Case BSA I-4110-1/20

RESOLUTION

of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber

23 January 2020

The Supreme Court composed of:

First President of the Supreme Court Małgorzata Gersdorf (Chair)
President of the Supreme Court Józef Iwulski
President of the Supreme Court Stanisław Zabłocki
President of the Supreme Court Dariusz Zawistowski
Supreme Court Justice Tomasz Artymiuk
Supreme Court Justice Teresa Bielska-Sobkowicz
Supreme Court Justice Bohdan Bieniek
Supreme Court Justice Jacek Błaszczyk
Supreme Court Justice Krzysztof Cesarz
Supreme Court Justice Dariusz Dończyk
Supreme Court Justice Jolanta Frańczak
Supreme Court Justice Małgorzata Gierszon
Supreme Court Justice Jerzy Grubba
Supreme Court Justice Paweł Grzegorczyk
Supreme Court Justice Jacek Gudowski
Supreme Court Justice Dariusz Kala
Supreme Court Justice Przemysław Kalinowski
Supreme Court Justice Wojciech Katner
Supreme Court Justice Halina Kiryło
Supreme Court Justice Kazimierz Klugiewicz
Supreme Court Justice Monika Koba
Supreme Court Justice Marian Kocon
Supreme Court Justice Zbigniew Korzeniowski
Supreme Court Justice Wiesław Kozielewicz
Supreme Court Justice Anna Kozłowska
Supreme Court Justice Jerzy Kuźniar
Supreme Court Justice Michał Laskowski
Supreme Court Justice Rafał Malarski
Supreme Court Justice Jarosław Matras
Supreme Court Justice Dawid Miąsik
Supreme Court Justice Piotr Mirek
Supreme Court Justice Grzegorz Misiurek
Supreme Court Justice Zbigniew Myszka
Supreme Court Justice Anna Owczarek
Supreme Court Justice Maciej Pacuda
Supreme Court Justice Władysław Pawlak

Supreme Court Justice Marek Pietruszyński
Supreme Court Justice Henryk Pietrzkowski
Supreme Court Justice Krzysztof Pietrzykowski
Supreme Court Justice Waldemar Płóciennik
Supreme Court Justice Piotr Prusinowski
Supreme Court Justice Zbigniew Puszkarski
Supreme Court Justice Krzysztof Rączka
Supreme Court Justice Marta Romańska (Rapporteur)
Supreme Court Justice Andrzej Siuchniński
Supreme Court Justice Barbara Skoczkowska
Supreme Court Justice Romualda Spyt
Supreme Court Justice Krzysztof Staryk
Supreme Court Justice Andrzej Stępka
Supreme Court Justice Krzysztof Strzelczyk
Supreme Court Justice Andrzej Tomczyk
Supreme Court Justice Roman Trzaskowski
Supreme Court Justice Katarzyna Tyczka-Rote
Supreme Court Justice Małgorzata Wąsek-Wiaderek
Supreme Court Justice Karol Weitz
Supreme Court Justice Eugeniusz Wildowicz
Supreme Court Justice Paweł Wiliński
Supreme Court Justice Andrzej Wróbel
Supreme Court Justice Włodzimierz Wróbel (Rapporteur)

after examining, in a closed session, in a formation of combined chambers: the Civil Chamber, the Criminal Chamber, and the Labour Law and Social Security Chamber, a case filed by petition of the First President of the Supreme Court of 15 January 2020 to resolve divergences in the interpretation of law existing in the case-law of the Supreme Court concerning the following legal question:

"Does participation in a formation of a common court, a military court or the Supreme Court, of a person appointed to the office of a judge by the President of the Republic of Poland on application of the National Council for the Judiciary formed in accordance with the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts (Journal of Laws of 2018, item 3, as amended), cause a breach of Article 45(1) of the Constitution of the Republic of Poland, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, No. 61, item 284, as amended) or Article 47 of the Charter of Fundamental Rights of the European Union and Article 19(1) of the Treaty on European Union, with the effect that, depending on the type of the case under examination:

a) in criminal proceedings – such person is not authorised to adjudicate

(Article 439(1)(1) of the Code of Criminal Procedure) or the court formation is unduly appointed (Article 439(1)(2) of the Code of Criminal Procedure);

b) in civil proceedings – the court formation with the participation of a person so appointed is unlawful (Article 379(4) of the Code of Civil Procedure)?"

has resolved as follows:

1. A court formation is unduly appointed within the meaning of Article 439(1)(2) of the Code of Criminal Procedure or a court formation is unlawful within the meaning of Article 379(4) of the Code of Civil Procedure also where the court formation includes a person appointed to the office of a judge of the Supreme Court on application of the National Council for the Judiciary formed in accordance with the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts (Journal of Laws of 2018, item 3).

2. A court formation is unduly appointed within the meaning of Article 439(1)(2) of the Code of Criminal Procedure or a court formation is unlawful within the meaning of Article 379(4) of the Code of Civil Procedure also where the court formation includes a person appointed to the office of a judge of a common court or a military court on application of the National Council for the Judiciary formed in accordance with the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts (Journal of Laws of 2018, item 3) if the defective appointment causes, under specific circumstances, a breach of the standards of independence within the meaning of Article 45(1) of the Constitution of the Republic of Poland, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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

4. Point 1 hereof shall apply to judgments issued with the participation of judges of the Disciplinary Chamber established at the Supreme Court under the Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2018, item 5, as amended) irrespective of the date of such judgments.

JUSTIFICATION

I.

1. The amendments of systemic regulations governing the organisation and functioning of judiciary bodies, in particular governing judicial appointments, implemented since the effective date of the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts (Journal of Laws of 2018, item 3, as amended, "Act of 8 December 2017 on the National Council for the Judiciary") and the practical application of solutions implemented by the legislature have given rise to doubts that they may depart too far from the standards for courts set in international and national law. The criteria to be met by judges who administer justice in adjudicating formations are essential to compliance with those standards, specifically, independence and impartiality of judges and independence of the court as a public body which administers justice. Such doubts have been referred nationally (decision of the Supreme Court of 28 March 2019, III KO 154/18) and (under Article 267 of the Treaty on the Functioning of the European Union, "TFEU") to the Court of Justice of the European Union ("Court of Justice of the European Union") (decision of a formation of seven judges of the Supreme Court of 21 May 2019, III CZP 25/19, OSNC 2019, No. 10, item 99; decisions of the Supreme Court of 12 June 2019, II PO 3/19, 30 August 2018, III PO 7/18, 19 September 2018, III PO 8/18, and 19 September 2018, III PO 9/18; decision of the Supreme Administrative Court of 26 June 2019, II GOK 2/18; decision of the Appeal Court of Kraków of 7 October 2019, I ACA 649/19).

Questions concerning the interpretation of Union law referred to the Court of Justice of the European Union essentially focused on the compliance of regulations governing the appointment of judges of common courts and the Supreme Court which define the systemic position of the Disciplinary Chamber of the Supreme Court with European Union law, as well as the effect of the departure from the previously

applicable procedures of judicial appointment and the status of persons who took office after appointment in proceedings carried out since the effective date of the Act of 8 December 2017 amending the Act on the National Council for the Judiciary. The adjudicating formations which referred those questions to the Court of Justice of the European Union or the Supreme Court raised doubts as to whether the changes to the system of judicial appointments and the method of appointing judges to the office since the effective date of the Act of 8 December 2017 amending the Act on the National Council for the Judiciary affect the status of persons who appointed as judges in that period of time.

The proponents of one position, who answer that question in the affirmative, submit that a defective procedure of judicial appointments affects the qualities of the court as a body responsible for the administration of justice.

The other position precludes any debate concerning the effect of defective procedures leading to judicial appointments, not only concerning the effectiveness of such appointment but also an assessment whether a judge appointed in a defective procedure may constitute a court which meets the international and national standards (cf. decision of the Supreme Court of 25 March 2019, CSK 183/18, issued by the Civil Chamber; decision of the Supreme Court of 17 May 2019, I NO 55/18, issued by the Chamber of Extraordinary Control and Public Affairs of the Supreme Court; resolution of 10 April 2019, II DSI 54/18, issued by the Disciplinary Chamber of the Supreme Court). According to the resolution of the Disciplinary Chamber of 10 April 2019, persons adjudicating in the Disciplinary Chamber were duly appointed as judges of the Supreme Court and their participation in an adjudicating formation does not infringe on the right to hearing of one’s case by an independent and impartial tribunal established by law, laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, No. 61, item 284, as amended, “ECHR”), and consequently they are not unauthorised to adjudicate with the meaning of Article 439(1)(1) of the Code of Criminal Procedure and an adjudicating formation of the court with their participation is not unlawful with the meaning of Article 439(1)(2) of the Code of Criminal Procedure.

After the Court of Justice of the European Union published its judgment of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18 concerning questions referred for a preliminary ruling by the Chamber of Labour Law and Social Security of

the Supreme Court, and after the legal interpretation provided by the Court of Justice of the European Union, binding to all courts and public authorities in Poland, was applied in case III PO 7/18 closed with the judgment of the Supreme Court of 5 December 2019, certain common courts referred further legal questions to the Supreme Court concerning the test necessary to establish whether a case has been heard by an independent court within the meaning of the second paragraph of Article 19(1), Article 2, Article 4(3), Article 6(3) of the Treaty on European Union (EU Official Journal C.07.306.1, as amended, and Journal of Laws of 2004, No. 90, item 864/30, as amended, "TEU") in conjunction with Article 47 of the Charter of Fundamental Rights (Journal of Laws of 2009, No. 203, item 1569, "Charter") and Article 267 TFEU, as well as the effect of the determination that a court which adjudicates a case does not meet the criteria of independence, impartiality and being established by law within the meaning of European Union law (cf. decisions of different formations of the Appeal Court in Katowice of 11 December 2019, V AGa 380/18, V AGa 701/18, V ACz 757/19, registered by the Supreme Court as III CZP 94/19, III CZP 97/19, III CZP 98/19; decisions of different formations of the Regional Court of Olsztyn of 7 January 2020, IX Cz 923/19, IX Cz 959/19, IX Cz 597/19, IX Cz 739/19, IX Cz 897/19, IX Cz 733/19, IX Cz 1004/19, registered by the Supreme Court as III CZP 1/20, III CZP 3/20, III CZP 4/20, III CZP 5/20, III CZP 6/20, III CZP 7/20, III CZP 8/20; decision of the Regional Court of Jelenia Góra of 17 December 2019, VI Ka 618/19, registered by the Supreme Court as I KZP 1/20). Other courts continue proceedings without investigating questions concerning the appointment of the court adjudicating a case as a court of lower or higher instance and the Supreme Court.

2. The Supreme Court is the guardian of uniformity of the case-law of common courts and its own case-law which impacts the case-law of common courts. To perform this function, according to Article 83(1) of the Act of 8 December 2017 on the Supreme Court (consolidated text: Journal of Laws of 2019, item 825, "Act on the Supreme Court" or "2017 Act on the Supreme Court"), the First President of the Supreme Court is authorised by law to petition a competent formation of the Court to resolve a legal question which is understood differently by common courts or adjudicating formations of the Supreme Court.

In view of legal doubts referred by common courts and the existing different judicial practice, creating the risk of deeper and permanent divergences emerging in

the case-law of common courts concerning a question of fundamental importance to the course and outcome of procedures, namely, the status and judicial capacity of a body before which criminal and civil proceedings are pending, on 15 January 2020, the First President of the Supreme Court presented a petition for resolution by the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Supreme Court, of the legal question quoted in the operative part, namely, to determine, under regulations concerning criminal and civil procedure, the effect of circumstances where a formation of a common court, a military court or the Supreme Court includes a person appointed to the office of a judge by the President of the Republic of Poland on application of the National Council for the Judiciary formed in accordance with the Act of 8 December 2017 amending the Act on the National Council for the Judiciary.

3. Article 83(1) of the Act on the Supreme Court empowers the First President of the Supreme Court to refer legal questions to such formations of the Supreme Court which the First President considers competent in view of the importance and the subject matter of the legal question. The First President of the Supreme Court referred the legal question concerned by the petition of 15 January 2020 to the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Supreme Court which are responsible for judicial review of the case-law of common courts whose proceedings are affected by the aforementioned legal question and apply the regulations concerning civil and criminal procedure under which the legal question is to be resolved.

Two Chambers of the Supreme Court: the Disciplinary Chamber, and the Extraordinary Control and Public Affairs Chamber, were not called to resolve the legal question because – irrespective of the organisational status of the Disciplinary Chamber of the Supreme Court, its functions and location in the organisation of the judiciary, examined in detail in the judgment of the Supreme Court of 5 December 2019, III PO 7/18, whereby such organisation cannot be considered a court – judges of those Chambers were appointed to the office of a judge of the Supreme Court following a procedure affected by the same defect whose effect to the status of judge is to be examined in the resolution. Thus, in assessing the effect of a defective procedure of judicial appointment under procedural law, judges of the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber would be acting

as “judges in their own case”. The same follows in the case of seven judges of the Civil Chamber of the Supreme Court appointed to the office in a procedure defined in the Act of 8 December 2017 amending the Act on the National Council for the Judiciary. Therefore, those seven judges of the Civil Chamber of the Supreme Court meet the criteria of recusal. They were recused by decision of the Supreme Court of 17 January 2020, BSA I-4110-1/20.

4. In passing this resolution in a formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, the Supreme Court enforces the judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18 by clarifying the practical procedural effect of the participation, in an adjudicating formation of a court, of a judge appointed to the office in proceedings carried out by the National Council for the Judiciary which fails the test of independence of the legislature and the executive and where the proceedings before the National Council for the Judiciary and any earlier or later stages of proceedings for the appointment of an individual to the office of a judge are affected by other defects, as well.

According to the case-law of the Court of Justice of the European Union, after receiving the answer of the Court of Justice of the European Union to a question concerning an interpretation of EU law, or where the case-law of the Court of Justice of the European Union already provides a clear answer to that question, without itself making a request to the Court of Justice of the European Union for a preliminary ruling, a court of final instance of a Member State, such as the Supreme Court, is itself required to do everything necessary to ensure that that interpretation of EU law provided by the Court of Justice of the European Union is applied (cf., for instance, judgment of the Court of Justice of the European Union of 5 April 2016, C-689/13, Puligienica Facility Esco SpA, ECLI:EU:C:2016:199, para. 42 and the operative part of the judgment). In that case, the court of final instance must disregard any national case-law which it considers inconsistent with EU law (cf. for instance, judgments of the Court of Justice of 5 April 2016, C-689/13, Puligienica Facility Esco SpA, ECLI:EU:C:2016:199, para. 38; 15 January 2013, C-173/09, Elchinov, EU:C:2010:581, para. 30).

According to the case-law of the Court of Justice of the European Union, “the effectiveness of [Article 267 TFEU] would be impaired if the national court were

prevented from forthwith applying Community law in accordance with the decision or the case-law of the Court" (cf., for instance, judgments of the Court of Justice of the European Union of 9 March 1978, 106/77, Simmenthal, EU:C:1978:49, para. 20; 5 April 2016, C-689/13, Puligienica Facility Esco SpA, ECLI:EU:C:2016:199, para. 39).

In the light of the established case-law of the Court of Justice of the European Union, which raises no doubts as to interpretation, the Supreme Court is required to disregard any act of the legislature or the executive and any national case-law that is in conflict with the principle of primacy of Union law, the principle of sincere co-operation (Article 4(3) TEU) and the principle of effective legal protection (second paragraph of Article 19(1) TEU), in particular anything that could hinder the enforcement of the judgment of the Court of Justice of 19 November 2019 by clarifying the effect of the interpretation of Union law provided by the Court of Justice of the European Union in the judgment from the perspective of national procedural regulations. It follows logically from that case-law that the effect of a resolution of the Supreme Court in application of Union law cannot be subsequently challenged by any legislative, executive or judicial act of other national bodies after such resolution is provided.

