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Legal Opinion about the Consequences of Judgment of the Court of Justice of the European Union on the National Council of the Judiciary and the Disciplinary Chamber in the Light of European Union Law

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I. Introduction

1. This legal opinion (the "Opinion") was prepared at the request of the Batory Fundation.
2. The subject-matter of this Opinion is defining the consequences of the judgment issued by the Court of Justice of the European Union (the "Court" or "CJEU") on 19 November 2019 in Joined Cases *A.K. v. Krajowa Rada Sądownictwa* (C-585/18) and *CP* (C-624/18), *DO* (C-625/18) *v. Sąd Najwyższy* [1](the "Judgment") in the light of EU law.
3. To begin with, I will present the conclusions.

II. Conclusions

1. **This judgment is of pivotal importance. In particular the Court ruled that the circumstances in which members of the National Council of the Judiciary (the "KRS") were elected and the way in which the KRS functions may be evaluated from the point of view of EU law. What follows unequivocally from the judgment is that the KRS has to offer sufficient guarantees of independence from the legislative and executive authorities.**
2. **This is yet another judgment in which the Court has held that, although the organisation of justice in the Member States falls within the competence of the latter, when exercising that competence, the Member States are required to comply with their obligations deriving for them from EU law.**
3. **The importance of the Judgment goes well beyond the case in which referrals for preliminary rulings were made. It is not only the Disciplinary Chamber (the "ID"), but also all other courts whose judges are appointed with the involvement of the KRS, that have to meet the standards specified in the Judgment. In particular, once the KRS' potential lack of independence from the legislature and the executive results in lack of independence and impartiality of ID judges, it also results – to this extent – in lack of independence and impartiality of other judges appointed with the participation of the KRS.**
4. **In order to hold that a given body is not a court within the meaning of EU law, in the light of the Judgment it is necessary to check the objective circumstances**

[1] ECLI:EU:C:2019:982.

in which members of this court have been appointed (in practice whether the KRS that was involved in their appointment is independent of the legislative and executive branches), the objective circumstances in which the given court was established, as well as the features of this body, and then to make an assessment whether then can give rise to individuals' legitimate doubts as to the court's imperviousness to outside influence. The court deciding the case (another evaluating authority) is not limited to the influences enumerated in the Judgment, but can refer to any other sufficiently proven material circumstances of which it becomes aware.

5. **Recognition that a given authority is not a court within the meaning of EU law means, in accordance with the principle of primacy of European law over national law, that it is necessary to disregard any national provisions which might hamper full effectiveness of EU law, including provisions that grant jurisdiction to a given court.**
6. **Provisions of the Act of 20 December 2019 on Amendments to the Act - Law on the System of Ordinary Courts, the Act on the Supreme Court, and Certain Other Acts, pursuant to which provisions an ordinary court, the Supreme Court, a military court, an administrative court or another authority is not permitted to assess the lawfulness of a judge's appointment or authorisation to perform tasks in the field of administration of justice, resulting from said appointment, and provisions to the effect that any actions challenging the existence of a service relationship of a judge, the effectiveness of a judge's appointment, or the legitimacy of a constitutional authority of the Republic of Poland constitute a disciplinary offence, are inconsistent with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.**
7. **CJEU Judgment does not automatically set aside or declare non-existent any judgments issued by judges appointed in contravention of EU law. However, ordinary and extraordinary means of appeal taking into account the standard resulting from the Judgment can be filed with courts.**
8. **The Judgment's effectiveness cannot depend on its "confirmation" by the Constitutional Tribunal.**
9. **As currently composed and in the current format, the KRS – as a body which in the light of the Judgment and the judgment of the Supreme Court (the "SN") is not independent from the legislature and the executive – should immediately suspend any activity.**
10. **The legislature should, as a minimum, immediately end the term of the KRS with the current members and format, and lay down the rules of election of new KRS members so as to ensure meeting European standards: independence of the KRS of the legislature and the executive, as well as abolish ID, while transferring the cases the Chamber was dealing with to another one (e.g. the Criminal Chamber).**

III. Facts. Judgment

1. The case came before the CJEU as a result of references for a preliminary rulings from the Polish SN in cases concerning one judge of the Supreme Administrative Court (the "NSA") and two SN judges, in connection with the entry into force of the Act of 8 December 2017 on the Supreme Court. According to that Act, judges of the Supreme Court (and NSA judges, to whom the act applied *mutatis mutandis*) as a rule retired at the age of 65, unless within the specified time period, they submitted a declaration

that they were willing to continue in their posts and a certificate of good health, and the President of the Republic consented to their continuing in their posts of SN (NSA) judges. According to the procedure set out in those provisions, prior to granting consent the President of the Republic was required to consult the KRS. Under that Act, judges who had reached the age of 65 by 3 July 2018 were required to retire on 4 July 2018, unless they submitted those documents within the prescribed time period and the President of the Republic granted consent for them to continue in judicial posts following the procedure set out in the Act.

2. Case C-585/18 concerned an appeal of an NSA judge against a negative opinion of the KRS. Cases C-624/18 and C-625/18 concerned actions brought by two SN judges for determination that their service relationships as active SN judges has not become service relationships of retired SN judges. Those judges had reached the age of 65 before 3 July 2018, but had not submitted declarations to continue in their posts pursuant to the SN Act. Consequently, the President of the Republic announced their retirement as of 4 July 2018.
3. In those circumstances the SN decided to stay the proceedings in the case concerning the NSA judge and to refer the following questions to the Court for a preliminary ruling:

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

4. Also in the cases concerning SN judges, the SN decided to stay the proceedings, and to refer the following questions to the Court for a preliminary ruling:

(1) Should Article 47 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 9(1) of [Directive 2000/78], be interpreted as meaning that, where an appeal is brought before a court of last instance in a Member State against an alleged infringement of the prohibition of discrimination on the ground of age in respect of a judge of that court, together with a motion for granting security in respect of the reported claim, that court — in order to protect the rights arising from EU law by ordering an interim measure provided for under national law — must refuse to apply national provisions which confer jurisdiction, in the case in which the appeal was lodged, on an

[2] Decision of the SN judgment of 30 August 2018, case III PO 7/18. A subsequent Case C-585/18.

organisational unit of that court which is not operational by reason of a failure to appoint judges adjudicating within it?
(2) In the event that judges are appointed to adjudicate within the organisational unit having jurisdiction under national law to hear and determine the action brought, on a proper construction of the [third] paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the Charter of Fundamental Rights, is a newly-created chamber of a court of last instance of a Member State which has jurisdiction to hear the case of a national court judge at first or second instance and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts, namely the [KRS], which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, an independent court or tribunal within the meaning of EU law?
(3) If the answer to the second question is negative, should the [third] paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the Charter of Fundamental Rights, be interpreted as meaning that a chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court seized with an appeal in an EU case should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?"[3]

5. By decision of the Court, the cases were joined. By order of 26 November 2018, the President of the Court accepted the SN's request that the present cases be subject to the expedited procedure[4].

