

ORAL SUBMISSIONS

1. Preliminary Questions no 3 (supplementary question of 5 July 2019) and no 1 (of 21 November 2018) of the referring court should be found admissible in the scope concerning the second subparagraph of Article 19(1) TEU.

1. In the view of the Commissioner for Human Rights, both questions of the referring court are admissible and the Court's answer necessary in so far as the questions concern the **interpretation of the principle of effective judicial protection under the second subparagraph of Article 19(1) TEU.**
2. **Firstly, the Court has jurisdiction to answer** questions concerning elements of the procedure for appointing judges of the Polish Supreme Court. The Supreme Court applies EU law and thus belongs to the system of legal remedies "in the fields covered by Union law". This results, as can be seen, e.g. in paras. 123 and 134 of the ruling in joined cases C-585/18, C-624/18 and 625/18 A.K. and Others [**A.K.**], in that the **substantive conditions and procedural rules** for the appointment of the members of that Court should meet the requirements of Article 19 (1)(2) TEU.
3. **Secondly, neither of the questions may be regarded as hypothetical since they are motivated by a real need to resolve the case pending before the national court.**
4. As regards **Question no 3**, the interpretation of Article 19 (1)(2) TEU **will enable the referring court to resolve procedural issues before ruling on the substance of the case pending before it**, namely, whether – contrary to the national provisions which exclude judicial review and order the discontinuance of judicial proceedings – the referring court will, while relying on the EU law, still be competent to examine the substance of the case, to which Article 19 TEU applies.
5. On the other hand, although **question no 1** concerns national legislation which is no longer in force, it may nevertheless be applied in the proceedings before the referring court. In the light of **para. 166 of the A.K. ruling**, such an interpretation of the principle of primacy of the EU law and the principle of loyal cooperation, requiring recourse to previously applicable rules determining court competence, **resulted from the fact that the case could not have been decided by a body which did not meet the requirements of the principle of effective judicial**

protection. **That is all the more necessary if, in violation of that principle, judicial review was excluded entirely. Restoring jurisdiction to the referring court on the basis of that construct would have been made in accordance with the restrictions then in force, as set out in question no 1.** On that assumption, question no 1 should be regarded admissible.

2. The lack of effective judicial review of NCJ resolutions in the procedure for appointment of judges affects independence and impartiality of those judges (and of adjudicating panels which include those judges).

6. **Firstly**, it follows from the A.K. ruling that the existence of effective judicial review of resolutions of the National Council of the Judiciary, as an element of the procedure for appointing judges, is **one of the factors to be taken account in order to determine, whether the judges selected by NCJ will be independent.**
7. **Secondly**, such findings require a comprehensive assessment of circumstances in fact and in law, concerning the procedure for appointing judges **in a specific Member State**. In the Polish context, for example, the failure to meet the minimum requirements of judicial review set out in **para. 145 of A.K. ruling** has a direct impact on the assessment of independence of judges appointed.
8. **Thirdly**, while the second subparagraph of Article 19(1) TEU does not create a uniform standard for the Member States as regards the way in which judges are appointed, let alone the judicial review of the process, it does nonetheless contain, in the light of the Court's case-law, certain **criteria which set limits to States' discretion. And namely:**
9. (a) **The rules of procedure for the appointment of judges should dispel any reasonable doubt in the minds of individuals as to the imperviousness of the court and judges to external factors and their neutrality, after their appointment, with respect to any conflicting interests before them.** Even indirect forms of influence by the other branches of the Member State, which may affect the decisions of judges are excluded. (A.K. paragraphs 125 and 134).
10. (b) The court will not offer a guarantee of independence and impartiality if, during the procedure for the appointment of judges, an irregularity of fundamental rules of the judicial system has been committed, of such a kind and of such gravity as **to create a real risk that**

other branches of the State could exercise undue discretion undermining the integrity of the outcome of the appointment process (judgment in joined cases C-542/18 RX-II *Simpson* and C-543/18 RX-II *HG*, paragraphs 72-76 [**Simpson**]).

11. It is in the light of these criteria that the removal or lack of effective judicial protection should be assessed in the Polish legal context in relation to Article 19 TEU.

3. The exclusion of judicial review of NCJ resolutions in the light of the specific features of the Polish legal system, as well as circumstances which accompany this exclusion, constitute violation of Article 19 (1) (2) TEU.

