant company submitted that irregularities in the procedure of appointment of judges to the Civil Chamber of the Supreme Court had been clearly confirmed by the domestic courts. Most recently, the Supreme

Administrative Court, in its judgment of 6 May 2021 (II GOK 2/18) had quashed NCJ resolution no. 330/2018 of 28 August 2018. That resolution recommended seven judges to the Civil Chamber of the Supreme Court, including three judges who had dealt with its case. The Supreme Administrative Court confirmed that due to several amendments to the domestic law the possibility of appealing effectively against the NCJ resolutions recommending candidates to the Supreme Court had been removed.

The applicant company considered that this situation made it impossible for it to have a meaningful judicial review of the competition and selection procedure for judges undertaken by the NCJ. According to the applicant company, this lack of effective judicial review of the process of appointment of future Supreme Court judges had constituted another violation of domestic law. The CJEU judgments of 19 November 2019 and 2 March 2021 were also relevant to the present case and the indications given in those judgments had enabled the Supreme Administrative Court to conclude that the NCJ could not be regarded as independent of the executive power.

246. Furthermore, several breaches of domestic law had been discerned in the Supreme Court's judgment of 5 December 2019 and in the joint resolution given by the three joined Chambers of the Supreme Court on 23 January 2020. Both rulings had concluded that the NCJ in its current formation had not offered sufficient guarantees of independence from the legislative and executive powers in the judicial appointment procedure. The Supreme Court's judgment had contained extensive grounds and had been based on the interpretation provided by the CJEU in its judgment of 19 November 2019. According to the conclusion of the Supreme Court's resolution, a court formation should be considered unlawful if it included a person appointed on the recommendation of the NCJ constituted in accordance with the 2017 Amending Act. The rulings of the Supreme Court were applicable to the instant case and all three judges who had dealt with the applicant company's cassation appeal had been recommended by the NCJ, a body which was not independent from the legislative and executive powers.

247. With respect to the second step of the test established in the *Guðmundur Andri Ástráðsson* judgment (cited above), the applicant company stated that the breaches of domestic law pertained to fundamental rules of procedure for appointing judges. The fact that twenty-three out of twenty-five judicial members of the NCJ had been appointed by the executive and legislative powers demonstrated that there had been a breach of the principles of the separation and balance of powers enshrined in Article 10 of the Constitution. The election to the new NCJ, held in spring 2018, had been boycotted by the vast majority of Polish judges, who had thereby shown their opposition to the unconstitutional amendments introduced by the ruling coalition. As a result, out of a total number of some 10,000 Polish judges, only eighteen candidates had applied for fifteen positions. The NCJ had not

intervened in cases of judges against whom politically motivated disciplinary proceedings had been instituted. In consequence, the NCJ no longer fulfilled its constitutional role as a guardian of judicial independence.

Furthermore, the competition procedure for the appointment of judges to the Supreme Court was chaotic and rudimentary. The NCJ, although formally responsible for the process of recommending the candidates, had failed to genuinely examine and verify the applications. It had recommended only the candidates supported by the authorities and connected to them. The applicant company found it important to underline the role of the Constitutional Court in this process. On 23 January 2020 it had made an interim order whereby it suspended the prerogative of the Supreme Court to issue resolutions concerning matters of national or international law. This ruling had been made in breach of the law and showed the intention of the ruling majority to take control over the Supreme Court.

248. With respect to the third element of the test, the applicant company argued that it had no means of challenging the composition of the Civil Chamber of the Supreme Court which had ruled in its case or of complaining of legal defects in the procedure of appointment to the Supreme Court.

249. Furthermore, and for all the reasons stated above, the applicant company argued that the court which had dealt with its case had not been independent and impartial as required by Article 6 § 1 of the Convention. The political pressure and influence of the executive was clear and the process of appointment to the Supreme Court lacked effective judicial review.

250. Comparisons between elements of constitutional and legal systems for judicial appointments in Europe, as relied on by the Government (see paragraph 257 below) to justify the choices of the Polish legislature, might be misleading if presented in isolation from their context. While every member State could apply different procedures, a broader context should nevertheless be taken into consideration to assess compliance with the requirement of independence and impartiality of a court established by law, as guaranteed by the Convention. Notwithstanding the margin of appreciation afforded to the States in applying and implementing the Convention, no State should have a right to violate its Constitution for political benefit.

251. In conclusion, the domestic law had been breached, as clearly established by the Supreme Court and the Supreme Administrative Court. In that regard, the applicant company stressed the importance of the Court's case-law on the principles of the rule of law and separation of powers. In the present case the breaches had undermined the very essence of the right to a "tribunal established by law" and the systemic defects in the judicial appointment process were of such gravity as to amount to a violation of Article 6 § 1 of the Convention.

(ii) The Government

252. The Government submitted that the court which dealt with the applicant company's case had been a "tribunal established by law" as required by Article 6 § 1 of the Convention. In particular, there had been no manifest breach of domestic law in the process of appointment of judges to the Supreme Court. The Government considered that in the light of the Grand Chamber judgment in *Guðmundur Andri Ástráðsson* (cited above, §§ 216 and 247) the impugned violations of the domestic law must be manifest", i.e., must be of a fundamental nature and must form an integral part of the judges' appointment process.

253. Under the second element of the test developed in the *Guðmundur Andri Ástráðsson* judgment, the key question was whether there was a real risk that the other organs of government, in particular the executive, had exercised undue discretion undermining the integrity of the appointment process to an extent not envisaged by the domestic rules in force at the material time. However, in the present case, there had been no violation of the ability of the judiciary to perform their duties free of undue interference and thereby to preserve the rule of law and the separation of powers. According to the Government, it was thus unnecessary to carry out the third step of the test as set out in the *Guðmundur Andri Ástráðsson* judgment (cited above) related to the examination of whether the violations had effectively been reviewed.

254. They stressed that all judges in Poland, including those sitting in the Civil Chamber of the Supreme Court, were appointed by the President, upon a proposal of the NCJ, for an indefinite period of time. The President was not bound by the recommendation of the NCJ in that he could decide not to appoint a person indicated by it. However, the President could not appoint a person who was not recommended by the NCJ. The mere fact that the judges were appointed by an executive body, the President, did not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality if once appointed they were free from influence or pressure when carrying out their role. In that respect the Government pointed to the judgment of the CJEU of 19 November 2019, which had confirmed this principle.

255. The three judges who had dealt with the applicant company's case had been appointed in the above-described procedure as defined by the applicable laws and the Constitution. In particular, they had participated in a competition conducted by the NCJ on the basis of the President's announcement of vacancies at the Supreme Court. The candidates, having succeeded in this competition, had been recommended for office by the NCJ in resolution no. 330/2018 of 7/18 2018. Finally, the three judges who had dealt with the applicant company's case had been appointed by the President in his decision of 10 October 2018. This appointment procedure met all the requirements laid down by the domestic law.

256. The Government noted that, under the Court's own case-law, the appointment of judges by the executive or the legislature was permissible provided that the nominees were free from influence and pressure in the exercise of their judicial function (*Guðmundur Andri Ástráðsson*, cited above, § 207). In the present case the applicant company had not shown that the judges adjudicating in its case were subject to such influence or that this could be considered relevant to the final outcome of the case.

Furthermore, the Court had also emphasised that an inherent element of the concept of a "court" was that it consisted of judges elected on the basis of competence – that is, judges who met the requirements of technical competence and moral integrity in order to perform the judicial functions required in a country based on the rule of law (*Guðmundur Andri Ástráðsson,* cited above, § 220). However, the applicant company had failed to submit any specific allegation against the judges of the Civil Chamber of the Supreme Court dealing with its cassation appeal which could indicate that they did not fulfil the conditions of impartiality or independence in this particular case. In consequence, the Government considered that the applicant company had failed to substantiate its allegations under Article 6 § 1 of the Convention.

257. The Government referred to systems of judicial appointments in Europe and concluded that the Polish approach did not differ from other countries. The fact that the judges were appointed by the executive seemed to be a rule in European States. They considered that in Europe the participation of representatives of judicial authorities in the procedure for appointment of judges, particularly those of the Supreme Court, was limited or not foreseen at all. In Poland, however, the judiciary participated in the procedure to a rather broad extent. The risk of excessive influence of the executive on the process of appointment of judges had thus been reduced.

258. Furthermore, the Convention did not imply an obligation to apply a specific mode of appointment of judges to the highest courts of the Contracting States. The Convention did not require the appointment of judicial councils or their participation in the procedure for appointment of judges. Moreover, the Convention did not require the States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interactions. A certain interaction between the three branches of government was not only inevitable but also necessary to the extent that the respective powers did not unduly encroach upon one another's functions and competencies. The Contracting States should thus be "afforded a certain margin of appreciation in connection [with] these issues since the domestic authorities [were] in principle better placed [than] the Court to assess how the interests of justice and the rule of law – with all its conflicting components – would be best served".

259. The Government emphasised that amendments made to the method of electing members of the NCJ and terminations of service established prior

to this amendment had been proportionate, since they were aimed at adjusting the election to the relevant provisions of the Constitution, as interpreted by the Constitutional Court in judgment in case no. K 5/17. The amendments had fallen within the ambit of the legislator's margin of appreciation, limited only by the constitutional provisions pertaining to the NCJ. As a matter of fact, Article 187 § 1 (2) of the Constitution provided for an election of the judicial members of the NCJ from among judges. The Constitution did not determine, however, who would elect these judges or how they would be elected. Consequently, it could be seen from the relevant provisions of the Constitution who could be elected as a judicial NCJ member, yet there was no mention of any modalities of the election of judges to the NCJ. In accordance with Article 187 § 4 of the Constitution these modalities were to be regulated by statute. Elections by representatives of the judiciary had not been annulled, yet the position that assemblies of judges were the only competent electoral bodies was unsubstantiated on the ground of the Constitution. Whereas Article 187 § 1 (3) of the Constitution clearly stipulated that the MPs sitting on the NCJ be elected by the *Sejm* and that senators sitting on it be elected by the Senate, the Constitution did not contain any precise provision with reference to the judicial members of the NCJ.

260. According to the Government, this meant that the Constitution did not provide for any particular way of electing judges to the NCJ. Such a manner of regulation of this matter had been chosen by the constitutional lawmaker consciously, with a view to setting it out at the level of a statute. It was therefore legitimate that this question should be regulated within the limits of the legislator's margin of appreciation. In this respect, the Constitution laid down a certain minimum number of fundamental safeguards. They also noted that after the amendments had entered into force, the NCJ would be elected by the *Sejm* by a qualified majority of three-fifths of the votes, in the presence of at least half of those entitled to vote, which made this election the result of a cross-party agreement between various groups represented in the *Sejm* and thus ensured high democratic legitimacy for the members of that body. The high qualified majority required for the election of the members of the NCJ who were judges distinguished the way in which they were elected from members who were MPs. In the latter case, the election was by a simple majority.

261. The Government stressed that although the Court could examine both the formal aspect of the existence of law and the issues related to the process of appointment of judges within the domestic legal system, it had limited power to interpret domestic law. Moreover, the Court was limited by the principle of subsidiarity, which allowed the High Contracting States to decide which measures to take to ensure the rights and freedoms of individuals and to implement the Convention guarantees.

262. According to the Government, the reform of the NCJ and Supreme Court had been carried out in compliance with the Constitution and national

legislation. In particular, the changes to the method of electing the judicial members of the NCJ sought to implement the Constitutional Court's judgment of 20 June 2017 (K 5/17) (see paragraph 152 above), which had held that both the individual nature of the term of office of the NCJ's judicial members and the manner of their appointment were unconstitutional. The Constitutional Court also found that the previous system had led to a differentiation in the voting power between judges of different levels of jurisdiction, which had meant that the votes cast had not been equal but had carried different weight depending on the court's level. The Government disagreed with the applicant company's allegation that the new members of the NCJ had been associated with the authorities and maintained that the new system had strengthened the transparency of the election of the members of the NCJ and had enabled a public debate on the nominated candidates. The new system allowing the candidates to be presented by a group of citizens or other judges ensured greater representativeness of the NCJ and better reflected the structure of the Polish judiciary.