6. In his opinion of 27 June 2019,[5] Advocate General **E. Tanchev suggested that the Court should answer these questions as follows**:

"(1) There is no need to give a ruling on Question 1 in Cases C-624/18 and C-625/18.
In the alternative, Article 47 of the Charter of Fundamental Rights of the European Union, in conjunction with Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, should be interpreted as meaning that, where an appeal is brought before a court of last instance in a Member State against an alleged infringement of the prohibition of discrimination on the ground of age in respect of a judge of that court, together with a motion for granting security in respect of the reported claimed, that court — in order to protect the rights arising from EU law by ordering an interim measure provided for under national law — must disapply national provisions which confer jurisdiction, in the case in which the appeal was lodged, on an organisational unit of that court which is not operational by reason of a failure to appoint judges adjudicating within it.
(2) The requirements of judicial independence laid down in Article 47 of the Charter should be interpreted as meaning that a newly-created chamber of a court of last instance of a Member State which has jurisdiction to hear a case by a national court judge and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts, namely the National Council of the

[3] Decision of the SN judgment of 19 August 2018, cases III PO 8/18 and III PO 9/18. Subsequent Cases C-624/18 and C-625/18.
[4] EU:C:2018:977.
[5] ECLI:EU:C:2019:551.

Judiciary, which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, does not satisfy those requirements.
Application of the second subparagraph of Article 19(1) TEU leads to the same conclusion.
(3) A chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court seized with an appeal in an EU case is required by the primacy of EU law to disapply provisions of national legislation which preclude it from having jurisdiction in that case."

7. **In the Judgment the Court held that**:
"(1) It is no longer necessary to answer questions referred by the Labour Law and Social Security Chamber of the Supreme Court in Case C-585/18 or the first question referred by the same court in Cases C-624/18 and C-625/18.
(2) The answer to the second and third questions referred by the aforementioned court in Cases C-624/18 and C-625/18 is as follows:
Article 47 of the Charter of Fundamental Rights of the European Union and Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provision. That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Supreme Court.
If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field."

8. The judgment has an extensive statement of reasons[6]. For the subject-matter of the present Opinion, the following CJEU statements are particularly important.
9. First of all, referring to its own earlier case law and the case law of the European Court of Human Rights, the CJEU stated that the mere fact that ID judges were appointed by the President of the Republic could not result in their subordination to the latter or give rise to doubts about their impartiality if, after the appointment, no pressure was exerted on these persons and they received no recommendations

[6] The whole Judgment consists of 172 paragraphs.

when carrying out their role[7]. 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[8]. In this context, the CJEU pointed out, among other things, that judges in Poland are appointed by the President of the Republic on a proposal of the KRS, that is, the body empowered under Article 186 of the Constitution to ensure the independence of the courts and judges[9]. According to the CJEU, an intervention of such a body in the process of judicial appointments may, as a rule, contribute to making that process more objective[10]. However, that is only the case provided that the body is itself sufficiently independent of the legislature and the executive and of the authority to which it is required to deliver such an appointment proposal[11]. This is so because the degree of independence enjoyed by the KRS in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter of Fundamental Rights of the European Union (the "Charter")[12].

10. **Then,** the Court held that it would be for the SN to ascertain whether or not the KRS offers sufficient guarantees of independence in relation to the legislature and the executive, having regard to all of the relevant points of law and fact relating both to the circumstances in which the members of that body were appointed and the way in which that body actually exercised its role[13]. Here, the Court referred to the factors enumerated in the questions submitted by the SN. Importantly, the CJEU assumed that although one or other of the factors thus pointed to by that court might be such as to escape criticism *per se* and may fall, in that case, within the competence of, and choices made by, the Member States, when taken together, in addition to the circumstances in which those choices were made, they might by contrast, throw doubt on the independence of a body involved in the procedure for the appointment of judges, despite the fact that, when those factors were taken individually, that conclusion would not be inevitable[14].
11. Having adopted such a reservation, the CJEU identified the following factors which should be taken into account in assessing whether the KRS was independent of the legislature and the executive: **first**, the fact that the KRS, as newly composed, was formed by means of reducing the ongoing four-year term in office of the members of that body at that time; **second**, the fact that whereas the 15 members of the KRS elected among members of the judiciary were previously elected by their peers, those judges are now elected by the legislature from among candidates capable of being proposed by groups of 2,000 citizens or 25 judges, such a reform leading to

[7] Para. 133.
[8] Para. 134. Here the Court referred to judgment of 24 June 2019, C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:531, para. 111.
[9] Para. 136.
[10] Para. 137.
[11] Para. 138.
[12] Para. 139.
[13] Para. 140.
[14] Para. 142.

appointments bringing the number of members of the KRS directly originating from or elected by the political authorities to 23 of the 25 members of that body; **third**, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed KRS; **fourth**, the way in which that body exercises its constitutional task of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive; **fifth,** the issue whether the way in which the Polish law determines the scope of an action challenging a resolution of the KRS concerning a proposal for appointment to the post of a SN judge, allows an effective judicial review of KRS resolutions in the matter of appointments to the post of a SN judge[15].

12. Regardless of conducting the aforementioned assessment concerning the KRS, the Court indicated that the SN "may… also wish" to assess the ID directly. For the purposes of ascertaining whether that the ID and its judges meet the requirements of independence and impartiality, the CJEU the following factors to be likely to be relevant: **firstly**, the ID being granted exclusive jurisdiction in cases in the scope of the employment, social security and retirement of SN judges, which previously fell within the jurisdiction of the ordinary courts, in particular the fact it took place in conjunction with the adoption of the provisions which lowered the retirement age of the judges serving in the SN at that time and empowered the President of the Republic with discretion to extend their exercise of active judicial service; **secondly**, the ID must be constituted solely of newly appointed judges, excluding judges already serving as SN judges; **thirdly**, the high degree of autonomy of the ID within the SN[16]. Also in this case the CJEU held that although any one of the aforementioned facts was indeed not capable, *per se* and taken in isolation, of calling into question the independence of a chamber such as the ID, that might, by contrast, **not be true once they were taken together, particularly if the abovementioned assessment as regards the KRS were to find that the KRS lacked independence in relation to the legislature and the executive**[17].
13. According to the Court, the SN will need to assess whether, taken together, the factors referred to above and all the other relevant and sufficiently proven findings of fact which it will have made are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the ID 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, thus, whether they may lead to that chamber 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[18].
14. The CJEU believes that if the SN holds the ID not to be an independent and impartial tribunal, it will have to, pursuant to the principle of primacy of EU law over national law, refer the case in which it made the referral for a preliminary ruling to the CJEU, to be determined by the court which had jurisdiction to hear it pursuant to provisions in force before the legislative amendment that conferred jurisdiction on the ID.

[15] Paras. 143-145.
[16] Paras. 147-151.
[17] Para. 152.
[18] Para. 153.