5. After the legal question quoted in the operative part was referred to the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, the Civil Chamber of the Supreme Court issued *ex officio* a decision of 20 January 2020 in case V CSK 347/19 imposing, in connection with the questions referred for a preliminary ruling to the Court of Justice of the European Union on 18 December 2019, an injunctive order prohibiting the application of Articles 82-84, Article 86 and Article 87 of the Act on the Supreme Court, Article 45, Article 48, Article 49, Article 52, Article 189, Article 379, Article 388, Article 390, Article 395, Article 397, Article 398^{15}, Articles 412-413, Article 424^{10}, Article 424^{11}(2) of the Code of Civil Procedure and suspending the application, among others, of Article 15, Article 83a of the Ordinance of the President of the Republic of Poland of 29 March 2018 – Rules of Procedure of the Supreme Court (Journal of Laws of 2018, item 660, as amended) and Article 203 of the Code of Civil Procedure in conjunction with Article 355 of the Code of Civil Procedure in conjunction with Article 391(1) and (2) of the Code of Civil Procedure in conjunction with Article 398^{21} of the Code of Civil Procedure. The injunction was issued by a court formation including a judge appointed

in a procedure carried out under the Act of 8 December 2017 amending the Act on the National Council for the Judiciary who met the criteria of recusal from the formation appointed to pass the resolution, and who was recused from that formation by decision of the Supreme Court of 17 January 2020.

The decision of 20 January 2020, V CSK 347/19, named no person responsible for the obligations referred to therein; however, it could not be the Supreme Court aiming to clarify the effect of the interpretation of Union law provided by the Court of Justice of the European Union in its judgment of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18 from the perspective of national procedural regulations. If the resolution provided in the decision of 20 January 2020, V CSK 347/19, was also addressed to the Supreme Court in a formation appointed to pass this present resolution, then in order to ensure the effect referred to in point 4 above, the Supreme Court was required to disregard it as it must not hinder an interpretation of national law ensuring its application in accordance with Union law. Compliance with the injunction issued in the decision in case V CSK 347/19 by common courts or by the Supreme Court in civil cases would preclude all their judicial functions as an assessment of the procedural criteria and the criteria of validity of proceedings referred to in Article 379 of the Code of Civil Procedure (the injunctive order does not specify to which of the several criteria of validity it applies) is necessary in each case heard by common courts and by the Supreme Court according to the regulations concerning civil procedure.

6. On 21 January 2020, the formation of the Disciplinary Chamber of the Supreme Court adjudicating in case II DSI 75/19, i.e., an organisation which is not account according to the judgment of the Supreme Court of 5 December 2019, III PO 7/18, referred the following questions to the Constitutional Tribunal: (1) does Article 439(1)(1) of the Code of Criminal Procedure understood in such a way that examination of whether a judgment is issued with the participation of an unauthorised person includes examination of the circumstances of appointment of a judge by the President of the Republic of Poland, including on application of the National Council for the Judiciary which includes judges appointed according to Article 9a of the Act of 12 May 2011 on the National Council for the Judiciary (consolidated text: Journal of Laws of 2019, item 84), stand in conflict with Article 45(1) in conjunction with Article 173 in conjunction with Article 175(1) in conjunction with Article 178(1) and in

conjunction with Article 180(1) of the Constitution of the Republic of Poland and consequently with Article 6(1) ECHR and the second paragraph of Article 19(1) TEU and Article 179 of the Constitution of the Republic of Poland in conjunction with Article 144(3)(17) of the Constitution of the Republic of Poland, and (2) does Article 439(1)(2) of the Code of Criminal Procedure understood in such a way that examination of whether a court is duly appointed allows for examination of the circumstances of appointment of a judge by the President of the Republic of Poland, including on application of the National Council for the Judiciary formed under the Act of 8 December 2017 amending the Act on the National Council for the Judiciary, stand in conflict with: (a) Article 45(1) in conjunction with Article 173 in conjunction with Article 175(1) in conjunction with Article 178(1) and in conjunction with Article 180(1) of the Constitution of the Republic of Poland and consequently with the first sentence of Article 6(1) ECHR and the second paragraph of Article 19(1) TEU and Article 179 in conjunction with Article 144(3)(17) of the Constitution of the Republic of Poland. The formation adjudicating in the case petitioned the Constitutional Tribunal to stay or suspend proceedings in cases pending before the Supreme Court and common courts concerning the effect of acts of judges of the Supreme Court and the status (mandate) of a judge of the Supreme Court, in particular concerning the present legal question. The injunctive order requested by the formation adjudicating in case II DSI 75/19 had not been issued by 23 January 2020. Even if the Constitutional Tribunal had issued such injunction, it would not hinder the resolution of the Supreme Court for the reasons enumerated in point 4.

7. The purpose of the injunctive order of 20 January 2020 in case V CSK 347/19 is to hinder the Supreme Court in exercising its responsibility of immediate application of Union law by the Supreme Court in accordance with the judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18 and unifying the practical application of that judgment by common courts. Therefore, with reference to the rule developed in the Simmenthal case, the Supreme Court in a formation of combined Chambers was required to consider the injunction to be in contravention to Union law and, as such, “invisible” in proceedings aiming to resolve a legal question (judgment of the Court of Justice of the European Union of 29 April 1999, C-224/97, Ciola v. Vorarlberg, ECLI:EU:C:1999:212).

8. On 22 January 2020, the First President of the Supreme Court was notified by the President of the Constitutional Tribunal that on 21 January 2020, case Kpt 1/20, the Constitutional Tribunal put on record a petition of the Speaker of the Sejm of 20 January 2020 for resolution of a conflict of powers between the Supreme Court and the Sejm of the Republic of Poland in relation to “whether the powers of the Supreme Court include the issuance of abstract resolutions in connection with a judgment of an international court, changing the normative status quo regarding the system and organisation of the judiciary, or whether such changes are within the exclusive powers of the legislature” in connection with the question “whether the Supreme Court is empowered, among others by means of a resolution referred to in Article 83(1) of the Act on the Supreme Court issued in connection with a judgment of an international court, to change the normative status quo regarding the system and organisation of the judiciary, or whether such powers are within the exclusive powers of the legislature in accordance with Article 10(1) and (2), Article 95(1), Article 176(2), Article 183(2) and Article 187(4) of the Constitution of the Republic of Poland.”

According to the letter of the President of the Constitutional Tribunal of 22 January 2020, a petition of the Speaker of the Sejm of 20 January 2020 was put on record on 21 January 2020 (file Kpt 1/20, as well, since it was presented in the same letter), for resolution of a conflict of powers between the Supreme Court and the President of the Republic of Poland in relation to “whether the power to appoint judges (Article 179 of the Constitution of the Republic of Poland) and the related power to interpret the Constitution of the Republic of Poland to that extent, and to review the effect of appointments, may be reviewed by the Supreme Court or any other court, or whether those are personal powers of the President of the Republic of Poland beyond the remit of judicial review” in connection with the question “whether the powers of the President of the Republic of Poland referred to in Article 179 in conjunction with Article 144(3)(17) of the Constitution may be understood in such a way that the Supreme Court or any other court may have powers to review the effect of judicial appointments not provided for in the Constitution of the Republic of Poland, in particular the power to review the effect of vesting the right to exercise judicial powers in the appointed judge, whether the Supreme Court may issue binding interpretations of the Constitution of the Republic of Poland in connection with the exercise of the power of the President of the Republic of Poland referred to in Article 144(3)(17) and Article

179 of the Constitution of the Republic of Poland, and in particular whether the Supreme Court may determine the conditions of effective judicial appointment."

Those developments were notified to the First President of the Supreme Court together with a statement to the effect that the submission of the petition of the Speaker of the Sejm of 20 January 2020 to the Constitutional Tribunal for resolution of a conflict of powers affects proceedings pending before the Supreme Court; although the letter of the Speaker of the Sejm contained no reference, be it to the file number of the petition of the First President of the Supreme Court concerning this present resolution, it was most likely submitted with the intention that the petition for resolution of a conflict of powers would hinder the proceedings concerning this present resolution.

In view of the statements contained in the letter of the President of the Constitutional Tribunal of 22 January 2020, the Supreme Court considered their effect in light of European Union law and considered whether the Supreme Court is in a conflict of powers with any central constitutional public authority.

First, it should be noted that, as mentioned in point 4, the Supreme Court is required to disregard any national regulations which could hinder its resolution aiming at immediate application of Union law in accordance with the judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18 and to unify practical application of the judgment by common courts. Such regulations include Article 86(1) of the Act of 30 November 2016 on the organisation and functioning of the Constitutional Tribunal (consolidated text: Journal of Laws of 2019, item 2393, "Act on the organisation and functioning of the Constitutional Tribunal"), which provides that the opening of proceedings before the Constitutional Tribunal to resolve a conflict of powers shall suspend proceedings pending before the bodies in such conflict of powers. Irrespective of the question whether there is a conflict of powers between the Supreme Court, the Sejm of the Republic of Poland and the President of the Republic of Poland (see below), that regulation could not have its effect with respect to the resolution of the Supreme Court because the Supreme Court would be required to disregard it as inconsistent with European Union law (see point 7). Turning to the question of a conflict of powers, it should be noted that, according to the decision of the Constitutional Tribunal of 20 May 2009, Kpt 2/08 (OTK-A 2009, No. 5, item 78), the powers of a constitutional public

authority consists in the authorisation of that authority by law or the constitution to act with an effect specified by law in a subjectively defined area; such act could be a legal obligation or right of such authority. So understood, powers should not be confused with systemic functions of authorities (roles played in the constitutional system), their responsibilities (i.e., specific goals defined by law and the effect of the functioning of public authorities) or the scope of objective competences (objectively defined areas of responsibility).

In the light of Article 189 of the Constitution of the Republic of Poland, the Constitutional Tribunal resolves conflicts of power between central constitutional public authorities, i.e., it decides about the substance and the limits of powers of authorities in such conflict, as well as about the legal nature of the conflicting powers. It may decide both about an objective aspect of the conflicting powers (the substance of acts of authorities in such conflict) and a personal aspect of the conflicting powers (entities competent to act as defined by law). According to the decision of the Constitutional Tribunal of 20 May 2009, Kpt 2/08, a question concerning powers typically arises in the context of specific individual circumstances where two (or more) central public authorities consider themselves to be competent with respect to the same legal act or not competent with respect to the same legal act. The jurisdiction of the Constitutional Tribunal is not limited to conflicts of powers defined in the Constitution of the Republic of Poland because the responsibilities of central constitutional authorities are exercised based on both constitutional and statutory powers, as well as powers derived from other generally applicable acts (ratified international treaties and even regulations). The substance and scope of the powers of central constitutional public authorities are determined by comparing detailed provisions concerning powers with the functions and responsibilities of authorities in a conflict of power laid down in the Constitution of the Republic of Poland.

With reference to legal theory, according to the decision of the Constitutional Tribunal of 28 June 2008, Kpt 1/08 (OTK-A 2008, No. 5, item 97), a conflict of powers occurs where two or more central constitutional public authorities consider themselves to be competent with respect to the same case or issue a decision in such case (positive conflict of powers) or consider themselves not to be competent with respect to the same case (negative conflict of powers). Such conflict must be substantive in nature, and it must be real, not only theoretical, motivated by the intention to obtain a

binding interpretation of the Constitutional Tribunal preceding the conflict.

It follows from the principle of legality laid down in Article 7 of the Constitution of the Republic of Poland that any act of authorities must be established by law. A power may be considered to be vested in an authority only if it has a specific legal basis. If the law does not expressly define a power of a public authority, such power is non-existent (cf. judgment of the Constitutional Tribunal of 20 July 2006, K 40/05, OTK-A ZU 2006, No, 7, item 82 and the case-law quoted therein).

To perform the responsibility of the Supreme Court of ensuring uniformity of the case-law of common courts and the case-law of the Supreme Court, according to Article 83(1) of the Act on the Supreme Court, the Supreme Court has the power to pass, among others by the initiative of the First President of the Supreme Court, resolutions to clarify legal questions arising in substantive and procedural law in connection with the administration of justice by common courts and the exercise of judicial review over them by the Supreme Court. No such power or similar power is vested in any other central public authority by the Constitution of the Republic of Poland or by law.

According to the petition of the Speaker of the Sejm, the conflict between the Sejm of the Republic of Poland and the Supreme Court derives from Article 10(1) and (2), Article 95(1), Article 176(2), Article 183(2) and Article 187(4) of the Constitution of the Republic of Poland which lay down the powers of those authorities; and the conflict between the President of the Republic of Poland and the Supreme Court derives from Article 179 in conjunction with Article 144(3)(17) of the Constitution of the Republic of Poland. None of the constitutional provisions referred to in the petition of the Speaker of the Sejm or any provisions of law, not referred to therein, which provide in particular how the responsibilities of the Sejm of the Republic of Poland or the President of the Republic of Poland are to be performed, give them the power to provide interpretations of procedural law applied by common courts which examine civil and criminal cases. Therefore, there is no room for any conflict of powers between the Supreme Court in its efforts to resolve the legal question referred to the Supreme Court in the petition of the First President of 15 January 2020 and the Sejm of the Republic of Poland or the President of the Republic of Poland. Consequently, the Supreme Court finds no conflict of powers between the Supreme Court and the Sejm of the Republic of Poland or the President of the Republic of Poland as referred to in the letter of the Speaker of

the Sejm of 21 January 2020 in connection with the performance of responsibilities and the exercise or related powers by the Supreme Court. It is significant that such conflict has not been invoked by the President of the Republic of Poland; however, the existence of such conflict between the Supreme Court and the President of the Republic of Poland has been stipulated by the Speaker of the Sejm. Therefore, the petition is instrumental in nature and the alleged conflict is only apparent. In the absence of substantive grounds, the intention is not so much to resolve a non-existing conflict as to trigger subsequent instruments, including in particular injunctive measures.

According to Article 86(1) of the Act on the organisation and functioning of the Constitutional Tribunal, the opening of proceedings before the Constitutional Tribunal to resolve a conflict of powers shall suspend proceedings before the bodies in such conflict of power. However, that does not suspend all their activities. Therefore, the notification of 22 January 2020 does not hinder the passing of this resolution by the formation of the combined Chambers of the Supreme Court because the Supreme Court found, in connection with the resolution, no conflict of powers between the Supreme Court and the Sejm of the Republic of Poland or the President of the Republic of Poland as to which of those authorities may, aiming to unify judicial practice and enforce the judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18, interpret Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Civil Procedure in the context of Article 6(1) ECHR, whose standards were transposed into Article 45(1) of the Constitution of the Republic of Poland, but mainly in the context of Article 47 of the Charter. That is an exclusive power of the Supreme Court.

In considering the petition of the First President of the Supreme Court, the Supreme Court acts as an authority of a Member State bound by the interpretation of Union law provided in the judgment of the Court of Justice of the European Union of 19 November 2019, responsible for ensuring effectiveness of Union law by clarifying the effect of the interpretation to the interpretation and application of national procedural regulations. In that context, the Supreme Court not only had the right but also the obligation to disregard Article 86(1) of the Act on the organisation and functioning of the Constitutional Tribunal as a provision contradictory to Union law to the extent that the petition of the Speaker of the Sejm of 20 January 2020 opening a

procedure with regard to an alleged conflict of powers would, be it temporarily, hinder the Supreme Court in enforcing the judgment of the Court of Justice of the European Union. The requirement to disregard Article 86(1) of the Act on the organisation and functioning of the Constitutional Tribunal derives not only from the case-law of the Court of Justice of the European Union referred to, by way of an example, in point 4 above but also from Article 91(3) of the Constitution of the Republic of Poland whereby Union law, including Article 47 of the Charter, take precedence over statutory provisions. The question whether Article 86(1) of the Act on the organisation and functioning of the Constitutional Tribunal should be disregarded when considering the petition of the First President of the Supreme Court falls within the remit of the Supreme Court which passes this present resolution and not that of any other authority.

