Provisional text

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 17 December 2020(1)

Case C-824/18

A.B.,
C.D.,
E.F.,
G.H.,
I.J.
v
Krajowa Rada Sądownictwa,
third parties: Rzecznik Praw Obywatelskich,
Prokurator Generalny

(Request for a preliminary ruling from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland))

(Reference for a preliminary ruling – Articles 2, 4(3) and 19(1) TEU – Article 267 TFEU – Article 47 of the Charter of Fundamental Rights of the European Union – Rule of law – Effective judicial protection – Principle of judicial independence – Procedure for appointing judges of the Polish Supreme Court – Appointment by the President of the Republic of Poland on a proposal by the National Council of the Judiciary – Lack of independence of the National Council of the Judiciary – Ineffective judicial remedy – Judgment of the Constitutional Court repealing the provision on which the jurisdiction of the referring court is based – National law limiting the powers of adjudication of the referring court – Primacy of Union law – Difference in treatment in relation to access to a judicial remedy)

1. As Lord Neuberger, the former President of the UK Supreme Court, aptly put it, ‘Once you deprive people of the right to go to court to challenge the government, you are in a dictatorship’. (2) The removal in Poland of the availability of judicial review in the context of the key constitutional field of judicial independence (3) forms the main focus of the dispute calling for resolution in this case. (4)

2. Indeed, this case raises important issues and will allow the Court to provide significant clarification, both in terms of procedure and substance, notably concerning Article 19(1) TEU. When dealing with the primacy of EU law, I will react to the recent judgment of the Bundesverfassungsgericht (Federal Constitutional Court, Germany, ‘the BVerfG’) in *Weiss* (2 BvR 859/15), where it ruled, inter alia, that a judgment of the Court of Justice was *ultra vires*, as well as to a recent order of the Disciplinary Chamber

of the Polish Supreme Court which, subsequent to that BVerfG judgment, ruled that a Court of Justice judgment was not binding in the Polish legal order.

3. In the present reference for a preliminary ruling – submitted on 21 November 2018 and supplemented by a new preliminary question by a decision of 26 June 2019 – the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) seeks an interpretation of Articles 2, 4(3), 6(1) and 19(1) TEU, Article 267 TFEU, Articles 15(1), 20, 21(1), 47 and 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter') as well as Articles 2(1) and (2)(a), 3(1)(a) and 9(1) of Directive 2000/78/EC. (5)

4. The reference arose in the context of legal proceedings between candidates for judicial office A.B., C.D., E.F., G.H. and I.J., on the one hand, and the Krajowa Rada Sądownictwa (National Council of the Judiciary; 'the KRS'), on the other, by which those candidates appealed against resolutions where: (i) the KRS decided *not to propose* to the President of the Republic of Poland ('the President of the Republic') their appointment to the position of judge of the Sąd Najwyższy (Supreme Court, Poland; 'the Supreme Court'); and at the same time, (ii) the KRS proposed the appointment of other candidates to the President of the Republic.

I. Legal framework

5. The KRS is governed by Ustawa z dnia 12 maja 2011 r. o Krajowej Radzie Sądownictwa (Law of 12 May 2011 on the National Council of the Judiciary). In particular, Article 44 of the Law on the KRS provides:

'1. A participant in the procedure may appeal to the [Supreme Court] on the grounds that the [KRS] resolution is unlawful, unless separate provisions provide differently. …

1a. In individual cases concerning appointment 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 proposal for appointment to the [Supreme Court].

1b. If not all the participants in the procedure have challenged the resolution … in individual cases concerning appointment to the office of judge of the [Supreme Court], that resolution becomes final in the part containing the decision to present the proposal for appointment to the [Supreme Court] and in the part comprising the decision not to present the proposal 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 [KRS] resolution not to present the proposal for appointment to the office of judge of the [Supreme Court] is equivalent to accepting the candidacy 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 [KRS] 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.'

II. The disputes in the main proceedings and the questions referred for a preliminary ruling

6. The KRS decided, by means of Resolution No 318/2018 of 24 August 2018, not to submit to the President of the Republic a proposal for the appointment of, inter alia, A.B. and C.D. as judges of the

Criminal Chamber of the Supreme Court. By means of Resolution No 330/2018 of 28 August 2018, the KRS decided not to submit to the President of the Republic a proposal for the appointment of, inter alia, E.F., G.H. and I.J. as judges of the *Civil Chamber* of the Supreme Court. Those resolutions also contained proposals for the appointment of other candidates to those positions.

7. The candidates who were not proposed appealed against the above resolutions to the referring court and submitted a request to that court to suspend their execution, which it granted.

8. In relation to the first question referred, the referring court notes, first, that, contrary to the provisions which were formerly applicable, the recently introduced Article 44(1b) of the Law on the KRS provides that in individual cases concerning an appointment as Supreme Court judge, a KRS resolution becomes final not only in the part of that resolution which contains the decision not to propose the appointment of candidates where there has been no appeal by the unsuccessful candidates, but also in the part of that resolution which contains the decision to propose the appointment if not all the participants in the competition procedure have lodged an appeal. However, those participants also include candidates whose appointment *was proposed* and who, therefore, have no interest in lodging an appeal against such a resolution. The referring court therefore considers that that resolution will de facto always be of a final nature.

9. Secondly, the referring court observes that Article 44(1a) of the Law on the KRS, which defines the function which it is called upon to exercise (review of the competition procedure in question), is based on overly general premisses, since no clear assessment criteria have been established.

10. Thirdly, the referring court states that it follows from Article 44(4) of the Law on the KRS that a consequence of the solution that has been adopted is that, where the referring court annuls a resolution of the KRS to not present a proposal for appointment to the office of judge of the Supreme Court, that merely results in the application of the participant in the proceedings who lodged an appeal being accepted for a vacant position of judge in the Supreme Court where the procedure before the KRS concerning that position has not been completed, and in the absence of such a procedure, for the next vacant position as judge in the Supreme Court.

11. In relation to the second question referred, the referring court also seeks guidance from the Court in order to be able to conduct an assessment as to whether the standard of equal access to public service (which meets general interest objectives) has been met in the present case. In its view, there is a clear difference in the effectiveness of the remedy between procedures for vacant judicial positions in other courts and the procedure concerning such positions at the Supreme Court.

12. It is against that background that the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(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?

– and, where the scope of that procedure also includes those positions of judges of the Supreme Court to whose holders the new lower retirement age has been applied without leaving the decision on whether to take advantage of the lower retirement age to the sole discretion of the judge concerned, in the context of the principle of the irremovability of judges – where it is found that this principle has been thereby undermined – also has an impact on the scope and outcome of the judicial review of the aforementioned selection procedure?

(2) Should Article 2 TEU, in conjunction with the third sentence of Article 4(3) and Article 6(1) TEU, in conjunction with Articles 15(1) and 20, in conjunction with Articles 21(1) and 52(1), of the Charter, in conjunction with Articles 2(1), 2(2)(a) and 3(1)(a) of Directive 2000/78 and the third paragraph of Article 267 TFEU, be interpreted as meaning that

– an infringement of the rule of law, of the principle of equal treatment and of equal and indiscriminate access to public service – service in the office of judge of the Supreme Court – occurs in a situation where, although the right of appeal to a competent court in individual cases concerning service in the office of judge of the aforementioned court has been granted, as a consequence of the criteria for the finality of the decision described in the first question, the appointment to a vacant position of judge of the Supreme Court may take place without the competent court conducting a review of the aforementioned selection procedure where such a review is initiated, and the absence of such a review, by infringing the right to an effective remedy, infringes the right of equal access to public service, thereby undermining objectives of general interest? And does not a situation in which the composition of the body in a Member State whose purpose is to safeguard the independence of the judiciary ([the KRS]), and before which the procedure concerning service in the office of judge of the Supreme Court takes place, is designed in such a way that representatives of the judiciary in that body are elected by the legislature undermine the principle of institutional balance?'

III. Procedure before the Court and the supplementary question for a preliminary ruling

13. In the context of the first part of the written procedure, observations were submitted to the Court by A.B., C.D., E.F. and I.J., the KRS, the Prokurator Generalny (Public Prosecutor, Poland), the Rzecznik Praw Obywatelskich (Ombudsman, Poland), the Polish Government and the Commission.

14. The written procedure before the Court was closed on 31 May 2019. On 26 June 2019 the referring court issued an order by which it rejected an application by the Public Prosecutor to rule that there is no need to adjudicate on the cases in the main proceedings. That application was based on the following developments.

15. First, by judgment of 25 March 2019 in Case K 12/18, delivered at the request of the KRS and a group of senators, the Trybunał Konstytucyjny (Constitutional Court, Poland) ruled that Article 44(1a) of the Law on the KRS was incompatible with Article 184 of the Polish Constitution. The Constitutional Court also concluded that it was necessary to terminate all proceedings brought under that provision because it had become invalid.