263. The Government reiterated that even in its judgment of 19 November 2019 (nos. C-585/18, C-624/18, C-625/18) the CJEU had not challenged the legitimacy of the NCJ or the Disciplinary Chamber of the Supreme Court. It had merely pointed out that the national court could assess, in an individual case, whether the national authority – competent under national law – was an independent and impartial tribunal within the meaning of Article 47 of the Charter of Fundamental Rights. Thereby, the CJEU had confirmed that it respected the areas reserved for the member States. Although it observed in its ruling that any political factor involved in the appointment of judges might give rise to doubts and trigger an assessment of whether the court was an independent court, it also pointed out that it was only a set of factors that could lead to a final conclusion ruling out the existence of the attributes of independence and impartiality. In this context, it was also worth mentioning the CJEU judgment of 24 June 2019 (no. C-619/18), concerning the independence of the Supreme Court, in which the CJEU had emphasised the principle of the irremovability of judges. Therefore, the interpretation of the judgment of 19 November 2019, leading to the conclusion that it was permissible to deprive judges and the competent court of their right to adjudicate, was unacceptable. Such an interpretation would be contrary to the fundamental principle of the European Union – the principle of the irremovability of judges.

264. The Government stressed that there had been no manifest violation of domestic law in the process of appointment of judges to the Supreme Court. Any doubts regarding both the Disciplinary Chamber and the Civil Chamber of the Supreme Court arising in view of the Supreme Court's resolution of 23 January 2020 had been removed by the judgment of the Constitutional Court of 20 April 2020 (U 2/20, see paragraphs 158-160 above).

265. In their additional observations, the Government noted that the resolution of the joined Chambers of the Supreme Court of 23 January 2020, relied on by the applicant company, should not apply to the case as the judgment of the Civil Chamber in its case had been given before the date of the resolution, on 25 March 2019. In that regard they referred to point 3 and 4 of the resolution. Furthermore, referring to the judgment of the Supreme Administrative Court of 6 May 2021 in case no. II GOK 2/18, the Government noted that in the reasons for the judgment it had been emphasised that "the effects of the ruling issued in this case [did] not relate to the systemic validity and effectiveness of presidential appointments to the office of Supreme Court judge made on the basis of recommendations presented by the NCJ by a resolution under review" (point 9 of the reasons). These acts were not subject to judicial review and were irreversible, which also allowed the principle of the irremovability of judges to be implemented, a principle emphasised by the Court itself in its judgment in the case of *Guðmundur Andri Ástráðsson* (cited above, § 239).

266. According to the Government, the CJEU's judgment of 19 November 2019, which had explicitly concerned allegations of a lack of independence and impartiality of the Disciplinary Chamber, was not of relevance for the case at hand. This judgment had not prejudged the status of the Disciplinary Chamber let alone the status of the judges appointed to the Civil Chamber of the Supreme Court. The present case did not concern any newly created chamber but an existing one, which had merely been reinforced by new judges displaying the necessary competencies and appointed for reasons entirely outside the political realm.

267. Finally, according to the Government, the President had not breached the Constitution when announcing vacancies at the Supreme Court as such a decision was one of his constitutional prerogatives and had not necessitated the countersignature of the Prime Minister.

(b) The third-party interveners

(i) Association "Lawyers for Poland"

268. The Association underlined that Europe had many different systems for the election and appointment of judges. Even the appointment of judges by the executive or the legislature had been found acceptable under the Convention. According to the *Guðmundur Andri Ástráðsson* judgment (cited above), Article 6 of the Convention did not impose on States any theoretical constitutional concept as regards the permissible limits of cooperation between the three branches of government. Moreover, the Court was required to respect the position of the national authorities, especially when it came to assessing the legality of the appointment procedure. The interpretation adopted by the national authorities, including the courts, could not be called into question unless there had been a manifest breach of law. The Contracting

States should also be afforded a certain margin of appreciation since they were in principle better placed than the Court to assess how the interests of justice and the rule of law would be best served in a particular situation. This finding implied a need for restraint in assessing possible violations of the law.

269. The intervener stated that in Poland the executive bodies did not participate in the process of appointment of judges to the Supreme Court before the President handed to the recommended persons their letters of appointment and administered the oath of office. The NCJ was an independent constitutional body composed in its majority of judges. While the members of the executive and legislature participated in its work they had no voting rights. The Association stressed that there had been no breach of domestic law in the process of appointment of the judges to the Supreme Court who had dealt with the applicant company's case. The procedure for their appointment had met all the requirements of the domestic law. The Constitution of Poland had left to the legislator the freedom to choose a method of electing the judicial members of the NCJ – the issue had been clarified by the Constitutional Court in its judgment of 20 June 2017. Consequently, the new NCJ could not be disqualified *a limine* as an independent and objective initiator of the resolution submitted to the President in the judicial appointment procedure.

270. The intervener also referred to an incorrect narration, disappointingly contained also in the Advocate General Tanchev's opinion of 15 April 2021 in the case C-487/19, that there had been a manifest breach of a fundamental rule in that the judges of the Supreme Court had been appointed in spite of the interim measure ordered by the Supreme Administrative Court. They noted that NCJ resolution no. 330/2018 had been challenged by an appellant in the case II GW 27/18 and on 27 September 2018 the Supreme Administrative Court had stayed its implementation. However, the impact of this ruling had been limited by the scope of the appeal and legal boundaries set out in section 44 of the 2011 Act on the NCJ. Consequently, the said interim ruling had only been notified to the parties to the proceedings: the appellant and the NCJ. It had not been notified to any judge appointed to the Civil Chamber of the Supreme Court following the recommendations contained in NCJ resolution no. 330/2018 or to the President of Poland. The persons appointed on the basis of that resolution had not been affected by the interim measure taken on 27 September 2018. Therefore, there had been no breach of any domestic law provision regulating the appointment of judges. Moreover, the appointment by the President of the persons indicated in resolution no. 330/2018 had not breached the interim measure itself, as its scope had been limited by section 44 1a and 1b of the 2011 Act on the NCJ in the wording in force at the material time.

271. The Association "Lawyers for Poland" concluded by stating that the application of Article 6 § 1 of the Convention to the instant case required taking into account the position of the Polish authorities, including the

Constitutional Court, which had not found any breach of the domestic law in the process of appointment of judges to the Supreme Court. The mere fact that the applicant company's case had been dealt with by the Civil Chamber of the Supreme Court comprised of newly appointed judges had not given rise to a violation of this provision of the Convention. The intervener also disagreed with the statement that there had been no effective measures by which to challenge the composition of a court in a given case. In particular, it was open to any party to proceedings to challenge a judge, this being a procedure of which the applicant company had failed to avail itself, thus raising doubts as to whether the domestic remedies had been exhausted. In sum, it was the intervener's opinion there had been no breach of Article 6 § 1 of the Convention.

(ii) Commissioner for Human Rights of the Republic of Poland

272. The Commissioner for Human Rights of the Republic of Poland ("the Commissioner") stressed that the case disclosed systemic and intentional irregularities. It was of paramount importance to the domestic judicial system since it concerned doubts relating to the composition of the top judicial body, which exercised a supervisory function over all ordinary courts in Poland. The rulings of the Supreme Court were not subject to review by another judicial body which, subject to meeting Convention standards, could resolve doubts and remedy deficiencies.

273. The Commissioner stressed that the problems raised by the present case resulted from systemic deficiencies brought about by the changes introduced in Poland. Thus, the finding of a violation in an individual case would be insufficient for restoration of Convention protection in Poland since the case was only one example of a general problem. For this reason, the Commissioner invited the Court to indicate general measures that would bring about a systemic remedy to the problem of access to justice. The measures would be particularly necessary if the Court were to conclude that the fundamental nature of the defects in the process of appointment of the Supreme Court judges was to outweigh the principles of irremovability of judges and the legal certainty of their decisions. The intentionality, systemic nature and gravity of infringements in the process of appointment to the Supreme Court should result in the refusal to extend the guarantee of irremovability of judges to those persons and limit the application of the principle of legal certainty in the decisions adopted by them. Grave and deliberate breaches of the law should not be rewarded by the acceptance of a situation that had been unlawfully created.

274. The Commissioner submitted that persons appointed to the Supreme Court since 2018 had been appointed in flagrant violation of domestic law. The deficiencies in the appointment of the Supreme Court judges since 2018 were due in particular to the participation of the NCJ – a body created and appointed in a manner manifestly incompatible with the national law. In order

to assess whether the NCJ met the necessary requirements, the Commissioner looked at the following elements: (a) the legislative procedure and nature of changes introduced by the 2017 Amending Act; (b) the election process of the members of the NCJ; (c) activities of the new NCJ after its creation.

275. With respect to point (a) above, the Commissioner stressed that the election of fifteen judges, previously elected by other judges, had been entrusted to the *Sejm* contrary to their constitutional role and the previous case-law of the Constitutional Court (judgment of 18 July 2007, K 25/07, see paragraph 150 above). In consequence, the legislative and executive branches now elected twenty-three out of twenty-five members of the NCJ, which granted them excessive influence over the process of appointments to the Supreme Court. At the same time the constitutionally protected four-year term of office of members of the NCJ had been prematurely terminated. The Commissioner also pointed to a general boycott of the elections to the new NCJ by the judges as a result of which out of a total of 10,000 Polish judges eligible, only eighteen candidates had applied for fifteen positions. Moreover, the transparency of the process had been heavily compromised by the authorities as they had refused to disclose the lists of support for the candidates in spite of the binding ruling of the Supreme Administrative Court ordering their disclosure (judgment of 28 June 2019, I OSK 5282/18).

276. The Commissioner further submitted that the members of the NCJ included persons with strong links to the executive: judges seconded to the Ministry of Justice and those recently appointed by the Minister of Justice to the posts of president and vice-president of the courts. The Supreme Court in its resolution of 23 January 2020 had established that Judge M.N. had been elected to the NCJ in breach of the 2017 Amending Act as he had not obtained the required number of signatures to support his candidature. The NCJ had not intervened in cases of judges prosecuted in politically motivated disciplinary or criminal proceedings. The NCJ had taken actions aimed at legitimising its own status by applying to the Constitutional Court to confirm the constitutionality of the 2017 Amending Act. As a result, the Commissioner concluded that the NCJ no longer fulfilled its constitutional role as guardian of judicial independence. The NCJ had been disqualified as an independent and objective initiator of resolutions submitted to the President of Poland for appointments to judicial posts.

277. The process of the appointment of judges to the Supreme Court was also flawed and amounted to a flagrant breach of the regulations and principles of domestic law and European standards. The Commissioner took the view that the act announcing vacancies at the Supreme Court issued by the President had not been valid as it had not been countersigned by the Prime Minister, as required by the Constitution. The competition for posts of judge had been boycotted by the whole legal profession in Poland, as only 216 candidates had applied for forty-four positions. The NCJ had carried out a rudimentary selection process based mostly on the material presented by the

candidates themselves and had spent a dozen minutes per interviewed candidate. As a result, the NCJ had recommended only those candidates who were associated with the authorities and had their support. For example, Judge K.Z. in the period directly preceding his appointment as a judge of the Civil Chamber of the Supreme Court, had been a director at the Ministry of Justice. At the meeting of the NCJ when his candidature had been discussed, the Minister of Justice came in person and strongly advocated for the NCJ to recommend him. This incident had demonstrated the susceptibility of the NCJ to political pressure as it had ultimately accepted this candidate, and also the candidate's significant dependence on a political public figure and a member of the executive. The Commissioner concluded that the organisation and the process of appointments to the Supreme Court were such as to raise doubts as to a lack of independence and impartiality on the part of the persons so appointed; these doubts were of a constant and irremovable nature.