12. **Firstly**, in the case of candidates to the Supreme Court judges, effective judicial review of the NCJ resolutions was excluded **intentionally**. As the referring court points out, there has been an established constitutional obligation under national law to carry out a judicial review of resolutions of the National Council of the Judiciary, which relates to the rule of law. **Such an exclusion therefore infringes a fundamental national constitutional norm** (p. 10, para. 14 of supplementary preliminary question).
13. **Secondly, the exclusion was entirely arbitrary**. It covered only candidates for judges of the Supreme Court. Such selection has not been supported by any convincing objective reason **related to the interest of the State**. In particular, it is not, as the National Council of the Judiciary suggested, **“the caring for the filling of positions of importance in the structure of Polish courts”** (p. 3, para. II.2. of written comments) or **the need to avoid obstruction when nominating Supreme Court judges**.
14. **Thirdly**, the exclusion has been accompanied by intensive efforts by the current state authorities, also at the legislative level, to prevent **any review of obligations imposed on a Member State under Article 19 TEU with regard to the process of appointment of judges following their nomination by the President**. Judges who seek to verify these deficiencies under existing procedural measures face disciplinary proceedings. **In this way, violation of the standards of Article 19 TEU become permanent and pose a risk to legal certainty**. It results in the flaws in the composition of national courts and their rulings, and thus in the ability to operate in a European legal area based on mutual trust.

15. **Fourthly**, the exclusion of judicial review in relation to the procedure of appointing judges to the Supreme Court **must be assessed not only from the point of view of the legislator's intentions, but also of the changes that have occurred simultaneously in the Polish legal system and the effect of the accumulation of various measures which may be relevant to independence in the context of filling judicial posts.** Those changes have been described in detail i.a. in the documents of the European Commission and the Venice Commission, but also in the A.K. ruling (paras. 136-151) and the resulting rulings of the Polish Supreme Court. **From all the relevant factors, there emerges a picture of deliberate actions that are meant to secure decisive control by the ruling majority over the process of appointing Supreme Court judges.**
 16. Considering the circumstances specific to the Polish legal system, including clear intentions of the state authorities, the arbitrary **exclusion of judicial review of NCJ resolutions in the procedure for appointing Supreme Court judges**, in violation of fundamental national constitutional norms, constitutes a violation of Article 19 TEU, as it may **give rise to reasonable doubts, in the minds of individuals, as to the imperviousness** of judges appointed to the Supreme Court to external factors and as to the neutrality of the judges with respect to the interests before them, and it may **pose a real risk that other branches of the State could exercise undue discretion undermining the integrity of the outcome of the appointment process.**
 17. **This does not mean, however, that Article 19 TEU introduces an obligation for all Member States** to establish judicial review of the procedure for appointing judges. Instead, they must, in the light of Article 19 TEU, ensure conditions which enable to exclude any reasonable doubt as to the independence of the judges they appoint. They may or may not introduce judicial review for this purpose. **However, the specific circumstances of a particular legal system may cause that the exclusion of such a review gives rise to doubts entailing an infringement of Article 19 TEU.**
- 4. The consequences of excluding judicial review of NCJ resolutions in violation of Article 19 TEU:**

a) The obligation to apply the principle of primacy of EU law.

18. If the removal of judicial review infringes the requirements of Article 19 TEU, the national court should, in accordance with the principle of primacy of EU law, refuse to recognise the effects of such removal resulting from national legislative or judicial practice. **In the circumstances of this case, the general right to judicial review of NCJ resolutions is rooted in the national law.** The exclusion of such control when appointing judges of the Supreme Court was made by a decision of the Constitutional Tribunal and a legislative amendment. **Since judicial review is required in the circumstances of this case, the referring court should disregard any national obstacles preventing it from carrying out such a review (Torubarov, C- 556/17, para. 74).**
19. In such a situation, the rule indicated by the Court in its **A.K. ruling (para. 166)**, determining the **jurisdiction of the court under the rules previously in force**, should apply by analogy. In accordance with the principle of loyal cooperation and the principle of the primacy of EU law – the **exclusion by national legislation or case-law of a judicial review of nominations of the Supreme Court judges in violation of Article 19 TEU, would compel the national court to derogate from that legislation or case-law if, under the rules previously in force, it was authorised to examine such a case, and no other court currently has jurisdiction under national law to do so** (ruling in joined cases C-924 and 925/19, FMS, para. 299).

b) The second subparagraph of Article 19(1) TEU has direct effect.

20. **However, the recognition by the Court of Justice of the above mentioned consequence on the basis of the second subparagraph of Article 19(1) TEU would first require a determination that it has a direct effect** in a similar way as Article 47 of the Charter of Fundamental Rights (see: A.K. ruling, para. 162).
21. The second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection in the fields covered by EU law, **within the meaning, in particular, of Article 47 of the Charter of Fundamental Rights (A.K., paras. 167 and 168)**. Therefore, since the elements of the Member States' obligations and the nature of legal remedies under Article 19 TEU, must be determined in accordance with

Article 47 of the Charter, which **is sufficiently precise to have a direct effect**, the second subparagraph Article 19(1) TEU **should have the same effect as well**.

22. In **para. 169 A.K.** ruling, the Court has already stated, that its answer concerning Member State's obligations under the principle of effective judicial protection and the procedure for appointing judges would not be different in the light of Article 47 of the Charter and Article 19 TEU.
23. Whereas, in the judgment **C-64/16 ASJP (the so-called Portuguese judges' case)**, the Court ruled solely on the basis of Article 19 TEU on questions related to the level of the remuneration of judges who brought the proceedings before the national court.
24. The obligations imposed on Member States under Article 19 TEU **must be accompanied by a possibility to enforce these guarantees also in national proceedings** (e.g. concerning candidates for judges). Leaving this issue to be enforced solely by the Commission would considerably **undermine the full effectiveness of the obligations imposed on Member States under Article 19 TEU**.

c) The consequences of applying the principle of primacy for Question no 3 of the referring court.