16. Secondly, the Ustawa z dnia 26 kwietnia 2019 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz ustawy – Prawo o ustroju sądów administracyjnych (Law of 26 April 2019 amending the Law on the National Council of the Judiciary and the Law on the System of Administrative Courts; 'the Law of 26 April 2019') (6) which entered into force on 23 May 2019, changed the second sentence of Article 44(1) of the Law on the KRS, which is now worded as follows: 'There shall be no right of appeal in individual cases regarding the appointment of Supreme Court Judges'. That law also states in Article 3 that 'proceedings in cases concerning appeals against [KRS] resolutions in individual cases regarding the

appointment of Supreme Court Judges, which have been initiated but not concluded before this Law comes into force, shall be discontinued by operation of law'.

17. It is against that background that the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to refer to the Court a supplementary (that is, a third) question for a preliminary ruling in the present case:

'(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 [KRS] 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 [KRS] resolutions and the verification of whether the selection procedure in which those resolutions were adopted was properly conducted, and

– 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 [KRS] resolutions, undermines the right of access to the courts 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?'

18. In the second part of the written procedure, observations were submitted to the Court by the Public Prosecutor, the Ombudsman, the Polish Government and the Commission.

19. All the parties that submitted written observations in the first part of the written procedure also took the opportunity to present oral argument at a hearing before the Court.

IV. Analysis

A. The jurisdiction of the Court

20. The Public Prosecutor argues that the Court has no jurisdiction to provide rulings on the questions referred on the ground that they concern the right to a judicial remedy in an area not covered by Union law. Any other decision would cause a coexistence of analogous and *erga omnes* competences over identical legal questions at the same time before the Court of Justice and the Constitutional Court.

21. However, the Court has already held that, although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law. (7) Moreover, as regards the scope of, in particular, the second subparagraph of Article 19(1) TEU, that provision aims to guarantee effective judicial protection in 'the fields covered by Union law', independently of the situation where the Member States are implementing Union law within the meaning of Article 51(1) of the Charter. (8)

22. It follows that the Court has jurisdiction to interpret, in particular, the second subparagraph of Article 19(1) TEU in the present case (see points 31 et seq. of the present Opinion).

B. Whether it is (still) necessary to give a ruling

23. The KRS, the Public Prosecutor and the Polish Government submit, in essence, that the questions referred have become devoid of purpose, it not being necessary to answer them in order to resolve the actions in the main proceedings. Article 44(1a) of the Law on the KRS, on which the referring court's competence was based, was repealed with *erga omnes* effect by the Constitutional Court by its 25 March 2019 judgment, which was also confirmed by the legislature.

24. I consider that, further to the Law of 26 April 2019, the preliminary questions have not become devoid of purpose. First, that law amends Article 44 of the Law on the KRS and removes the right of appeal in individual cases *exclusively* as far as the appointment of judges of the *Supreme Court* is concerned. Secondly, that law also provides that pending proceedings concerning appeals against KRS resolutions in individual cases are discontinued by operation of law.

25. The latter element dictates that the questions referred cannot be devoid of purpose. Indeed, I would stress that the Court has already rejected an analogous line of argument by the Polish Government in *A. K. and Others*, paragraph 102.

26. I would note that the Law of 26 April 2019 did not itself terminate the main proceedings and did not give rise to a withdrawal of the preliminary reference since, as the referring court has pointed out, the Law of 26 April 2019 '*requires appropriate concrete action by the court* before which proceedings are ongoing in a case that is already pending before it (this also applies to the consequences resulting from the judgment of [25 March 2019]), *which in essence needs to be in the form of an order – because it is only in such a way that a court's jurisdiction to give a ruling can be expressed*, *since the jurisdiction of that court is not abolished by that legislation*' (emphasis added). The referring court did not take a decision that there is no need to adjudicate and decided, instead, to maintain its preliminary reference (see also *A. K. and Others*, paragraph 103).

27. Hence, provisions of national law such as the Law of 26 April 2019 cannot preclude a court from which there is no appeal from confirming questions which it referred to the Court for a preliminary ruling (see *A. K. and Others*, paragraph 104).

28. I would point out that, aside from the previously cited judgment, *A. K. and Others*, the Court has already in a number of cases refused to accept that it is no longer necessary to give a ruling owing to the alleged disappearance of the subject matter of the proceedings, as had been requested by the Polish authorities in those cases. It is clear that the Polish legislature unhesitatingly modified, in urgent and repeated fashion, the national legal framework examined by the Court in those cases, only then to argue that the infringement actions or preliminary references had become devoid of purpose. (9)

29. It follows that the Law of 26 April 2019 and/or the judgment of 25 March 2019 are not capable of providing a justification for the Court to refrain from ruling on the preliminary questions.

C. Admissibility

30. The Public Prosecutor and the Polish Government argue, in essence, that the questions referred are inadmissible on the basis of arguments analogous to those in point 20 of the present Opinion.

31. First of all, I would observe that it follows from the case-law that, 'Article [267 TFEU] is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of [Union] law which they need in order to decide the disputes before them'. (10)

32. The referring court seeks to know whether the legal remedy foreseen by the national law is consistent with the requirement of effective judicial protection under Article 47 of the Charter. However, that article is only applicable when what is raised is a violation of an individual right guaranteed under Union law.

33. The referring court also refers to Directive 2000/78. According to Article 1 of that provision, the purpose of that directive is 'to lay down a general framework for combating discrimination *on the grounds of religion or belief, disability, age or sexual orientation* as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment' (emphasis added).

34. The referring court does not explain the link between the applicants in the main proceedings and the right not to be discriminated against guaranteed under Directive 2000/78, whose field of application is limited to the specific grounds listed above. Suffice to say therefore that to the extent that the requests for a preliminary ruling in the present case do not indicate that the applicants in the main proceedings seek to rely on rights guaranteed under Union law, such as those provided by Directive 2000/78, neither Article 47 of the Charter nor Directive 2000/78 is applicable in the present case.

35. The referring court also raises Article 2 TEU as a standalone provision. However, that article does not as such figure among provisions under which the compatibility of national legislation with EU law should be assessed and which could therefore per se lead the referring court to disapply a national provision by following the interpretation given by the Court of Justice. That is in any case not necessary as Article 2 TEU and the value of the rule of law stated therein are given concrete expression by Article 19 TEU (see point 87 of the present Opinion).

36. I consider that the first and third questions, in particular, are pertinent for the actions in the main proceedings, as they concern the extent of the referring court's powers if it finds the KRS resolutions at issue to be unlawful. That leaves the second subparagraph of Article 19(1) TEU and Article 267 TFEU as the sole pertinent provisions of EU law raised in the preliminary questions.

D. Substance

37. I consider that the substance of the third (supplementary) question referred needs to be addressed first as the answer to that question will either lead to the Court declaring that there is no need to adjudicate on the first two questions or, conversely, it will lead to the Court examining those questions.

1. Third question referred

38. This question should be understood as the referring court asking, in essence, whether Article 267 TFEU and Article 19(1) TEU must be interpreted as precluding a provision which causes national proceedings to be discontinued by operation of law without any possibility to continue those proceedings or to bring them again before a different court (first branch of the third question) and whether those provisions of EU law preclude the consequence which is liable to flow from that national provision in terms of the Court of Justice declining jurisdiction in cases which have already given rise to a reference for a preliminary ruling which is still pending (second branch of the third question).

(a) Brief summary of the parties' arguments

39. The Public Prosecutor submits, in essence, that the exclusion of all legal remedies against the proposals for appointment at issue is authorised by the Polish Constitution. Restrictions of constitutional freedoms and rights are allowed if they are laid down by law and are necessary, in particular in the interest of public policy. The Polish Government argues, in essence, that Article 3 of the Law of 26 April 2019 does not limit the possibilities for the referring court to bring a preliminary reference before the Court, but only seeks to provide for the closing of cases of a type such as the one in the main proceedings.

40. The Commission submits that the second subparagraph of Article 19(1) TEU does not preclude national provisions such as those in the main proceedings, save for a structural rupture in the appointment process, capable of putting in doubt the independence of that candidate after appointment. As a consequence, the adoption of a national provision which causes actions seeking judicial review of such resolutions to be discontinued by operation of law (Article 3 of the Law of 26 April 2019) is not precluded by Article 19(1) TEU. Nor does Article 267 TFEU preclude Article 3 of the Law of 26 April 2019, the Commission submits.

41. Contrary to the above parties, A.B., C.D., E.F., I.J. and the Ombudsman submit, in essence, that the third question should be answered in the affirmative.

(b) Assessment

42. First, it is necessary to address the second branch of the third question, in so far as it deals with Article 267 TFEU.

(1) Second branch of the third question (Article 267 TFEU)

43. It is true that in the present case it is the joint action of the Constitutional Court and the Polish legislature that could, according to the preliminary questions, potentially lead to a situation where there is no need to adjudicate under national law, which could result in a situation whereby the Court of Justice declines jurisdiction in relation to the present reference for a preliminary ruling. Indeed, to begin with, it was the judgment of 25 March 2019 that repealed the national provision on which the competence of the referring court was based, and that with immediate effect, whilst specifying that that declaration of unconstitutionality meant that any proceedings of that type still pending before the referring court had to be discontinued.