278. Moreover, the Commissioner pointed to another serious irregularity consisting of a lack of judicial review and remedies. He explained that at the time when the competitions to the Supreme Court had been announced, the law had provided for judicial review of the NCJ resolutions before the Supreme Administrative Court. During the competition procedure, the Act of 20 July 2018 had limited the effectiveness of that judicial review by stipulating that a resolution became final in the part concerning the recommendation for the post, unless all participants appealed against it (section 44 of the Act on the NCJ see paragraph 100 and 101 above). Subsequently, the possibility of the judicial review of the Supreme Court's appointments had been entirely excluded, in application of the Constitutional Court's judgment of 25 March 2019 (K12/18) and the ensuing amendment introduced by the Act of 26 April 2019. The above-mentioned Constitutional Court judgment had been given in a composition which included unlawfully appointed persons and contradicted the earlier judgment of that court confirming the well-established principle of allowing for judicial review of NCJ resolutions (see Constitutional Court judgment of 27 May 2008, SK 57/06, § III.5). Finally, the so-called "Muzzle Act" of 20 December 2019 prohibited any review of the lawfulness of the appointment of judges. The Commissioner concluded that the Government had, firstly, arranged for the appointments to be received only by persons who had supported them and, secondly, had sought to legalise their choices by all possible means (see paragraph 105 above).

279. In the present case, NCJ resolution no. 330/2018 recommending candidates for posts at the Civil Chamber of the Supreme Court had been appealed against by the rejected candidates. Although on 27 September 2018 the Supreme Administrative Court had stayed the implementation of this resolution, the President had gone ahead and given letters of appointment to the candidates recommended by the NCJ and the candidates had accepted them. In those circumstances the Commissioner considered that the NCJ's act

of recommendation of candidates for judicial posts at the Civil Chamber of the Supreme Court had not become final and enforceable. Moreover, the appointment of judges, and their acceptance of these appointments, in spite of the staying of the implementation of the NCJ resolution, had showed an intention to undermine the *res judicata* effect of a final court decision.

All those elements led to the conclusion that the appointments to the Supreme Court had not been subject to judicial review either before the final appointments by the President or afterwards.

280. The Commissioner concluded that the selection and appointment of judges to the Supreme Court had taken place in manifest and flagrant breach of domestic law and European standards. All the above-mentioned defects in the appointment process were of a serious nature and had led to a conclusion that the judges had not been properly appointed and that the judicial formations with their participation had not been established by law and had not met the requirements of a tribunal within the meaning of Article 6 § 1 of the Convention. The infringements had been committed intentionally in order to ensure that the political authorities would have a dominant influence over the appointments of judges. They nullified the Supreme Court appointment procedure *ab initio*, undermining the effect of the appointment of judges and depriving those appointed of the necessary legitimacy to resolve legal disputes. According to the Commissioner, there were no objective conditions for such judges to be seen as lawfully established, independent, and impartial. Moreover, the association of those appointed to the Supreme Court with the current Minister of Justice, and the fact that they had accepted the appointments in spite of the stay of implementation of the NCJ resolutions recommending them, had seriously and permanently undermined confidence in their capacity to maintain standards of independence and impartiality in the exercise of judicial activities. Without independent and impartial judges established by law the Polish legal system could not function properly, thus constituting a threat to Poland as a democratic State based on the rule of law.

(iii) Polish Judges Association "Iustitia"

281. The Polish Judges Association "Iustitia" (hereafter referred to also as "Iustitia") described itself as the largest professional association of judges in Poland with over 3,500 members, amounting to more than one third of all judges in the country. Its objective was the preservation and enforcement of the principle of a democratic State built upon the rule of law by ensuring in particular the principle of independence of the judiciary and its protection from interference by the legislative or executive branches of government.

282. The intervener considered that the appointment of judges to the Supreme Court after 2018 had taken place in obvious and flagrant violation of the domestic law. Those infringements had been deliberate and concerned fundamental rules of judicial appointment. The circumstances of their

appointment and their conduct had raised legitimate doubts as to the independence and impartiality of judges appointed to the Supreme Court.

283. With respect to the creation of the new NCJ the intervener reiterated various allegations which had been the subject of wide national and international criticism: election of fifteen judicial members by the *Sejm*, premature termination of the term of office of the previous NCJ, boycott of elections to the NCJ by the Polish judges and controversies surrounding lists of support for the candidates (their original non-disclosure and the subsequent discovery that the successful candidates to the NCJ had been supported by each other and by judges linked to the Ministry of Justice). It considered that the majority of new members of the NCJ were directly connected with the Ministry of Justice thus placing them in a relationship of professional dependency or personal gratitude to the Government. Out of fifteen judicial members of the NCJ, nine had in the preceding period been promoted as presidents or vice-presidents of courts by the Minister of Justice and four had been employed at the Ministry of Justice. The NCJ had been taking measures aimed at its own legitimisation. As an example, "Iustitia" noted the NCJ's official statement of 10 January 2020 following the adoption of the so-called "Muzzle Act"[11], asserting that "the law serve[d] the implementation of the principle of separation of powers, [did] not infringe the principle of independence of the judiciary, and [was] aimed at protecting legal security of citizens and their trust in the State". On 22 November 2018 the NCJ had initiated proceedings before the Constitutional Court in order to legitimise its own status and confirm the constitutionality of the legislative changes.

284. According to the intervener, the new model of appointments of judges to the Supreme Court had become "impoverished" and any involvement of the Supreme Court in that process had been excluded. It had been fully entrusted to the new NCJ, which did not carry out a genuine process of verification and proposed only the candidates who were associated with the authorities and had their support. The appointment procedure had been initiated by an act of the President of Poland without a countersignature of the Prime Minister, as required under Article 144 § 3 of the Constitution. Moreover, the NCJ resolution recommending seven judges to the Civil Chamber had not been final since it had been appealed against by unsuccessful candidates and the Supreme Administrative Court had stayed its implementation. The fact that the President had gone ahead and handed letters of appointment to the recommended persons and they had accepted them demonstrated an instrumentalising attitude to the law and disregard for the judicial decision of the Supreme Administrative Court. The process of appointment of judges to the Supreme Court was therefore not subjected to effective judicial scrutiny, neither before nor after the appointments. The association referred to the series of amendments to section 44 of the 2011

[11] The 2019 Amending Act, see paragraph 105 above.

NCJ Act which had sought to exclude any judicial review and undermined the jurisdiction of the Supreme Administrative Court.

285. "Iustitia" referred to extensive international material which provided analysis of the nature and consequences of changes to the organisation of the Polish judiciary, for instance opinions by the Venice Commission. Moreover, the involvement of the CJEU, in particular its judgment of 19 November 2019, had had a direct impact on the case-law of the Polish courts. Applying the CJEU's indications, the Polish Supreme Court in a judgment of 5 December 2019 had reached the conclusion that the NCJ did not offer a sufficient guarantee of independence of the legislative and executive authorities. The intervener also referred to the Supreme Court's resolution of 23 January 2020, issued jointly by its Chambers, which had concluded that a judicial formation should be considered incorrectly appointed if its members had been appointed following the recommendation of the NCJ as established under the 2017 Amending Act. The intervener considered that the far-reaching consequences of the above-mentioned judgment of the CJEU had been paralysed by the legislator and blocked by the adoption of the so-called "Muzzle Act". It had introduced the disciplinary liability of judges for questioning the professional status of a judge or the effectiveness of a judicial appointment (section 107 § 1 (3) of the Act on the Ordinary Courts). Furthermore the Chamber of Extraordinary Review and Public Affairs – composed in its entirety of judges appointed through the contested procedure on the recommendation of the NCJ – had been given sole competence to deal with requests to verify the status of a judge and to apply the judgment of the CJEU of 19 November 2019.

286. The intervener concluded that the application of the three-step test established in the *Guðmundur Andri Ástráðsson* judgment (cited above) should lead to the conclusion that there had been a violation of the applicant company's right to a tribunal established by law, in breach of Article 6 § 1 of the Convention. There had been flagrant breaches of the domestic rules on the appointment of judges which were of a fundamental and intentional nature. Moreover, allegations regarding the right to a "tribunal established by law" could not be effectively reviewed and remedied by the domestic authorities. This situation affected all citizens of Poland who, when bringing their dispute before a court, should expect justice to be free from any political agenda that may be dictated by the executive and legislative branches of power. The independence of judges and courts were essential to the rule of law.

(iv) Helsinki Foundation for Human Rights

287. The Helsinki Foundation for Human Rights submitted that the present case concerned a very important problem related to the situation of the judiciary in Poland and the status of judges of the Supreme Court appointed upon resolutions of the reorganised NCJ. According to the

intervener there had been several violations of the law in the process of appointment of new judges to the Civil Chamber of the Supreme Court. Firstly, the violations were related to the reorganisation of the NCJ, following which it had become *de facto* subordinated to the executive. Other violations of the law pertained to the lack of countersignature of the Prime Minister on the announcement of vacancies at the Supreme Court and the appointment of judges by the President despite the decision of the Supreme Administrative Court to stay the implementation of the NCJ resolution.

288. As regards the first point raised above, the intervener reiterated that the NCJ was a constitutional body set up to safeguard the independence of judges and courts in Poland. Its role in the process of appointments was very important as it recommended candidates for posts of judge and the President could not appoint a person who had not been recommended by the NCJ. From the creation of the NCJ in 1989 its fifteen judges-members had been elected by judges themselves, a model consistent with its primary function of safeguarding the independence of courts and its role as a forum of exchange of opinions between the three branches of power. The amendment which entered in force in 2018 changed this model, granting the *Sejm* the right to elect fifteen judicial members of the NCJ. The intervener noted that the declared purpose of this amendment had been the implementation of the Constitutional Court's judgment of 20 June 2017 (K 5/17). However, this ruling had to be regarded as controversial, not only because of its highly questionable interpretation of the Constitution, but also because it had been given by a bench composed of two unlawfully elected persons. Another ruling of the Constitutional Court, of 25 March 2019, which confirmed the compliance with the Constitution of the new model of election of the judicial members of the NCJ, had also been given in an unlawful composition. One person had been elected in 2017 to the seat vacated because of the death of the unlawfully elected person in 2015 (the findings established by the Court in the judgment *Xero Flor w Polsce sp. z o.o.* (cited above), applied accordingly). The Helsinki Foundation for Human Rights noted that its conclusions regarding the NCJ had been confirmed by the CJEU, in particular in its judgment of 19 November 2019. Consequently, the violation of the law in the present case had occurred because the Supreme Court's judges who dealt with the applicant company's case had been appointed following the resolution submitted by the reorganised NCJ, which in its current composition was no longer an independent body.

289. With respect to the second circumstance which had affected the legality of the appointment of judges to the Supreme Court, the intervener referred to the President's decision of 24 May 2018 to announce vacancies at the Supreme Court. This act had not been submitted for countersignature to the Prime Minister, which according to the opinions of many scholars and that of the intervener, had amounted to a breach of Article 144 § 2 of the

Constitution. This defect rendered the whole process of appointment of Supreme Court judges invalid.

290. Thirdly, the intervener considered that the President had failed to comply with the final ruling of the Supreme Administrative Court, which had stayed the implementation of the NCJ resolution proposing the candidates to be appointed as judges of the Supreme Court. It could be considered inconsistent with Article 179 of the Constitution. The Helsinki Foundation for Human Rights noted that the Constitutional Court had subsequently found the provisions allowing the Supreme Administrative Court to review the legality of the NCJ resolutions to be unconstitutional (K 12/18). This ruling had been incorporated into domestic law by the Act of 26 April 2019, which explicitly excluded access to a court in cases concerning NCJ resolutions recommending candidates to the Supreme Court. The issue had been the subject of the CJEU judgment of 2 March 2021, after which the Supreme Administrative Court had reviewed the legality of the NCJ resolutions.

291. The above-mentioned violations of the law had been explicitly confirmed by the Supreme Court and the Supreme Administrative Court, based on the rulings of the CJEU. Most notably, the Supreme Court had issued a resolution of 23 January 2020 in which it held that a panel of the Supreme Court which included a person appointed upon the recommendation of the reorganised NCJ was "inconsistent with the provisions of law" within the meaning of Article 379 § 4 of the Code of Civil Procedure, or "unduly appointed" within the meaning of Article 439 § 1 of the Code of Criminal Procedure, irrespective of the impact of such irregularity on the outcome of the case. The intervener referred to the reasoning of the Supreme Court's resolution, which had extensively examined all irregularities in the judicial appointment procedure and their impact. From the perspective of the assessment under the "tribunal established by law" principles it was crucial to retain that the Supreme Court had clearly found that the new judges of the Supreme Court had been appointed in breach of the law.