15. In this regard the CJEU reminded that the principle of primacy requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States[19]. Consequently, any national court, hearing a case within its jurisdiction, has an 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[20]. The Court pointed out that Article 47 of the Charter is such a provision with direct effect[21].
16. **Finally,** the Court spoke about Articles 2 and 19 of the Treaty on the European Union (the "TEU"). The Court reminded 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[22]. In turn, the 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, currently confirmed by Article 47 of the Charter, meaning that the former provision requires all 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[23].
17. In view of the above, the Court held that it did not appear necessary to conduct a distinct analysis of Article 2 and the second subparagraph of Article 19(1) TEU, **which could in its view only reinforce the conclusions already set out earlier**, for the purposes of answering the questions posed by the referring court and resolving the cases before it[24].

IV. Analysis

1. **This judgment is of pivotal importance**. Although it differs from the opinion of the Advocate General, in the sense that the CJEU has not itself determined whether the ID is an impartial and independent tribunal, while the KRS – a body independent from the legislature and the executive. Yet it has to be borne in mind that the CJEU relatively infrequently issues judgments in which it determines the outcome of the main proceedings in the procedure of preliminary rulings[25]. What happens more often is that the CJEU gives certain guidelines to the national court on the basis of the Court's interpretation of EU law, leaving the decision (applying of the interpretation) to the referring court[26]. As indicated above, in the statement of reasons for the Judgment,

[19] Para. 158.
[20] Para. 161.
[21] Para. 162.
[22] Para. 167.
[23] Para. 168. The Court again referred to the judgment in Case C-619/18 *Commission v Poland*, paras. 47, 49 and 54.
[24] Para. 169.
[25] Cf. also T. Tridimas, *Bifurcated Justice: The Dual Character of Judicial Protection in EU Law* [in:] *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, 369-371.
[26] Cf. also P. Filipek, who, in his comments about the CJEU's failure to unequivocally determine in the Judgment whether the ID is an impartial and independent tribunal, points out: "In the procedure of preliminary rulings, while developing the European constitutional model, the CJ left its application to the national law. This reflects the character of the procedure of preliminary rulings, where the CJ provides guidance on interpreting EU law, but as a rule leaves it to the referring court to determine its results in the specific case, without doing this task for said court. Therefore the Court of Justice indicates a normative standard, explaining the general norm, while the national makes the subsumption."; idem, *Irremovability of Judges and the Limits of a the Member State's Competence to Regulate Domestic Judiciary: Remarks in the Light of Court of the*

the Court set out the criteria to be used by the SN in assessing whether the ID is an impartial and independent tribunal within the meaning of EU law. Part of these criteria concern directly the KRS as a body which is involved in the procedure of appointing ID judges. **This way the Court determined that the circumstances in which members of the KRS were elected and the way in which the KRS operates may be evaluated from the point of view of EU law**. **What follows unequivocally from the judgment is that the KRS has to offer sufficient guarantees of independence from the legislative and executive authorities.** Considering that as early as in the judgment in case C-619/18 *Commission v Poland*, the Court ruled that a body such as the KRS had to be independent in relation to the legislature and the executive[27], we can speak of the Court's established position in this regard.

2. The Judgment elaborates on the existing case law, where the Court stated that **guarantees of independence and impartiality of judicial bodies require rules, particularly as regards the composition of the body and the appointment**, length of service and grounds for abstention, rejection and dismissal **of its members**, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it[28].
3. The Court has already issued some rulings concerning the rules of appointing members of adjudicating bodies[29]. For instance, in Case C-175/11, *D. and A.*, the CJ ruled that provisions governing the appointment of members of the Refugee Appeals Tribunal were not capable of calling into question the independence of that tribunal, because the members "are appointed for a specific term from among persons with at least five years' experience as a practising barrister or a practising solicitor, and the circumstances of their appointment by the Minister do not differ substantially from the practice in many other Member States"[30]. The Court refers to this ruling in the Judgment, indicating that the mere fact that ID judges are 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"[31]. In such a case, according to CJEU, 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[32].

Justice Judgment of 24 June 2019, in Case C-619/18, European Commission v Poland, "Europejski Przegląd Sądowy" 12/2019, 7.

[27] Cf. para. 115.

[28] Thus, e.g. in judgment of 25 July 2018 in Case C-216/18 PPU, *LM*, EU:C:2018:586, para. 66 and the case law cited there; also in judgment of 24 June 2019 in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:531, para. 74. Cf. also Judgment, para. 123.

[29] Although the case law is not extensive, in particular compared to case law relating to removal of judges from office *ex officio*. More on the subject: P. Bogdanowicz, M. Taborowski, *Lack of independence of the National Courts as Failure to Fulfil an Obligation within the Meaning of Art. 258 TFEU (Part I)*, "Europejski Przegląd Sądowy" 1/2018, 9-11.

[30] Judgment of 31 January 2013 in Case C-175/11, *D. and A.*, EU:C:2013:45, para. 99. Cf. also judgment of 9 October 2014 in Case C-222/13, *TDC A/S*, EU;C:2014:2265, concerning members of Teleklagenævnet (Telecommunications Complaints Board), appointed by the Minister for Enterprise and Growth for a period of four years, with the option of renewal of their term (para. 33).

[31] Cf. para. 133.

[32] Cf. para. 134.

4. **The Judgment is yet another one in which the Court has held that, although the organisation of justice in the Member States falls within the competence of the latter, when exercising that competence, the Member States are required to comply with their obligations deriving for them from EU law**[33]**.** By now the issue should not give rise to any doubts. But the Judgment goes further and confirms that this obligation also applies to the independence of a body like the KRS in relation to the legislature and the executive. **Compared to its earlier case law, the Court further clarified the criteria for assessing the independence of the KRS from the legislature and the executive, while stating that the criteria concern both the appointment of the KRS and its operation**[34].
5. The Judgment does not mean that every European state needs a body like the KRS. However, if it does exist and does participate in the process of appointing judges, like in Poland, the body needs sufficient independence from the legislature and the executive, as well as the authority to which is makes the motion for a judge to be appointed[35].
6. **The importance of the Judgment goes well beyond the case in which referrals for preliminary rulings were made**. **It is not only the ID, but also all other courts whose judges are appointed with the KRS' involvement, that have to meet the standards specified in this judgment**. In particular, once the KRS' potential lack of independence of the legislature and the executive results in lack of independence and impartiality of ID judges, it also results – to this extent – in lack of independence and impartiality of other judges in whose appointment the KRS was involved. **Contrary to the views voiced by some, including the SN President who chairs the work of the ID[36] and the KRS itself[37], the judgment does not only apply to the one NSA judge and the two SN judges, whose cases the preliminary ruling procedure concerned. According to CJEU case law, interpretation of EU law provided by the CJEU is binding on all the national courts and tribunals of the Member States** (cf. judgment in Case C-8/08 *T-Mobile Netherlands et al.*, ECLI:EU:C:2009:343[38]). This standpoint is also expressed by legal scholars[39].
7. **In the SN's view, expressed back in 2015** "*there are compelling arguments in favour of recognition of* ***relative binding force*** **erga omnes** *of CJEU interpretive judgments, in particular for the courts that are obligated to make a reference for a preliminary ruling under the third paragraph of Article 267 TFEU, the Supreme Court being one of them*..."[40]. According to the SN, the "relative" binding force *erga omnes* manifests itself in that the only legal path for challenging a relatively binding CJEU judgment is through making a new request for a preliminary ruling and obtaining another CJEU judgment

[33] The Court stated so expressly in para. 75.