44. It is also true that in recent years there have been serious doubts expressed, inter alia, by the Commission about the current capability of the Constitutional Court to (still) exercise its function in a fully independent manner, and the Commission has taken a decision formally starting the procedure foreseen by Article 7(1) TEU regarding the rule of law in Poland. (11)

45. As is demonstrated in the present case, Article 19 TEU entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals which, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed. (12)

46. In particular, concerning Article 267 TFEU, I would recall that ‘the judicial system [of the Union] has as its keystone the preliminary ruling procedure provided for in [that provision], which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law …, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties’. (13)

47. It follows clearly from the Court’s case-law that, in accordance with Article 267 TFEU, national courts must remain free to decide whether to refer preliminary questions to the Court or not. (14)

48. Next, it is settled case-law that ‘Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case’. (15)

49. The Court has also made clear that that discretion and competence cannot be called into question by the application of national legal rules. (16)

50. Indeed, '[p]rovisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted …, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions [of a court responsible for the application of EU law]. … [The judicial independence mentioned above] is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU'. (17)

51. What is important in the present case is the fact that, as pointed out by the referring court, the national law *contains a constitutional obligation*, by rule of law, *to have a judicial remedy available for resolutions of the KRS* such as those in the main proceedings.

52. It follows that, first, in relation to the second branch of the third question referred (concerning Article 267 TFEU), I consider that *not least in view of the context* – where the Court has in recent years been seised in relation to numerous alleged infringements of the rule of law and of the independence of the judiciary in Poland (see point 28 of the present Opinion, and in relation to the present case it may be pointed out that, in spite of the fact that the referring court had suspended the KRS 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 KRS in the resolutions at issue here (18)) – the Court should rule that Article 267 TFEU precludes a national law such as the Law of 26 April 2019 in that it *decreed the discontinuation by operation of law of proceedings* such as those before the referring court, while at the same time *excluding any transfer of the review of the actions to another national court or to bring the actions again before another national court.* Moreover, in doing so, the Polish legislature ignored rulings of the Constitutional Court which make clear that there should be judicial review of KRS resolutions such as those in the main proceedings.

53. This is so a fortiori given that the following stage in the appointment procedure, that is the President's appointment of a candidate as a judge of the Supreme Court, is a presidential prerogative and as such cannot be the subject of judicial review under Polish law.

54. Now I shall turn to the first branch of the third question referred, which deals essentially with the question of whether the principle of the primacy of EU law and Article 19(1) TEU allow the referring court to declare itself competent – in spite of the Law of 26 April 2019 – to rule on and to continue to assess the actions in the main proceedings.

(2) First branch of the third question (Article 19(1) TFEU and the primacy of EU law)

(i) The judgment of the Constitutional Court of 25 March 2019

55. First I shall address the judgment of 25 March 2019, which the Polish legislature allegedly sought to implement by way of the contested Law of 26 April 2019 and which is, as we shall see below, important for resolving this case.

56. The derogation by the judgment of 25 March 2019 from Article 44(1a) of the Law on the KRS had the result of calling into question the jurisdiction of the referring court (the Supreme Administrative Court) as the court (originally) having jurisdiction to hear cases concerning appeals against resolutions of the KRS regarding the decision to submit (or not to submit) proposals for appointment to the position of judge of the Supreme Court on the basis of – as is apparent from the grounds of that ruling – the type of case and the institutional nature of administrative courts in relation to ordinary courts, which would result in the referring court not being the court 'destined to hear cases concerning resolutions of the [KRS]'.

57. It is true that, as a general principle, it could be argued that regardless of the Constitutional Court's judgment it is settled case-law of the Court of Justice that national courts may not be bound by higher court rulings which would prevent them from implementing EU law. (19)

58. Indeed, '[a] rule of national law, pursuant to which legal rulings of a higher court bind another national court, cannot take away from the latter court the discretion to refer to the Court of Justice questions of interpretation of the points of European Union law concerned by such legal rulings. That court must be free, if it considers that a higher court's legal ruling could lead it to deliver a judgment contrary to European Union law, to refer to the Court of Justice questions which concern it'. (20)

59. The Court pointed out in the same judgment (21) that 'it follows from well-established case-law that rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of European Union law ... Moreover, the Court of Justice has already established that those principles apply to relations between a constitutional court and all other national courts'.

60. However, I consider that despite appearances, the present case is, in fact, not one where there exists a real conflict between the ruling of a Constitutional Court of a Member State and EU law.

61. First, it is important to stress that, according to the referring court, the judgment of the Constitutional Court of 25 March 2019 is a *ruling with prospective effects*, which means that the provision which has been declared unconstitutional should continue to be applied to the legal assessment of factual situations existing before the date the provision became invalid. That assessment is confirmed by the legal literature. (22)

62. Such a provision should therefore continue to be applied to the legal assessment of the circumstances on the basis of which – in the light of the original form of the jurisdiction *ratione materiae* of the referring court, as the court having jurisdiction in cases concerning appeals against the KRS resolutions at issue – entitled persons have effectively exercised their constitutional rights.

63. Secondly, and here I agree with the referring court, the judgment of the Constitutional Court not only did not specifically contest the institution of judicial review of those KRS resolutions, it follows clearly from that judgment that such a review must in fact be available in Poland.

64. I draw attention to the argument stated in the grounds of the judgment of 25 March 2019: '… The very institution of appealing against resolutions of the [KRS] in individual cases is … the consequence of implementing the judgment … in Case SK 57/06 [judgment of 27 May 2008], but [this] should not be put into practice in the form of proceedings that are subject to completely different courts'.

65. That is relevant because the constitutional precedent in question (Case SK 57/06) dealt explicitly with the issue of the possibility for candidates for judicial office to appeal against KRS resolutions such as those in the main proceedings (in that case the KRS also did not present the applicant's candidacy to the President of the Republic).

66. As the referring court pointed out, Article 3 of the Law of 26 April 2019 (together with the change made to the second sentence of Article 44(1) of the Law on the KRS introduced by the amending law) can be seen as equivalent to the provision contained in the second sentence of Article 13(2) of the Law of 27 July 2001 on the KRS which, in the judgment in Case SK 57/06, was held by the Constitutional Court to be incompatible with Article 45(1) of the Polish Constitution, read in conjunction with Article 77(2) and Article 60 thereof.

67. The referring court explains this further in its reference of 26 June 2019: 'that [the necessity to have an effective remedy] is also confirmed by the position taken by the Constitutional Court. Thus, in the grounds of the judgment in Case SK 57/06 – whose relevance and consequences are in no way questioned or undermined by the ruling given in Case K 12/18, but on the contrary are confirmed by it – the Constitutional Court stated that Article 45(1) of the Constitution clearly expresses the legislature's intention that the right of access to the courts should encompass the widest possible range of cases, and from the principle of the democratic rule of law comes the instruction prohibiting a restrictive interpretation of the right of access to the courts, since the *Constitution establishes a specific presumption of the right of access to the courts*, … the conclusion that the procedure under which the [KRS] assesses a

candidate for a specific judge's position and decides to submit a proposal to the President of the Republic … [for] appointment to that position relates to the right set out in Article 60 of the Constitution to apply for public office on equal terms, and thus to a right that forms part of the category of constitutional rights and freedoms to which the absolute prohibition on restricting access to the courts expressed in Article 77(2) of the Ustawa Zasadnicza (Basic Law) applies' (emphasis added; point III.5 of the grounds of the judgment in Case SK 57/06).

68. The Constitutional Court also makes clear that it is not the appeal procedure against KRS resolutions in individual cases per se that is unconstitutional, but that, in that court's view, it is the referring court (the Supreme Administrative Court) that does not have jurisdiction to hear such cases (paragraph 6.2 of the grounds of the judgment in Case K 12/18).

69. It should be emphasised that removing the referring court's jurisdiction in cases concerning appeals against KRS resolutions relating to appointments to the position of judge of the Supreme Court was conspicuously not accompanied by any positive action by the national legislature aimed at establishing a replacement court with jurisdiction in those cases, despite the fact that the Constitutional Court, in Case K 12/18, did not question the possibility to institute proceedings for judicial review of the KRS resolutions in question, referring in that regard to the leading judgment in Case SK 57/06 (see paragraphs 8 and 12), which states a requirement for such review.

70. I therefore agree with the referring court that 'the intention of the legislature was to exclude access to the courts in such cases, which … is in opposition to the position taken in the grounds of the abovementioned judgments of the Constitutional Court and its case-law, from which it is apparent that, in a democracy based on the rule of law, it is unacceptable to have a situation where there is no possibility of judicial review of rulings issued in any proceedings or other decisions'. (23)

71. Moreover, I consider (as does the Ombudsman) that that exclusion is entirely arbitrary, as it is applicable exclusively to appointments to the Supreme Court. What is more, the selective nature of that measure is not justified by any objective or convincing reason.