292. The irregularities in the process of appointment of Supreme Court judges had also been confirmed by the Supreme Administrative Court in judgments of 6 May 2021. The court had quashed the NCJ resolution on the basis of which the President had appointed seven judges of the Civil Chamber of the Supreme Court. It had reiterated that the NCJ did not provide sufficient guarantees of independence from the executive and legislative authorities in the procedure for judicial appointments. The Supreme Administrative Court had also confirmed other breaches of the law, namely the lack of a countersignature of the Prime Minister and actions taken in order to prevent the Supreme Administrative Court from reviewing the legality of the NCJ's resolutions. Although the Supreme Administrative Court had not invalidated the President's acts of appointment of judges it had found that the process of appointment was fundamentally flawed.

293. Finally, the Helsinki Foundation for Human Rights pointed to various actions of the Government aimed at legitimising the new judges. Firstly, Parliament had adopted a law which excluded the competence of the courts to review the legality of the NCJ resolutions recommending candidates to the Supreme Court. Secondly, in December 2019, Parliament had adopted the so-called "Muzzle Act", which explicitly provided that the fact of questioning the effectiveness of judicial appointments or the mandate of a constitutional body constituted a disciplinary offence (section 107 of the Act on the Ordinary Courts, as amended by the 2019 Amending Act, see paragraphs 105-109 above). The law prevented judges from applying standards developed in the case-law of the CJEU and the Supreme Court and raising issues under Article 6 of the Convention. Thirdly, the executive and legislative powers had been using the Constitutional Court to undermine the scope of review of the legality of the appointed judges. The intervener referred to the Constitutional Court rulings of 28 January and 21 April 2020 (Kpt 1/20), which concerned the Supreme Court's right to issue resolutions and the ruling of 20 April 2020, which held that the resolution of the Supreme Court of 23 January 2020 had breached the Constitution. Recently, the Prime Minister had submitted a motion to the Constitutional Court in which he challenged the constitutionality of EU law. The Constitutional Court had also given two judgments on 4 March and 2 June 2020 (case nos. P 22/19 and P 13/19) in which it had held that the provisions of the Codes of Civil and Criminal Procedure violated the Constitution in so far as they allowed a review of a motion for the withdrawal of a judge on the basis of irregularities in the judge's appointment.

2. The Court's assessment

(a) General principles

294. In its judgment in *Guðmundur Andri Ástráðsson* (cited above, § 218) the Grand Chamber of the Court clarified the scope of, and meaning to be given to, the concept of a "tribunal established by law". The Court reiterated that the purpose of the requirement that a "tribunal" be "established by law" was to ensure "that the judicial organisation in a democratic society [did] not depend on the discretion of the executive, but that it [was] regulated by law emanating from Parliament" (ibid., § 214 with further references). The Court analysed the individual components of that concept and considered how they should be interpreted so as to best reflect its purpose and, ultimately, ensure that the protection it offered was truly effective.

295. As regards the notion of a "tribunal", in addition to the requirements stemming from the Court's settled case-law, it was also inherent in its very notion that a "tribunal" be composed of judges selected on the basis of merit – that is, judges who fulfilled the requirements of technical competence and moral integrity. The Court noted that the higher a tribunal was placed in the

judicial hierarchy, the more demanding the applicable selection criteria should be (ibid., §§ 220-222).

296. As regards the term "established", the Court referred to the purpose of that requirement, which was to protect the judiciary against unlawful external influence, in particular from the executive, but also from the legislature or from within the judiciary itself. In this connection, it found that the process of appointing judges necessarily constituted an inherent element of the concept "established by law" and that it called for strict scrutiny. Breaches of the law regulating the judicial appointment process might render the participation of the relevant judge in the examination of a case "irregular" (ibid., §§ 226-227).

297. As regards the phrase "by law", the Court clarified that the third component also meant a "tribunal established in accordance with the law". It observed that the relevant domestic law on judicial appointments should be couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process (ibid., §§ 229-230).

298. Subsequently, the Court examined the interaction between the requirement that there be a "tribunal established by law" and the conditions of independence and impartiality. It noted that although the right to a "tribunal established by law" was a stand-alone right under Article 6 § 1 of the Convention, a very close interrelationship had been formulated in the Court's case-law between that specific right and the guarantees of "independence" and "impartiality". The institutional requirements of Article 6 § 1 shared the ordinary purpose of upholding the fundamental principles of the rule of law and the separation of powers. The Court found that the examination under the "tribunal established by law" requirement had to systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned fundamental principles and to compromise the independence of the court in question (ibid., §§ 231-234).

299. In order to assess whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, and whether the balance between the competing principles had been struck by State authorities, the Court developed a threshold test made up of three criteria, taken cumulatively (ibid., § 243).

300. In the first place, there must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation of the right to a tribunal established by law, since a procedure that is seemingly in compliance with the domestic rules may nevertheless produce results that are incompatible with the object and purpose of that right. If this is the case, the Court must pursue its examination under the second and third limbs of the test set out below, as applicable, in order to determine whether the results of the application of the relevant domestic rules

were compatible with the specific requirements of the right to a "tribunal established by law" within the meaning of the Convention (ibid., §§ 244-245).

301. Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Accordingly, breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold. To the contrary, breaches that wholly disregard the most fundamental rules in the appointment or breaches that may otherwise undermine the purpose and effect of the "established by law" requirement must be considered to be in violation of that requirement (ibid., § 246).

302. Thirdly, the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself. The assessment by the national courts of the legal effects of such a breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom (ibid., §§ 248 and 250).

(b) Application of the above principles to the present case

(i) Preliminary remarks

303. The above principles have recently been applied by the Court in a number of cases concerning Poland (see, in particular, *Xero Flor w Polsce sp. z o.o.,* cited above, §§ 243-291; *Reczkowicz*, cited above, §§ 216-282; and *Dolińska-Ficek and Ozimek v. Poland*, cited above, §§ 272-355).

304. In the present case the alleged violation of the right to a "tribunal established by law" concerns the formation of the Civil Chamber of the Supreme Court, composed of the judges who were appointed to their posts in the procedure involving the NCJ as established by the 2017 Amending Act. In particular, the applicant company alleged that the judges of that Chamber had been appointed by the President of Poland upon the NCJ's recommendation in manifest breach of the domestic law and the principles of the rule of law, separation of powers and the independence of the judiciary.

305. Accordingly, the Court will examine whether the fact that the applicant company's case was heard by the Civil Chamber of the Supreme Court – sitting in a formation of judges who were all appointed in the impugned procedure – gave rise to a violation of the applicant company's right to a "tribunal established by law". It will do so in the light of the three-step test as formulated by the Court in the case of

Guðmundur Andri Ástráðsson (cited above, § 243) and as applied in the final judgments in *Xero Flor w Polsce sp. z o.o.* and *Reczkowicz* (both cited above).

(ii) Whether there was a manifest breach of the domestic law

(α) Issues before the Court and its scope of review

306. Under the first element of the test, the Court has to determine whether the relevant domestic law was contravened in the procedure for the appointment of judges to the Civil Chamber of the Supreme Court.

The parties disagreed on that issue. In support of their arguments they relied on contradictory views expressed, on the one hand, by the Supreme Court, the Supreme Administrative Court and the CJEU and, on the other, by the Constitutional Court, in their respective rulings given between 2017 and 2021.

307. The applicant company referred to the CJEU's case-law and relied, in particular, on the Supreme Court's conclusions in the judgment of 5 December 2019 and its interpretative resolution of 23 January 2020, stressing that the Supreme Court and the CJEU judgment of 19 November 2019 (cases nos. C-585/18, C-624/18 and C-625/18) had clearly established a fundamental breach of domestic and international law and the principles of the rule of law, separation of powers and independence of the judiciary in the process of appointment of judges on the recommendation of the "new" NCJ. It also relied on the CJEU's position in its judgment of 2 March 2021 (case no. C-824/18) stating that successive amendments removing the possibility for non-recommended candidates to appeal against the NCJ's resolutions, when viewed in conjunction with other, contextual factors, were such as to suggest that the Polish authorities had acted with a specific intention of preventing any possibility of judicial review of appointments made on the basis of such resolutions (see also paragraph 209 above).

In particular, the applicant company maintained that the domestic law had been breached, first, as a result of the structural change in the manner of electing judicial members of the NCJ under the 2017 Amending Act, following which it was no longer independent from the legislative and executive powers. As a result, the NCJ's involvement in the selection and recommendation of candidates to sit as judges of the Supreme Court and its recommendations of selected individuals submitted to the President had compromised the procedure of judicial appointments. Secondly, relying on the Supreme Administrative Court's judgment of 6 May 2021 (see paragraphs 163-165 above) and the CJEU judgments of 19 November and 2 March 2021, the applicant company submitted that the lack of judicial review of the NCJ resolutions recommending candidates for posts in the Supreme Court, resulting from a series of legislative amendments, amounted to another flagrant breach of the domestic law (see paragraphs 100-101 and 253 above). That argument has further been supplemented by the third-

party interveners, the Commissioner of Human Rights, the Polish Judges Association "Iustitia" and the Helsinki Foundation for Human Rights. They underlined that the President of Poland had prevented the pending judicial review of appointments to the Civil Chamber (see paragraphs 279, 284 and 290 above) since, notwithstanding that appeals of other candidates against NCJ resolution no. 330/2018, recommending judges to the Civil Chamber, were pending before the Supreme Administrative Court and that the implementation of that resolution had been stayed, he had appointed the judges recommended by the NCJ, thus undermining the pending review procedure.

Thirdly, the applicant company maintained that the domestic law had also been breached by the President of Poland on account of his announcement of vacant positions in the Supreme Court without the Prime Minister's countersignature. This had rendered invalid *ab initio* his appointment of the candidates previously recommended by the NCJ.

308. The Government, for their part, asserted that the reform of the NCJ and the Supreme Court had been carried out in accordance with the Constitution and national legislation. They stressed that the modification of the legal provisions governing the organisation of the NCJ, granting the *Sejm* the power to elect the NCJ's judicial members, had been introduced by the 2017 Amending Act in order to implement the Constitutional Court's judgment of 20 June 2017 (K 5/17; see paragraphs 151-154 above), holding that both the individual character of the term of office of the NCJ's judicial members and the manner of their election under the 2011 Act on the NCJ were unconstitutional (see paragraphs 259 and 262 above).

Furthermore, in their view, the President's announcement of the vacant positions at the Supreme Court was not of such a nature as to require a countersignature by the Prime Minister for it to be valid (see paragraph 267 above).

As regards the Supreme Court's resolution of 23 January 2020, the Government took the view that it did not apply to the newly-appointed judges of the Civil Chamber. First of all, it had been issued after the judgment given in the applicant company's case, whereas pursuant to conclusions 3 and 4 of the resolution the interpretation of Article 379 § 4 of the Code of Civil Procedure to the effect that a court formation composed of judges appointed on the NCJ's recommendation was "inconsistent with the provisions of law" should not be applied to judgments given before the date of that resolution. Moreover, according to the Supreme Administrative Court, the effects of its judgment of 6 May 2021 did not relate to the systemic validity of judicial appointments by the President of Poland (see paragraphs 127, 164-166 and 263-264 above).

Secondly, the findings and conclusions of the Supreme Court resolution could not be taken into account in the Court's assessment because, in their words, it had been "removed" by the Constitutional Court's judgment of

20 April 2020 (U 2/20; see paragraphs 158-160 and 264 above), holding that the resolution was inconsistent with several constitutional provisions.

309. Being confronted with two fundamentally opposite views of the highest Polish courts as to whether or not there was a manifest breach of the domestic law, the Court would emphasise, as it has done on many previous occasions, that it will normally cede to the national courts' interpretation of whether there was a manifest breach, objectively and genuinely identifiable as such, of the domestic law, unless the national court's findings can be regarded as arbitrary or manifestly unreasonable (see *Guðmundur Andri Ástráðsson,* cited above, § 244, with further references to the Court's case-law; and *Reczkowicz,* cited above, § 230).