[34] Cf. also the SN in judgment of 5 December 2019, case III PO 7/18, para. 26: "what matters is the practice and the whole complex context of the legal and factual milieu in which the body exercises its constitutional powers".

[35] Para. 138 of the Judgment.

[36] Cf. "Statement of the Supreme Court President chairing the work of the Supreme Court Disciplinary Chamber" of 19 November 2019: "... it [the Judgment] binds only the court which made the referral and only in the case it concerns. Therefore any references to the findings contained in it are ineffective in other judicial proceedings."

[37] Cf. "Standpoint of the National Council of the Judiciary of 21 November 2019 in the mater of judgment of the Court of Justice of the EU dated 19 November 2019."

[38] Cf. para. 50.

[39] Cf. K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford 2014, 244-246; and P. Dąbrowska-Kłosińska, *Skutki wyroków prejudycjalnych Trybunału Sprawiedliwości Unii Europejskiej w postępowaniu przed sądami krajowymi w świetle orzecznictwa Trybunału i prawa Unii Europejskiej* [in:] A. Wróbel (ed.), *Zapewnienie skuteczności orzeczeń sądów międzynarodowych w polskim porządku prawnym*, Warsaw 2011, 391-418 and the arguments quoted.

[40] Cf. decision of a panel of 7 SN judges of 14 October 2015 in case I KZP 10/15.

interpreting EU law. As the SN argues later on, recognition of the relative binding force of preliminary rulings results also in accepting a statement which goes further: ***"if the indirect conclusion from the CJEU judgment is that the national provision is inconsistent with the interpreted EU provision, the obligation to disapply that provision of national law is borne not only by the court which made the request for a preliminary ruling, but by all other courts"***.

8. Finally, in the judgment of 5 December 2019, that is, the judgment in the case in which the referral for a preliminary ruling was made to the CJEU (C-585/18), **the SN stated expressly that the results of the standard (procedural mechanism) presented in the Judgment "bind the Supreme Court and all other courts and bodies in Poland, as well as in other Member States"**[41].
9. Once the Court's interpretation of provisions EU law is binding for all national courts of the Member States, this means that in every case decided by a national body capable of determining, as a court, matters relating to the application or interpretation of EU law, its independence and impartiality should be assessed by checking whether the KRS gives sufficient guarantees of independence from the legislature and the executive. This is emphatically stressed by the SN: "an indispensable element of assessing whether a body referred to as a court is a tribunal independent in relation to the legislature and the executive within the meaning of EU law is determining whether in the formation of this body there participated a body tasked with safeguarding the independence of courts and judges, which body indeed performs its functions in a manner giving sufficient guarantee of independence from the legislature and the executive."[42]
10. As has been mentioned above, in the Judgment the CJEU identifies five factors to be taken into account when assessing whether the KRS is independent from the legislature and the executive. Importantly, **it is there factors taken together that matter, not the assessment of each of them separately**[43]. Once again, the Court drew attention to the context of the amendments. Such a comprehensive approach of the CJ to legislative amendments relating to judicial independence can be found not only in the Judgment, but also in the judgment in Case C-192/18 *Commission v Poland (Independence of ordinary courts)*[44] and the judgment in Case C-619/18 *Commission v Poland (Independence of the Supreme Court)*[45]. It involves assessing precisely the combined effect of the solutions introduced by Poland, rather than individual amendments relating to irremovability of judges or their appointments[46].
11. We should observe that **the first two factors have an objective character**: As newly composed, the KRS was formed by means of reducing the four-year term in office of

[41] Para. 22 of SN judgment of 5 December 2019, case III PO 7/18. In the statement of reasons, the SN indicates that "the principle of universally binding nature of the Court of Justice's interpretation of EU law follows from the essence and function of preliminary rulings procedure and autonomy of EU law in relation to national law" and refers to the Polish legal scholarship on this subject.

[42] Para. 25.

[43] Therefore the CJEU seems to have gone further than in the cited judgment in Case C-175/11 *D. and A.*, where it pointed out that the validity of decisions of the Refugee Appeals Tribunal could be questioned before the High Court, the decisions of which could be appealed against to the Supreme Court, hence "[t]he existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members" (para. 103).

[44] Judgment of 5 November 2019 in Case C-192/18, *Commission v Poland*, EU:C:2019:924, pkt 127.

[45] Paras. 84-85.

[46] Cf. P. Bogdanowicz, M. Taborowski, *The Retirement Age Regulations as a Tool to Remove a Particular Group of the Supreme Court Judges: Some Remarks about Court of Justice Judgment of 24 June 2019, C-619/18,* European Commission v Poland, "Europejski Przegląd Sądowy" 12/2019, 22.

the members of the previous KRS; currently 23 out of 25 KRS members originate from or are elected by the political authorities.

12. Although, as for the circumstances in which the KRS was formed, the statute that reduced the term of the previous KRS was adopted in connection with the judgment of the Constitutional Tribunal (the "TK") of 20 June 2017 in case K 5/17, which pronounced Article 11(2)-(4) and Article 13(3) of the KRS Act incompatible to the Constitution to the extent to which they provided for individual terms of office of KRS members who were judges. But as the SN correctly pointed out in its judgment dated 5 December 2019, not only cannot the view of the TK be defended on the basis of Article 194(1) of the Constitution, but, first and foremost, it was issued by said body in a composition inconsistent with the constitutional standard established in TK case law[47].
13. **Compared to the first two factors, the case of the third factor is different**. It concerns the possible irregularities that may have occurred in the process of appointment of certain members of the KRS, as newly composed. As the CJEU stated, the referring court (and once the judgment also binds all other courts and tribunals in Poland and in other Member States, also those courts and tribunals) will be obligated to verify those irregularities if need arises.
14. The referring court, the SN, made such a verification in its judgment of 5 December 2019, and concluded: "In this regard, the issue concerns the lists on which judges allegedly expressed their support for the candidates. Until now it has not been verified whether the candidates were put out in accordance with the law or who supported them. The relevant documents have not been disclosed yet, despite the judgment issued in the case by the Supreme Administrative Court on 28 June 2019, OSK 4282/18 (LEX No. 2694019). As we know, enforcement of the judgment has been suspended by a decision of the President of the Personal Data Protection Office of 29 July 2019, which was issued upon the initiative of one of the new KRS members. Hence a situation exists where a court whose tasks include reviewing the administration is actually subject to the latter's review. *Failure to enforce the NSA judgment justifies the presumption that the contents of the lists of support for individual judges-candidates for KRS members confirms the candidates' subordination to the legislature or the executive*."[48] [emphasis added]. The SN goes on to identify the circumstances accompanying the selection of the current KRS members, which circumstances give rise, in an average individual's mind, to doubts as to the KRS' independence from the executive[49], withdrawal of support before the lapse of the time period for nominating candidates, and at least one member of the new KRS having supported himself as a candidate[50].