72. In my view, eliminating the (right to a) judicial remedy which was until then available in a case such as the one in the main proceedings, and, in particular, taking it away from litigants who – much as the applicants in the main proceedings – have already brought such an action constitutes (given the context and constellation of the other elements pointed out by the referring court underlying the elimination of that right) a measure whose nature contributes to – indeed reinforces – the absence of the appearance of independence and impartiality on the part of the judges actually appointed to the court concerned, and on the part of the court itself. Such an absence of the appearance of independence and impartiality violates the second subparagraph of Article 19(1) TEU.

73. I shall examine whether that results in the referring court being obliged to disapply the national law concerned.

(ii) The primacy of EU law and Article 19(1) TEU

74. Indeed, according to the Court's case-law, 'it should be pointed out that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it'. (24)

75. That is the subject of the first branch of the third question referred, which concerns the question of whether the primacy attached to EU law provisions, such as the second subparagraph of Article 19(1) TEU, allows, in turn, the referring court to not give effect to the Law of 26 April 2019 by way of declaring itself – notwithstanding that law – competent to rule on the actions in the main proceedings and to carry on with their assessment.

76. Before I proceed with examining the primacy of EU law in the context of the present case, I need to briefly address recent rulings from the Polish Supreme Court and the German BVerfG.

77. The former of the two is an Order of the Disciplinary Chamber of the Supreme Court of 23 September 2020 (II DO 52/20), where it held that the Court's judgment in *A. K. and Others* 'cannot be considered binding in the Polish legal order, because in all proceedings pending before the Labour and Social Insurance Chamber of the Supreme Court, in which questions were referred to the CJEU for a preliminary ruling (… a question for a preliminary ruling registered in the CJEU [in Cases] C-585/18, … C-624/18, … [and] C-625/18), acts were carried out by benches that were in conflict with the provisions of the law.' The reason was the fact that the preliminary references in those cases were submitted by benches of three judges, whereas the Polish court considered that such cases should have been examined at first instance by the Supreme Court, composed of one judge of the Disciplinary Chamber.

78. First of all, the above has occurred even though the Court of Justice ruled in April 2020 in an interim measures order (25) that the activities of the Disciplinary Chamber of the Supreme Court should be suspended pending the resolution of case C-791/19, *Commission* v *Poland*.

79. That issue will have to be dealt with in the context of that case, however, the judgment of the Disciplinary Chamber of the Supreme Court follows another recent judgment, from Germany, which I need to address, even if only briefly (given the fact that the scope of the present Opinion is limited to resolving the questions referred in this case and I consider that the judgment of the BVerfG has no impact on this case or the Court's case-law in relation to the primacy of EU law in particular).

– *The judgment of the German Bundesverfassungsgericht in Weiss*

80. In the BVerfG's recent judgment in *Weiss* (cited in point 2 of the present Opinion), in essence, the Second Senat (chamber) of the BVerfG declared the Grand Chamber judgment of the Court of Justice (in *Weiss and Others* (26)), as well as several decisions of the European Central Bank concerning the 2015 Public Sector Assets Purchase Programme, to be *ultra vires* and not applicable in Germany.

81. Rather than endangering the whole system of the EU community based on the rule of law and taking such an unprecedented approach, the BVerfG could have explained what, in its view, was open to criticism in the Court's case-law and could have then sent a new reference for a preliminary ruling to the Court (indeed, as it should have done, had it followed its own case-law on that very issue (27)). After all, judicial dialogue is valuable, indeed, it is integral to the functioning of the EU legal order.

82. In any case, we are not faced here with a situation of national law and international law and which one of the two gets priority in a given national legal system (28): 'EU law is not "foreign law", but it is rather by its very nature and in its own right "the law of the land" in each Member State and primacy goes hand in hand with the principle of equality of Member States before the law, since it rules out "cherry-picking" that may serve individual national interests'. (29)

83. The BVerfG's *ultra vires* approach undermines the rule of law in the EU, which is a *conditio sine qua non* to integration. The EU does not have a superstructure to deal with conflicts of courts, but the rule of law serves as a bridge to deal with such conflicts.

84. According to the Treaties, which are the Member States' 'contract', the final instance in EU law is the Court of Justice. This is clear from Article 19 TEU and Article 267 TFEU. What is more, under Article 344 TFEU, the Member States have even explicitly committed to the following: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'. (30)*Pacta sunt servanda* and so it is simply not the BVerfG's role or competence to rule the way it did in *Weiss.* (31) No national court is allowed by the Treaties to overrule a Court of Justice judgment, otherwise EU law would not be applied equally or effectively across all 27 Member States and the entire legal basis of the EU would be called into question. If a national constitutional court deems that an EU act or a Court of Justice ruling clashes with its

constitution, it cannot simply find that the act or ruling is inapplicable in its jurisdiction. What it can do is to seek to remedy the situation by compelling the government of the country in question to amend the constitution, to seek to change the EU legal norm involved by working through the EU political process or, if necessary, to withdraw from the Union. (32) That is the only way of ensuring the equality of Member States in the Union they created.

– *The direct effect of Article 19(1) TEU*

85. According to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States (33) and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU. (34)

86. The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act. (35)

87. Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. (36)

88. The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields. (37)

89. It follows from the Court's recent case-law that the second subparagraph of Article 19(1) is a priori applicable – independently of any requirement relating to a concrete situation of effective implementation of EU law – in relation to any national court as soon as it *could* rule as a court or tribunal on questions concerning the application or interpretation of EU law and thus falling within the fields covered by EU law. (38)

90. In view of that case-law I no longer defend the view I expressed in *Commission* v *Poland (Independence of ordinary courts)* (39) that the material scope of Article 19(1), second subparagraph, TEU is confined, in the context of the irremovability and independence of judges, to correcting problems with respect to structural infirmity in a given Member State (systemic or generalised deficiencies, which 'compromise the essence' of the irremovability and independence of judges).

91. Indeed, the Court has already ruled that Article 47 of the Charter has direct effect (*A. K. and Others*, paragraph 162). That is in any event the case for the requirement of the independence of judges.

92. The concept of effective legal protection, referred to in Article 19(1) TEU, must be interpreted by taking account of the content of Article 47 of the Charter and in particular the safeguards inherent in the (right to) an effective legal remedy granted by the latter provision.

93. Indeed, according to the case-law, 'the second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law'. (40) Therefore, Article 19(1) TEU includes the necessity to preserve the independence of the court which is entrusted with interpreting and applying EU law.

94. Furthermore, the Court has already implicitly accepted that Article 19(1) TEU has direct effect. In the main proceedings in *Juizes Portugueses* (41) Article 19(1) TEU was invoked before a national court and the Court did not raise any objections in relation to the direct possibility of relying on that provision. Likewise, in *Miasto Łowicz*, (42) the Court considered that the question referred was not pertinent for the resolution of the disputes in the main proceedings, but it raised no issues as far as the possibility of relying on Article 19(1) TEU was concerned.

95. Hence, the Court has already confirmed that that provision has direct effect and may be invoked by litigants before national courts as an autonomous legal basis (besides Article 47 of the Charter) in order to appraise the conformity of a Member State's actions with EU law.

– *The application of Article 19(1) TEU to the present case*

96. Now that Article 19(1) TEU can be applied by the referring court directly in the present case, it is necessary to examine whether it can rely on that provision to find that the relevant national rules are precluded by Article 19(1) TEU.

97. The Court held in *A. K. and Others* (paragraph 167) that 'Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court'.

98. Moreover, '[t]he principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law which is now enshrined in Article 47 of the Charter, so that the former provision requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of the latter provision, in the fields covered by EU law' (*A. K. and Others*, paragraph 168).

99. The Court added that 'it does not appear necessary to conduct a distinct analysis of Article 2 and the second subparagraph of Article 19(1) TEU, which can only reinforce the conclusion already set out in paragraphs 153 and 154 [of that judgment], for the purposes of answering the questions posed by the referring court and of disposing of the cases before it' (*A. K. and Others*, paragraph 169).

100. In view of that case-law, the effective judicial protection which such courts must be able to offer in accordance with that provision requires, in particular, that they comply structurally with the requirement of independence and impartiality, as it was developed under the Court's case-law in relation to Article 267 TFEU, Article 47 of the Charter and Article 19 TEU. Moreover, the Court must ensure that the interpretation which it gives to those provisions safeguards a level of protection which does not fall below the level of protection established in Article 6 of the ECHR, as interpreted by the European Court of Human Rights ('ECtHR') (*A. K. and Others*, paragraph 118).

101. First, the Court has ruled that 'the mere fact that … 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 … 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' (emphasis added; *A. K. and Others*, paragraphs 133 and 134).

102. Secondly, it also follows from the Court's case-law that the rules concerning the *appointment* of judges must, together with other types of rules concerning them (such as the disciplinary regime applicable to the judges, their irremovability and so forth), contribute to guaranteeing that independence, in particular in order to remove any legitimate doubts, in the minds of subjects of the law, as to the imperviousness of such a court to external factors, and, in particular, to the direct or indirect influence of the legislature and

the executive, and as to its neutrality with respect to the interests before it, and any lack of the appearance of independence or impartiality of that court, which could prejudice the trust which justice in a democratic society must inspire in subjects of the law, must not be allowed. (43)

103. Therefore, in a situation where national rules on the appointment of judges come within the scope of application of the second subparagraph of Article 19 TEU, there are obligations on the Member State to establish the requirement to guarantee that the appointment procedure is carried out in a way that safeguards the independence and impartiality of the judges thus appointed.