However, once a breach of the relevant domestic rules has been established, the assessment by the national courts of the legal effects of such breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom. Where the national courts have duly assessed the facts and the complaints in the light of the Convention standards, have adequately weighed in the balance the competing interests at stake and have drawn the necessary conclusions, the Court would need strong reasons to substitute its own assessment for that of the national courts. Accordingly, while the national courts have discretion in determining how to strike the relevant balance, they are nevertheless required to comply with their obligations deriving from the Convention when they are undertaking that balancing exercise (see *Guðmundur Andri Ástráðsson,* cited above, § 251, with further references to the Court's case-law).

310. The Court's task in the present case is therefore not to resolve the existing conflict of opinions as to the application and interpretation of the domestic law or to substitute itself for the national courts in their assessment of the applicable provisions, but to review, in the light of the above principles, whether the Polish courts in their respective rulings struck the requisite balance between the various interests at stake and whether, in carrying out that exercise and reaching their conclusions, they had due regard to, and respect for, the Convention standards required of a "tribunal established by law" (see *Reczkowicz*, cited above, § 231).

(β) Applicable domestic legal framework

311. As regards the domestic legal provisions applicable to the judicial appointment procedure, it is common ground that they are set out in the Constitution, the 2011 Act on the NCJ as amended by the 2017 Amending Act and subsequent amending statutes, and the 2017 Act on the Supreme Court. Pursuant to these provisions read as a whole, judges are appointed to all levels and types of courts, including the Supreme Court, by the President of Poland following a recommendation of the NCJ – a recommendation which the NCJ issues after a competitive selection procedure in which it evaluates and nominates the candidates. The NCJ's proposal of candidates to

the President of Poland is a condition *sine qua non* for any judicial appointment (see Article 179 of the Constitution at paragraph 95 above). The President may not appoint a judge who has not been so recommended but, at the same time, as submitted by the Government, he is free not to appoint a recommended judge.

312. The NCJ itself is a constitutional body whose main role, in accordance with Article 186 § 1 of the Constitution, is to safeguard the independence of courts and judges. The composition of the NCJ is determined by Article 187 § 1 of the Constitution, which provides that the NCJ is composed as follows: (1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; (2) fifteen judges elected from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts; and (3) four members elected by the *Sejm* from among its Deputies and two members elected by the Senate from among its Senators. Pursuant to Article 187 § 4 of the Constitution, the organisational structure, scope of activity and the NCJ's working procedures, as well as the manner of choosing its members, are specified by statute (see paragraph 95 above; see also *Reczkowicz*, cited above, §§ 232-233).

(γ) The first alleged breach of the domestic law – the alleged lack of independence of the NCJ from executive and legislative powers

313. As noted above, the applicant company's first argument is that the initial manifest breach of the domestic law originated in the 2017 Amending Act, which had changed the manner of electing the fifteen judicial members of the NCJ, who were thenceforth to be elected by the *Sejm* and not, as previously, by their peers, and which had resulted in that body's no longer being independent from the legislative and executive powers.

314. The impugned law is part and parcel of the legislation on the reorganisation of the Polish judiciary initiated by the Government in 2017 and, as such, must be seen not in isolation but in the context of coordinated amendments to Polish law effected for that purpose and having regard to the fact that those amendments and their impact on the Polish judicial system have drawn the attention and prompted the concern of numerous international organisations and bodies, and have been the subject of several sets of proceedings before the CJEU (see also paragraphs 226-228 above and *Reczkowicz*, cited above, § 235).

315. According to the Government, the 2017 Amending Act was introduced in order to implement the Constitutional Court's judgment of 20 June 2017, which had found that the provisions governing the procedure for electing members of the NCJ from among the judges of the ordinary courts and administrative courts were incompatible with Article 187 § 1 (2) in conjunction with Article 2 of the Constitution, the latter provision enshrining the rule of law principle (see paragraphs 152 and 259 above).

Under the previous regulation, the judicial members of the NCJ were elected by judges, a rule which – until the said judgment of 20 June 2017 – had been firmly established in the Polish legal order and confirmed by the Constitutional Court in its judgment of 18 July 2007 (see paragraph 150 above). The Government, in line with the Constitutional Court's position in the June 2017 judgment, argued that the previous model had been replaced by a "more democratic" one and that the change had been prompted by the need to remove the hitherto existing – in their view unjustified – difference of treatment with regard to the election of judges at various court levels, which had discriminated against judges sitting in lower courts as it had not provided them with equal opportunities of standing for election (see paragraph 262 above; see also the Government's arguments in *Reczkowicz*, cited above, §§ 197-200 and 236).

316. In *Reczkowicz*, the case which concerned the parallel procedure for judicial appointments to the Disciplinary Chamber of the Supreme Court, the Court examined in depth the new model of electing judicial members of the NCJ in the light of similar arguments of the parties and the third-party interveners, as well as various rulings of the Supreme Court and the Constitutional Court. In its assessment, it also took into account CJEU judgments, and opinions of the Advocate General, that had been given in the context of the reorganisation of the Polish judiciary, together with numerous reports and statements of other international institutions, including the Council of Europe, the United Nations and the European Union (see *Reczkowicz,* cited above, §§ 126-176, 178 and 240-264).

Given that the seven new judges of the Civil Chamber were appointed through an identical procedure, all the Court's considerations and findings as to the characteristics of the NCJ and the existence of a breach of the domestic law caused by the participation of the NCJ in the appointment procedure are equally valid in the present case.

317. This applies in particular to the weight that the Court attached to the Supreme Court's conclusions, in its judgment of 5 December 2019 and the resolution of 23 January 2020, finding the procedure for judicial appointments involving the NCJ as established under the 2017 Amending Act to be contrary to the law (ibid., §§ 251-264). The joined Chambers comprising 59 judges found in the resolution that, following the change in the election procedure under the 2017 Amending Act and the circumstances in which the NCJ had been constituted, this body lacked the necessary independence from the legislative and executive powers and that a judicial formation including a person appointed – be it to the Supreme Court or to military or ordinary courts – upon its recommendation was contrary to the law and amounted to a breach of Article 47 of the Charter, Article 6 § 1 of the Convention and Article 45 § 1 of the Constitution (see paragraphs 127-142 above).

It is again to be emphasised that those conclusions were reached after a thorough and careful evaluation of the relevant Polish law from the perspective of the Convention's fundamental standards and those of EU law, and in application of the CJEU's guidance and case-law (ibid., §§ 258-263).

318. The Government argued that the conclusions in the Supreme Court's resolution did not apply in the present case.

First, it had been issued after the final domestic judgment in the present case and could not therefore have had any effects on the lawfulness of the judicial formation dealing with the applicant company's case for the purposes of Article 379 § 4 of the Code of Civil Procedure.

The Court does not accept this contention. In that regard, it would stress that its establishment of a "manifest breach of domestic law" in Convention terms, on the basis of the Supreme Court's resolution, is not linked with any effects that that resolution may or may not have at domestic level on the validity of final judgments given with the participation of judges appointed in the impugned procedure and the application by national courts of legal provisions governing the nullity of proceedings.

Secondly, the Government – as they had already said in *Reczkowicz* – argued that the resolution had been "removed" by the Constitutional Court's judgment of 20 April 2020, holding that the President of Poland's decisions on judicial appointments could not be subject to any type of review, including by the Supreme Court, and declaring that the resolution was incompatible with a number of constitutional provisions, including, *inter alia*, the principle of the rule of law (Article 2), the obligation to respect international law binding on Poland (Article 9), the principle of legality (Article 7), the right to a fair hearing before an impartial and independent court (Article 45 § 1) and the provision setting out the President's prerogative to appoint judges (Article 144 § 3 (17)), and that it was also in breach of Articles 2 and 4(3) TEU and Article 6 § 1 of the Convention.

For a number of reasons already stated in *Reczkowicz* (cited above, §§ 258-263), the Court is not persuaded that the Constitutional Court's judgment relied on by the Government deprived the Supreme Court's resolution of its meaning or effects for the purposes of this Court's ruling as to whether there has been a "manifest breach of the domestic law" in terms of Article 6 § 1.

Without repeating all the considerations that led the Court to reject the arguments of the Constitutional Court in *Reczkowicz*, it would nevertheless reiterate that this judgment appears to focus mainly on protecting the President's constitutional prerogative to appoint judges and the *status quo* of the current NCJ, leaving aside the issues which were crucial in the Supreme Court's assessment, such as an inherent lack of independence of the NCJ which, in that court's view, irretrievably tainted the whole process of judicial appointments, including to the Supreme Court. The Constitutional Court, while formally relying on the constitutional principles of the separation of

powers and the independence of the judiciary, refrained from any meaningful analysis of the Supreme Court's resolution in the light of these principles (ibid., § 261).

Furthermore, the Court sees no conceivable basis in its case-law for the Constitutional Court's interpretation of the standards of independence and impartiality of a court under Article 6 § 1 of the Convention to the effect that they excluded the power of "other judges" to generally question a "judge's right to adjudicate" or to verify "the regularity of the procedure preceding the appointment of a judge by the President" that led it to the conclusion that the Supreme Court's interpretative resolution was incompatible with that provision. Consequently, as in *Reczkowicz,* it finds that the Constitutional Court's evaluation must be regarded as arbitrary and as such cannot carry any weight in the Court's conclusion as to whether there was a manifest breach, objectively and genuinely identifiable as such, of the domestic law involved in the procedure for judicial appointments of new judges to the Civil Chamber of the Supreme Court (ibid.).

319. At this juncture the Court will revert to the Government's argument as to non-exhaustion of domestic remedies on account of the applicant company's failure to lodge a constitutional complaint contesting the rules governing the procedure of appointment to the Supreme Court. Having regard to all the above considerations that led the Court to reject the Constitutional Court's position on the manifest breach of the domestic law and its interpretation of Article 6 of the Convention, in the particular circumstances of this case the Court does not see sufficiently realistic prospects of success for a constitutional complaint based on the grounds suggested by the Government.

It also considers that the effectiveness of that remedy must be seen in conjunction with the general context in which the Constitutional Court has operated since the end of 2015 and its various actions aimed at undermining the finding of the Supreme Court resolution as to the manifest breach of domestic and international law due to the deficient judicial appointment procedure involving the NCJ. These actions have been described in more detail in *Reczkowicz* (cited above) and characterised as, among other things, an "interference with a judicial body, aimed at incapacitating it in the exercise of its adjudicatory function in the application and interpretation of the Convention and other international treaties" and as an "affront to the rule of law and the independence of the judiciary" (ibid., § 263).

In view of the foregoing, the Government's preliminary objection must be rejected.

320. Lastly, in connection with the Constitutional Court's actions related to the application and interpretation of the Convention, the Court cannot but note its recent ruling of 24 November 2021 (see paragraphs 69-70 above), which was given in an apparent attempt to prevent the execution of the Court's judgment in *Xero Flor w Polsce sp. z.o.o* under Article 46 of the

Convention and to restrict the Court's jurisdiction under Articles 19 and 32 of the Convention in respect of Poland. The Constitutional Court found Article 6 § 1 of the Convention and the right to a fair trial enshrined therein to be incompatible with Article 8 § 1 (the Constitution being the supreme law of Poland), Article 10 § 2 (the principle of separation of powers), Article 173 (the principle of the independence of the judiciary), Article 175 § 1 (administration of justice being vested with the Supreme Court, ordinary, administrative and military courts) and Article 194 § 1 (election of judges to the Constitutional Court being vested with the *Sejm*) of the Constitution "in so far as the term 'tribunal' used in that provision includes the Constitutional Court" and "in so far as it confers on the European Court of Human Rights competence to assess the legality of the election of judges to the Constitutional Court".

321. Having regard to all the above considerations, the Court finds it established that there was a manifest breach of the domestic law, for the purposes of the first step of the *Ástráðsson* test, on account of the fact that the procedure for judicial appointments involving the NCJ, as established under the 2017 Amending Act, was contrary to the law and to standards deriving from the Court's case-law.