The authorities which invoked the alleged conflict of powers in the expectation that the Supreme Court would refrain from acts under Article 83(1) of the Act on the Supreme Court do not juxtapose that power, which they consider to be in question, with any other power vested in them which could provide the basis for the same or similar acts. The Supreme Court does not find that the central public authorities, which allegedly are in a conflict of power with the Supreme Court referred to in the petition of the Speaker of the Sejm of 22 January 2020, have refrained in any area from exercising their powers in order to perform their responsibilities, as required under Article 86(1) of the Act on the organisation and functioning of the Constitutional Tribunal, which could suggest a genuine conflict of powers referred to in the petition. In particular, on 23 January 2020, the Sejm of the Republic of Poland continued legislative work on an Act amending the Act – Law on the common court system, the Act on the Supreme Court and certain other Acts, approved at the session of 20 December 2019, which was tabled – after rejecting the motion of the Senate of the Republic of Poland for rejection of the draft Act – for signature to the President of the Republic of Poland.

9. The nature of the powers vested in the Supreme Court under Article 83(1) of the Act on the Supreme Court, which are exercised in the passing of this present resolution, and the powers referred to by the Speaker of the Sejm in the letter of 22 January 2020 as conflicting powers, is incomparable with the powers involved in the conflict resolved with the decision of 1 August 2017, II KK 313/17, in accordance

with Article 86(1) of the Act on the organisation and functioning of the Constitutional Tribunal, suspending proceedings in the individual case M.K., M.W., G.P. and K.B. pending before the Supreme Court in connection with a cassation appeal filed by accessory private prosecutors following the application of measures of clemency by the President of the Republic of Poland in favour of persons not convicted with a legally valid judgment. What both proceedings have in common is that, in case II KK 313/17, it was not the President of the Republic of Poland but the Speaker of the Sejm who filed a petition for the proceedings to be stayed under Article 86(1) of the Act on the organisation and functioning of the Constitutional Tribunal due to the fact that, on 8 June 2017, the Speaker of the Sejm petitioned the Constitutional Tribunal to resolve a conflict of powers in the individual case M.K., M.W., G.P. and K.B. between the President of the Republic of Poland and the Supreme Court. The petition initiating the procedure before the Constitutional Tribunal did not specify that the President of the Republic of Poland considered himself competent to act and decide within the remit of the exclusive judicial powers of the Supreme Court in case II KK 313/17; according to the reasoning of the judgment of the Supreme Court staying the proceedings, the petition provided that the President of the Republic of Poland considered himself competent to exercise the right to grant clemency in an individual case, where as a rule a common court under review of the Supreme Court should first determine whether a crime was committed as a precondition for the exercise by the President of the Republic of Poland of the right to grant clemency to an individual. The Supreme Court stressed that the powers of the President of the Republic of Poland were in fact exercised in such a way that, in the light of Article 529 of the Code of Criminal Procedure, would deprive the Supreme Court of the power to hear a cassation appeal in that case. As the Constitutional Tribunal has, since 8 June 2017, failed to examine the aforementioned petition for resolution of a conflict of powers and motions to stay the proceedings concerning the petition due to the apparent nature of the conflict of powers, the case affected by the alleged conflict of powers between the Supreme Court and the President of the Republic of Poland, filed by the Speaker of the Sejm of the Republic of Poland rather than the President of the Republic of Poland, has been stayed since 8 June 2017. It should be noted that the “alleged” conflict did not hinder the responsibilities of the President of the Republic of Poland, who has exercised the right to grant clemency also after that date.

10. In a closed session held to examine the petition of the First President of the Supreme Court for a resolution, written comments concerning the petition were submitted by the Ombudsman for the Rights of the Child and by the Prosecutor General. The Ombudsman for the Rights of the Child joined the proceedings and moved for the proceedings to be deferred in order for the Ombudsman to prepare a more detailed position; he stressed the requirement of ensuring the stability of procedures pending with the participation of children in different procedural roles and the stability of judgments passed in such procedures. The Ombudsman for the Rights of the Child did not attempt to balance the stability of the procedural position and of decisions passed in procedures with independence and impartiality of judges and independence of the court before which such procedures are pending.

The Prosecutor General moved for the Supreme Court to refuse to pass the resolution on the grounds that there is no controversy as to the fact that judicial appointments granted in proceedings according to the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and the 2017 Act on the Supreme Court to persons participating in adjudicating formations has not reduced the standards of independence and impartiality of judges and independence of courts which should administer justice within the meaning of Article 45(1) of the Constitution of the Republic of Poland, Article 6 ECHR, and Article 47 of the Charter. The Prosecutor General submitted that the organisation of the judiciary and proceedings in which an individual is authorised to exercise judicial powers is an internal matter of a Member State, which means that even a defective procedure of judicial appointments does not, by itself, constitute grounds to contest such appointments.

II.

11. The legal question to be resolved by the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber is not meant to resolve systemic issues concerning the status of persons who were appointed to the office of a judge by the President of the Republic of Poland following the procedure defined in the Act of 8 December 2017 amending the Act on the National Council for the Judiciary; there is no doubt that, formally, they have acquired the status of a judge. The Supreme Court is not empowered to grant that status to anyone or to deprive anyone of that status by means of this resolution and in the

enforcement of the judgment of the Court of Justice of the European Union of 19 November 2019; it is among others for this reason that the Supreme Court is not in any conflict of powers with the President of the Republic of Poland. The question of that status is not subject to the petition of the First President of the Supreme Court of 15 January 2020. The issue in question in relation to judges of the Supreme Court appointed to the office on application of the National Council for the Judiciary in a formation established according to the Act of 8 December 2017 amending the Act on the National Council for the Judiciary, is under examination in cases III CZP 25/19 and II PO 3/19, where relevant questions have been referred for a preliminary ruling to the Court of Justice of the European Union (cf. para. 62 of the justification of the judgment of the Supreme Court of 5 December 2019, III PO 7/18, not published). In this present resolution, the Supreme Court acts on the assumption that individuals appointed to the office following the procedure defined in the Act of 8 December 2017 amending the Act on the National Council for the Judiciary have formally acquired the status of a judge. That assumption may be refuted depending on the outcome of cases III CZP 25/19 and II PO 3/19, which is largely dependent on the answers to the questions referred in those cases for a preliminary ruling to the Court of Justice of the European Union.

Likewise, the legal question to be resolved by the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber is not meant to determine whether the procedure for judicial appointments established in the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and the severity of irregularities in specific such procedures infringe on the right of access to public service of persons who stood as candidates for the office of a judge but were eventually unable to participate in a fair competition procedure. That issue has been examined by the Chamber of Extraordinary Control and Public Affairs of the Supreme Court (in a formation composed exclusively of members appointed in the procedure contested on grounds of a serious breach of the standards) in its resolution of 3 January 2020, I NOZP 3/19. However, in this present resolution, the Supreme Court must consider the invoked circumstances from the perspective of their effect to the exercise of the right to a fair trial guaranteed in Union law, international law, and Article 45(1) of the Constitution of the Republic of Poland.

Therefore, in this present resolution, the Supreme Court must address the

question whether participation in a formation of a common court, a military court or the Supreme Court, hearing a case under the Code of Civil Procedure or the Code of Criminal Procedure, of a person appointed as a judge by the President of the Republic of Poland following the procedure defined in the Act of 8 December 2017 amending the Act on the National Council for the Judiciary, causes a breach of the standards of independence and impartiality of the court which would be inadmissible under Article 6(1) ECHR, Article 45(1) of the Constitution of the Republic of Poland, and Article 47 of the Charter and, if that is the case, it must define the procedural effect of the administration of justice under such circumstances.

The standards of independence and impartiality of judges and independence of courts are safeguarded by a number of specific instruments available for many years in civil and criminal procedural law. The legal questions to be resolved in this present resolution is to determine whether the participation in an adjudicating formation of a person appointed to the office of a judge following the procedure defined in the Act of 8 December 2017 amending the Act on the National Council for the Judiciary may, under Article 6(1) ECHR, Article 45(1) of the Constitution of the Republic of Poland, and Article 47 of the Charter, provide unconditional grounds for appeal in criminal proceedings, referred to in Article 439 (1)(2) of the Code of Criminal Procedure, and grounds for invalidity of proceedings in civil proceedings, referred to in Article 379(4) of the Code of Civil Procedure.

12. According to the resolution of the full formation of the Supreme Court of 28 January 2014, BSA I-4110-4-4/13 (OSNC 2014, No. 5 item 49), the Supreme Court is, in its interpretations of the law, fully empowered to undertake an independent review of the consistency of specific statutory provisions with the constitutional principles; it may, and even should, interpret the law in a way that is “friendly” for the Constitution (pro-constitutional interpretation). An interpretation that is “friendly” for the Constitution implies preference not only for an interpretation which is consistent with the Constitution but for one that is most consistent with it by embodying values enshrined in the Constitution to the broadest extent possible, even if other interpretations were also viable under the Constitution. Such reasoning is not only well within the powers of courts; it is their obligation derived from Article 8 and Article 178(1) of the Constitution of the Republic of Poland, extending beyond the powers of the Constitutional Tribunal which is only responsible for the vertical cohesion of the legal

system (cf. Article 188 of the Constitution of the Republic of Poland).

Furthermore, it is an obligation of the Supreme Court to consider, in its interpretations and reviews of the law, the case-law of the ECtHR and the Court of Justice of the European Union, in particular the judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18 concerning the requirements which courts in a democratic state have to fulfil on order to be considered an impartial and independent tribunal established by law in the light of Article 6 ECHR and Article 47 of the Charter. That obligation follows directly from the constitutional position of the Supreme Court as a body responsible for the administration of justice within the meaning of Article 175(1) of the Constitution of the Republic of Poland. It also follows directly from the role of the Supreme Court in the judicial system of the European Union as a guardian, together with other authorised and obliged judicial bodies, of the rights and freedoms safeguarded under Article 47 of the Charter and Article 6(1) ECHR. The Supreme Court cannot be released from that obligation by a decision of an executive or legislative body.

III.

13. An individual's right to a fair trial as a public subjective right enforceable from the State is a foundation of a democratic State. That right imposes the requirement of ensuring that an individual's legal status or legal dispute with another person is resolved by a body holding the status of a court and so to provide legal protection to the individual. Refusal to enforce the right to a fair trial or its defective enforcement give rise to liability of the State under national and international law.

The right to a fair trial, which is not only a right but also a measure of protection of all other subjective rights, is defined in Article 6(1) ECHR, ratified by Poland on 15 December 1992, which provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal." That legal concept of the right to a fair trial has been transposed into Article 45(1) of the Constitution of the Republic of Poland, which provides that "[e]veryone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court" [cf. judgments of the Constitutional Tribunal of 9 June 1998, K 28/97, OTK 1998, No. 4, item 4; 12 May 2003, SK 38/02, OTK-A 2003, No. 5, item 38;

24 October 2007, SK 7/06, OTK-A 2007, No. 9, item 108]. It is elaborated in Article 77(2) of the Constitution of the Republic of Poland, which prohibits barring a fair trial in the of enforcement of rights and freedoms which have been infringed [cf. judgment of the Constitutional Tribunal of 10 May 2000, K 21/99, OTK 2000, No. 4, item 109], and Article 78 of the Constitution of the Republic of Poland, which provides that each party shall have the right to appeal against judgments and decisions made in first instance [cf. judgment of the Constitutional Tribunal of 16 November 1999, SK 11/99, OTK 1999, No. 7, item 158].

The same concept of the right to a fair trial is enshrined in Article 47 of the Charter [cf. judgments of the Court of Justice of the European Union of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, para. 35; 13 March 2007, C-432/05 Unibet London Ltd v. Justitiehanslern, para. 37; 22 December 2010, C-279/09, DEB Deutsche Energiehandels (…) v. Germany, para. 29-33]. The first paragraph of Article 47 of the Charter, which provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal, has its counterpart in Article 13 ECHR; and the second paragraph has its counterpart in Article 6(1) ECHR with the proviso that the limitation of the right laid down in Article 6(1) ECHR to disputes concerning civil rights and obligations and criminal charges does not apply in Union law and its enforcement.

According to the first paragraph of Article 4(3) TEU, the Member States shall ensure that Union law is applied and respected in their territory; according to the second paragraph of Article 19(1) TEU, Member States shall provide remedies sufficient to ensure effective legal protection of individuals in the fields covered by Union law. Conditions necessary to ensure the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law [judgment of the Court of Justice of the European Union of 28 March 2017, C-72/15, PJSC Rosneft Oil Company v. Her Majesty's Treasury (…), para. 73] and it is a general principle of Union law derived from the constitutional traditions shared by all the Member States, expressed in Article 6 and Article 13 ECHR.

Polish common courts and the Supreme Court may adjudicate in matters related to the application or interpretation of European Union law; as "courts" defined in Union law, they are part of the system of authorities ensuring access to remedies

“in the fields covered by Union law” within the meaning of the second paragraph of Article 19(1) TEU. Therefore, those courts should meet the criteria necessary to ensure effective legal protection in those fields. According to 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, it is not necessary for the court in a case to apply Union law in order to invoke provisions of the Treaty safeguarding the independence of the judiciary in the Member States; it is sufficient that national courts may potentially resolve matters of application or interpretation of Union law.

14. The court must provide protection against arbitrary and self-interested government and against emotions of those who prevail in the dispute by virtue of money, sheer numbers, or physical power. However, to protect the weak, the court must be independent of any direct and indirect influence of the government and parliament, political parties, and financial groups. That independence is not absolute: court judgments are subject to multi-level review, the functioning of the court must be transparent, and the reasoning for court decisions cannot be disclosed but must be exhaustively presented to those whose case is heard by the court and to the general public.

In adjudicating, courts are bound by the will of the people expressed in the Constitution and in law. By decision of the people to join international organisations, courts must comply with international law and the law of international organisations. This includes in particular European Union law.

Courts which are no longer impartial and independent turn into adjudicating institutions which enforce the will of the governing group and the current parliamentary majority. Courts which are no longer impartial and independent cannot determine the truth and administer justice in the case of conflicts and disputes; consequently, judicial procedures rely on rules necessary to establish whether a given court in a given case meets the requirements of impartiality and independence. What is at stake is more than judges’ subjective belief that they adjudicate impartially and independently. Judicial proceedings and court judgments are more than the administration of justice towards those whose case is pending before the court; it is a message to the people, stating how justice is administered. That function of the judiciary cannot be fulfilled in the absence of objective conditions for a court to be perceived as independent and impartial by the general public. The right of individuals to a fair trial by an impartial and

independent court can only be enforced if the individual can be certain of that impartiality and independence. Solemn subjective assurances from the judge are not enough.

As a judicial body, a court is more than a judge. A court must be composed of a judge but it may also comprise lay judges who directly represent the people in the administration of justice (Article 182 of the Constitution of the Republic of Poland).

15. According to international standards and Polish constitutional standards, the right to a fair trial must be enforced by courts; the status of a court is not determined by the name of a body but by the scope of its responsibilities and the criteria it fulfils in performing them.

According to Article 6 ECHR, a public authority may be considered a court only if it safeguards independence and impartiality in the performance of its responsibilities. Article 45(1) of the Constitution imposes the same requirements on bodies holding the status of a Polish court [cf. judgments of the Constitutional Tribunal of 23 October 2006, 23 October 2006, SK 42/04, OTK-A 2006, No. 9, item 125; 24 October 2007, SK 7/06, OTK-A, No. 9, item 108]. A court which enforces the right to an effective remedy under the first and second paragraph of Article 47 of the Charter must also be independent and impartial [cf. judgments of the Court of Justice of the European Union of 25 July 2018, Minister for Justice and Equality, PPU, C-216/18, para. 53; 24 June 2019, Commission v. Poland, C-619/18, para. 57 and the case-law cited therein]. Those criteria are referred to in the second paragraph of Article 19(1) TEU, which provides that legal disputes in the Union shall be resolved by courts established by law, i.e., courts whose judges are appointed according to the applicable provisions of national law (judgment of 23 January 2018, T-639/16 P, FV v. Council of the European Union, para. 68 and the ECtHR case-law cited therein in the context of Article 6(1) ECHR).