104. It is true that EU law, as it now stands: (i) does not contain a norm or a principle which would confer on candidates for the position of judge such as those in the main proceedings a right to a judicial remedy nor determine the conditions of effectiveness which such a right would have to satisfy; and (ii) does not provide that such candidates have a right not to be discriminated against, on the basis of the types of vacant judicial positions concerned, as far as such a remedy is concerned.

105. However, as the Court has already ruled (*A. K. and Others*, paragraph 153), while certain aspects of national law are not capable, per se and taken in isolation, of calling into question the independence of a court or its members, that may, by contrast, not be true once they are *taken together*, as an *accumulation of legal and factual factors* whose combination is capable of raising doubts, in the minds of subjects of the law, as to the imperviousness of that court or its members to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interest before it and, thus, they may lead to that court or its members not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law.

106. In that connection, the Court has already made clear (*A. K. and Others*, paragraphs 131 to 153), *in relation to a constellation of normative and factual circumstances which converge with those in the case in the main proceedings*, that the following circumstance, in connection with those other circumstances, and subject to final assessment and verification to be carried out by the national court, may lead to raising such doubts.

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 KRS, of *the scope of the action which may be brought challenging a resolution of the KRS, including its decisions concerning proposals for appointment to the post of judge of that court, allows an effective judicial review to be conducted of such resolutions, covering, at the very least, an examination of whether there was no* ultra vires *or improper exercise of authority, error of law or manifest error of assessment* (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 KRS 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 KRS (*in casu*, acting as a disciplinary body) itself raises serious issues in that regard. (47) One author (48) has made the argument in legal writing that the above should only apply when the judicial council acts as a disciplinary body and not when it 'merely' plays an advisory role, such as in the context of judicial appointments. I do not share that view since such a difference is not made out in the ECtHR case-law and I consider that in any event it cannot hold true in a context such as the one in Poland.

113. Secondly, the point I made in point 109 above is supported by the principle that a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body. (49)

114. The Court had an opportunity recently to confirm that judicial independence from the executive in particular is an element of effective judicial protection. (50) Such protection should, in principle, be given to all EU citizens, including to candidates for judicial office with the Supreme Court.

115. As the Court held in *Simpson and HG*, (51) 'it follows from the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law, guaranteed by Article 47 of the Charter, that everyone must, in principle, have the possibility of invoking an infringement of that right. Accordingly, the Courts of the European Union must be able to check whether an irregularity vitiating the appointment procedure at issue could lead to an infringement of that fundamental right'. I consider that the same goes for national courts (which are EU courts, too). Again, while that case-law deals specifically with Article 47 of the Charter, the Court explains in *A. K. and Others* that if it analysed Articles 2 and 19 TEU, then the conclusions from that analysis would be the same as those of the analysis of Article 47 of the Charter (see paragraphs 167 to 169 of that judgment).

116. Indeed, the Supreme Court has already ruled in no uncertain terms that the KRS is not independent. (52)

117. In particular, in view of multiple and serious legal defects, it has concluded that choices made by the KRS are not independent of political interests, affecting the fulfilment of the objective criteria of impartiality and independence by persons appointed to the office of judge on proposal by the KRS (see paragraph 36 of the resolution of 23 January 2020). Furthermore, the Supreme Court has ruled that because the KRS has become politicised, then competitions for judicial positions are very likely to be decided on the basis of political loyalties or support for the reform of the judiciary pursued by the parliamentary majority in conflict with the Polish Constitution, rather than on substantive criteria. In terms of the whole justice system, that undermines trust in the impartiality of office holders so appointed. The lack of independence is essentially seen in decisions of that body being subordinated to the political authorities, in particular the executive (see paragraph 38 of the resolution of 23 January 2020).

118. First, in my Opinion in joined Cases *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:2019:551), I came to the conclusion that the

KRS is not an independent body: the mandates of the members of the KRS were prematurely terminated; and the manner of appointment implies that 23 out of 25 members come from the legislative and executive authorities, which discloses deficiencies that appear likely to compromise the KRS's independence from the legislative and executive authorities (see notably points 132 and 135).

119. Indeed, as pointed out in the European Charter on the Statute for Judges (see point 111 of the present Opinion), '2.1. [of the Explanatory Memorandum to that charter] Judicial candidates must be selected and recruited by an independent body or panel' and '1.3. [of that charter] In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary'. That is the case because 'the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature. There would be a risk of party-political bias in the appointment and role of judges under such a procedure. Judges sitting on the independent body are expected, precisely, to refrain from seeking the favour of political parties or bodies that are themselves appointed or elected by or through such parties' (see 1.3. of the Explanatory Memorandum to that charter).

120. Then, I refer to the Court's judgment in that case (*A. K. and Others*) and the judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową(Disciplinary regime for judges)*, Joined Cases C-558/18 and C-563/18, EU:C:2020:234.

121. On 5 December 2019 the referring court in the case of *A. K. and Others*, the Sąd Najwyższy - Izba Pracy i Ubezpieczeń Społecznych (Supreme Court, (Labour and Social Insurance Chamber), Poland), ruled – on the basis of that judgment of the Court of Justice – that the KRS is not, in its current composition, a body which is impartial and independent of the legislative and executive powers. It also held that the Disciplinary Chamber of the Supreme Court could not be considered to constitute a court for the purposes of Article 47 of the Charter and Article 45(1) of the Polish Constitution.

122. The judgment also stated: (i) the KRS had not been independent from the political authorities since its creation in 2018; (ii) the new KRS had been established in violation of constitutional provisions (53); and (iii) the judgment considered other factors impinging upon the KRS's independence (the election of the KRS's current members had not been transparent; the independence of the KRS had been questioned publicly many times by NGOs, lawyers' associations, and judges of the ordinary courts; KRS members had been promoted by the Minister of Justice to the position of court president or vice-president, or to other high judicial office; and the KRS's members had also publicly supported the government's judicial reforms). (54) In ruling that the Disciplinary Chamber could not be considered a court within the meaning of EU law, that same judgment of 5 December 2019 (paragraphs 67-68) was also based on the fact that the candidatures proposed to that chamber by the KRS had not been subject to judicial review.

123. That judgment was confirmed by the Supreme Court (Labour and Social Insurance Chamber) on 15 January 2020 (in the other cases which gave rise to *A. K. and Others*) and, in particular, on 23 January 2020, when the Grand Chamber of all the judges of three chambers of the Supreme Court adopted a resolution, (55) which has the effect of a legal principle. It confirmed the above judgment of 5 December 2019 and held that the KRS was not independent of the executive.

124. Secondly, the gravity of the situation concerning the KRS is confirmed by the following fact: on 27 May 2020 the Executive Board of the European Network of Councils for the Judiciary (ENCJ) adopted a Position Paper on the KRS's Membership of the ENCJ. In that paper the Board sets out the reasons for its proposal to the General Assembly to expel the KRS from the ENCJ (see https://www.encj.eu/node/556). The reasons are, in essence: (i) the KRS does not comply with the statutory rule of the ENCJ that a member council should be independent from the executive; (ii) the KRS 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; and (iii) the KRS

undermines the application of EU law on the independence of judges and courts, 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. The Board concluded that the KRS had committed serious breaches of the aims and objectives of the ENCJ as set out in Articles 3 and 4 of its Statutes, and was not prepared to remedy those serious breaches. I would point out that the KRS had already been suspended from the ENCJ on 17 September 2018 because it no longer met that body's requirements of being independent of the executive and the legislature in a manner which ensures the independence of the Polish judiciary.

125. Moreover, the ENCJ based its proposal to expel the KRS on the following elements and positions of organisations, such as: (i) the Organization for Security and Cooperation in Europe (OSCE)'s Office for Democratic Institutions and Human Rights (ODIHR), the Council of Europe (Greco, the European Commission for Democracy through Law ('the Venice Commission') and the Parliamentary Assembly), EU institutions and the networks of the judiciary and advocates in Europe, which were critical of the reforms of the judiciary in Poland and of the role of the KRS; (ii) a report of 6 January 2020 by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe which stated that 'The reform of the [KRS] had brought this institution under the control of the executive, which is incompatible with the principle of independence.'; (iii) the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe's Joint Urgent Opinion of 16 January 2020, (56) recommending, inter alia, 'to restore the powers of the judicial community in the questions of appointments, promotions and dismissals of judges', implying that the KRS was under the control of the executive; (iv) the resolution of the Grand Chamber of the Polish Supreme Court, mentioned in point 123 of this Opinion; (v) the order of the Court in Case C-791/19 R, EU:C:2020:277, granting interim measures in the case, where the Commission argues, inter alia, that the independence of the new Disciplinary Chamber in Poland was not guaranteed because its judges are selected by the KRS, while the judge-members of the KRS are selected by the lower house of the Polish Parliament; (vi) the Commission's launching of another infringement procedure by sending a letter of formal notice to Poland regarding the new law on the judiciary of 20 December 2019, which entered into force on 14 February 2020; (57) (vii) on 13 May 2020 the LIBE Committee of the European Parliament published a draft interim report in the Article 7 TEU procedure against Poland. Regarding the impact of the Polish Law of 20 December 2019 on the independence of the KRS, the report holds that '23. (…) this measure led to a far-reaching politicisation of the [KRS]; (…) 26. Calls on the Commission to start infringement proceedings against the [Law on the KRS] and to ask the [Court of Justice] to suspend the activities of the new [KRS] by way of interim measures'. (58)