(δ) The second alleged breach of the domestic law – lack of effective judicial review of NCJ resolution no. 330/2018 and the President of Poland's appointment of judges to the Civil Chamber despite the stay of the implementation of that resolution

322. The second alleged breach of the domestic law relates to the lack of effective judicial review of NCJ resolution no. 330/2018 of 28 August 2018, recommending candidates for seven posts of judges in the Civil Chamber of the Supreme Court.

323. On 27 September 2018, after a number of non-recommended candidates had appealed to the Supreme Administrative Court contesting the legality of the resolution, that court issued an interim order staying its implementation pending examination of the appeals. On 10 October 2018, when the interim order was already in force and the appeals were pending, the President of Poland handed the letters of appointment to the seven candidates and administered the oath of office to them. At that time, the implementation of resolution no. 330/2018 was still stayed, and the appeals were pending. The final judgment annulling that resolution, in so far as it recommended the seven candidates to the Civil Chamber, including three persons who became judges of the Supreme Court and who had sat in the applicant company's case, was given on 6 May 2021 (see paragraphs 49 and 165-168 above).

324. In a request of 21 November 2018, supplemented on 26 June 2019, the Supreme Administrative Court applied to the CJEU for a preliminary ruling in cases of individuals who, on the strength of NCJ resolution

no. 330/2018, had not been recommended for appointment to the Civil and Criminal Chambers of the Supreme Court, including the appellant A.B. (see paragraphs 46, 48 and 207 above).

The Supreme Administrative Court's questions related to compatibility with EU law of amendments to the 2011 Act on the NCJ introduced in 2018 and 2019. The first amendment concerned section 44(1b) and (4) as inserted into the 2011 Act on the NCJ by the amendment of 20 July 2018, by virtue of which a NCJ resolution recommending candidates for judicial appointments in the Supreme Court became final in the part concerning the recommended candidates unless all the participants in the appointment procedure had appealed, including those who had been recommended by the NCJ and thus had no interest in contesting the resolution (see paragraphs 100 and 207 above). The next amendments were introduced by the 26 April 2019 Act when the judicial review of NCJ resolution no. 330/2018 was pending before the Supreme Administrative Court. Pursuant to new section 44(1) of the 2011 Act on the NCJ, the hitherto existing right to appeal against NCJ resolutions concerning appointment to the Supreme Court in individual cases was extinguished. At the same time, section 3 of the Act of 26 April 2019 stated that any pending appeals against such NCJ resolutions should be discontinued by operation of law (see paragraph 101 above).

325. Advocate General Tanchev in his opinion, given on 17 December 2020, noted that the President of Poland had proceeded to appoint the judges to the Civil Chamber notwithstanding that the referring court had stayed the implementation of NCJ resolution no. 330/2018 (see paragraph 208 above). Furthermore, he observed that owing to the specific circumstances in Poland, judicial review of appointment procedures by a court whose independence was beyond doubt was indispensable under the second subparagraph of Article 19(1) TEU in order to maintain the appearance of the independence of the judges appointed in those procedures. This was notably because of the rapid changes in Polish legislative provisions governing judicial review of the NCJ's selection procedures and decisions, in particular, amendments introduced by the Act of 26 April 2019. Those changes had given rise to reasonable doubts as to whether the process of appointment to the Supreme Court was currently oriented towards the selection of internally independent candidates, or rather towards politically convenient ones. He underlined that in the specific Polish context, judicial review of the NCJ resolutions was a significant guarantee for the objectivity and impartiality of appointment procedures and the constitutional right of equal access to public office. However, the remedy available to participants in the procedure who had not been proposed for appointment was completely ineffective, contrary to the requirements of the principle of effective judicial protection under the TEU. In his view, the removal of the right to appeal against the NCJ resolutions – in particular in a situation where the unsuccessful candidates had already lodged such appeals – reinforced the absence of appearance of independence

and impartiality on the part of the judges effectively appointed and the court so composed, in violation of Article 19 § 1 (2) TEU (see paragraph 208 above).

326. The CJEU, in its judgment of 2 March 2021 in *A.B. and Others*, held that Article 19(10) TEU must be interpreted as precluding legislative amendments – which, as in the present case, first deprived a national court of its jurisdiction to rule in the first and last instance on appeals lodged by unsuccessful candidates for posts at a court such as the Polish Supreme Court against decisions of a body such as the NCJ and, second, declared such appeals to be discontinued – where those amendments were capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of judges so appointed to external factors, in particular to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them, as a result of which those judges might not be seen to be independent or impartial (see paragraph 209 above).

327. In that context, the Court also considers relevant the indications as to non-compliance with the domestic law given by the Civil Chamber of the Supreme Court in its request to the CJEU for a preliminary ruling of 26 June 2019 (see paragraphs 148-149 above). While the request related to the parallel procedure of appointment to the Chamber of Extraordinary Review and Public Affairs (NCJ resolution no. 331/2018) and, specifically, to Judge A.S. (see paragraphs 26-27, 30-31, 34-35, 37-40 and 44-45 above), the legal and factual situation as regards the judicial review of NCJ resolution no. 331/2018 by the Supreme Administrative Court was, for all practical purposes, the same as in respect of resolution no. 330/2018 issued in the present case. In particular, in both appointment procedures the President of Poland proceeded to appoint judges to the respective Chambers despite pending appeals to the Supreme Administrative Court against the NCJ resolutions recommending them for the posts and despite a stay of the implementation of those resolutions pending judicial review.

Accordingly, the Supreme Court's assessment of the legal consequences of those actions with regard to the Chamber of Extraordinary Review and Public Affairs, as well as the subsequent conclusions of the CJEU and its Advocate General, apply by analogy to the appointment of seven judges to the Civil Chamber.

328. The Supreme Court made a comprehensive assessment of the procedure of appointment to the Chamber of Extraordinary Review and Public Affairs in the light of the applicable domestic law and identified a number of breaches committed in the process.

To begin with, it noted that the NCJ's motion for appointment, submitted to the President of Poland, lacked legal force since the legality of its resolution recommending, among other candidates, Judge A.S. had been challenged and was subject to the pending judicial review. Secondly, the

appointment had in reality been made on the assumption that the NCJ resolution would not be overturned. Thirdly, the President's appointment had violated the constitutional provisions on the separation and balance of powers (Article 10 § 1 of the Constitution) and legality (Article 7), according to which each authority must remain within the limits of its competence and not encroach upon that of another. The President's exercise of his prerogative in respect of judicial appointments prior to the conclusion of the proceedings before the Supreme Administrative Court amounted to an interference by the executive power with pending judicial proceedings and with the judiciary's competence. Fourthly, the appointment had taken place in defiance of that court's interim order staying the implementation of the impugned resolution. The interim order was final and binding, not only on the parties to the proceedings but also on other State authorities, including the President. This was yet another reason why the resolution could not constitute a valid motion for the appointment of a judge within the meaning of Article 176 of the Constitution. Furthermore, the above breaches of the domestic law had been flagrant not only because they infringed fundamental constitutional principles but also because they had been intentionally committed in order to render meaningless the judicial review before the Supreme Administrative Court. All these elements being considered, in the Supreme Court's view the participation of the person so appointed in a judicial formation justified the conclusions that such a body was not a "tribunal established by law" (see paragraph 149 above).

329. Following the Supreme Court's request for a preliminary ruling, Advocate General Tanchev delivered his opinion for the CJEU on 15 April 2021. He noted that the Supreme Court had already established that in the impugned appointment procedure there had been flagrant breaches of the domestic law. In his view, the act of appointment that had been adopted by the President before the Supreme Administrative Court had ruled with final effect on the appeals brought against the NCJ resolution, had constituted a flagrant breach of national rules governing the procedure for the appointment of judges to the Supreme Court, when those rules were interpreted in conformity with EU law. Moreover, the irregularity committed in the appointment process stemmed *a fortiori* from the fact that the President had proceeded with the appointment despite the Supreme Administrative Court's order staying the implementation of that resolution. The Advocate General agreed with the Supreme Court that such deliberate and intentional infringement of a judicial decision by the executive branch – manifestly committed in order to ensure that the government could influence judicial appointments – had demonstrated a "lack of respect for the principle of the rule of law". Moreover, in the context of the contentious judicial reform in Poland, the gravity of the breach was serious and the very fact that the President had paid no heed to the final order staying the implementation of

resolution no. 331/2018 pending appeals had demonstrated the gravity of the breach committed.

330. The CJEU, in its judgment of 6 October 2021 in *W.Ż.,* noted that when the impugned appointment had taken place, there could have been no doubt, first of all, that the effects of resolution no. 331/2018 proposing candidatures had been suspended by the final order issued by the Supreme Administrative Court. It had also been clear that the said suspension would remain valid until the CJEU had given a preliminary ruling in *A.B. and Others*, a case which, as explained above, was initiated by the Supreme Administrative Court's request for a preliminary ruling in relation to judicial review of NCJ resolution no. 330/2018 recommending seven judges to the Civil Chamber (see paragraph 347 above). Finally, it had likewise been clear that the answer expected from the CJEU in that case had been capable of requiring the referring court, in accordance with the principle of the primacy of EU law, to set aside the relevant legal provision and, if necessary, to annul resolution no. 331/2018 (see paragraph 216 above).

The CJEU further underlined that, in the light of its case-law, EU law required that the national court dealing with a dispute governed by that law must be able to grant interim relief in order to ensure the full effectiveness of the judgment to be given. Thus, the appointment of a judge in breach of the authority attaching to the final order of the Supreme Administrative Court, and without waiting for the CJEU judgment in *A.B. and Others*, had undermined the system established in Article 267 TFEU. Subject to the final assessment to be made by the domestic court, the circumstances of the case seen as a whole were such as to lead to the conclusion that the appointment had taken place in clear disregard of the fundamental procedural rules for the appointment of judges to the Supreme Court (ibid.).

331. Fully subscribing to the views expressed by the Supreme Court, the CJEU and its Advocate General, the Court would once again reiterate that Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question (see, among many other authorities, *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII; *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 72, ECHR 2002-VII; and *Agrokompleks v. Ukraine*, no. 23465/03, § 144, 6 October 2011). This applies, by definition, to the implementation of judicial decisions on interim measures that remain in force until a final decision determining the case before a court has been given (see *Sharxhi and Others v. Albania*, no. 10613/16, §§ 92-96, 11 January 2018). To hold otherwise would mean rendering a binding, albeit transitional, judicial decision that is devoid of purpose and meaning.

332. Furthermore, the Court has condemned, in the strongest terms, any attempts by the legislative or executive powers to intervene in court proceedings, considering such attempts to be *ipso facto* incompatible with the notion of an "independent and impartial tribunal" within the meaning of Article 6 § 1 of the Convention (see *Agrokompleks*, cited above, § 133, with further references to the Court's case-law). It has also consistently underlined that the principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute (see, for instance, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 49, Series A no. 301-B).

Whether such interventions have actually affected the course of the proceedings is of no relevance since, coming from the executive and legislative branches of the State, they reveal a lack of respect for judicial office itself and as such are capable of justifying fears as to the independence and impartiality of the courts concerned (see *Agrokompleks*, cited above, § 134).

The State's obligation to ensure a trial by an "independent and impartial tribunal" under Article 6 § 1 of the Convention is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. Thus, the State's respect for the authority of the courts is an indispensable precondition for public confidence in the judiciary and, more broadly, for the rule of law. For this to be the case, the constitutional safeguards of the independence and impartiality of the judiciary do not suffice. They must be effectively incorporated into everyday administrative attitudes and practices (ibid. § 136).

333. Conversely, in the present case, the executive power, by proceeding with appointments to the Civil Chamber despite the pending judicial review of resolution no. 330/2018, and the legislature, by intervening in pending judicial proceedings in order to extinguish any legal or practical effects of judicial review, demonstrated an attitude which can only be described as one of utter disregard for the authority, independence and role of the judiciary.