16. Organisation of the judiciary is a competence of the EU Member States but in exercising it the Member States are required to follow the rule of law in keeping with their obligations arising from international treaties, in particular the second paragraph of Article 19(1) TEU (judgments of the Court of Justice of the European Union of 27 February 2018, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, C-64/16, para. 40; 24 June 2019, Commission v. Poland, C-619/18, para. 52 and the case-law cited therein).

Legal disputes must be resolved by an independent court composed of an independent and impartial judge 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 (judgments of the Court of Justice of the European Union of 25 July 2018, C-216/18 Minister for Justice and Equality, PPU, para. 66 and the case-law cited therein; 24 June 2019, Commission v. Poland, C-619/18, para. 74).

According to the case-law of the Court of Justice of the European Union, the requirement of independence of the court (judge) has two aspects. The first aspect, which is external, requires that such body carries out its functions in a wholly independent manner, not occupying a hierarchical or subordinate position in relation to any other body and not taking orders or instructions from any source whatsoever [judgments of 17 July 2014, C-58/13 and C-59/13, A.A. Torresi (…) v. Consiglio dell Ordine degli Avvocati di Macerata, para. 22; 6 October 2015, C-203/14, Consorci Sanitari del Maresme, para. 19], ensuring that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them [judgments of 19 September 2006, C-506/04, Wilson v. Ordre des avocatos (…), para. 51; 9 October 2014, C-222/13, TDC A/S v. Erhvervesstyrelsen, para. 30; 6 October 2015, C-203/14, Consorci Sanitari del Maresme v. Corporació de Salut (…), para. 19]. The second aspect, which is internal, is linked with impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law [judgments of 19 September 2006, C-506/04, Wilson v. Ordre des avocatos (…), para. 52; 9 October 2014, C-222/13, TDC A/S v. Erhvervesstyrelsen, para. 31; 6 October 2015, C-203/14, Consorci Sanitari del Maresme v. Corporació de Salut (…), para. 20].

17. The key systemic and organisational issues necessary to ensure that Polish courts enforce the right to a fair trial according to Article 45(1) of the Constitution of the Republic of Poland and consequently Article 6(1) ECHR and Article 47 of the Charter are laid down in Articles 173-185 of the Constitution of the Republic of Poland. Article 173 of the Constitution of the Republic of Poland provides that courts are separate and independent; Article 177 provides that courts have the exclusive power

to administer justice; Article 178(1) provides the principle of judicial independence.

A number of circumstances must occur in order to meet the criteria of independence of a court which administers justice and independence and impartiality of a judge of the court. First of all, the systemic position of courts as bodies responsible for the administration of justice and their location within the system of public authorities should, under the Polish system (Article 10 of the Constitution of the Republic of Poland), be defined in keeping with the principle of division and balance of powers. It is safeguarded by specific provisions of the Constitution of the Republic of Poland which cannot be revoked in the legislative process by any political authority which does not have the majority of seats in parliament necessary to amend the Constitution of the Republic of Poland. Under Polish law, the same criteria must apply to review systemic provisions governing the existence of the National Council for the Judiciary, its responsibilities, procedures for appointment, position in relation to the legislature, the executive and the judiciary, and role in the procedure of judicial appointments.

According to 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, the participation of a body such as the National Council for the Judiciary in the context of a process for the appointment of judges may, in principle, be such as to contribute to making that process more objective. However, that is only the case provided that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal. The degree of independence enjoyed by the National Council for the Judiciary in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered, under Article 186 of the Constitution, to ensure the independence of the courts and of the judiciary, may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter.

Clearly, one of the key criteria for meeting the requirements of independence of a court and a judge is the procedure of appointment to the office established in the legal system, the degree of influence of political factors on appointments, in particular specific political expectations of candidates for judges, as well as the criteria for removal from office. The procedure of judicial appointment should take into consideration the candidate’s substantive, personal and emotional capacity to hold

the office, including his ability to meet the requirement of independence, rather than the candidate's political opinion and to what degree he would be willing to meet political expectations, if not directly then because he will appreciate the appointment, especially if such appointment is in breach of the applicable rules.

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

Another criterion conducive to meeting the requirement of judicial independence are the substantive and ethical requirements for candidates for office. Such requirements must be thoroughly checked according to the same criteria for all candidates for office in the same competition procedure. Only if so selected, may a candidate for the office of a judge perform his responsibilities without being concerned that his qualifications may be contested.

The criteria of judicial independence include independence from non-judicial bodies, independence from judicial authorities and bodies, independence from social pressure, including personal characteristics underpinning internal strength and independence of the judge. Impartiality of a judge, in turn, must be considered in the context of a specific dispute which the judge is to examine from a neutral standpoint, objectively, without any personal or financial interest.

To meet the standard of judicial independence, a specific climate is required around their adjudicating activity. It is unacceptable to disparage judges *in genere* as representatives of the profession (public service); to raise expectations, especially on the part of politicians and the media under their influence, as to how specific cases should be resolved; to express approval for those judges who collaborate with a political authority and accept functions in the administrative organisation of the judiciary offered by that authority, or disapproval and even hostility towards those who are critical of such behaviour, the intentions of the political authority and declared objectives of the reform.

18. The procedure for judicial appointments in different legal systems is a function of history, different in details, but it must respect principles necessary to ensure that judicial appointees represent the highest standards of professionalism,

impartiality, independence in the administration of justice. Any deviation from those principles of judicial appointments, depending on the infringed standards, the scale and severity of infringements, may undermine the standards of independence of judges and their courts. Particularly significant are manifest infringements, i.e., violations of fundamental principles which are an integral part of the organisation and functioning of the judiciary. If such violations are intentional or caused by obvious disregard for such principles, there is a real risk that other public authorities, including the executive, abuse their powers by undermining the reliability of the appointment procedure to the extent which cannot be foreseen in applicable law (cf. the ECtHR judgment of 12 March 2019, 26374/18, Guðmundur Andri Ástráðsson v. Iceland, issued in the context of Article 6(1) ECHR).

19. The impartiality and independence of the court is a precondition for the administration of justice. The essence of the administration of justice is to determine the truth, evaluate the credibility of witnesses, impose penalties, determine the degree of guilt, assess the contribution to damage caused or the amount of compensation in a specific case with respect to a specific individual, which cannot be precisely described in abstract and general provisions of law made by parliament or computer algorithms. Such assessment must take place in the conscience of the judge who mustn't be motivated by personal interest, fear or, worse, the intention to please someone. The functioning of courts as an institution responsible for resolving conflicting positions and interest between individuals and between individuals and society is a foundation of the contemporary state which subscribes to the principles of social justice.

National regulations, in particular regulations governing the organisation and the procedure for the appointment of judges who, as members of adjudicating formations, have direct responsibilities in the administration of justice, may and should be reviewed to ensure that they meet, in the territory of the Union, the criteria laid down in the second paragraph of Article 19(1) TEU, Article 47 of the Charter, and Article 6 ECHR.

IV.

20. Impartiality and independence of the court is reviewed at each stage of judicial proceedings. A range of instruments and regulations support such review.

They are available to individuals whose cases are heard by the court, to other participants of the proceedings, and in some cases also to the judge himself or to a higher-instance court.

Under certain circumstances, it is reasonable to conclude, in general, that a court comprised of certain judges would not be impartial and independent. In such cases, the judge must be recused, as laid down in Article 40(1) of the Code of Criminal Procedure and Article 48 of the Code of Civil Procedure (e.g., the judge is a close family member of a party to the proceedings; the judge has been personally involved in the case; the case concerns the judge directly). That is based on a strong conviction that such cases provide no objective conditions to conclude that the court comprised of such judge can be perceived as impartial and independent. The list of circumstances necessitating recusal of the judge is not exhaustive; according to the law, a motion for recusal of a judge may be lodged at any time where "a circumstance arises such that could cause reasonable doubt as to his [the judge's] impartiality in the case."

Another means of ensuring impartiality of the court is to lodge a motion for recusal of a judge who has been assigned to the case in breach of statutory provisions which establish safeguards against arbitrary decisions (cf. Article 47a of the Act of 27 July 2001 – Act on the common court system, consolidated text: Journal of Laws of 2019, item 92).

21. As has already been mentioned, a motion raising doubts as to the impartiality of a judge, which would affect the impartiality and independence of the court, may be lodged by a party to the proceedings, or the matter may be reported by the judge himself. In the latter case, a different court formation may *ex officio* examine the matter reported by the judge (Article 42(1) in conjunction with Article 4 of the Code of Criminal Procedure and Article 49(1) of the Code of Civil Procedure, cf. also the resolution of the Supreme Court of 26 April 2007, I KZP 9/07, OSNKW 2007/5, item 39; the judgment of the Supreme Court of 21 April 2011 r., V KK 386/10).

Another measure of ensuring impartiality and independence of the judge is provided in Article 37 of the Code of Criminal Procedure and Article 44^1 of the Code of Civil Procedure. Under those provisions, a court may, by its own initiative or by the initiative of a party to the proceedings, request the Supreme Court to transfer the case to another court of the same level if so required by the good of the administration of

justice. The utmost good of the administration of justice is to ensure objective conditions for the court to be perceived as impartial and independent. Historically, that has been the most frequent reason for the Supreme Court to replace the adjudicating formation in a case. Although the wording of Article 37 of the Code of Criminal Procedure has been associated with a transfer to a court with a different jurisdiction (i.e., transfer to a court of the same level in another city), yet the wording of the provision does not rule out an interpretation where a case is transferred to another formation of a court of the same level within the same organisational unit of common courts. The essence of the regulation is to ensure that the case is heard by another court of the same level within the organisation of the judiciary (e.g., another department) and not necessarily a court with a different jurisdiction.

22. To review any doubts about the independence of a judge, the court considers all circumstances which could affect his independence. Those may include relations between the judge and parties to the proceedings; circumstances suggesting that the judge is dependent on certain third parties, including other public authorities or political parties. How the judge obtains specific benefits or promotions could be of relevance. All such circumstances are broadly discussed in legal literature.

23. Doubts concerning the impartiality and independence of the court may be examined in a follow-up review of a judgment or proceedings in which a judgment is issued. Claims regarding the absence of impartiality and independence may in particular be raised as a remedy asserting unfair trial or even a violation of substantive law in criminal cases where, under the Criminal Code, criminal liability and penalty shall be determined only by a court, that is, a body which meets all the constitutional criteria and passes the test of impartiality and independence.

In the absence of impartiality and independence of a court of first instance, the appeal court may find in broadly understood criminal cases that it would be manifestly unjust to uphold the judgment of such court of first instance (Article 440 of the Code of Criminal Procedure). It should be noted that the appeal court is required to consider such circumstances *ex officio* even if the parties to the proceedings take no initiative. If that obligation is breached, a cassation appeal against a legally valid judgment of the appeal court may be lodged with the Supreme Court.

24. The most relevant means of follow-up review of impartiality and independence of courts is provided in Article 439(1)(1)-(2) of the Code of Criminal

Procedure and Article 379(4) of the Code of Civil Procedure, which have been interpreted in detail by the Supreme Court as the legal question referred by the First President of the Supreme Court concerns those provisions.

It should be noted that both those provisions establish follow-up safeguards of fulfilment of the objective criteria of impartiality and independence of the court in hearing a case. The criterion of being unauthorised to adjudicate, defined in Article 439(1)(1) of the Code of Criminal Procedure, is purely formal and relates to the fulfilment of the conditions for obtaining the status of a judge established by law. It refers to general powers vested directly by law. The general powers as such, however, are not decisive to determine that the participation of such person in a formation of the court, in a specific instance, ensures that the court is duly appointed.

The “unconditional grounds for appeal”, defined in Article 439(1)(2) of the Code of Criminal Procedure, refer to regulations which lay down the criteria of “due” appointment of a court. Those are both purely formal (e.g., number of judges or lay judges in a court formation) and based on substance. Such interpretation is instrumental to meeting the requirements derived from Article 47 of the Charter and its interpretation, in the light of the Constitution and the Convention, ensuring enforcement of the right to a fair trial by an independent court, referred to in Article 45(1) of the Constitution of the Republic of Poland and Article 6(1) ECHR. The court cannot be deemed to be “duly” appointed failing the objective criteria for the court to be perceived as impartial and independent. As a rule, anyone whose participation in hearing a case precludes the court from being perceived as impartial and independent should recuse himself or be recused on application of a party. If he is not recused, and if it is determined that the case was heard with the participation of a person who holds the status of a judge but does not meet the criteria of impartiality and independence, which implies absence of the objective criteria for the court to be perceived as impartial and independent, then the court is not duly appointed within the meaning of Article 439(1)(2) of the Code of Criminal Procedure.

If the circumstances defined in Article 439(1)(2) of the Code of Criminal Procedure occur in given proceedings, then as a rule the judgment issued in the proceedings should be annulled and the proceedings should be reopened. The appeal court determines such circumstances *ex officio*, regardless of the scope of the appeal and the claims raised as remedy. However, the key condition for such review is that

an (ordinary or extraordinary) measure of appeal is lodged. It should be noted that procedural defects caused by circumstances defined in Article 439(1)(2) of the Code of Criminal Procedure must affect the main proceedings rather than “incidental” proceedings (cf. judgment of the Supreme Court of 11 August 1999, V KKN 229/99). For instance, if a court responsible for incidental proceedings is not duly appointed (e.g., the court hearing a motion to recuse a judge is not duly appointed), that circumstance may be raised in an ordinary measure of appeal as a potential breach of procedural law affecting the judgment issued in the main proceedings. If the court finds, on application of a party or *ex officio*, that the court is not duly appointed, it will annul the judgment of the court of first instance. The appeal court is required to determine the facts underlying that determination, and it may examine evidence *ex officio*; evidence may also be presented by a party.

25. That does not mean that a claim concerning unconditional grounds for appeal cannot be raised in an appeal concerning a decision issued in incidental proceedings. This concerns in particular detention proceedings, which are subject to independent court review in accordance with Article 41(2) of the Constitution of the Republic of Poland. If a decision concerning temporary detention or its extension is affected by unconditional grounds for appeal, referred to in Article 439(1)(1) of the Code of Criminal Procedure or Article 439(1)(2) of the Code of Criminal Procedure, the decision must be annulled and the case must be reopened. However, such annulment does not necessarily imply that the main proceedings, in the course of which detention is imposed, are defective.

26. A special measure of reviewing due appointment of a court within the meaning of Article 439(1)(2) of the Code of Criminal Procedure is an appeal concerning a judgment of an appeal court, which can be lodged with the Supreme Court (Article 539a(1) of the Code of Criminal Procedure). After the judgment becomes legally valid, due appointment of the court may be reviewed in cassation. However, it should be noted that cassation is not available to parties in all cases. Cassation may be lodged only in cases where the appeal court passes a legally valid judgment; it must be lodged within 30 days after a copy of the judgment with a justification is served. However, any judgment may be challenged, on the grounds laid down in Article 439(1)(2) of the Code of Criminal Procedure, by the Ombudsman for Civil Rights or the Prosecutor General in an extraordinary cassation. In cassation

proceedings, the Supreme Court *ex officio* reviews due appointment of the court in the meaning referred to herein, both in first-instance and in appeal proceedings. Eventually, the circumstances referred to in Article 439(1)(2) of the Code of Criminal Procedure may be examined when the proceedings are reopened *ex officio* (on application of a party).