[47] Cf. para. 40 of SN judgment. Cf. on this topic also A. Rakowska-Trela, *Krajowa Rada Sądownictwa po wejściu w życie nowelizacji z 8.12.2017 r. – organ nadal konstytucyjny czy pozakonstytucyjny?* [in:] Ł. Bojarski, K. Grajewski, J. Kremer, G. Ott, W. Żurek, *Konstytucja. Praworządność. Władza sądownicza. Aktualne problemy trzeciej władzy w* Polsce, Warsaw 2019, 119-121.

[48] Cf. para. 45. Similarly the Ombudsman, who in the written remarks of 3 December 2019 to the CJEU in Case C-487/19, *W.Ż.*, included a remark that actions of the President of the Personal Data Protection Office, as well as the fact that a group of Polish MPs challenged before the TK Article 11c of the KRS Act, understood as not giving grounds for refusal to provide public information in the form of a list of judges supporting the nominations of KRS candidates elected from among judges, as inconsistent with the Constitution, should be seen as intentional hampering of the publication of support lists, which gives rise to doubts both as to the legality of the procedure of putting out candidates for KRS members and as to the legality of appointments and the operation of the KRS in general. Para. 61.

[49] For instance that judges were recommended for the KRS by district court presidents appointed by the Minister of Justice; they were also nominated by e.g. judges subordinate to the candidate holding a managerial position in a court of higher instance, by an attorney of the Institute of Justice at the Ministry of Justice, and that some of the elected members of the future KRS worked at the Ministry of Justice (para. 46).

[50] Cf. para. 46.

15. In this context we should also mention the order of the Regional Court in Olsztyn dated 20 November 2019, requesting the Head of the Chancellery of the Sejm [Lower House of the Parliament] to present the documents submitted to the Chancellery of the Sejm in connection with the Announcement of the Speaker of the Sejm of the Republic of Poland of 4 January 2018 on the procedure of nominating candidates for members of the National Council of the Judiciary elected from among judges: the nominations and lists of citizens and lists of judges who supported candidates for KRS members, as well as citizens' and judges' statements on withdrawal of support for such candidates[51]. The order was issued as part of enforcement of the Judgment. As has been mentioned above, **once the Judgment binds other courts in Poland, not only the referring court (the SN), then those other courts have a duty to verify the irregularities that might have affected the process of appointment of certain members of the KRS, as newly composed, where they consider it necessary**. I will return to this issue later in this Opinion, when discussing the Act of 20 December [xx] on Amendments to the Act – Law on the System of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts, passed by the Sejm.
16. **As for the fourth element**, the CJEU holds that the referring court (hence any other court or tribunal) can also take into account the way in which the KRS exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive. In this regard, the SN observed, among other things, that the KRS failed to take any action to defend the independence of the SN and of SN judges, in connection with an attempt to unlawfully force them to retire. On the contrary, the KRS issued an opinion where it considered that the First President of the Supreme Court was no longer an active judge and thus vacated the position. The SN also recalled the public statements of KRS members, requesting the initiation of disciplinary proceedings against judges who made references for preliminary rulings and denying them the right to make such references. These are only some of the arguments used by the SN to demonstrate that the way in which the KRS exercised its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers was indeed capable of calling into question its independence in relation to the legislature and the executive52.
17. **The above elements have been sufficient for the SN to ascertain that the current KRS does not give sufficient guarantees of independence in relation to the legislature and the executive in the procedure of appointing judges**[53]. Thus the SN omitted in this part of its reasoning the fifth element identified by the CJEU in the Judgment, namely whether the way in which Article 44(1) and (1a) of the KRS Act defined 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, allowed 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[54]. For clarity, it should be added that later in the judgment, the SN did point out that

[51] The order was issued *in camera*, in case IX Ca 1302/19.
[52] Cf. more broadly in paras. 50-59.
[53] Para. 60. The SN assessed the status of assistant judges separately.
[54] Para. 145.

appeal was not available in individual cases concerning appointment to the post of a SN judge, although in the process of nominations for ordinary courts this fundamental right was retained (*vide* Article 44 of the KRS Act). According to the SN, a solution of this kind leaves an open path for the KRS, which "in a completely unrestricted manner obtained the authority to recommend candidates for judicial posts, in a procedure excluded from judicial review"[55].

18. **The very fact that, in the opinion of the CJEU, lack of judicial review of KRS resolutions[56] may be evaluated in the light of EU law deserves attention**. It seems that the CJEU ruled so because decisions of the President of the Republic in matters of appointments of SN judges could not be reviewed by courts. But there is no such obstacle in the case of KRS resolutions. In this respect, the CJEU presents a different view from the judgment in Case C-619/18, *Commission v Poland*, where it held that an opinion of the KRS concerning the possibility of extending a judge's active service should be issued on the basis of objective and relevant criteria and be duly substantiated[57], but without indicating it had to be subject to judicial review. In Case C-619/18, *Commission v Poland*, the Court did, however, draw attention to the fact that the decision of the President of the Republic on (refusal of) extension of a judge's active service could not be challenged before a court[58]. The difference can be explained in the following way. In the case which the Judgment concerns, we are dealing with a prerogative of the President of the Republic to appoint judges, so only KRS resolutions could be subject to judicial review. In Case C-619/18, *Commission v Poland*, the situation was different. KRS opinions were non-binding, thus their judicial review would not be of any major importance. Anyway, in the proceedings before the CJEU, the Commission did not challenge the lack of possibility to appeal against KRS opinions (but did raise the objection that the decision of the President of the Republic was not subject to judicial review and the Court shared the Commission's doubts). But if the opinion of the KRS were to be binding, it seems there would be no obstacles for the KRS opinion to be the subject of appeal then, rather than the decision of the President of the Republic[59].
19. One should agree with the SN that the emphasis placed by the CJEU on the importance of this element of assessing the impact of the KRS on creating an independent and impartial court is an unequivocal indication that the decision of the President of the Republic might be treated as irreversible only after prior judicial review of the activity of a body like the KRS is ensured. It is only then (when such review takes place or when the time limit for challenging a KRS resolution elapses) that one can speak of a given person having been correctly (i.e. lawfully) presented to the President of the Republic with a motion for appointment and lawfully appointed by him for service. Otherwise, without ensuring judicial review before the

[55] Para. 68.
[56] This issue is also the subject-matter of the NSA's request for a preliminary ruling in Case C-824/18, *National Council of the Judiciary*.
[57] Para. 116.
[58] Para. 114.
[59] This section was prepared on the basis of P. Bogdanowicz, M. Taborowski, *The Retirement Age Regulations as a Tool to Remove a Particular Group of the Supreme Court Judges: Some Remarks about Court of Justice Judgment of 24 June 2019, C-619/18,* European Commission v Poland, "Europejski Przegląd Sądowy" 12/2019, 24. Moreover, one should not lose sight of the two referrals from the SN for preliminary rulings in Cases C-487/19, *M.F v J.M.*, and C-508/19, *W.Ż*. Depending on the answers to these questions, one cannot exclude that the effectiveness of actions of the President of the Republic in the process of appointing judges will be able to undergo judicial review.