Those actions were clearly taken with the ulterior motive of not only influencing the outcome of the pending court proceedings but also preventing the proper examination of the legality of the resolution that recommended candidates for judicial posts and, in consequence, rendering any judicial review of the resolution meaningless and devoid of effect. They were aimed at ensuring that the judicial appointments as proposed by the NCJ – a body over which the executive and the legislative authorities held an unfettered power – would be given effect even at the cost of undermining the authority of the Supreme Administrative Court, one of the country's highest courts, and despite the risk of setting up an unlawful court. As such, the actions were in

flagrant breach of the requirements of a fair hearing within the meaning of Article 6 § 1 of the Convention and were incompatible with the rule of law.

334. Assessing all the above circumstances as a whole, the Court concludes that both the legislature's interference with the pending judicial review of the legality of NCJ resolution no. 330/2018 and the President of Poland's appointment of seven judges to the Civil Chamber upon the contested resolution, notwithstanding that its implementation had been stayed pending appeals contesting its legality, amounted to a manifest breach of the domestic law. Conduct of the State's highest executive authority which, by deliberate actions disregarding a binding judicial decision and through *faits accomplis*, interferes with the course of justice, in order to vitiate and render meaningless a pending judicial review of the appointment of judges, can only be characterised as blatant defiance of the rule of law.

The requirements of the first step of the *Ástráðsson* test have therefore been satisfied also with regard to the second alleged breach of the domestic law.

(ε) The third alleged breach of the domestic law – lack of the Prime Minister's countersignature on the President of Poland's act announcing vacant positions in the Supreme Court

335. Lastly, the applicant company alleged a breach of the domestic law in that the President of Poland's announcement of vacant positions in the Supreme Court had lacked the Prime Minister's countersignature (see paragraph 244 above).

The Court notes that, in that respect, the Government's position on the matter differs from opinions expressed by the Supreme Court and, more recently, the Supreme Administrative Court (see paragraphs 135 and 165-168 above). However, given that, as established above, the process of judicial appointments to the Civil Chamber was inherently defective on account of the involvement of the NCJ, as a body lacking independence from the legislature and executive, and the fact that the President of Poland's subsequent appointment of judges to that Chamber was in breach of the rule of law, the Court does not find it necessary to ascertain whether in addition there was a separate breach of the domestic law resulting from the fact that the President's announcement of vacant positions in the Supreme Court was made without the Prime Minister's countersignature.

(iii) Whether the above breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges

336. When determining whether a particular defect in the judicial appointment process was of such gravity as to amount to a violation of the right to a "tribunal established by law", regard must be had, *inter alia*, to the purpose of the law breached, that is, whether it sought to prevent any undue interference by the executive or the legislature with the judiciary, and whether

the breach in question undermined the very essence of the right to a "tribunal established by law" (see *Guðmundur Andri Ástráðsson*, cited above, §§ 226 and 255).

337. The process of appointment of judges may be open to such undue interference, and it therefore calls for strict scrutiny; moreover, it is evident that breaches of the law regulating the judicial appointment process may render the participation of the relevant judge in the examination of a case "irregular", given the correlation between the procedure for the appointment of a judge and the "lawfulness" of the bench on which such a judge subsequently sits (ibid., § 226).

338. In that context, the Court would also refer to the following statement in the CJEU's preliminary ruling of 19 November 2019:

> "139 The degree of independence enjoyed by the [NCJ] in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered, under Article 186 of the Constitution, to ensure the independence of the courts and of the judiciary, may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter."

339. As regards the degree of independence of the NCJ and the issue whether there was undue interference by the legislative and executive powers with the appointment process, the Court would first refer to the various – and in substance unanimous – opinions of the international organisations and bodies which have already been cited above (see paragraphs 170-225 above), according to which the changes in the election procedure for the judicial members of the NCJ introduced under the 2017 Amending Act had the result that the NCJ was no longer independent or able to fulfil its constitutional obligation of safeguarding the independence of courts and judges.

340. In that context, the Court also finds it important to take into account the circumstances in which the new NCJ was constituted.

341. After the entry into force of the 2017 Amending Act on 17 January 2018, the *Sejm* proceeded with an examination of the applications from candidates to the new NCJ and elected its fifteen judicial members on 6 March 2018 (see paragraph 14 above). As submitted by the applicant company, the Commissioner for Human Rights and the Association Polish Judges "Iustitia", the elections were apparently boycotted by the legal community as only eighteen candidates applied for fifteen positions to the new NCJ (see paragraphs 247, 275 and 283 above). As pointed out by "Iustitia", nine judges out of fifteen elected to the NCJ by Parliament had in the preceding period been appointed as presidents or vice-presidents of courts by the Minister of Justice and four had been employed by the Ministry of Justice (see paragraph 283 above). The concerns were raised by the Council of Europe's Commissioner for Human Rights (see paragraph 29 of the report of 28 June 2019 in paragraph 177 above) and the ENCJ (see paragraph 223 above) that the majority of the members of the current NCJ were either

members of the ruling party, holders of governmental office or chosen by Parliament on the recommendation of the ruling party.

342. The Supreme Court, in its judgment of 5 December 2019, found that it was the executive, through persons directly or indirectly subordinate to it, which had proposed most of the candidates for election as judicial members of the NCJ (see paragraphs 116-118 above).

In its resolution of 23 January 2020, it also established that there had been significant influence exerted by the Minister of Justice, who was also the Prosecutor General, over the composition of the NCJ. It noted that this had been confirmed by the official statement of the Minister himself in the Senate of the Republic of Poland (see paragraph 138 above).

343. There also appears to have been some controversy surrounding the initial non-disclosure of the endorsement lists by the executive authorities, which had made it impossible to verify whether the candidates had obtained the required number of signatures of judges to endorse their candidatures for election to the NCJ (see paragraphs 16-22 above). In the Court's view, a situation where the public are not given official clarification as to whether the formal requirement of obtaining sufficient support for the candidates for the NCJ has been met may raise doubts as to the legality of the process of election of its members. Moreover, a lack of scrutiny as to who had supported the candidates for the NCJ may raise suspicions as to the qualifications of its members and to their direct or indirect ties to the executive. According to the information now in the public domain, the NCJ members had been elected with the support of a narrow group of judges with strong ties to the executive (judges seconded to the Ministry of Justice and the presidents and vice-presidents of courts recently promoted to those posts by the Minister of Justice; see also paragraph 223 above). As indicated by the Supreme Court, there were also doubts as to whether all elected members of the NCJ had fulfilled the legal requirement of having been supported by twenty-five active judges (see paragraphs 117 and 134 above and the statement by the third-party intervener at paragraph 276 above).

344. In view of the foregoing, the Court finds that by virtue of the 2017 Amending Act, which deprived the judiciary of the right to elect judicial members of the NCJ – a right afforded to it under the previous legislation and recognised by international standards – the legislative and the executive powers achieved a decisive influence on the composition of the NCJ (see paragraphs 170-190 and 198-225 above). The Act practically removed not only the previous representative system but also the safeguards of independence of the judiciary in that regard. This, in effect, enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, a possibility of which these authorities took advantage – as shown, for instance, by the circumstances surrounding the endorsement of judicial candidates for the NCJ (see paragraphs 341-342 above). This situation was further aggravated by the subsequent appointment

of judges to the Civil Chamber by the President of Poland, carried out in flagrant disregard for the fact that the implementation of NCJ resolution no. 330/2018 recommending their candidatures had been stayed.

345. Having regard to all the above circumstances, the Court concludes that the breaches of the domestic law that it has established above, arising from non-compliance with the rule of law, the principle of the separation of powers and the independence of the judiciary, inherently tarnished the impugned appointment procedure. As a consequence of the first breach, the recommendation of seven new candidates for judicial appointment to the Civil Chamber – a condition *sine qua non* for appointment by the President of Poland – was entrusted to the NCJ, a body that lacked sufficient guarantees of independence from the legislature and the executive. That breach was compounded and, in effect, perpetuated by the legislature's and the President of Poland's actions taken in blatant defiance of the rule of law in order to render meaningless the judicial review of the NCJ's resolution recommending the candidates.

A procedure for appointing judges which, as in the present case, discloses undue influence of the legislative and executive powers on the appointment of judges is *per se* incompatible with Article 6 § 1 of the Convention and, as such, amounts to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of the judges so appointed.

346. In sum, the breaches in the procedure for the appointment of seven judges to the Civil Chamber of the Supreme Court, including three judges who dealt with the applicant company's case, were of such gravity that they impaired the very essence of the applicant company's right to a "tribunal established by law".

(iv) Whether the allegations regarding the right to a "tribunal established by law" were effectively reviewed and remedied by the domestic courts

347. The Government, apart from their plea of non-exhaustion, have not argued that there had been that any other procedure under Polish law whereby the applicant company could have challenged the alleged defects in the procedure for the appointment of judges to the Civil Chamber of the Supreme Court. The applicant company stated that no such procedure was available.

In that context, it is to be recalled that NCJ resolution no. 330/2018 recommending seven new judges for appointment to the Civil Chamber of the Supreme Court was subject to judicial review by the Supreme Administrative Court which, on 6 May 2021, gave judgment quashing that resolution (see paragraphs 49-52, 165-169 and 323 above). However, as established above, the Polish authorities' actions, taken in manifest breach of the domestic law, rendered that judicial review meaningless and devoid of any purpose (see paragraphs 333-334 above).

348. That being so and having regard to its above decision to reject the Government's objection (see paragraph 319 above), the Court finds that no remedies were provided to the applicant company (see *Guðmundur Andri Ástráðsson*, cited above, § 248).

(v) Overall conclusion

349. The Court has established that, on two counts, there was a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Civil Chamber of the Supreme Court. First, the appointment was made upon a recommendation of the NCJ, as established under the 2017 Amending Act, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers. Second, the Polish legislature intervened in the process of appointments by extinguishing the effects of the pending judicial review of NCJ resolution no. 330/2018, and the President of Poland, despite the fact that the implementation of that resolution – whereby seven judges of the Civil Chamber had been recommended for appointment, including those who had dealt with the applicant company's case – had been stayed by the Supreme Administrative Court and that the legal validity of that resolution was yet to be determined by that court, appointed them to judicial office in manifest disregard for the rule of law.

These irregularities in the appointment process compromised the legitimacy of the formation of the Civil Chamber of the Supreme Court which examined the applicant company's case to the extent that, following an inherently deficient procedure for judicial appointments, it did lack the attributes of a "tribunal" which is "lawful" for the purposes of Article 6 § 1. The very essence of the right at issue has therefore been affected.

350. In the light of the foregoing, and having regard to its overall assessment under the three-step test set out above, the Court concludes that the formation of the Civil Chamber of the Supreme Court, which examined the applicant company's case, was not a "tribunal established by law".

351. Accordingly, there has been a violation of Article 6 § 1 of the Convention in that regard.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

352. The applicant company complained that the facts of the case also disclosed a breach of the right to an independent and impartial tribunal as provided for in Article 6 § 1 of the Convention. The Government contested this view and argued that there had been no violation under that head.

353. The Court notes that, in the present case, the complaints concerning the "tribunal established by law" and "independence and impartiality"

requirements stem from the same underlying problem of an inherently deficient procedure for judicial appointments of new judges to the Civil Chamber of the Supreme Court. As the Court has found above, the irregularities in question were of such gravity that they undermined the very essence of the applicant company's right to have its case examined by a tribunal established by law (see paragraphs 349-350 above).

Having made that finding, the Court concludes that the remaining question as to whether the same irregularities have also compromised the independence and impartiality of the same court has already been answered in the affirmative (see paragraphs 303-351 above) and does not require further examination.

V. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

A. Article 41 of the Convention

354. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

355. The applicant company claimed a total of 2,500,000 euros (EUR) in respect of non-pecuniary damage. Moreover, it claimed the equivalent of EUR 13,000,000 in respect of pecuniary damage, covering pure losses incurred in connection with the withdrawal from the market of its dietary supplement, with interest. In addition, the Chairman of the Board claimed EUR 200,000 for losses caused by the fact that he had not received his remuneration.