27. In civil proceedings, due appointment of the court hearing the case is a relevant circumstance necessary to determine if the proceedings carried out by the court are valid. An unlawful formation of an adjudicating court or the participation of a judge recused by law in hearing of the case provides grounds for invalidity of the proceedings under Article 379(4) of the Code of Civil Procedure, considered *ex officio* to the extent of the appeal by a court of second instance (Article 378(1) of the Code of Civil Procedure) and by the Supreme Court in cassation proceedings (Article 398^{9}(1)(3) and Article 398^{13} § 1 *in fine* of the Code of Civil Procedure). It follows that, if a court of second instance annuls a judgment of the adjudicating court on grounds that it is unlawful (Article 379(4) of the of the Code of Civil Procedure) and the case is reopened, the same formation of the court of first instance cannot re-examine the case (Article 386(5) *in fine* of the Code of Civil Procedure).

The participation of an unauthorised person in a court formation or adjudication by a judge recused by law, where a party cannot move for recusal before the judgment becomes legally valid, also provides grounds for the proceedings closed with a legally valid judgment to be reopened (Article 401(1) of the Code of Civil Procedure).

A person unauthorised to adjudicate is any person who has no power to sit on an adjudicating formation of a court, i.e., a person who is not appointed to the office of a judge or lay judge or who adjudicates before such appointment or after resigning from office or retiring or after being defectively appointed as a lay judge. According to the case-law, a person unauthorised to adjudicate is also any judge who is not delegated to adjudicate in the given court and any judge whose delegation does not meet the legal requirements for the validity and effect of delegation. In doubtful cases, it is necessary to check whether a lay judge has been sworn in as required by law (cf. judgment of the Supreme Court of 11 March 1932, I C 3064/31, OSP 1932, item 314).

28. According to regulations, the court is required to consider *ex officio* whether is lawfully appointed (Article 379(4) of the Code of Civil Procedure), and the participation of an unauthorised person in a court formation provides grounds for re-

opening of proceedings closed with a legally valid judgment (Article 401(1) of the Code of Civil Procedure); however, Polish law does not expressly provide for a specific procedure or measure available to parties in order to challenge the effective appointment of any person sitting on an adjudicating formation to the office of a judge if the circumstances of such appointment subsequently arouse doubt as to whether the person so appointed is capable of administering justice in the court formation in an impartial and independent manner. Therefore, the circumstances of appointment of a judge to the office, if different from the customary practice of judicial appointments, must be examined by reviewing whether the formation of the adjudicating court was lawful. Such circumstance must be examined *ex officio*; consequently, any court which reviews its own status or the status of any other court in connection with horizontal or higher-instance review of a judgment must take into account systemic regulations, known to the court *ex officio* due to the status quo of the legal system in which it administers justice, applicable in the appointment to the office of the judge who carries out proceedings or gives a judgment in the case. The requirement that justice may only be administered by an independent court composed of independent and impartial judges, laid down in Article 45(1) of the Constitution of the Republic of Poland, Article 6(1) ECHR, and Article 47 of the Convention, must be met by means of procedural measures available by law to the court which carries out the proceedings and to the parties participating in the proceedings.

29. The foregoing suggests that the provisions of Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Civil Procedure, which enumerate circumstances providing unconditional grounds for appeal and grounds for invalidity of proceedings, are only one of many instruments available to examine, in given court proceedings, whether the court which carries out the proceedings meets the criteria of independence and impartiality. In this sense, if a judge to be recused under Article 41 of the Code of Criminal Procedure and Article 48 of the Code of Civil Procedure sits on a court formation, then such court formation is not duly appointed, provided that the participation of such judge deprives the court of independence and impartiality. The claim that a court formation is not duly appointed in the light of the principle of independence and impartiality may also be raised as a claim concerning a breach of procedural law (e.g., the right to a fair trial or the right of defence, which can be effectively enforced only before an independent and impartial court) or

substantive law or a circumstance causing the judgment to be manifestly unfair. The same applies in civil proceedings to the concept of unlawfulness of a court formation. Furthermore, in civil proceedings, in special cases, if justified by exceptional circumstances of the proceedings, the inability of a party or participant to enforce his rights in the absence of independence and impartiality of the court may provide grounds for invalidity of the proceedings under Article 379(5) of the Code of Civil Procedure.

30. It should be stressed once again that the interpretation provided by the Supreme Court in this present resolution does not concern the regulations governing the appointment of judges or the regulations governing the status of judges: the resolution does not refer to those matters. Neither does this resolution determine to any degree what is the systemic effect of the defective organisation and functioning of the procedure for the nomination of candidates for the office of a judge by the National Council for the Judiciary to the present and future status of persons appointed to the office of the judge in that procedure.

The doubts concerning interpretation arising in the case-law, referred to the formation of the combined three Chambers, concern the effect of the defective nomination of candidates for the office of a judge by the National Council for the Judiciary, following the changes to the system of the National Council for the Judiciary and the competition procedure under the Act of 8 December 2017 amending the Act on the National Council for the Judiciary, to the application of criminal and civil procedural law. Those doubts have arisen due to amendments of regulations expanding the constitutional norms concerning the Council, its functioning and subsequent stages of the procedure of judicial appointments, which have been introduced since late 2017.

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31. In the light of Article 179 of the Constitution of the Republic of Poland, the President of the Republic of Poland appoints to the office of a judge not just anyone, at his discretion as to the candidate’s qualifications and ability to hold the office, but exercises that power on the motion of the National Council for the Judiciary. Therefore, a motion of the National Council for the Judiciary is a *sine qua non* condition of effective appointment. Moreover, a motion concerning a judicial appointment cannot

be lodged by anyone; it must be lodged by a body acting as the National Council for the Judiciary, not only by name but based on the procedure of its appointment and the conditions under which it exercises its powers (decision of the Constitutional Tribunal of 23 June 2008, 1 Kpt 1/08).

The Act of 8 December 2017 amending the Act on the National Council for the Judiciary terminated the mandates of members of the National Council for the Judiciary referred to in Article 187(1)(2) of the Constitution of the Republic of Poland, appointed according to previous regulations. The termination of the mandate of judges sitting on the National Council for the Judiciary at the effective date of the amendment was ostensibly justified by the requirement of establishing a shared term of office of all members of the National Council for the Judiciary; however, the amended Act allows for a mandate of a member of the National Council for the Judiciary to expire before the end of the four-year term of office (cf. Article 11e(1) and (3), Article 14(1) of the Act of 12 May 2011 on the National Council for the Judiciary, consolidated text: Journal of Laws of 2019, item 94, “Act on the National Council for the Judiciary”), which stands in conflict with Article 187(3) of the Constitution of the Republic of Poland. Therefore, the argument out forth in justification of the amendment was untrue and the mandate of the National Council for the Judiciary was terminated for other reasons.

New members of the National Council for the Judiciary were appointed by the Sejm of the Republic of Poland in accordance with the Act on the National Council for the Judiciary amended by the Act of 8 December 2017 amending the Act on the National Council for the Judiciary, which stood in conflict with Article 187(1)(2) of the Constitution of the Republic of Poland. That provision removed the requirement for judges – members of the National Council for the Judiciary to be appointed by judges, which prevents the identification of a public authority which could appoint them. The Constitution does not allow for that power to be implicitly awarded to the parliament. After the amendment of the Act on the National Council for the Judiciary, fifteen members of the National Council for the Judiciary who are judges were appointed by the Sejm of the Republic of Poland for a joint four-year term of office (Article 9a(1) of the Act in the National Council for the Judiciary). None of them is a judge of the Supreme Court, which is required under Article 187(1)(2) of the Constitution of the Republic of Poland.

In view of the procedure of appointment of judges to the National Council for

the Judiciary under the Act of 8 December 2017 amending the Act on the National Council for the Judiciary, the judiciary has no more control of the membership of the National Council for the Judiciary and, indirectly, in connection with amendments of other systemic provisions, of which candidates are proposed to the President for appointment to the office of a judge of a common court, a military court, the Supreme Court, or an administrative court. The National Council for the Judiciary is dominated by political appointees of the majority in the Sejm. Following the appointment of 15 judges – members of the National Council for the Judiciary by the Sejm, as many as 21 out of the 25 members of the National Council for the Judiciary are political appointees of both Houses of Parliament. Following the appointment of judges to the National Council for the Judiciary, judges – members of the National Council for the Judiciary no longer represent judges of the Supreme Court, judges of common courts, administrative courts, and military courts, as required under Article 187(1)(2) of the Constitution of the Republic of Poland. Judges – members of the National Council for the Judiciary by political appointment have no legitimacy as representatives of the judicial community, who should have authority and stay independent of political influence. That has largely weakened the role of the National Council for the Judiciary as a patron of independence of courts and judges.

The provisions of the Act of 8 December 2017 amending the Act on the National Council for the Judiciary governing the appointment of judges to the National Council for the Judiciary are inconsistent with the principle of division and balance of powers (Article 10(1) of the Constitution of the Republic of Poland) and the principle of separation and independence of courts (Article 173 of the Constitution of the Republic of Poland) and independence of judges (Article 178 of the Constitution of the Republic of Poland). The principle of separation of the judiciary is of crucial relevance in this context. According to that principle, based on the division and balance of powers, the legislature and the executive may interfere with the functioning of the judiciary only to the extent allowed by the Constitution of the Republic of Poland, that is, where expressly provided for in the Constitution. With respect to the National Council for the Judiciary, the principle of separation implies that the legislature and the executive may influence the membership and functioning of the National Council for the Judiciary only to the extent expressly provided for by the Constitution of the Republic of Poland (Article 187(1)(1) *in fine*, Article 187(1)(3)-(4)). Consequently, in determining the

system, responsibilities and rules of procedure of the National Council for the Judiciary (Article 187(4) of the Constitution of the Republic of Poland), the legislature cannot exercise the power to appoint judges – members of the National Council for the Judiciary which is not provided for in the Constitution of the Republic of Poland because its power to appoint members of the National Council for the Judiciary are defined in the Constitution (Article 187(1)(3) of the Constitution of the Republic of Poland).

The termination of the mandate of previous members of the National Council for the Judiciary and the appointment of new members of the National Council for the Judiciary in accordance with the Act of 8 December 2019 amending the Act on the National Council for the Judiciary arouses serious doubts as to compliance with Article 187(1) and (3) of the Constitution of the Republic of Poland and, consequently, doubts as to the legality of the National Council for the Judiciary and the nomination of candidates for judges with the participation of the National Council for the Judiciary.

32. The Act of 8 December 2017 amending the Act on the National Council for the Judiciary changed the procedure for the appointment of judges – members of the National Council for the Judiciary as follows: *authorised to propose a candidate for a member of the Council shall be a group of at least: (1) two thousand citizens of the Republic of Poland who are over 18 years of age, have the full legal capacity and enjoy full public rights; (2) twenty-five judges, other than retired judges.* Candidates are proposed in writing by a proxy, that is, a person named in a written declaration of the first 15 persons on the list. Attached to the candidature proposed by a proxy is a list of judges endorsing the candidature, containing the full name, place of office, PESEL identifier, and hand-written signature. The candidatures are immediately notified to MPs by the Speaker of the Sejm and published with the exception of enclosures. The Act lays down the specific procedure for the appointment of other elective members of the National Council for the Judiciary.

Endorsement lists presented by judges running as candidates for the National Council for the Judiciary had to be signed not just by anyone but by judges. According to the Act amending the Act on the National Council for the Judiciary, the Speaker of the Sejm and the Minister of Justice shall verify whether the persons whose names are written in the list hold the office of a judge; however, that is done without the participation of the interested person and without any public scrutiny. A request for

information concerning persons who signed the lists of endorsement of judges running as candidates for the National Council for the Judiciary, according to regulations governing access to public information, confirmed as legitimate by a legally valid judgment of the National Administrative Court of 28 June 2019, I OSK 4282/18, dismissing a cassation appeal of the Head of the Chancellery of the Sejm of the Republic of Poland concerning the judgment annulling the decision to the extent of refusal to disclose such information, has been disregarded by the Head of the Chancellery of the Sejm of the Republic of Poland and the Speaker of the Sejm, who have refused to comply with the legally valid judgment. That state of affairs has prevailed to date.

Given the refusal to comply with the judgment ordering disclosure, in accordance with the regulations governing access to public information, of the details of the persons who signed the lists of endorsements for the individuals appointed to the National Council for the Judiciary by the parliamentary majority, it is not possible to verify whether the endorsement lists were signed by existing persons and whether such persons were judges at the time of giving endorsement and of appointment of members of the National Council for the Judiciary at a specific place of office, and whether the lists were signed by the number of persons required by law. Such circumstances are very easy to verify. Judges of any court may check whether a person signed on a list as a judge of that court was in fact in service of the court when the endorsement list were signed. Executive bodies are concealing the details concerning the endorsement for persons sitting on the National Council for the Judiciary, thus preventing review of the legitimacy of appointed members of the National Council for the Judiciary (cf. on the issue of importance attributed by the ECtHR to refusal to disclose documents relevant to a case: judgment of 24 July 2014, 28761/11, Abu Zubaid, Abd al-Rahim al Washira v. Poland).

According to a published statement of Judge Maciej Nawacki, appointed as a member of the National Council for the Judiciary, he signed his own endorsement list. According to a published statement of four judges, Judge Maciej Nawacki used withdrawn endorsements to run as a candidate for the National Council for the Judiciary. The endorsements were withdrawn long before the list was verified and used in a vote; the Speaker of the Sejm was given an advance notice of the circumstance (on 25 January 2018). Furthermore, only several judges of the District

Court in Wieliczka confirmed that they had endorsed Judge Paweł Styrna. No details of other judges who endorsed candidates for the National Council for the Judiciary have been published. If candidates for the National Council for the Judiciary signed each other's lists of endorsement, that is indicative of the scale of endorsement for the members of the National Council for the Judiciary in the judicial community.

33. The National Council for the Judiciary acting in accordance with the Act of 8 December 2017 amending the Act on the National Council for the Judiciary held sessions where it issued opinions concerning candidates for judicial positions in different courts. The candidates were presented to the President of the Republic of Poland. From 4 July 2018, when the First President of the Supreme Court was to be retired under Article 111 of the Act on the Supreme Court, to 1 January 2019, i.e., the effective date of the Act of 21 November 2018 amending the Act on the Supreme Court (Journal of Laws, item 2507, "Act of 21 November 2018"), the National Council for the Judiciary held: (1) a session on 10-13 July 2019, after which 5 motions were tabled for appointment to the office of a judge of a common court and 3 motions for appointment to the office of a judge of an administrative court; (2) a session on 24-27 July 2018, after which 20 motions were tabled for appointment to the office of a judge of a common court and 1 motion for appointment to the office of a judge of an administrative court; (3) a session on 23-24 and 27-28 August 2018, after which 40 motions were tabled for appointment to the office of a judge of the Supreme Court (the President of the Republic of Poland did not appoint Małgorzata Ułaszonek-Kunacka, who withdrew her candidature, and Jarosław Duś; Wojciech Sych resigned from office at the Criminal Chamber of the Supreme Court following his appointment to the Constitutional Tribunal); (4) a session on 18-21 September 2018, after which 17 motions were tabled for appointment to the office of a judge of a common court and 2 motions for appointment to the office of a junior judge of an administrative court; (5) a session on 9-12 October 2018, after which 32 motions were tabled for appointment to the office of a judge of a common court and 1 motion for appointment to the office of a junior judge of an administrative court; (6) a session on 16-19 October 2018, after which 50 motions were tabled for appointment to the office of a judge of a common court, 4 motions for appointment to the office of a judge of an administrative court, and 1 motion for appointment to the office of a junior judge of an administrative court; (7) a session on 6-9 November 2018, after which 28 motions were tabled for appointment

to the office of a judge of a common court and 5 motions for appointment to the office of a judge of the Supreme Administrative Court; (8) a session on 20-23 November 2018, after which 45 motions were tabled for appointment to the office of a judge of a common court, 1 motion for appointment to the office of a judge of an administrative court, and 2 motions for appointment to the office of a junior judge of an administrative court; (9) a session on 4-7 and 11-13 December 2018, after which 75 motions were tabled for appointment to the office of a judge of a common court.