President of the Republic issues the deed of nomination, the person might be "unlawfully" appointed by the President[60].

20. As we recall, having identified in the Judgment five factors to be taken into account when assessing whether the KRS is independent with respect to the legislature and the executive, the CJEU stated that the referring court "may… also wish" to take into consideration various other features that more directly characterise the ID[61]. Some doubts could have been aroused by the expression used by the referring court: "may… also wish". In particular, a question might arise whether the referring court would be allowed to stop at assessing the (lack of) independence of the KRS from the legislature and the executive in order to determine whether the ID and its members meet the requirements of independence and impartiality set by EU law.
21. It seems that this question should be answered in the negative. Firstly, in the statement of reasons for the Judgment, in paragraph 152, so after the analysis of factors concerning only the ID, the CJEU ruled that taken together those factors might lead to the conclusion that the ID was not independent, "*particularly* if the abovementioned assessment as regards the KRS were to find that that body lacks independence in relation to the legislature and the executive" [emphasis added]. Therefore, if any of these factors alone were to constitute independent grounds for assessing the independence and impartiality of the ID, these would be factors relating to the ID directly. Secondly, the CJEU later pointed out that "the referring court will need to assess, in the light, where relevant, of the reasons and specific objectives alleged before it in order to justify certain of the measures in question, *whether, taken together, the factors referred to in paragraphs 143 to 151 above and all the other relevant findings of fact which it will have made* are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the Disciplinary Chamber 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, thus, whether they may lead to that chamber 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"[62] [emphasis added]. Paragraphs 143-151, to which the CJEU refers, concern both the issues of independence of the KRS from the executive and the legislature (paras. 143-145) and the features of the ID as such (paras. 147-151). Thirdly and lastly, the operative part of the Judgment mentions "the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed". So it combines both categories of factors: the objective circumstances in this a body is formed and its features apply to the ID *per se*, while the way in which the members were appointed - to the KRS.
22. Also the SN, albeit using slightly different words, refers to such a test in its judgment of 5 December 2019. Specifically, the SN believes that it is necessary to assess, first, the degree of KRS independence in relation to the legislature and the executive in the performance of its statutory tasks; second, the circumstances in which members of a chamber such as the ID were appointed and the role the KRS played in the process[63].

[60] SN judgment, para. 28.
[61] Para. 146.
[62] Para. 153.
[63] Para. 35.

In any case, the SN expressly stated that "not every choice made by the current National Council of the Judiciary has general significance for the court thus formed"[64].

23. As indicated above, the CJEU listed three factors that were necessary to determine whether the ID and its judges met the requirements of independence and impartiality. The SN analysed them in detail in the judgment of 5 December 2019. This analysis plus an assessment of the independence of the KRS in relation to the legislature and the executive, led the SN to the correct conclusion about **the ID not being a court within the meaning of EU law**[65]. The assessment was underpinned by the following arguments and circumstances: the ID was newly created[66]; ID members were granted discretion in assessing which of SN judges could remain in active service, which was combined with the fact that only new persons elected by the KRS could become ID members[67]; persons elected to the ID had very strong ties with the legislature and the executive[68]; conditions were changed during the contest for SN judges, which eliminated the candidates' possibility to file successful appeals against KRS resolutions with the court having jurisdiction to examine them[69]; the SN was completely excluded from the process of electing SN judges and had no role in it[70]; the ID was granted broad autonomy and a special status as an extraordinary court[71]; following its establishment, the ID took steps to withdraw referrals for preliminary rulings[72]; the activity was ostentatiously continued after the Judgment[73]; and the ID issued individual decisions recognising, contrary to existing case law, a judge's fault in issuing a judgment (*nota bene* one that did not meet the expectations of the Minister of Justice)[74].
24. Consequently, considering that there was "concurrence of the negative grounds for case to be heard by the ID of the SN, resulting from the test introduced by the Court of Justice of the EU", the SN ruled that the case should be examined by the Labour Law and Social Security Chamber of the SN, not the ID[75]. As the SN admitted itself, acting as an EU court, because it had almost a constitutional (Article 91(3) of the Constitution) duty to refuse to apply provisions of the SN Act assuming jurisdiction of the ID[76].
25. In fact the duty was also a constitutional one. The Judgment states expressly that "in the light of the primacy principle… where it is impossible… to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such

[64] In this context, the SN made a reservation that this was the case of assistant judges, because their nominations depended mainly on the results of exams they take to become judges. Para. 80.
[65] But also within the meaning of Convention for the Protection of Human Rights and Fundamental Freedoms, and the Constitution. Cf. para. 79.
[66] Para. 64.
[67] Para. 65.
[68] Para. 66.
[69] Para. 67.
[70] Para. 68.
[71] Paras. 73 and 74.
[72] Para. 75.
[73] *Ibidem*.
[74] Paras. 76-77.
[75] Para. 81.
[76] Para. 82.

provision by legislative or other constitutional means"[77]. In its case law, the CJEU has also pointed out that "in accordance with the principle of the primacy of Union law, provisions of the Treaty and directly applicable measures of the institutions have the effect, in their relations with the internal law of the Member States, merely by entering into force, of rendering automatically inapplicable any conflicting provision of national law"[78]. **Such directly applicable and directly effective provisions include Article 47 of the Charter**[79], the provision used as the basis for review in the Judgment, **and second subparagraph Article 19(1) TEU**, which was not separately analysed by the CJEU in the Judgment, because it in its opinion the analysis would only repeat the conclusion with regard to application of Article 47 of the Charter in the case[80]. **This means that any provisions of the SN Act that assume jurisdiction of the ID are void by operation of law**. **This chamber should immediately cease any activity**[81].