126. The Joint Urgent Opinion of 16 January 2020, (59) mentioned in the above paragraph, points out that '[t]he judicial community in Poland lost the power to delegate representatives to the [KRS], and hence its influence on recruitment and promotion of judges. Before the 2017 reform 15 (out of 25) members of the [KRS] were judges elected by their peers. Since the 2017 reform, those members are elected by Parliament. Taken in conjunction with the immediate replacement, in early 2018, of all the members appointed under the old rules, this measure led to a far reaching politicisation of the [KRS]'. Moreover, 'two new chambers within the Supreme Court were created in 2017: the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs. ... These new chambers were staffed with newly appointed judges, selected by the new [KRS], 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, or the power of the Disciplinary Chamber to discipline other judges. That put these new chambers above all others and created de facto a "Supreme Court within a Supreme Court"'. As far as the KRS is concerned, the Joint Urgent Opinion concludes that 'In the opinion of the Venice Commission, it is necessary to return to the question of composition of the [KRS], in order to bring the method of appointment of its judicial members in accordance with the European standards and best practices. That would remove the risk of legal chaos, although the question of validity of judicial appointments made in the meantime would have to be addressed by the Polish authorities'.

127. The case-law of the ECtHR makes clear that the composition of the body which appoints judges is relevant from the stand-point of the requirement of 'independence'. (60)

128. The Strasbourg case-law also confirms that the independence of justice concerns not only the exercise of judicial functions in specific cases, but also the judicial organisation (that is, structural independence, such as the manner of appointment of the court's members and their term of office) and the question of whether the court concerned presents or not an 'appearance of independence', which constitutes an essential element of maintaining the confidence that courts and tribunals must inspire in a democratic society. In order to protect that appearance of independence, it is necessary to foresee sufficient guarantees. (61)

129. In the light of the foregoing considerations, I consider (as does the legal literature (62)) 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 KRS'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 (63) that it was the well-established case-law of the Constitutional Court before 2015 that the KRS'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 KRS's decision was a significant guarantee for the objectivity and impartiality of appointment procedures and the equal constitutional right of access to public office.

130. There is support for this conclusion in international soft law instruments on the subject of national councils for the judiciary. The Consultative Council of European Judges (CCJE) adopted an opinion, (64) which stresses that '[s]ome decisions of the Council for the Judiciary in relation to the management and administration of the justice system, as well as the decisions in relation to the *appointment*, mobility, promotion, discipline and dismissal of judges … *should* contain an explanation of their grounds, have binding force, *[be] subject to the possibility of a judicial review*. *Indeed, the independence of the Council for the Judiciary does not mean that it is outside the law and exempt from judicial supervision*' (emphasis added).

131. As the Court recently pointed out in *Simpson and HG*, (65) 'the [ECtHR] has already had an opportunity to observe that the right to be judged by a tribunal "established by law" within the meaning of Article 6(1) ECHR encompasses, by its very nature, the process of appointing judges (ECtHR, 12 March 2019, *Ástráðsson v. Iceland*, CE:ECHR:2019:0312JUD002637418, interim judgment, § 98)'. (66)

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). (67)

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 Ombudsman) 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. (68) Nor do other

chambers of that court, to which judges were assigned who were appointed on the basis of KRS 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).

2. First question referred

137. This question should be understood as seeking to determine whether the second subparagraph of Article 19(1) TEU precludes – in the overall national normative and factual context in Poland – an action which presents defects in terms of effectiveness such as the one originally applicable to the cases in the main proceedings. (69)

(a) Brief summary of the arguments of the parties

138. In essence, the KRS submits that the national provisions at issue, as amended by the Law of 26 April 2019, fall under the procedural autonomy of the Member States, provided that an effective judicial review is guaranteed, which is the case under Article 44(4) of the Law on the KRS. The fact that the part of the KRS resolution which proposes the appointment becomes definitive is justified by the requirement to fill positions at the Supreme Court without delay. The manner in which the 15 members of the KRS are elected constitutes a choice which falls under the exclusive competence of Member States, which cannot be reviewed by the Court.

139. The Public Prosecutor submits, in essence, first, that the referring court's suspension of the KRS resolutions at issue was illegal. Secondly, there is no common binding standard flowing from EU law in relation to: (i) the appointment of judges and the eventual role, in this context, of other national authorities; or (ii) the possibility of bringing an action against decisions adopted in this area, a procedure which, moreover, does not exist in numerous Member States.

140. The Polish Government argues, in essence, that the EU law provisions raised in the questions referred do not constitute a yardstick of the control of national provisions concerning procedures for the appointment of judges, lest they should violate the principle of the respect of Member States' constitutional traditions. The KRS is a constitutional organ of the State, independent of the legislative, executive and judicial powers, whose role consists in harmonising the mutual relations of those three branches of power, whilst at the same time guaranteeing the independence of judges. Any judicial review of KRS resolutions which was not limited to respect of procedural rules, but which also related to the merits of the resolutions and to the selection made, would undermine the exclusive competence given to the KRS and the constitutional balance sought.

141. The Ombudsman submits, in essence, that the way in which judges are appointed constitutes one of the elements which may be assessed in order to verify that the independence of judges is guaranteed and, given the key role the KRS plays in the appointment procedure for judges of the Supreme Court, the second subparagraph of Article 19(1) TEU must also apply to the procedure before that body and to the possibility of bringing actions against its resolutions.

142. A.B., C.D., E.F. and I.J. argue that Article 44(1b) and (4) of the Law on the KRS only provides for a sham review and purely formal access to a legal remedy, thus breaching the rule of effective judicial protection of the rights at issue, in violation of Articles 2, 4(3)(3), 6(1) and 19(1) TEU, in combination with Article 47 of the Charter.

143. The Commission submits that Article 19(1) TEU does not provide a general requirement that decisions on the appointment of judges must be subject to judicial review or that such a requirement should apply to opinions put forward in the context of the selection of judges, nor that such a review should have suspensive effect. It would be only under particular circumstances that Article 19(1) TEU would be breached, that is where the amendment of legal rules on the appointment of judges of a court, concurrently with amendments of other legal provisions applicable to that court, amount to a structural distortion capable of undermining the perception of the independence of that court from the point of view of subjects of the law. The Commission argues that such circumstances do not arise in the present case.

(b) Assessment

144. I would refer here to the explanations and analysis provided by the referring court in points 8 to 10 above.

145. The considerations above under the third question are also applicable *mutatis mutandis* in the context of the first question in order to establish that the second subparagraph of Article 19(1) TEU precludes – in the legal and factual context present in Poland – a judicial remedy which is vitiated by defects of effectiveness such as the one which was originally applicable in the main proceedings (paragraphs 1a, 1b and 4 of Article 44 of the Law on the KRS).

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 KRS 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.

147. To my mind, in order for an appeal framework to be effective, it would require that: (1) the lodging of an appeal by any unsuccessful candidate for a judicial position in the Supreme Court would halt the entire nomination procedure until that appeal has been examined by the referring court; (2) the upholding of the appeal against a KRS resolution concerning a decision not to submit a proposal for appointment to the Supreme Court results in an obligation on the part of the competent body in the Member State (the KRS) to re-examine the individual case concerning the appointment to the position of Supreme Court judge; (3) the resolution becomes valid if the referring court has dismissed the appeals against it, and that only then can the resolution be submitted to the President of the Republic and the candidate named in the proposal be appointed as a Supreme Court judge.

148. Therefore, I consider that there is a clear doubt as to the effectiveness of the remedy available against the resolutions of the KRS made in individual cases concerning appointment to the Supreme Court, and thus in cases concerning rights guaranteed by EU law, since the issue at stake here is the position of a judge at the court of last instance of a Member State. This is all the more so since the framework of the appeal against resolutions in such cases differs from that applicable to selection procedures concerning vacant judicial posts in courts other than the Supreme Court (which conspicuously remained unchanged and do not foresee the restrictive 'innovations' introduced recently), which cannot be justified solely by the criterion of the court in which the vacancy is being filled.

149. The referring court considers that this amounts to creating, between two categories of candidates for the appointment to the position of judge, a differentiated access to a competent court, which may infringe the principle of equal access to a court.

150. I would underline, in particular, the fact that no convincing arguments have been put forward that would justify that difference in the effectiveness of the remedy and the 'special treatment' of the Supreme Court appointment procedure.

151. In view of the foregoing, the referring court is correct when it considers that those national rules are not in compliance with EU law.

152. Indeed, it follows from the Court's case-law that Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are required to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields. (70) This protection constitutes an essential characteristic of the rule of law under Article 2 TEU.