At the same time, after the 2017 Act on the Supreme Court was passed, the legislature and the executive, and subsequently also the National Council for the Judiciary, challenged the status of Małgorzata Gersdorf as the First President of the Supreme Court. According to Article 187(1)(1) of the Constitution of the Republic of Poland, the members of the National Council for the Judiciary include not just any judge of the Supreme Court or a person performing just any function at the Supreme Court but the First President of the Supreme Court. After the effective date of the Act on the Supreme Court, which forced the First President of the Supreme Court into retirement, that is, after 4 July 2018, the First President of the Supreme Court was no longer notified or sessions of the National Council for the Judiciary as the First President of the Supreme Court; the First President of the Supreme Court was ignored by the National Council for the Judiciary until the effective date of the Act of 21 November 2018. That Act corrected the defective termination of the mandate of the First President of the Supreme Court; according to Article 2(4) of the Act, the mandate of the First President of the Supreme Court subject to the “corrective” Act is considered to be uninterrupted. Such legal fiction cannot repair most of the infringements which occurred from the effective date of the unlawful Act to the correction of the defect. The “corrective” Act does not repair the exclusion of the First President of the Supreme Court from the membership of the National Council for the Judiciary from 4 July 2018 to 1 January 2019 because the wording to the effect that the mandate of the First President of the Supreme Court is considered to be uninterrupted does not make the First President of the Supreme Court properly notified of sessions of the National Council for the Judiciary or present at sessions where her vote would count in decisions passed by the National Council for the Judiciary.

34. Article 31(1) of the Act on the Supreme Court deprived the First President of the Supreme Court of the power to announce vacant positions of judges

of the Supreme Court and vested that power in the President of the Republic of Poland. The new legal power is not enumerated in Article 144(3) of the Constitution of the Republic of Poland as one of the 30 prerogatives; therefore, it is evident that the publication in Monitor Polski of an announcement concerning the number of vacant judicial positions in chambers of the Supreme Court requires a counter-signature of the Prime Minister. According to Article 144(2) of the Constitution of the Republic of Poland, official acts of the President other than the prerogatives shall require, for their validity, the counter-signature of the Prime Minister. The power to announce vacant judicial positions in the Supreme Court vested in the President of the Republic of Poland under the 2017 Act on the Supreme Court cannot be considered a prerogative derived from the prerogative of appointing judges (Article 144(3)(17) of the Constitution of the Republic of Poland). Only such power that is necessary to execute a prerogative may be considered to be its derivative power requiring no counter-signature. According to the regulations applicable before the effective date of the 2017 Act on the Supreme Court, the power to announce vacant judicial positions in the Supreme Court was vested in the First President of the Supreme Court without prejudice to the exercise of the President's power of appointing judges of the Supreme Court. The power of the President of the Republic of Poland to decide about the announcement of vacant judicial positions in the Supreme Court is not necessary to exercise the prerogative of appointing judges of the Supreme Court; instead, it is a convenient means of exerting arbitrary influence on whether, and when, positions in the Supreme Court can be filled.

According to the resolution of the full formation of the Supreme Court of 28 January 2014, BSA I-4110-4-4/13 (OSNC 2014, No. 5, item 49), if a legal provision may pose a risk to the separation and independence of the judiciary, be it indirect, potential or even hypothetical, then it should be interpreted strictly, in the case of doubt narrowly, in line with the pro-constitutional intention of substantiating and respecting the principle of division of powers, including separation of the judiciary. The foregoing is necessary to protect the judiciary for the good and interest of all citizens (Article 1 of the Constitution of the Republic of Poland). In exercise of the power vested under the 2017 Act on the Supreme Court, the President of the Republic of Poland issued, with no counter-signature of the Prime Minister, an announcement of 24 May 2018 concerning vacant judicial positions at the Supreme Court (Monitor Polski of 2018,

item 633). Such defective announcement of the President of the Republic of Poland could not initiate a non-defective procedure of appointment for judicial positions at the Supreme Court (cf. also the judgment of the full formation of the Constitutional Tribunal of 23 March 2006, K 4/06, OTK-A 2006, No. 3, item 32).

35. The requirement of holding a competition procedure before the National Council for the Judiciary for the selection of a candidate for the office of a judge to be presented to the President of the Republic of Poland not only creates conditions of fair competition for candidates for public office but, in particular, ensures that the office goes to the person best positioned to hold it.

The Act of 20 July 2018 amending the Act – Law on the common court system and certain other Acts (Journal of Laws of 2018, item 1443), under paragraph 3 inserted in Article 35, eliminated the requirement for the National Council for the Judiciary to consider, when drawing up a list of candidates recommended for appointment to the office of a judge, opinions on candidates issued by colleges of the relevant courts and appraisals issued by relevant general assemblies of judges. That was a reaction to the behaviour of judicial self-government bodies which refused to exercise their powers in defective proceedings before the National Council for the Judiciary. Instead of eliminating the broadly criticised defects of the system it had devised, the legislature decided to eliminate from the system the last options of participation in the procedure of judicial appointments previously left for judicial self-government bodies.

At the same time, Article 44 of the Act on the National Council for the Judiciary, which provides for the possibility of lodging appeals against resolutions of the National Council for the Judiciary in procedures carried out to draw up a list of candidates recommended to the President of the Republic of Poland for appointment to the office of a judge, was amended in the *Act of 8 December 2017 amending the Act on the National Council for the Judiciary, effective as of 17 January 2018*, by eliminating the option of raising the claim of undue assessment of a candidate's fulfilment of the criteria considered when deciding to table a motion for appointment to the office of a judge in the position of a judge of the Supreme Court. The legislature made the Supreme Administrative Court competent for the examination of such appeals.

Article 44(1b) and (4) of the Act on the National Council for the Judiciary in the wording of the *Act of 20 July 2018 amending the Act – Law on the common court*

system and certain other Acts (Journal of Laws of 2018, item 1443), effective as of 27 July 2018, without formally eliminating the option for participants of the competition procedure for the office of a judge of the Supreme Court to lodge an appeal on grounds of an unlawful resolution of the National Council for the Judiciary, provides that, unless a resolution in an individual case concerning appointment to the office of a judge of the Supreme Court is appealed by all participants of the procedure, it becomes legally valid to the extent of the decision to table a motion for appointment to the office of a judge of the Supreme Court and to the extent of the decision not to table a motion for appointment to the office of a judge of the Supreme Court with respect to those participants of the procedure who do not appeal. *In individual cases concerning appointment to the office of a judge of the Supreme Court, if the Supreme Administrative Court annuls a resolution of the National Council for the Judiciary not to table a motion for appointment to the office of a judge of the Supreme Court, the participant of the procedure who appeals is to be proposed as a candidate for a vacant judicial position at the Supreme Court in a procedure pending before the National Council for the Judiciary at the date of the judgment of the Supreme Administrative Court or, in the absence of such procedure, for another announced vacant judicial position at the Supreme Court.*

All resolutions of the National Council for the Judiciary naming candidates for the office of a judge of the Supreme Court were appealed. The National Council for the Judiciary ignored the appeals and presented selected candidates for judicial positions to the President of the Republic of Poland. However, the resolutions of the National Council for the Judiciary were not definitive in that their judicial review was initiated and could result in their annulment. Such resolutions provided no grounds to move that the President of the Republic of Poland appoint the persons concerned to vacant judicial positions. As the resolutions were appealed, the vacant judicial positions were filled defectively (cf. justification of the judgment of the Supreme Court of 21 May 2019, III CZP 25/19, OSNC 2019, No. 10, item 99), and the fitness of candidates for office was in fact never duly checked. Vacancies were filled whether or not the appointee was the best candidate for the job.

To prevent the irreversible effect of such appointments, the Supreme Administrative Court, where appeals were lodged concerning resolutions refusing nomination of specific individuals as candidates for specific vacancies, suspended the

effect of the resolution of the National Council for the Judiciary of 24 August 2018, No. 318/2018, selecting a candidate for the position of a judge of the Supreme Court in the Criminal Chamber (decision of the Supreme Administrative Court of 25 September 2018, II GW 22/18 and II GW 23/18), the effect of the resolution of the National Council for the Judiciary of 28 August 2018, No. 330/2018, selecting candidates for the position of a judge of the Supreme Court in the Civil Chamber (decision of the Supreme Administrative Court of 27 September 2018, II GW 27/18), and the effect of the resolution of the National Council for the Judiciary of 28 August 2018, No. 331/2018 selecting candidates for the position of a judge of the Supreme Court in the Extraordinary Control and Public Affairs Chamber (decision of the Supreme Administrative Court of 27 September 2018, II GW 28/18). The Supreme Administrative Court provided its reasons for granting the legal protection to the appellants and the scope of such protection (as did the Supreme Court in decisions of 1 August 2018, III PO 4-6/18). Despite the pending judicial review of the resolutions of the National Council for the Judiciary concerning all candidates for the Supreme Court and despite the decisions of the Supreme Administrative Court suspending the effect of the resolutions concerning the candidates for the Civil Chamber, the Criminal Chamber, and the Extraordinary Control and Public Affairs Chamber, being aware of the effect of his decisions that would be difficult to reverse *de lege lata,* the President of the Republic of Poland presented appointments to the persons named in the resolutions of the National Council for the Judiciary and the appointees accepted the appointments.

Article 44(1b) and (4) was revoked in the Act of 26 April 2019 amending the Act on the National Council for the Judiciary and the Act – Law on the common court system (Journal of Laws of 2019, item 914); Article 3 of that Act provides that appeal procedures concerning resolutions of the National Council for the Judiciary in individual cases of appointment to the office of a judge of the Supreme Court, opened but not closed before the effective date of the Act, shall be discontinued by law. The decision of the Supreme Administrative Court of 26 June 2019, II GOK 2/18, in an appeal procedure concerning the resolution of the National Council for the Judiciary of 28 August 2018, No. 330/2018, concerning tabling (not tabling) motions for appointment to the office of a judge of the Supreme Court, in connection with the motion of the Prosecutor General to discontinue such proceedings, referred a question

for a preliminary ruling to the Court of Justice of the European Union.

36. According to Article 7 of the Constitution of the Republic of Poland, bodies of public authority shall function on the basis of, and within the limits of, the law; that is, exclusively within powers defined by law which gives them legitimacy. That applies also to the President of the Republic of Poland because his official acts are not excluded from the scope of Article 7 of the Constitution of the Republic of Poland; furthermore, he is liable before the State Tribunal for the breach of any provision of the Constitution of the Republic of Poland, including provisions which lay down his prerogatives (Article 145 of the Constitution of the Republic of Poland). Assuming that the exercise of prerogatives by the President of the Republic of Poland is not subject to on-going review by body other than the State Tribunal or at any other time, that assumption only applies to acts which are, in essence, the exercise of a prerogative. The President of the Republic of Poland is not a public authority above the Constitution of the Republic of Poland whose own assertion would bindingly and definitively identify an instance of exercising a prerogative, which would preclude review of the legality of such act and, consequently, of its effect.

The President appoints judges but he does so not just at any time and at his own discretion but on a motion of the National Council for the Judiciary. No appointment may be granted to anyone who is not concerned by such motion (cf. the decision of the Constitutional Tribunal of 23 June 2008, 1 Kpt 1/08).

Therefore, it is a necessary condition for the exercise of the prerogative by the President of the Republic of Poland that such act be initiated by a duly formed and appointed body holding the status of the National Council for the Judiciary. Since the effective date of the Act on 8 December 2017 amending the Act on the National Council for the Judiciary and the 2017 Act on the Supreme Court, the National Council for the Judiciary has not been duly appointed under the Constitution of the Republic of Poland; consequently, the National Council for the Judiciary could not exercise its powers, which the President of the Republic of Poland should have determined before exercising his prerogative. Persons named in the lists of recommendations drawn up in a defective procedure of appointment for judicial positions cannot be considered to have been candidates for office duly presented to the President of the Republic of Poland whom the President of the Republic of Poland is competent to appoint to the office. Even assuming that presentation of an appointment to such persons formally

makes them appointed to the office of a judge, it is necessary to determine whether, and to what extent, such persons may exercise judicial powers without infringing on the requirement of impartiality and independence of a court which administers justice.

37. According to the resolution of the full formation of the Supreme Court of 28 January 2014, BSA I-4110-4-4/13 (OSNC 2014, No, 5, item 49), in reference to the resolution of the Supreme Court of 17 July 2007, III CZP 81/07 (OSNC 2007, No. 10, item 154) and the justification of the resolution of the full formation of the Supreme Court of 14 November 2007, BSA I-4110-5/07, a judge exercises judicial powers at the court which is his place of office. The place of office, also known as the “seat of a judge”, is one of the key criteria of the status of a judge. The President appoints a judge to the office of a judge and assigns him a place of office, which may only be changed in exceptional cases according to a strict procedure. A judge appointed to the office has a place of office defined in the appointment. The appointment to the office of a judge invests the judge with the judicial power, i.e., the power to pass judgments and make other judicial acts on behalf of the Republic of Poland; the place of office, in turn, delineates the scope of those powers: a specific court, the jurisdiction of the judge, and the type of cases he may resolve, defined in the regulations of procedural law concerning objective jurisdiction.

According to the case-law and legal theory alike, the place of office is a component of the judicial power *sensu stricto* rather than a mere matter of employment. Any change of the place of office of a judge interferes with the powers of the judge: it subtracts, expands, or transfers the judge’s powers. If a judge abuses the scope of his powers, either with regard to territory or in objective scope, for instance, if he adjudicates outside of the court (territory) of his place of office, he is not a competent judge (court) within the meaning of Article 45(1) of the Constitution of the Republic of Poland and procedural law; likewise, a court composed of judges of a different court is not competent, either. The concept of competent (natural) judge, first put forth in the French Constitution of 3 September 1791, now substantiated in constitutional provisions of most democratic States and intrinsically linked with the principle that a judge is affiliated with an office and cannot be removed or transferred, is one of the components of the essence and function of judicial independence. Competent judge is also one of the key factors of procedural justice, an element of the right to a fair trial which is a foundation of the democratic state ruled by law.

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

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

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

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

In systemic terms, that undermines trust in the impartiality of persons so appointed. The lack of independence essentially consists in decisions of that body being subordinated to political authorities, in particular the executive. Not least relevant to an assessment of the functioning of the National Council for the Judiciary is the suspension of its membership in the European Network of Councils for the Judiciary.

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

40. Defective competitions for the office of a judge carried out by the National Council for the Judiciary, which is structurally no longer independent, took place under conditions of long-term intentional steps taken by representatives of the executive and the legislature aiming to generally undermine trust in the courts, their impartiality and independence. Under such conditions, judicial appointments in extremely politicised procedures further undermine the objective criteria for courts with the participation of such persons to adjudicate in conditions necessary for the courts to be perceived as impartial and independent.

41. Steps taken by a political body, that is, the Minister of Justice, through disciplinary officers appointed by him in order to persecute judges adjudicating to clarify uncertainties concerning the competition procedure for judicial positions corroborate the systemic limitation of judicial independence and the intention to eliminate any control over the influence exerted by political authorities on the competitions in order to promote persons amenable to the opinions of the political group of the Minister of Justice.

42. It is particularly relevant that doubts concerning the appointment of the members of the National Council for the Judiciary cannot be clarified, in particular their fulfilment of the formal criteria of appointment to the National Council for the Judiciary. This creates uncertainty as to the due appointment of the National Council for the Judiciary and consequently uncertainty about the validity of decisions of that body.