26. In this context, it is necessary to assess the Act of 20 December 2019 on Amendments to the Act – Law on the System of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts, passed by the Sejm. This Act prohibits courts and other bodies from challenging, as part of their activities, the legitimacy of courts and tribunals, constitutional authorities of the state, and authorities in charge of state audit and the defence of rights. An ordinary court, the SN, a military court, an administrative court or another authority is not permitted to assess the lawfulness of the appointment of a judge or said judge's authorisation to perform tasks in the field of administration of justice, resulting from said appointment[82]. Moreover, actions challenging the existence of a service relationship of a judge, the effectiveness of a judge's appointment or the legitimacy of a constitutional authority of the Republic of Poland constitute a disciplinary offence for which the judge may be punished with dismissal from office[83].
27. **Had the Act in this wording been in force on the day when the SN made referrals for preliminary rulings which the CJEU dealt with in the Judgment, or on the day when the SN issued its judgment, actions of SN judges might be considered a disciplinary offence**. One of the questions asked by the SN to the CJEU was whether a court whose members were selected with the involvement of a body like the KRS, which, after the 2018 amendments affecting the principles of election of members who are judges, is not guaranteed to be independent from the legislative and executive authorities is an independent court or tribunal within the meaning of EU law[84]. It should be borne in mind in this context that the Act defines one of disciplinary offences very broadly and vaguely as "acts or omissions that might prevent a body of the administration of justice from operating or pose a major obstacle to its operation"

[77] Para. 160. The Court refers to judgment of 24 June 2019 in Case C-573/17, *Popławski*, EU:C:2019:530, para. 58 and the case law cited.
[78] Cf. for instance, judgment of 8 September 2010 in Case C-409/06, *Winner Wetten*, EU:C:2010:503, para. 53.
[79] Cf. judgment of 29 July 2019 in Case C-556/17, *Torubarov*, EU:C:2019:626, para. 56.
[80] Para. 169.
[81] In this context, one should remember that on CJEU's case list there is also an action brought by the Commission against Poland (C-791/19) pursuant to Article 258 of the Treaty on the Functioning of the European Union. In the action, the Commission raises, among others, the following objection: "the new disciplinary regime does not guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, which is composed solely of judges selected by the National Council for the Judiciary, which is itself politically appointed by the Polish Parliament (Sejm)". The judgment should be issued in the first half of 2020.
[82] Cf. for instance Article 1(19) of the Act.
[83] Cf. for instance Article 1(32) and (35) of the Act.
[84] Cf. para. 36 of SN judgment.

28. Consequently, it should be concluded that **provisions of the Act pursuant to which an ordinary court, the SN, a military court, an administrative court or another authority is not permitted to assess the lawfulness of the appointment of a judge or said judge's authorisation to perform tasks in the field of administration of justice, resulting from said appointment, and provisions which make any actions challenging the existence of a service relationship of a judge, the effectiveness of a judge's appointment, or the legitimacy of a constitutional authority of the Republic of Poland a disciplinary offence are inconsistent with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter[85].**
29. **In accordance with established CJEU case law, any national provision and any legislative, administrative or judicial practice which might impair the effectiveness of EU law** by withholding from the national court having jurisdiction to apply such law the power to do everything necessary – at the moment of its application – to set aside national legislative provisions which might prevent EU rules from having full force and effect **are incompatible with those requirements, which are the very essence of EU law**. The Court clarified that this would happen if - in case of a discrepancy between a provision of EU law and a national statute adopted subsequently - resolving the conflict were to be reserved for another body and not the court having jurisdiction to apply EU law, said body having its own discretionary powers[86].
30. We do have such a situation of inconsistency with EU law of the Act, whose provisions restrict the effectiveness of EU law, in particular the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, by withholding from each court having the jurisdiction to apply EU law the power to disapply e.g. provisions which grant jurisdiction to the ID, due to the fact that the ID is not a court within the meaning of EU law[87]. What should be recognised as inconsistent with EU law is also those provisions of the statute which grant to the Extraordinary Review and Public Affairs Chamber of the SN exclusive jurisdiction to examine an application for determination and assessment of the lawfulness of a judge's appointment or his/her power to perform tasks within the scope of administration of justice, said Chamber leaving it without examination by operation of law. Last but not least, the aforementioned provisions of the statute are inconsistent with EU law to the extent to which they limit the national courts' freedom to make any referral to the CJEU for a preliminary ruling as the given court considers necessary and at any stage of the proceedings[88].
31. As an aside, one can mention only that the Act is contrary to EU law in many other aspects, which do not belong to the subject-matter of this Opinion. For instance,

[85] There are completely unsubstantiated claims in the public discourse that provisions having the same effect are in force in other Member States, in particular in France. To the best of the author's knowledge, no laws in France prohibit courts from applying the provisions of EU law.

[86] Cf. for instance, judgment in Case C-409/06, *Winner Wetten*, cited above, paras. 56 and 57.

[87] This is why the view expressed by the Bureau of Research of the Chancellery of the Sejm in the Opinion on the consistency with EU law of MPs' bill to amend the Act on Law on the System of Ordinary Courts, the Act on the Supreme Court and Certain Other Acts (BAS-WAPM-240/19) is wrong. It states: "there is no inconsistency with EU law to the extent to which the bill prohibits courts/judges/assistant judges from challenging the legitimacy of courts, tribunals, constitutional authorities of the state or authorities in charge of state audit or protection of rights, as well as the lawfulness of appointment of a judge and the resulting power of the latter to perform tasks in the field of administration of justice. In this regard it would be difficult to find any direct basis for review in EU law." The obvious bases are precisely the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

[88] Cf. for instance CJEU judgment of 22 June 2010 in Joined Cases C-188/10 and C-189/10, *Melki and Abdeli,* EU:C:2010:363, para. 52.

Article 11(1)[89] and Article 12(2)[90] of the Act should be deemed inconsistent with EU law to the extent to which these provisions intend to annul the effect of the referral for a preliminary ruling made by the NSA in Case C-824/18, *Krajowa Rada Sądownictwa*.

32. Returning to the main thread of these reflections, also the parties' counsels can invoke the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. **A CJEU judgment does not automatically set aside or declare non-existent any judgments issued by judges appointed in contravention of EU law**. However, ordinary and extraordinary means of appeal based on the standard resulting from the Judgment can be filed with courts. This means, for instance, that an extraordinary appeal against a judgment of the Higher Disciplinary Court of the Polish Bar can be filed with the Criminal Chamber of the SN, bypassing the ID. Then it is the former chamber, not the ID, that should examine it[91].
33. In this context is should be reminded once again that the results of the standard presented in the Judgment bind not only the SN, but also all other courts and tribunals in Poland, as well as in other Member States. The standard referred to in the Judgment can be applied to other courts, not only the ID[92]. However, implementing this standard requires, each time, checking the independence of the KRS from the legislative and executive powers, as well as the objective circumstances in which a given judicial body (other than the ID) was established and the features of such a body, in order to assess whether these factors can give rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the ID to external factors. Whereas, in the light of the SN judgment, assessing the independence of the KRS from the legislature and the executive should not cause any major difficulties, a certain degree of caution has to be exercised when assessing factors that more directly characterise the body concerned. Some of the factors mentioned by the CJEU and the SN will, by the nature of things, have a limited scope of application. For instance, "being newly-created" will also apply to the Extraordinary Review and Public Affairs Chamber, but "granting broad autonomy and a special status" applies to the ID only. In such a case, it seems that emphasis should be placed on the body's features[93]. Moreover, one should not forget that the court (another body) deciding the case is not limited to the factors enumerated in the Judgment, but can refer to any other sufficiently proven material circumstances of which it becomes aware[94].
34. **In the light of EU law, including the case law of the CJEU on the principle of primacy of European law over national law, as discussed above, the Judgment's**

[89] "Proceedings in the matter of opinions about candidates for judges of provincial administrative courts and the Supreme Administrative Court, and presentation of candidates to the National Council of the Judiciary pending before provincial administrative courts and the Supreme Administrative Court and initiated prior to this Act's entry into force shall be discontinued by operation of law."