153. Given that the referring court has to review the KRS resolutions at issue in accordance with the national provisions applicable before the amendment introduced by the Law of 26 April 2019, that review must be effective and must not be capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the validity of the appointment process of judges appointed on that basis.

154. That means that the referring court must have the possibility of proceeding with a judicial review – *at the very least* in so far as indicated by the Court in *A. K. and Others* (paragraph 145), that is in a way which allows it to examine whether there was any *ultra vires* or improper exercise of authority, error of law or manifest error of assessment. (71)

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. (72)

156. Indeed, as the Court held in *FMS*, (73) 'the principle of the primacy of EU law and the right to effective judicial protection, guaranteed by Article 47 of the Charter, require the referring court to declare that it has jurisdiction to hear and determine the appeal [at issue], if no other court has, under national law, jurisdiction to hear and determine it'.

157. That means that national provisions which constitute an obstacle to bringing about the aims of Article 19(1) TEU should be disapplied by the referring court. In the present context the referring court should therefore disapply (i) provisions which would entail the total exclusion of the possibility to review any error of assessment of the judicial candidates in the light of the criteria which are imposed on them; and (ii) the partially definitive character of KRS resolutions regarding the candidates who were appointed. Otherwise, the judicial review of such a resolution would be illusory in relation to the appointed candidate.

158. Therefore, concerning the candidate who has been appointed, national rules such as those in the main proceedings would amount to the absence of any control whatsoever, which paves the way to discretionary actions by the other branches of power and is capable of giving rise to legitimate doubts, in the minds of subjects of the law, in violation of Article 19(1) TEU.

3. Second question referred

159. Given that the answer to the first question is affirmative (that is, I find that the framework of the appeal procedure against KRS resolutions in individual cases concerning appointments to the position of Supreme Court judge does not ensure the right to an effective legal remedy and judicial protection, including by ensuring adequate scope for that protection), by its second question the referring court considers that it is justified to determine the significance of those shortcomings in the framework of the appeal procedure against the KRS's resolutions at issue provided in national law (and the aspects of those

shortcomings indicated here) in terms of whether they also result in an infringement of the *right to equal access to public service* which does not meet general interest objectives.

160. A.B., C.D., E.F. and I.J. submit, in essence, that the fact that they were deprived of effective judicial protection of their constitutional right of access to public service according to the same rules as those applicable to persons whose candidacies were proposed by the KRS also constitutes a violation of various principles of EU law, such as the rule of law, equality of treatment, equality of access to public service as well as institutional balance. Moreover, the manner of the KRS's composition offers no guarantee whatsoever in relation to its independence in relation to the legislative and executive branches of power.

161. However, it is sufficient to point out that the fact that a possible application of the principle of equal treatment *under EU law*, including of Articles 20 and 21 of the Charter, in the presence of a difference of treatment such as the one alleged in the main proceedings (which it is argued exists between the actions open to judicial candidates for the Supreme Court and those open to candidates for other judicial positions) is far from evident, in particular, *in the absence of a difference in treatment in the area of access to employment which would be founded on one of the specific grounds envisaged in Directive 2000/78*.

162. Be that as it may, I consider that it is not necessary to answer the second question referred, since the referring court will have sufficient guidance from the answers to the first and third questions in order to resolve the cases in the main proceedings.

V. Conclusion

163. For the reasons set out above, I propose that the Court should answer the questions referred for a preliminary ruling by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) as follows:

1. The second subparagraph of Article 19(1) TEU in conjunction with Article 267 TFEU should be interpreted as meaning that:

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 KRS 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 KRS 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 KRS 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 KRS 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.

The second subparagraph of Article 19(1) TEU can be applied directly by the referring court in order to disapply the Law of 26 April 2019 and declare itself competent to rule on the cases in the main proceedings in the legal framework which was applicable before the adoption of that Law.

2. The second subparagraph of Article 19(1) TEU should be interpreted as meaning that:

The considerations under point 1. above are applicable *mutatis mutandis* also in the context of the first question referred, in order to establish that the second subparagraph of Article 19(1) TEU precludes – in view of the context and constellation of other elements present in Poland and pointed out by the referring court – a judicial remedy which is vitiated by defects of effectiveness such as the one which was originally applicable in the main proceedings (paragraphs 1a, 1b and 4 of Article 44 of the Law on the KRS).

In the context and constellation of other elements present in Poland, as pointed out by the referring court, national provisions which constitute an obstacle to bringing about the aims of the second subparagraph of Article 19(1) TEU should be disapplied by the referring court. In the present context the referring court should therefore disapply (i) provisions which would entail the total exclusion of the possibility to review any error of assessment of the judicial candidates in the light of the criteria which are imposed on them; and (ii) the partially definitive character of KRS resolutions as regards candidates which were appointed. Otherwise, the judicial review of such a resolution would be illusory in relation to the candidate who was appointed.

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1 Original language: English.

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2 See the article on the UK Internal Market Bill, which enables the UK government to breach international law and exempts some of its powers from legal challenge: https://www.theguardian.com/law/2020/oct/07/brexit-strategy-puts-uk-on-slippery-slope-to-tyranny-lawyers-told.

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3 Since the enforcement of EU law is decentralised, the entire EU system of judicial protection is predicated on the premiss that the Member States enjoy and cherish (indeed, protect) an independent judiciary that is capable of providing effective judicial protection of EU rights. See Lenaerts, K., *On Judicial Independence and the Quest for National, Supranational and Transnational Justice*, in Selvik, G. and others (eds.), *The Art of Judicial Reasoning*, Springer, 2019, p. 173.

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4 See also my previous Opinions in Minister for Justice and Equality (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:517), in Commission v Poland (Independence of the Supreme Court) (C-619/18, EU:C:2019:325), in Commission v Poland (Independence of ordinary courts) (C-192/18, EU:C:2019:529), in Joined Cases 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:2019:551), and in Joined Cases Miasto Łowicz and Prokuratura Okręgowa w Płocku (Disciplinary regime for judges) (C-558/18 and C-563/18, EU:C:2019:775).See also the recent Opinion of Advocate General Bobek in Asociaţia “Forumul Judecătorilor din România”, Asociaţia “Forumul Judecătorilor din România” and Asociaţia “Mişcarea pentru Apărarea Statutului Procurorilor”, PJ and SO (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, EU:C:2020:746).

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5 Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

6 Dziennik Ustaw of 2019, item 914.

7 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, paragraph 75 and the case-law cited; given the many references to this judgment, hereafter simply as '*A. K. and Others*').

8 Judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 50, and *A. K. and Others*, paragraphs 82 and 83).

9 See judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraphs 27 to 31), and of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924, paragraphs 41 to 46).

10 Judgment of 24 March 2009, *Danske Slagterier* (C-445/06, EU:C:2009:178, paragraph 65 and the case-law cited).

11 See Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017) 835 final) of 20 December 2017, recitals 91 to 113. See, inter alia, also the Interim Report of the European Parliament on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, A9-0138/2020, 20 July 2020 (pointing out 'overwhelming evidence of rule of law breaches in Poland'), and the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe 'Joint Urgent Opinion', 16 January 2020, Opinion No. 977 / 2019. See also *ex multis* Zoll, F., and Wortham, L., *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, Fordham International Law Journal, Vol. 42, Issue 3, and Pietrzak, M., *The Foundation for Law, Justice & Society, The Constitutional Court of Poland: The Battle for Judicial Independence*, 24 May 2017, https://www.fljs.org/content/constitutional-court-poland-battle-judicial-independence (describing new laws on public media, surveillance and antiterrorism and the 'reorganisation' of the prosecution system, which the alleged neutering of the Constitutional Court permitted).

12 See judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 33 and 34 and the case-law cited).

13 Opinion of the Court 2/13, Accession to the ECHR, EU:C:2014:2454, paragraph 176 and the case-law cited.

14 See judgments of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363), and of 11 September 2014, *A* (C-112/13, EU:C:2014:2195).

15 See judgment of 5 October 2010, Elchinov (C-173/09, EU:C:2010:581, paragraph 26 and the case-law cited).

16 See judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraphs 95 and 98), and order of 12 February 2019, *RH* (C-8/19 PPU, EU:C:2019:110, paragraph 47 and the case-law cited).

17 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 58 and 59 and the case-law cited).

18 The orders of the referring court suspending the enforcement of the KRS resolutions which are the subject of the main proceedings have also resulted in the suspension of those resolutions in so far as they concern the decision on submitting a proposal for appointment to the position of Supreme Court judge. Those orders are still in force and have not been varied or set aside in accordance with the procedure laid down by national law. In spite of this, the KRS submitted the resolutions which are the subject of the main proceedings to the President of the Republic. On 10 October 2018, the President of the Republic appointed seven nominees to the position of Supreme Court Judge in the Civil Chamber, and one to the position of Supreme Court Judge in the Criminal Chamber.

19 See, to that effect, a case which also concerned the Supreme Court and the Constitutional Court of a Member State: judgment of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraphs 62 to 73 and the case-law cited).