Furthermore, it automatically creates uncertainty about the status of persons presented to the President of the Republic of Poland for appointment to the office of a judge. If acts of the National Council for the Judiciary are found to be defective, the authority of persons appointed to the office of a judge could be reviewed, opening the door to contesting the legality of decisions of such persons. A court is not “duly” appointed if it includes a person whose judicial powers could be contested in the future and it is not possible to objectively clarify doubts as to such person’s appointment procedure.

The formation of the Supreme Court passing this present resolution fully shares the position presented in the judgment of the Supreme Court of 5 December 2019, III PO 7/18 to the effect that the National Council for the Judiciary so formed is not an independent body but a body subordinated directly to political authorities. Consequently, competitions for the office of a judge carried out by the National Council for the Judiciary have been and will be defective, creating fundamental doubts as to the motivation behind motions for the appointment of specific individuals to the office of a judge. That notwithstanding, in view of factual and legal obstacles aiming to prevent the elimination of doubts as to the legality of the appointment of individual members of the National Council for the Judiciary, up to and including unlawful refusal to comply with court judgments, the stability and legality of decisions of the National Council for the Judiciary may be permanently contested, becoming an object of political dispute, which puts in question the neutrality of persons nominated by the National Council for the Judiciary. Such persons may objectively be deemed to be motivated by the intention to support one of the parties to that dispute in order to protect their own interest (including their official position).

It should be stressed that the defect of the procedure of nominating candidates to the office of a judge by the National Council for the Judiciary is structural in nature, preventing that body’s due performance of its constitutional functions. It cannot be exculpated merely by assurances of members of the National Council for the Judiciary that the body functions duly and fairly. The foregoing is unrelated to doubts concerning the constitutionality of the appointment of some members of the National Council for the Judiciary. The latter question has not been considered in an interpretation of the Supreme Court; however, it is reasonable to say that the current functioning of the National Council for the Judiciary is a result of the departure from the constitutional

requirements for the appointment of some members of the National Council for the Judiciary.

VI.

43. The objective criteria for a court to be perceived as impartial and independent, referred to in the judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18, must be considered comprehensively, taking into account all circumstances, especially those related to the process of judicial appointment.

44. According to Article 179 of the Constitution of the Republic of Poland, judges shall be appointed for an indeterminate period. Appointment, which is a power of the President of the Republic of Poland exercised on application of the National Council for the Judiciary, vests the adjudicating power (*votum*). It is a part of the judge's personal status subject to constitutional safeguards of retention and stability (Article 180 of the Constitution of the Republic of Poland). The judge exercises the adjudicating power vested in him in judicial procedures, where the judge should not adjudicate in certain cases despite holding the *votum*. Review and verification of the criteria and limitations of the adjudicating power is a responsibility of the court acting according to judicial procedures. Such verification does not touch on the matter of the judge's appointment by the President of the Republic of Poland (awarding the *votum*) according to Article 179 of the Constitution of the Republic of Poland; a judge who is recused or recuses himself in a given case does not forego or relinquish that status.

Appointment to the office of a judge by the President of the Republic of Poland does not lead to a permanent and incontestable presumption that the criteria of impartiality and independence will be met in every case examined by a court with the participation of such judge. This is in particular the case where the procedure preceding the appointment was defective, especially if it was carried out with the participation of the National Council for the Judiciary that is not independent, as stated in particular in the judgment of the Court of Justice of the European Union of 19 November 2019. It cannot be argued that any defect in the nomination process stands corrected by the presidential act of appointment to the office of a judge; such interpretation would unreasonably limit the right to a fair trial before an independent and impartial court. Constitutional powers of public authorities cannot be interpreted

in such a way that the interpretation undermines fundamental constitutional principles.

The safeguarded principle of judicial independence and impartiality implies that the substance and substantiation of that principle should be decided by courts. A contrary view, prohibiting courts from taking a position in such matters or implying that courts should examine cases disregarding a review of the criteria of independence and impartiality, would undermine the substance of the right to a fair trial as a safeguard of constitutional rights. Constitutional independence of judges and courts and an interpretation of Article 45(1) of the Constitution of the Republic of Poland in a way consistent with Article 6 ECHR and Article 47 of the Charter may only be ensured on the assumption that no such presumption exists: a judge appointed with the participation of a defectively formed and defectively functioning National Council for the Judiciary cannot be presumed to be independent. A contrary conclusion would imply that the legislature and executive in the Polish legal system may deprive individuals of the guarantee of the right to have their cases heard by an independent judge and an independent court. The Supreme Court's interpretation of the provisions of the Code of Civil Procedure and the Code of Criminal Procedure in line with Article 45(1) of the Constitution of the Republic of Poland, Article 47 of the Charter and Article 6 ECHR aims to prevent that effect. That is particularly urgent following the judgment of the Court of Justice of the European Union of 19 November 2019 and the judgment of the Supreme Court of 5 December 2019, III PO 7/18, which concluded that in the permanent absence of conditions necessary for the National Council for the Judiciary to be perceived as an independent body, a structural defect affects the participation of that body in the procedure of nominating candidates for the office of a judge.

45. In the absence of independence of the National Council for the Judiciary, the procedure of judicial appointment is defective. However, that defect and its effect undermining the criteria of independence and impartiality of the court may prevail to a different degree. First and foremost, the severity and scope of the procedural effect of a defective judicial appointment varies depending on the type of the court of appointment and the position of such court in the organisation of the judiciary.

The status of a judge of a common court or a military court is different than the status of a judge of the Supreme Court. This is due to the different systemic position of common and military courts and the Supreme Court, their different powers, and different criteria for appointment to the office (Article 175(1) of the Constitution of the

Republic of Poland). Notably, the special, constitutional, systemic characteristics of the Supreme Court distinguish it not only from other judicial bodies but also from other authorities of the Republic of Poland. Such exceptional position of the Supreme Court is mainly due to the exclusive powers of the Supreme Court, essential for the functioning of the Republic of Poland, which ensure uninterrupted and proper functioning of the democratic State ruled by law, including the lawfulness of individual participation in authorities through the election process as well as civil review. According to Article 129(1) and Article 101(1) of the Constitution of the Republic of Poland, the Supreme Court shall adjudicate upon the validity of the election of the President of the Republic of Poland and the validity of the elections to the Sejm and the Senate. According to Article 125(4) of the Constitution of the Republic of Poland, the Supreme Court shall adjudicate upon the validity of a nationwide referendum and the referendum referred to in Article 235(6) of the Constitution of the Republic of Poland, i.e., a systemically important constitutional referendum. Therefore, it is key for the due performance of the powers vested in the Supreme Court that the objective criteria of its independence and impartiality are met. That concerns procedures of appointment to the office of a judge of the Supreme Court as well as the objective perception of the Supreme Court as a judicial body independent of political influence. The qualified standard of independence of the Supreme Court from political authorities is a necessary condition of its functioning in accordance with the Constitution and the due exercise of its powers which are of fundamental importance to individuals within the organisation of the democratic State.

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

Despite the formal requirement that candidates for the office of a judge of the Supreme Court be of impeccable moral character and have particularly extensive legal knowledge, review of those requirements was removed from the competition procedure and left only for the members of the National Council for the Judiciary appointed by the parliamentary majority. Review of the fulfilment of those requirements by candidates for the office of a judge of the Supreme Court in the procedure carried out by the National Council for the Judiciary is, by nature, limited.

The possibility of lodging an appeal against resolutions naming a candidate for the office by other participants of the competition procedure was also eliminated, leaving them the only option of running for office in another competition to be announced by arbitrary decision of the President of the Republic of Poland. That in fact left the appointment for positions in the Supreme Court for decision of the political authority.

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

The circumstances of that process must be considered in the light of the fact that the competitions for positions of a judge of the Supreme Court, which attract the strongest interest of the general public due to the importance of the Supreme Court, were carried out at the time when attempts were made to remove some judges of the Supreme Court from office, including the First President of the Supreme Court whose constitutional mandate was to be terminated. Those steps were taken in breach of the Constitution of the Republic of Poland. Standing as a candidate for a judicial position where the membership of the body responsible for the competition was unconstitutional (i.e., without the participation of the active First President of the Supreme Court) had to be objectively perceived as endorsement of the political steps taken by the parliamentary majority.

It should be stressed that appointment to the Supreme Court is always a first appointment to the office in the Supreme Court, which imposes specific conditions and procedures necessary to duly verify the candidate’s competences, including his characteristics necessary to maintain independence and impartiality. The absence of

such verification and of transparency of the appointment procedure, affecting the competitions, gave rise to uncertainty and suspicions as to political motivation of the nomination decisions. That precludes the fulfilment of the objective criteria for persons so nominated to be perceived as impartial and independent. That is even more so given that they were appointed to a court of last instance competent to annul legally valid court judgments and issue binding legal interpretations, a court whose judgments are not subject to further review which could verify the fulfilment of the criteria of impartiality and independence of a court comprised of persons appointed to the office of a judge of the Supreme Court in defective procedures. Therefore, the highest standards must be observed in the appointment procedure to ensure that the person selected guarantees independence and impartiality of the Supreme Court when he adjudicates in a formation of the Supreme Court.

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

It is also relevant to note that the exclusive jurisdiction of the Extraordinary Control and Public Affairs Chamber includes hearing appeals against resolutions of the National Council for the Judiciary concerning candidates for the office of a judge of common, military and administrative courts. As a result, a Chamber which is

comprised entirely of defectively appointed judges reviews the appointment of other judges on application of a National Council for the Judiciary formed in the same way.

It should be mentioned that additional circumstances arise with regard to judges of the Disciplinary Chamber, confirming the inability of an adjudicating court with their participation to fulfil the criteria of independence and impartiality. Such circumstances concern directly the Chamber's organisation, system, and appointment procedure, as well as its separation from the Supreme Court. The formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Supreme Court fully shares, in that regard, the legal assessment and its justification provided in the judgment of the Supreme Court of 5 December 2019 in case III PO 7/18, which found that the Disciplinary Chamber established in the Supreme Court under the 2017 Act in the Supreme Court structurally fails to fulfil the criteria of an independent court within the meaning of Article 47 of the Charter and Article 45(1) of the Constitution of the Republic of Poland and Article 6(1) ECHR, and that it is an extraordinary court which cannot be established in the times of peace according to Article 175(2) of the Constitution of the Republic of Poland. For those reasons alone, judgments issued by formations of judges in the Disciplinary Chamber are not judgments given by a duly appointed court.

46. The interpretation of Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Civil Procedure presented in point 1 of this resolution does not imply that persons appointed to the office of a judge of the Supreme Court are removed from office or suspended in the office within the meaning of Article 180 of the Constitution of the Republic of Poland. The interpreted provisions neither concern formal competences of persons so appointed to the office nor provide general prohibitions or limitations concerning the performance of judicial functions. Therefore, they do not affect their status or appointment, referred to in Article 179 of the Constitution of the Republic of Poland. However, from the procedural perspective, certain circumstances which occurred in the procedure of appointment to the office of a judge or subsequently to that procedure could permanently eliminate the conditions necessary for a formation of the Supreme Court comprised of a given judge to be perceived as an impartial and independent court. That could also be the case with respect to the inability to adjudicate referred to, for instance, in Article 439(1)(1) of the Code of Criminal Procedure. Procedural determination of such circumstance in no way

infringes on Article 180 of the Constitution of the Republic of Poland.

Persons who applied in procedures for appointment to the office of a judge of the Supreme Court under the conditions defined in the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and decision-making bodies in such procedures evidently must have realised the procedural effect regarding the principle of impartiality and independence of courts that would arise due to the systemic defect of the procedures for appointment to the office of a judge of the Supreme Court.

However, in should be noted with reference to civil proceedings in particular that follow-up review of judgments through appeal depends by the initiative of the parties and participants of proceedings. Consequently, a court formation may be found to be unlawful within the meaning of Article 379(4) of the Code of Civil Procedure as a rule by the initiative of the parties and participants of proceedings. It may be that parties and participants may not be interested in invoking circumstances confirming that the court does not meet the criteria of impartiality and independence. At the same time, there is no other measures necessary to annul legally valid judgments issued under the circumstances defined in Article 379(4) of the Code of Civil Procedure with the participation of judges of the Supreme Court appointed in the procedure defined in the Act of 8 December 2017 amending the Act on the National Council for the Judiciary.

VII.

47. With respect to judges of common courts and military courts, due to the practical possibility of review of fulfilment of the criteria of impartiality and independence, greater variety in the severity of the defective competition procedures and the status of their participants, and different constitutional functions of common and military courts compared to the Supreme Court, it is necessary to establish a different method of determining the criteria of application of Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Civil Procedure. In particular, such method should assess the severity of defectiveness of individual competition procedures, as well as the circumstances affecting the participating judges and the nature of cases adjudicated by courts with their participation. Therefore, it may be that in spite of fundamental doubts as to whether the criteria of

impartiality and independence are met by a judge participating in a court formation due to his appointment to the office in a competition procedure defined in the Act of 8 December 2017 amending the Act on the National Council for the Judiciary, such doubts may not be substantiated under specific circumstances, which would imply that the court formation comprised of such judge meets the necessary criteria of impartiality and independence.

It should be noted that such assessment in fact amounts to the question about the objective criteria to be met, from the perspective of individuals, to perceive a judge as impartial and independent and the court with the participation of such judge as an independent court. The method of assessment known from the case-law relies on a normative pattern of a model observer with a sufficient understanding of relevant circumstances to draw a conclusion. It cannot be equalised with a subjective assessment by parties to proceedings or by the general public in a given case. The actual perception of the court by the general public may, at best, be one of the factors considered in assessing the fulfilment of the criteria of independence and impartiality, referred to in the judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18. As has been mentioned, the assessment of those criteria cannot be limited to the subjective conviction of the judge himself as to his impartiality and independence, although any judge who believes that he will be unable to meet the requirements in a specific case should always have the possibility of recusing himself.

48. It is necessary to consider a range of different criteria in order to make a differentiated case-by-case assessment of the effect of the defective appointment procedure of a judge to the fulfilment of the criteria of impartiality and independence of a court adjudicating with the participation of such judge.

Evidently, in the case of judges of courts of a higher level in the organisation of the judiciary, which may exercise higher-instance review of acts and judgments of lower-level courts, higher requirements must apply concerning the necessary criteria of impartiality and independence. Certain specific circumstances relating to the defective judicial appointment procedure may be tolerated in the case of appointment of judges of lower-level courts while at the same time resulting in a lack of independence and impartiality in the case of higher-level courts.

49. Likewise, one must differentiate between cases where an appointment

is the first appointment to the office of a judge and cases where the judge accepts another office in a higher-level court. Persons who were previously appointed to the office of a judge in incontestable procedures and who apply in a competition for the office of a judge in a higher-level court already hold the status of a judge within the meaning of the Constitution. Therefore, they have already been duly vetted. That presumption is absent in the case of individuals appointed to the office of a judge of a common or military court for the first time, especially if it is their first appointment to a higher-level court and participation in the competition is not preceded by long-term training in the profession of a judge, in particular completion of court training or judge training and passing of the examination for judges.

50. Due to the structural dependence of the National Council for the Judiciary on political authorities, there is more doubt as to the fulfilment of the aforementioned criteria if a court is to adjudicate in a given case on matters relevant to such authorities. This concerns in particular financial interest of the State Treasury and criminal cases where the public prosecutor is the public prosecution office, currently headed by the Minister of Justice as Prosecutor General. The same may concern other types of judicial proceedings which may, for various reasons, attract interest of the general public and politicians, especially those directly affiliated with the political group which dominates in the legislature and executive. Expectations addressed by political authorities to courts regarding a specific outcome of proceedings, combined with the appointment of a judge on application of the politicised National Council for the Judiciary, may arouse reasonable doubt as to the fulfilment of the criteria of impartiality and independence by a court formation with the participation of such judge.