[90] "A decision granting security issued prior to this Act's entry into force in actions challenging resolutions of the National Council of the Judiciary in the matter of appointment to the post of a judge shall not produce any legal effects or affect the effectiveness of appointment of a person by the President of the Republic of Poland to the post of a judge, even if the person were appointed prior to this Act's entry into force."

[91] First cases of this kind, cf.: https://www.prawo.pl/prawnicy-sady/wnioski-o-wznowienie-postepowan-zakonczonych-w-izbie,496646.html (accessed on 5 January 2019)

[92] For this reason, the aforementioned order of the Regional Court in Olsztyn, where the court did nothing else but enforced the Judgment in the part relating to the assessment of KRS' independence from the legislature and the executive, should be considered lawful.

[93] Cf. e.g. information that might be used in case of assessing the independence and impartiality of one of the judges of an ordinary court: https://wiadomosci.onet.pl/tylko-w-onecie/krs-za-awansem-nawackiego-wbrew-opinii-wizytatora-i-srodowiska/fstbxg9.

[94] Para. 153 of the Judgment.

effectiveness cannot depend on its "confirmation" by the TK. In fact the CT itself has indicated in the past that it was not necessary to refer to it any legal questions about the compatibility of national law with EU law[95].

35. Regardless of the above, **there are no grounds whatsoever for claims that the TK might apply**, following the example of the German Federal Constitutional Court, **the doctrine of *ultra vires* and consider the Judgment as issued outside the powers transferred to the European Union**[96]. Leaving aside the consistency of this doctrine with EU law, it should be reminded that the CJEU has already determined that, although the organisation of justice in the Member States falls within the competence of the latter, when exercising that competence, the Member States are required to comply with their obligations deriving for them from EU law. This very position was reiterated in the Judgment[97].
36. **It would also be ineffective to refer, in order to "derogate" the effects of the Judgment, to the national identity clause contained in Article 4(2) TEU[98]**. One should agree with the standpoint expressed in legal scholarship that the national (constitutional) identity can only be invoked - in order to provide additional justification in the context of a certain interpretation of the already existing constructions of EU law, such as the principle of proportionality - by those states that adhere to the values enshrined in Article 2 TEU, including the rule of law and its components: the independence of courts and judges[99]. Having regard to even just the Judgment and also two CJEU judgments ascertaining, on the basis of Article 258 of the Treaty on the Functioning of the European Union, that Poland has infringed its

[95] Cf. TK judgment of 19 December 2006, in case P 37/05. In this context cf. SN decision of 21 November 2019, case II CO 108/09 to submit a legal question to the TK, including "I. Is Article 49 of the Act of 17 November 1964 Code of Civil Procedure (Dz. U. 2018.1360 as amended, the "CCP") - to the extent to which the court examining a motion for abstention filed by a person appointed to the post of a judge: [...] is obligated to take into account, ex officio, as disqualifying or likely to cause doubts as to the compatibility to principles of independence of a judge or the court in which he/she is to adjudicate, the circumstances of election as a candidate for a judge of a person appointed to the post of a judge in accordance with the criteria set out in the Treaty on the European Union and in Article 47 of the Charter of Fundamental Rights of the European Union to the extent determined in the judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C 585/18, C 624/18 and C 625/18, concerning the election of a candidate for the post of a judge, including due to the judgment of the Constitutional Tribunal, referred to in para. 1, confirming that the composition of the National Council of the Judiciary does not meet the requirements specified in the Polish Constitution, [...] 4) shall examine the statement of the judge, referred to in Article 51 CCP, taking into account the criteria set in Article 47 of the Charter of Fundamental Rights of the European Union to the extent specified in the judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C 585/18, C 624/18 and C 625/18, concerning election of a candidate for the post of a judge, including due to the judgment of the Constitutional Tribunal, referred to in para. 1, confirming that the composition of the National Council of the Judiciary does not meet the requirements specified in the Polish Constitution - consistent with: (a) Article 45(1) and Article 175(1), Article 179 in conjunction with Article 187(1) and (3) of the Polish Constitution, (b) first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Dz. U. 1993.61.284 as amended), (c) first and second sentence of Article 47 of the Charter of Fundamental Rights of the European Union (OJ EU C 303 of 14 December 2007, p. 1) in conjunction with Article 6(1) of the Treaty on the European Union (Dz. U. 2004.90.864) as amended) understood in the way determined in judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C 585/18, C 624/18 and C 625/18?"

[96] More about that doctrine and its application so far by the German Constitutional Court, cf. M. Bainczyk, *Polski i niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej*, Wrocław 2017, full book in the electronic version on website:
https://www.bibliotekacyfrowa.pl/Content/79679/Polski_i_niemiecki_Trybunal_Konstytucyjny.pdf

[97] Cf. para. 75 and the case law cited.

[98] It is worthwhile to observe that although the Polish government hsa used various arguments in the proceedings before the CJEU in the case which the Judgment concerned, it never raised the argument of respect for national identity. However, this argument does appear in the public discourse.

[99] Cf. M. Taborowski, *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego*, Warsaw 2019, 95-96.

obligations under the second subparagraph of Article 19(1) TEU[100], it is clear that Poland could not invoke that clause.

37. As the Judgment binds all courts in Poland, **the KRS as currently composed and in the current format – as a body which in the light of the Judgment and the judgment of the SN is not independent from the legislature and the executive – should immediately suspend any activity.** Suspending all the ongoing nomination procedures in which the KRS - as currently composed and in the current format - is involved means that also the President of the Republic (who is also bound by the judgment of the CJEU) has a duty to stop taking steps aimed at filling the vacant posts of judges. Furthermore, no new competitions for the posts of judges should be held.
38. **There is no doubt that the Judgment binds the legislature**, which should, **as a minimum,** immediately end the term of the KRS with the current members and in the current format, and lay down the rules of election of new KRS members so as to ensure meeting European standards, i.e. independence of the KRS from the legislature and the executive, as well as abolish ID, while transferring the cases the Chamber was dealing with to another SN chamber (e.g. the Criminal Chamber).

V. Reservations

1. This Opinion concerns only provisions of EU law, with the reservations and remarks made in the text.
2. This Opinion concerns only the issue explicitly stated in Section I (Introduction), with the reservations and remarks made in the text.
3. The author does not express any opinions about facts.
4. The Opinion expresses the author's own views and it cannot be seen as the opinion of institutions where the author is employed.

[100] This concerns the judgment in cases C-619/18 and C-192/18.

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The Stefan Batory Foundation Legal Experts Group assesses legal changes to the state system prepared by the government and parliament, as well as public and civic institutions' place in the legal system. The Group's members monitor draft legal acts, analysing whether they comply with the Polish Constitution, international norms and democratic standards of the rule of law. They also assess whether provisions interfere with human and civil rights and the direction of systemic changes set by the law.

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