25. **Firstly**, the consequence of applying the principle of primacy in the context of Article 19 TEU in the case pending before the referring court would be to **reject the application of the national provision and the position of the Constitutional Tribunal** (in the case K 12/18) ordering the discontinuance of the proceedings pending before the referring court (Article 3 of the Act of 26 April 2019 amending the Act on the National Council of the Judiciary and the Law on the system of the administrative courts).
26. **Secondly**, disapplying the current regulation abolishing **the jurisdiction** of the referring court to adjudicate on a case pending before it, should result in that court to continue to be able to decide on that case as the **court which had jurisdiction to do so in accordance with the provisions in force prior to the legislative amendment infringing Article 19 TEU**. The above consequences are complemented by the recognition by the referring court of **the prospective effect of the judgment of the Constitutional Tribunal**. This means that the derogation of the unconstitutional provision **would only have an effect in the future**

and would not affect the proceedings pending before the referring court. Accordingly, the referring court, having disapplied the provision ordering the discontinuance of proceedings and the current legislation excluding judicial review, would have the **competence under national law**, corresponding to EU law, to examine the appeal brought by the applicants in accordance with the rules in force prior to the introduction of the legislative amendment incompatible with Article 19 TEU.

d) The principles of judicial review applicable before the introduction of the legislative amendment contrary to Article 19 TEU as indicated in Question no 1 of the referring court

27. If it is determined that the referring court should carry out a judicial review of the resolution of the National Council of the Judiciary in accordance with the provisions in force prior to introducing the legislative amendment inconsistent with Article 19 TEU, as indicated in Question no 1, then this **review should be effective and should not raise doubts in the minds of individuals as to the independence of judges nominated in this way.**
28. **Firstly**, this means that the referring court must therefore be able to exercise judicial review covering, at the very least, **an examination of whether there was no *ultra vires* or improper exercise of authority, error of law or manifest error of assessment (para. 145, A.K. ruling).**
29. **Secondly**, the principle of effective judicial protection requires that **the court's judgments following such a review should be given due effect**, otherwise the remedy would only be illusory (**Torubarov**, para. 57).
30. **Thirdly**, if national provisions impede the implementation of that standard of judicial review in the light of Article 19 TEU and in ensuring the effectiveness of the judgment given in that regard, they should not be applied by the national court.
31. In reference to **Question no 1** of the referring court, it would mean that **a general exclusion of a possibility to review an error in the candidates' assessment against the criteria defined, would be unacceptable** (former Article 44 (1a) of the Act on the National Council of the Judiciary).
32. It would equally be unacceptable if **the resolution of the National Council of the Judiciary was partially final with regard to the candidate who had been nominated** (Article 44

(1b) of the Act on the National Council of the Judiciary). This would turn the judicial review into an illusory one. Such a mechanism would be equivalent to a lack of judicial control in relation to the candidate nominated for the judicial post. This, in turn, opened the door to discretionary actions by other state authorities, and may raise doubts violating the standard of Article 19 TEU. For the other participants in the selection process, such a legal construct creates a situation analogous to the one in which they would have been if they had not filed an appeal. They could only stand for a new contest for a judicial position.

5. Proposed answers to preliminary questions

In the light of the foregoing, the Court should answer the questions of the national court as follows:

Question no 3 (supplementary)

The second subparagraph of Article 19(1) TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, must be interpreted as meaning that there is an infringement of the principle of effective judicial protection, if the exclusion of judicial protection of the elements of the procedure for nominating judges to the national court and the order to discontinue pending proceedings in this respect, in the circumstances of the specific legal system such as the Polish one, in which, as a rule, there is a legal basis for judicial review of those elements of the procedure for nominating judges, **may raise reasonable doubts in the minds of individuals as to the independence of the court and judges to external factors and their neutrality with respect to the interests before them following their appointment.**

Question no 1

The second subparagraph of Article 19(1) TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, must be interpreted as meaning that there is an infringement of the principle of effective judicial protection, if the national legislature adopts restrictions on judicial review such as those referred to in Question No 1 of the referring court, in so far as those restrictions, firstly, do not enable the referring court to establish **that there was *ultra vires* or improper exercise of authority, error of law or manifest error of assessment and, secondly, do not make it possible to ensure that the decision of the referring court following such review is duly effective.**

Furthermore, the fact that the scope of the nomination procedure includes the positions of the judges of the national court, which have been vacated as a result of an infringement of European Union law, may constitute a relevant factor in the assessment by the referring court of the compatibility of the exclusion of effective judicial protection in the light of the criteria laid down in the second subparagraph of Article 19(1) TEU.