51. Furthermore, it should be noted that, in the case of adversarial proceedings in civil cases, the position of the parties is relevant to the assessment of the fulfilment of the criteria of independence and impartiality by the court competent for the proceedings. Each part may move, under Article 49 of the Code of Civil Procedure, for recusal of a judge who was appointed to the office under circumstances which subsequently affect the perception of such judge as independent and impartial. If no such motion is lodged during the proceedings, then as a rule the proceedings arouse no doubt of the parties as to whether the court hearing their case is independent and whether the judge is independent and impartial. The position taken

by the parties in the course of proceedings, which indicates no reservation as to the independence and impartiality of the judge, must be considered in the subsequent assessment of whether the criteria of impartiality and independence were met by the court in the proceedings to the effect that the court was unlawfully appointed.

Such circumstance is less relevant in criminal proceedings and in non-contentious civil proceedings where parties (participants) to the proceedings have a different status and the fairness of the court judgment, which depends on impartiality and independence of the court, is more relevant to the society at large. A key objective of adjudicating in matters of criminal liability is to protect legal goods which extend beyond individual interest. Likewise, in non-contentious civil proceedings, public interest is at stake alongside individual interest.

52. Specific circumstances relating to the judge himself may be relevant to the assessment of the effect of a defective judicial appointment procedure to the fulfilment of the criteria of impartiality and independence of the court. Evidently, reasonable doubt as to the fulfilment of the criteria arises where the judge was employed, directly before his appointment to the office, in entities subordinated to the Minister of Justice or other executive bodies or the National Council for the Judiciary. This concerns the period of time when managers on the authorities of such entities were appointed by the parliamentary majority which passed the Act of 8 December 2017 amending the Act on the National Council for the Judiciary. The judge's position with respect to such changes is relevant, as publicly expressed during the competition procedure and subsequently to it, especially concerning endorsement of unconstitutional steps taken by executive authorities in relation to courts, including the Supreme Court, and endorsement of the loss of independence of the National Council for the Judiciary. In the context of the defect affecting the procedure of appointment to the office of a judge discussed above, such statements could arouse serious doubts as to interdependence between the nomination of the candidate by the National Council for the Judiciary as a person to be appointed to the office and the sympathy he manifests for the political group which exerts dominant influence on the National Council for the Judiciary. According to objective assessment, such interdependence may be suggested by other defects in the procedure for appointment to the office, especially refusal of members of the National Council for the Judiciary to recuse themselves in proceedings concerning persons related to them, positive outcome of

the competition for the office of a judge in the case of individuals granted administrative promotions in the judicial organisation by arbitrary decision of the Minister of Justice, manifest non-transparency of competition procedures where parts of the sessions of the National Council for the Judiciary or its teams were held *in camera* and lack of access to details of the competition procedure, voting by members of the National Council for the Judiciary *in pleno* without justification, despite contrary opinions of teams of the National Council for the Judiciary, nominations granted by the National Council for the Judiciary for the office of a judge in the absence of an opinion of bodies of judicial self-governance or following an opinion expressly demonstrating no endorsement for the candidate, in particular failing a majority of supporting votes or garnering much less support than another candidate running in the same competition without reasonable justification for such decision or after the candidate is delegated to a higher-level court by arbitrary decision of the Minister of Justice without a reasonable substantive justification related to the quality of the judge's work or without such delegation in the case of low quality of work.

Another circumstance arousing doubt as to the independence of a candidate occurs in such competition procedures where the nominee has evidently less qualifications than other participants in the competition. In the case of judges presented for promotion by the National Council for the Judiciary, the nature of such promotion is particularly relevant, in particular how quickly the promotion is granted and to what position the judge is promoted. For instance, the promotion of a judge of a district court to the position of a judge of an appeal court (and in particular the Supreme Court) may arouse serious doubts as to the judge's independence under the suspicion that the judge owes his position mainly to political support rather than legal expertise and experience.

53. Specific circumstances, referred to in point 2 of the resolution, must be reviewed using measures of evidence available in civil and criminal proceedings. It should be noted that the inability to review them due to the potential obstruction caused by the National Council for the Judiciary, judicial bodies or other public authorities would in fact confirms the reservations concerning the lack of impartiality and independence of the court. Non-transparency specifically undermines the objective conditions for a court to be perceived as impartial and independent, and confirms the suspicion of dependence of the judge on specific groups or authorities.

From this perspective, it is particularly relevant to eliminate any doubt concerning the appointment of members of the National Council for the Judiciary: as long as any such doubt persists, decisions of the National Council for the Judiciary may be contested for fundamental reasons, which could undermine the stability of court judgments issued with the participation of persons concerned by such decisions. That state of affairs directly jeopardises the right of every individual to hearing of his case by an independent court. Judgments cannot be issued under conditions of uncertainty as to their stability.

It should be noted that certain circumstances would suggest that, despite the defective judicial appointment procedure under the conditions defined in the Act of 8 December 2017 amending the National Council for the Judiciary, a given judge may meet the necessary criteria for the court to be perceived as impartial and independent. That is the case in particular where such person would have met the applicable criteria of nomination for the office of a judge also in a due procedure before the National Council for the Judiciary. That may also be the case where individuals received positive opinions based on a fair assessment, in particular impartial inspections. Another circumstance suggesting that a judge follows the principles of impartiality and independence is where he takes steps to have any doubt concerning him clarified before hearing a case (for instance, reporting in accordance with Article 41 of the Code of Criminal Procedure and Article 49(1) of the Code of Civil Procedure).

It should be noted that follow-up review of the fulfilment of the criteria of impartiality and independence of a court takes place in specific proceedings and that it is a review of the court rather than of an individual judge: such review does not affect the participation of the judge in a court formation responsible for other proceedings and it is not binding on another court formation. Typically, however, if certain circumstances are reviewed in given proceedings (e.g., when reviewing a motion for recusal of a judge), such circumstances should not be evaluated differently in a follow-up review in proceedings held to examine the grounds for appeal and the grounds for invalidity provided that the motion for recusal of the judge was reviewed fairly. If a court with the participation of a given judge is found not to fulfil the criteria of impartiality and independence in given proceedings, that determination in not binding in another case in which the same judge participates in a court formation; however, such assessment should always be taken into consideration.

VIII.

54. The Supreme Court issues a resolution in accordance with Article 83(1) of the Act on the Supreme Court where divergent legal interpretations exist in the case-law of common courts or the Supreme Court. Such state of affairs is adverse to legal certainty and the principle of trust of individuals in the State, and to the principle of equality. A legal interpretation is an immanent constitutional power of the courts, falling within the remit of judicial independence. A resolution of the Supreme Court identifies such an understanding of controversial provisions which, in the opinion of the Supreme Court, is most reasonable and appropriate taking into account the standards of the right to a fair trial by an impartial and independent court laid down in the Constitution and international law. An interpretation is binding to all adjudicating formations of the Supreme Court; it also impacts the case-law of common courts by force of authority, rather than as a legal obligation.

55. The special procedure for interpretations provided by the Supreme Court does not change the essence of interpretations: interpretations concern provisions which provide the basis for reconstructing the resulting legal norm. Disputes concerning legal interpretations may often appear to be disputes concerning the substance of provisions; in fact, however, they are always disputes concerning the scope of application (hypothesis) or the scope of the regulation (operation) of a legal norm. Every legal norm has a temporal scope of application. When interpreting the substance of a norm, the body which applies the law must also determine the factual circumstances to which it will apply. Like an interpretation of any other elements of the norm, such determination must take into consideration the fundamental constitutional values, in particular protection of trust of individuals in the State and in the law made by the State, as well as the principle of stability of judgments issued by courts in the administration of justice in cases concerning individuals. To consider that a norm in a given meaning would apply to all factual circumstances, including those in existence before such meaning is determined, would inevitably infringe on the values which the norm should in practice protect. That could inspire a differentiation of the temporal scope of application of the norm to the effect that the given understanding of the norm applies only to future factual circumstances, i.e., that it applies prospectively.

This is what the Supreme Court has decided in this present resolution on the

assumption that the application of this interpretation of Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Criminal Procedure [sic.] to previously issued judgments would cause a disproportionate infringement of the aforementioned constitutional values which would not be balanced by the intention of ensuring effective enforcement of the constitutional right of individuals to a fair trial before an independent court (Article 45(1) of the Constitution of the Republic of Poland) based on Article 47 of the Charter and Article 6(1) ECHR (the resolution of the Supreme Court of 28 January 2014, BSA I-4110-4-4/13, followed the same approach). Consequently, the Supreme Court has decided that the interpretation provided in points 1 and 2 of this resolution shall apply to court judgments issued after 23 January 2020. The Supreme Court has defined two exceptions to that rule. In the case of proceedings pending as at 23 January 2020 under the Code of Criminal Procedure (even if applied accordingly in the case) before a given court formation, the interpretation shall not apply to a judgment issued by such formation when the proceedings are closed after 23 January 2020. In this regard, the Supreme Court acts in support of the stability of court formations in criminal proceedings: any change of formation could require the proceedings to be reopened. The other exception concerns judgments issued by judges appointed to the Disciplinary Chamber of the Supreme Court as that body has from the outset been an extraordinary court which cannot be established and cannot function in the times of peace under Article 175(2) of the Constitution of the Republic of Poland. Furthermore, the Disciplinary Chamber does not fulfil the criteria of an independent court laid down in Article 47 of the Convention and Article 6(1) ECHR. In that connection, judgments issued with the participation of judges of the Disciplinary Chamber deserve no protection as they are not covered by the principle of trust. Clearly, the foregoing does not concern judgments of disciplinary courts functioning in the common court system.

56. It should also be stressed that the substance of this resolution has been determined by the scope of the legal question referred to the combined Chambers by the First President of the Supreme Court. The intertemporal provisions of points 3 and 4 of this resolution also concern the interpretation of the provisions referred and, as such, they do not concern directly any other procedural regulations which also establish safeguards for the principle of impartiality and independence of courts. Neither do they affect *ex tunc* the interpretation of Article 47 of the Charter provided

in the judgment of the Court of Justice of the European Union of 19 November 2019 in Union cases.

IX.

57. This resolution of the Supreme Court has been issued due to doubts arising in particular with respect to the special procedure of nominating candidates for the office of a judge under the Act of 8 December 2017 amending the Act on the National Council for the Judiciary. As a result of that Act, the National Council for the Judiciary is no longer independent. If the constitutional standard is restored and the defect of the judicial appointment procedure is eliminated, the circumstances necessitating review of the criteria of court appointment under Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Civil Procedure in order to ensure enforcement of the requirements under Article 47 of the Charter may longer prevail. This resolution does not concern systemic issues of the judiciary as a safeguard of effective legal protection in areas covered by Union law (second paragraph of Article 19(1) TEU).

Passing a resolution concerning regulations providing unconditional grounds for appeal and invalidity of proceedings due not non-fulfilment of the criteria of an impartial and independent court may have far-reaching consequences for the functioning of courts and the enforcement of the constitutional right of the individual to hearing of his case by an independent court. The notion of hearing of a case involves the right of stability of the judgment and legal certainty. It is a foundation of the rule of law.

58. Stability of court judgments mainly depends on stability of the systemic framework of the judiciary. This is why the fundamental concepts of the functioning of the judiciary are anchored in the Constitution, preventing a parliamentary majority from passing laws challenging the legitimacy of courts which adjudicate in individual cases. This is why compliance with the applicable constitutional procedures for the appointment of judges and the functioning of courts is essential. Any infringement of such principles, even by law, causes uncertainty about the legitimacy of courts in the administration of justice. It opens the door to further systemic changes being imposed through laws by yet another parliamentary majority, which is related to the possibility of reviewing prior defective judgments.

59. The current instability of the Polish judiciary originates from the changes to the court system over the past years, which are in breach of the standards laid down in the Constitution, the EU Treaty, the Charter of Fundamental Rights, and the European Convention of Human Rights. The leitmotif of the change was to subordinate judges and courts to political authorities and to replace judges of different courts, including the Supreme Court. That affected the appointment procedure of judges and the bodies participating in the procedure, as well as the system for the promotion and disciplining of judges. In particular, a manifestly unconstitutional attempt was made to remove some judges of the Supreme Court and to terminate the mandate of the First President of the Supreme Court, contesting the legitimacy of the Supreme Court. The systemic changes caused doubts about the adjudicating legitimacy of judges appointed to the office in the new procedures. The political motivation of the changes jeopardised the objective conditions necessary for courts and judges to be perceived as impartial and independent.

The Supreme Court considers that the politicisation of courts and their subordination to the parliamentary majority in breach of constitutional procedures establishes a permanent system where the legitimacy of individual judges and their judgments may be challenged with every new political authority. That notwithstanding, the politicisation of courts departs from the criteria of independence and impartiality of courts required under Union law and international law, in particular Article 47 of the Charter and Article 6(1) ECHR. That, in turn, causes uncertainty about the recognition of judgments of Polish courts in the Union space of freedom, justice and security. Even now courts in certain EU Member States refuse to co-operate, invoking violation of the standards, and challenge judgments of Polish courts.

It should be noted that a resolution of the Supreme Court cannot mitigate all risks arising in the functioning of the Polish judiciary at the systemic level. In fact, that could only be done by the legislature if it restored regulations concerning the judiciary that are consistent with the Constitution of the Republic of Poland and Union law. The Supreme Court may, at best, take into consideration such risks and the principles of stability of the case-law and legal certainty for individuals in its interpretations of provisions which guarantee that a judgment in a specific case will be given by an impartial and independent court. In its interpretation of the regulations governing criminal and civil proceedings, referred by the First President of the Supreme Court,

the Supreme Court considered the effect of the judgment of the Court of Justice of the European Union of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18, as well as the obligation to identify such legislative instruments in the legal system which would guarantee that a judgment will be issued by an impartial and independent court despite doubts arising from a range of systemic changes affecting the status of judges.

60. The question of preventive or subsequent guarantees that a case will be heard and a judgment issued by an independent and impartial court is not a new question in the light of civil and criminal procedural regulations applied by common courts, military courts, and the Supreme Court. As has been mentioned, many instruments provide guarantees that a judgment will be issued by an independent and impartial court: recusal of a judge, regulations concerning the allocation of cases, the option of changing court in order to ensure objective conditions that the court will be perceived as impartial and independent, conditional and unconditional grounds for annulment of a judgment, invalidity of proceedings, annulment of a judgment *ex officio* as manifestly unfair beyond the scope of ab appeal, reopening proceedings. Such regulations must be interpreted in such a way that ensures to the best extent possible the fulfilment of the requirements under Article 45(1) of the Constitution of the Republic of Poland, Article 6(1) ECHR and in particular Article 47 of the Charter within the meaning provided in the case-law of the Court of Justice of the European Union, in particular the judgment of 19 November 2019 in cases C-585/18, C-624/18 and C-625/18.

It should be stressed that, according to Article 91(3) of the Constitution of the Republic of Poland, if an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws. That concerns in particular the Charter of Fundamental Rights. Consequently, in the event of a conflict of laws with norms arising from such legal act, Polish courts are required to disregard such laws in adjudicating. In this context, it is important to quote once again *in extenso* the principle reiterated on many occasions in the case-law of the Court of Justice of the European Union (formerly the European Court of Justice): "*any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court*

having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of community law." That is because a "*national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently*" (judgment of 9 March 1977, C-106/77).

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

If, however, the Constitution of Poland, in particular Article 179 which provides that judges shall be appointed by the President of the Republic of Poland on application of the National Council for the Judiciary, are found to prevent review of the independence and impartiality of a court adjudicating in a given case, then the Polish Constitution would be in fundamental conflict with Article 47 of the Charter. In the territory of the European Union, independence and impartiality of courts must be real; and their independence and impartiality cannot be uncontestably decreed by the mere fact of being appointed to the office of a judge by the President of the Republic of Poland.