20 Judgment of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 68 and the case-law cited).

21 Judgment of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 70 and the case-law cited).

22 See, in particular, Florczak-Wątor, M., *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne* (The decisions of the Constitutional Tribunal and their legal effects), Poznań 2006, p. 73 and the legal literature cited.

23 See also the order V CSK 101/12 of the Supreme Court of 30 January 2013.

24 Judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 61 and the case-law cited).

25 Order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277). See also pending Cases C-487/19, *W. Ż. (Chambre de contrôle extraordinaire de la Cour suprême - Nomination)* and C-508/19, *Prokurator Generalny (Chambre disciplinaire de la Cour suprême - Nomination)*. I would note that, on 4 December 2020, the Commission decided to follow up on its infringement procedure of 29 April 2020 to protect judicial independence of Polish judges by sending an additional letter of formal notice to Poland regarding the continued functioning of the Disciplinary Chamber of the Supreme Court (https://ec.europa.eu/commission/presscorner/detail/en/inf_20_2142).

26 Judgment of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000).

27 Even under its own concept of judicial dialogue developed in the judgment of 6 July 2010 (*Honeywell*), BVerfG 2 BvR 2661/06, the BVerfG should have sought clarification from the Court of Justice in a second preliminary reference (on the interpretation of the principle of proportionality, namely the balancing requirement, which was not at all subject of the first preliminary reference). As the Italian Corte costituzionale did in the judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936), following the Court's

decision in Case C-105/14, *Taricco* (EU:C:2015:555). See Editorial Comments, Common Market Law Review 57: 965–978, 2020.

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28 Indeed, international law is not concerned about the integrity of EU law and of the EU itself.

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29 Lenaerts, K., *The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties*, VerfBlog, 8 October 2020.

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30 See inter alia Mayer, F. C., *Auf dem Weg zur Richterfaustrecht?*, VerfBlog, 7 May 2020.

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31 And it is not even necessary to enter into the substance of the legal questions, where the reasoning of the BVerfG is not watertight, to put it mildly. See inter alia Timmermans, Ch., *Wie handelt er ultra vires?*, Nederlands Juristenblad, 95, 26 June 2020, p. 1791, and Ziller, J., *L'insoutenable pesanteur du juge constitutionnel allemand*, https://blogdroiteuropeen.com/. See also Poiares Maduro, M., *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court*, VerfBlog, 6 May 2020, and da Cruz Vilaca, J. L., *The Judgment of the German Federal Constitutional Court and the Court of Justice of the EU – Judicial Cooperation or Dialogue of the Deaf?*, the original is available at https://www.cruzvilaca.eu/pt/noticias/2/.

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32 Kelemen, D., Eeckhout, P., Fabbrini, F., Pech, L., and Uitz, R., *National Courts Cannot Override CJEU Judgments - A Joint Statement in Defense of the EU Legal Order*, VerfBlog, 26 May 2020. See the article for the full list of signatories.

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33 The seriousness of the mutual trust problem as regards Poland is reflected in pending cases C-354/20 PPU *(Openbaar Ministerie)* and C-412/20 PPU *(Openbaar Ministerie)*. The Rechtbank Amsterdam (Tribunal of Amsterdam, the Netherlands) for the first time decided that the performance of the European Arrest Warrant *in all pending and future proceedings* at the request of Polish courts shall be suspended until the Court answers the preliminary questions. Courts in the Netherlands, Germany, Slovakia, Spain and Ireland have so far decided to suspend the performance of a European Arrest Warrant at the request of Polish courts on a case by case basis.

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34 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 30 and the case-law cited).

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35 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 31 and the case-law cited).

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36 See judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 32 and 33 and the case-law cited).

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37 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 34 and the case-law cited).

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38 See to that effect *A. K. and Others*, paragraphs 82 and 83 and the case-law cited.

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39 See my Opinion in C-192/18, EU:C:2019:529, point 115.

40 Judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 54 and the case-law cited).

41 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117).

42 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234).

43 See, to that effect, *A. K. and Others*, paragraph 153 and paragraph 2 of the operative part.

44 See *A. K. and Others*, paragraph 145. Some legal literature even suggests that this paragraph could be interpreted as the Court imposing a specific obligation regarding the organisation of national judicial appointments, as the Court mentions that the referring court needs to make sure whether the part of the judicial appointment process which ends up with the presentation of a candidate to the President of the Republic, can be subject to judicial review at least in terms of an ultra vires or improper exercise of authority, error of law or manifest error of assessment. See Krajewski, M., and Ziółkowski, M., *EU judicial independence decentralized: A. K.*, Common Market Law Review 57 (2020).

45 This is supported by the judgment of the Constitutional Court in Case SK 57/06.

46 Council of Europe, DAJ/DOC (98) 23, Strasbourg, 8 – 10 July 1998.

47 ECtHR, 25 September 2018, *Denisov v. Ukraine*, CE:ECHR:2018:0925JUD007663911 (Grand Chamber), § 67 et seq.. See also § 79.

48 Leloup, M., An uncertain first step in the field of judicial self-government, E.C.L. Review 2020, 16(1), 145-169, p. 156.

49 See, in relation to the second paragraph of Article 47 of the Charter, judgment of 13 December 2017, *El Hassani* (C-403/16, EU:C:2017:960, paragraph 39). I consider that the approach cannot be different under the second subparagraph of Article 19(1) TEU.

50 These are *A. K. and Others*, and 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).

51 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, paragraph 55).

52 See the Supreme Court judgment of 5 December 2019 and the Grand Chamber resolution of the three Supreme Court divisions of 23 January 2020 (‘the resolution of 23 January 2020’).

53 See paragraphs 40-41 of that judgment. The new Law on the KRS dismissed the elected members of the KRS before the end of their term and changed the rules of election. The original election by judges, of different types and level of court, was replaced by the ultimate power of Parliament to elect 15 members of the KRS. Since the Sejm would decide on the majority of the KRS's members, the balance between the three branches of power, provided in constitutional terms in Art. 187(1) of the Constitution, had been distorted.

54 See Case III Po 7/18, judgment of the Polish Supreme Court of 5 December 2019, in particular, paragraphs 40-41, 46-48, 49, 50-51 and 56.

55 BSA I-4110-1/20. See the English version available here: www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf.

56 See also the following paragraph of the present Opinion. The Venice Commission opinion is cited in footnote 11 above.

57 On the basis, inter alia, that under that law, the content of judicial decisions can be considered to be a disciplinary offence; the law prevents Polish courts from fulfilling their obligation to apply EU law or request preliminary rulings. It also prevents Polish courts from assessing, in the context of cases pending before them, the power to adjudicate cases by other judges. After the *A. K. and Others* judgment of 19 November 2019 and the Supreme Court judgment of 5 December 2019, Poland introduced legislation to make national judges liable to disciplinary sanctions if they question the legitimacy of certain aspects of the judicial reforms in Poland (see Leloup, op.cit.).

58 The ENCJ also mentions a letter by the European Association of Judges, representing the majority of judges in Europe, and a joint letter by the Polish Judges' Association, *Iustitia*, the Association of Family Court Judges, *Pro Familia*, the Polish Association of Administrative Court Judges, and the Permanent Presidium of the Judges' Cooperation Forum. Both letters publicly support the proposal to expel the KRS from the ENCJ.

59 Opinion No. 977/2019, CDL-PI(2020)002. See, in particular, points 8 and 31 et seq.

60 See ECtHR, *Oleksandr Volkov v. Ukraine* (no. 21722/11), §§ 109-117 and 130; *Özpinar v. Turkey*, no. 20999/04, §§ 78-79.

61 See ECtHR, *Findlay v. UK* (no. 22107/93), § 73; ECtHR, *Sramek v. Austria* (no. 8790/79), § 42; *Campbell and Fell v. UK*, no. 7819/77 and 7878/77, § 78; ECtHR, *Cooper v. UK* (no. 48843/99), § 104; ECtHR, *Sacilor Lormines v. France* (no. 65411/01), § 63; and ECtHR, *Clarke v. UK* (no. 23695/02).

62 Krajewski, and Ziółkowski, op.cit., p. 1128.

63 Krajewski and Ziółkowski, op.cit., p. 1128, referring to the Constitutional Court's judgment in Case SK 57/06.

64 Opinion No. 10 (2007) of the [CCJE] to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, 23 November 2007, Strasbourg.

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65 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, paragraph 74).

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66 I would note that, on 1 December 2020, that interim judgment was confirmed and the Grand Chamber of the ECtHR held, unanimously, that there had been a violation of Article 6(1) ECHR on account of grave breaches in the appointment of a judge to the Icelandic Court of Appeal (Application no. 26374/18).

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67 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, paragraph 75).

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68 See points 121 et seq. of the present Opinion. See also *A. K. and Others* and the order in C-791/19 R (EU:C:2020:277).

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69 See paragraphs 1a, 1b and 4 of Article 44 of the Law on the KRS.

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70 See judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 34 and the case-law cited).

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71 The Court refers here, to that effect, to ECtHR, 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, §§ 25 and 81.

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72 See judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraph 57).

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73 Judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 299).