356. The Government contested the claims.

357. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards to the applicant company EUR 15,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

2. Costs and expenses

358. The applicant company, represented by lawyers of its choosing and granted legal aid, claimed a sum equivalent to EUR 7,300 for legal costs incurred before the domestic courts and EUR 7,000 incurred as court fees. In respect of the costs before the Court the applicant company claimed a total of approximately EUR 3,850. It attached copies of the relevant invoices.

359. The Government considered that the claims were excessive.

360. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,850, less EUR 850 already received under the Court's legal aid scheme, for the proceedings before the Court, and dismisses the remainder of the claims.

3. Default interest

361. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

B. Article 46 of the Convention

362. Article 46 of the Convention, provides, in so far as relevant, as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution
>
> ...."

363. The Court reiterates that by virtue of Article 46 the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Broniowski v. Poland* [GC], no. 31443/96, § 192, ECHR 2004-V; and *Stanev v. Bulgaria* [GC], no. 36760/06, § 254, ECHR 2012, all with further references to the Court's case-law).

However, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court may seek to indicate the type of

individual and/or general measures that might be taken in order to put an end to the situation incompatible with the Convention that it has found to exist (see *Broniowski,* cited above, § 194; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 148, 17 September 2009; and *Stanev*, cited above, § 255).

364. In the present case the Court will refrain from giving any such detailed indications and limit its considerations to general guidance.

As already noted above, the Court's conclusions regarding the incompatibility of the judicial appointment procedure involving the NCJ with the requirements of an "independent and impartial tribunal established by law" under Article 6 § 1 of the Convention will have consequences for its assessment of similar complaints in other pending or future cases (see paragraph 227 above). The deficiencies of that procedure as identified in the present case in respect of the newly appointed judges of the Supreme Court's Civil Chamber, and in *Reczkowicz* (cited above) in respect of the Disciplinary Chamber of that court, and in *Dolińska-Ficek and Ozimek* (cited above) in respect of the Chamber of Extraordinary Review and Public Affairs have already adversely affected existing appointments and are capable of systematically affecting the future appointments of judges, not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts (see also paragraphs 127 and 142 above). It is inherent in the Court's findings that the violation of the applicant's rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges so appointed. In this situation and in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State is required.

365. In that context, various options are open to the respondent State; however, it is an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuates the systemic dysfunction as established above by the Court and may in the future result in potentially multiple violations of the right to an "independent and impartial tribunal established by law", thus leading to further aggravation of the rule of law crisis in Poland.

As regards the legal and practical consequences for final judgments already delivered by formations of judges appointed upon the NCJ's recommendation and the effects of such judgments in the Polish legal order, the Court at this stage would note that one of the possibilities to be contemplated by the respondent State is to is to incorporate into the necessary general measures the Supreme Court's conclusions regarding the application of its interpretative resolution of 23 January 2020 in respect of the Supreme

Court and other courts and the judgments given by the respective court formations (see paragraph 127 above).

366. That being said, in accordance with its obligations under Article 46 of the Convention, it will fall upon the respondent State to draw the necessary conclusions from the present judgment and to take any individual or general measures as appropriate in order to resolve the problems at the root of the violation found by the Court and to prevent similar violations from taking place in the future.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits the Government's preliminary objection of non-exhaustion of domestic remedies and *dismisses* it;

2. *Declares* the application admissible;

3. *Holds*, that there has been a violation of Article 6 § 1 of the Convention as regards the applicant company's right to an independent and impartial tribunal established by law;

4. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts**,** to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 3 February 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Ksenija Turković President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

K.T.U.
R.D.

CONCURRING OPINION OF JUDGE WOJTYCZEK

In the instant case, I have certain reservations concerning the Court's reasoning.

1. Under the Polish Constitution, the key element of the procedure for the appointment of judges is the motion to appoint specific persons to judicial positions, presented to the President of the Republic by the National Council of the Judiciary. The President of the Republic cannot appoint anyone to a judicial position without a valid motion of the National Council of the Judiciary. If this motion is invalid, then the appointment procedure is incompatible with the domestic law.

I note in this context that, in the instant case, as in *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, § 254, 1 December 2020), the domestic courts established a certain number of breaches of the domestic law. More precisely, as rightly stated by the Court in paragraph 347 of the present judgment:

> "In that context, it is to be recalled that NCJ resolution no. 330/2018 recommending seven new judges for appointment to the Civil Chamber of the Supreme Court was subject to judicial review by the Supreme Administrative Court which, on 6 May 2021, gave judgment quashing that resolution (see paragraphs 49-52, 165-169 and 323 above)."

Moreover, in the relevant judgment (6 May 2021, II GOK 2/18), the Supreme Administrative Court endorsed the position of the Supreme Court expressed in the judgment of 5 December 2019, III PO 7/18 (see paragraphs 52 and 110), which established further breaches of domestic law.

Even if – unlike the situation in *Guðmundur Andri Ástráðsson,* cited above, – the compatibility of these two judgments with domestic law is disputed, under the Convention there are no sufficient reasons, in my view, to call into question the interpretation of the domestic law, established by the Supreme Administrative Court, in connection with the specific question of validity of the NCJ motion. The above-mentioned judgment of the Supreme Administrative Court is a sufficient premise upon which to conclude that the appointment procedure was in breach of domestic legal rules and that the rules breached are of a fundamental importance for that procedure (as explained by the domestic courts).

2. The reasoning contains considerations concerning the issue of compliance with domestic law in paragraphs 306-351. As summarised in paragraph 349, the Court has found two sets of breaches of domestic legal rules:

> "The Court has established that, on two counts, there was a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Civil Chamber of the Supreme Court. First, the

> appointment was made upon a recommendation of the NCJ, as established under the 2017 Amending Act, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers. Second, the Polish legislature intervened in the process of appointments by extinguishing the effects of the pending judicial review of NCJ resolution no. 330/2018, and the President of Poland, despite the fact that the implementation of that resolution – whereby seven judges of the Civil Chamber had been recommended for appointment, including those who had dealt with the applicant company's case – had been stayed by the Supreme Administrative Court and that the legal validity of that resolution was yet to be determined by that court, appointed them to judicial office in manifest disregard for the rule of law."

The approach adopted calls for a few remarks. Firstly, as in the case of *Reczkowicz v. Poland* (no. 43447/19, 22 July 2021), it is still not clear which specific legal rules pertaining to the composition of the NCJ have been breached (compare my concurring opinion in *Reczkowicz*, ibid.). I note, in this context, that concerning the second issue, the Court – following the Polish Supreme Court – identifies with much greater precision the specific domestic legal rules which have been breached (see paragraphs 327-328). Secondly, if the rules breached are not identified with precision, then it is simply impossible to address the question whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges. In fact, in paragraphs 336-348, the Court does not really reflect upon the nature and importance of the legal rules breached but rather restates once again the deficiencies of the appointment procedure already established. Thirdly, the Court seems to lay the emphasis on the importance of the interim measures decided by the administrative court and the obligation to comply with them, whereas the Supreme Court identified more important problems at that stage, connected with the substantive issues and the fact that *the legal existence of the NCJ's resolution no. 331/2018, which included the motion for his* [i.e. the candidate's] *appointment, was not permanent* (decision of the Supreme Court, 21 May 2019, III CZP 25/19, summarised in paragraph 149 of the reasoning). Fourthly, as explained above, the most important legal issue is the invalidity of resolution no. 330/2018. This point, despite its fundamental importance explained above, is mentioned only – somewhat *en passant* – in paragraph 323 *in fine* and in paragraph 348. Fifthly, and more generally, a breach of domestic law which requires 45 paragraphs of the Court's own reasoning and numerous references to European Union case-law appears less flagrant (compare my concurring opinion in *Reczkowicz*, cited above).

3. The reasoning states the following in paragraph 310:

> "The Court's task in the present case is therefore not to resolve the existing conflict of opinions as to the application and interpretation of the domestic law or to substitute itself for the national courts in their assessment of the applicable provisions, but to review, in the light of the above principles, whether the Polish courts in their respective rulings struck the requisite balance between the various interests at stake and whether, in carrying out that exercise and reaching their conclusions, they had due regard to, and

> respect for, the Convention standards required of a 'tribunal established by law' (see *Reczkowicz*, cited above, § 231)."

In my view, there is no other option for the Court than to express a position, taking into account the Convention standards, in the existing conflict of opinions as to the application and interpretation of the domestic law, and the Court should not hide the fact that it is actually doing so.

4. In paragraphs 332-334, the Court, without providing arguments, declares Article 6 applicable to judicial proceedings in which unsuccessful candidates for judicial positions tried to invalidate the appointment motion. This issue would have deserved more thorough consideration in the light of the Court's rich case law (see, in particular, *Revel and Mora v. France* (dec.), no. 171/03, 15 November 2005; *Tencheva-Rafailova v. Bulgaria* (dec.), no. 13885/04, 5 January 2010; *Fiume v. Italy*, no. 20774/05, § 35, 30 June 2009; *Majski v. Croatia (no. 2)*, no. 16924/08, § 50, 19 July 2011; *Juričić v. Croatia*, no. 58222/09, 26 July 2011; *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, § 84, 15 September 2015; *F.G. v. Greece* (dec.), 58740/11, 25 April 2017; and *Frezadou v. Greece*, no. 2683/12, 8 November 2018).

5. The judgment tries to give some guidance to the parties to domestic judicial proceedings and to domestic authorities concerning other cases connected with the reforms of the judiciary in Poland (compare my concurring opinion in *Reczkowicz*, cited above). On the one hand, the Court states in paragraph 364:

> "As already noted above, the Court's conclusions regarding the incompatibility of the judicial appointment procedure involving the NCJ with the requirements of an 'independent and impartial tribunal established by law' under Article 6 § 1 of the Convention will have consequences for its assessment of similar complaints in other pending or future cases (see paragraph 227 above). The deficiencies of that procedure as identified in the present case in respect of the newly appointed judges of the Supreme Court's Civil Chamber, and in *Reczkowicz* (cited above) in respect of the Disciplinary Chamber of that court, and in *Dolińska-Ficek and Ozimek* (cited above) in respect of the Chamber of Extraordinary Review and Public Affairs have already adversely affected existing appointments and are capable of systematically affecting the future appointments of judges, not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts (see also paragraphs 127 and 142 above)."

This suggests that all domestic judgments rendered with the participation of judges appointed upon the motion of the NCJ created in 2018 may be considered in breach of Article 6.

On the other hand, the Court further states the following in paragraph 365:

> "As regards the legal and practical consequences for final judgments already delivered by formations of judges appointed upon the NCJ's recommendation and the effects of such judgments in the Polish legal order, the Court at this stage would note that one of the possibilities to be contemplated by the respondent State is to is to incorporate into the necessary general measures the Supreme Court's conclusions regarding the application of its interpretative resolution of 23 January 2020 in respect of the Supreme

> Court and other courts and the judgments given by the respective court formations (see paragraph 127 above)."

This suggests a case-by-case approach to judgments rendered by judges appointed to ordinary or administrative courts upon the motion of the NCJ created in 2018. If I understand these general guidelines correctly, the validity of ordinary court judgments and of administrative court judgments – rendered with the participation of such judges – has to be assessed on a case-by-case basis and their participation will not necessarily entail a breach of Article 6.

Such an approach would be further confirmed by *Guðmundur Andri Ástráðsson* (cited above, § 222, emphasis added):

> "It goes without saying that **the higher a tribunal** is placed in the judicial hierarchy, **the more demanding t**he applicable selection criteria should be."

In any event, it would have been preferable to explain the position of the Court on these questions in a clearer manner.

6. Finally, I note that the Court may join the issue of effectiveness of possible remedies to the merits of the case. Such an approach is justified when the question of effectiveness of remedies is intrinsically linked to the substantive legal issues belonging to the merits.

In the instant case, the Court decided to join to the merits the issue of the effectiveness of the constitutional complaint as a possible remedy to be exhausted. However, the question of the effectiveness of the constitutional complaint does not depend upon the merits of the case and is actually dealt with in considerations that are independent from other matters (paragraphs 319-320). It would therefore have been preferable to follow the usual structure of judgments and to deal with the issue of exhaustion of remedies separately, as a preliminary question.