ECLI:EU:C:2021:153

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

2 March 2021 (*)

(Reference for a preliminary ruling – Article 2 and the second subparagraph of Article 19(1) TEU – Rule of law – Effective judicial protection – Principle of judicial independence – Procedure for appointment to a position as judge at the Sąd Najwyższy (Supreme Court, Poland) – Appointment by the President of the Republic of Poland on the basis of a resolution emanating from the National Council of the Judiciary – Lack of independence of that council – Lack of effectiveness of the judicial remedy available against such a resolution – Judgment of the Trybunał Konstytucyjny (Constitutional Court, Poland) repealing the provision on which the referring court's jurisdiction is based – Adoption of legislation declaring the discontinuance of pending cases by operation of law and precluding in the future any judicial remedy in such cases – Article 267 TFEU – Option and/or obligation for national courts to make a reference for a preliminary ruling and to maintain that reference – Article 4(3) TEU – Principle of sincere cooperation - Primacy of EU law – Power to disapply national provisions which do not comply with EU law)

In Case C-824/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 21 November 2018, received at the Court on 28 December 2018, and which was supplemented by decision of 26 June 2019, received at the Court on 5 July 2019, in the proceedings

A.B.,

C.D.,

E.F.,

G.H.,

I.J.

v

Krajowa Rada Sądownictwa,

intervening parties:

Prokurator Generalny,

Rzecznik Praw Obywatelskich,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal (Rapporteur), M. Vilaras, E. Regan, M. Ilešič, L. Bay Larsen, A. Kumin and N. Wahl, Presidents of Chambers, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos and N. Jääskinen, Judges,

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 6 July 2020,

after considering the observations submitted on behalf of:

– A.B., by M. Dębska-Koniecek, adwokat,

– C.D., by M. Bogdanowicz, radca prawny,

– E.F., by M. Gajdus, adwokat,

– I.J., by P. Strumiński, radca prawny,

– the Krajowa Rada Sądownictwa, by L. Mazur, J. Dudzicz and D. Pawełczyk-Woicka,

– the Prokurator Generalny, by B. Górecka, R. Hernand, A. Reczka, S. Bańko and B. Marczak,

– the Rzecznik Praw Obywatelskich, by A. Bodnar, M. Taborowski and P. Filipek,

– the Polish Government, by B. Majczyna, A. Grajewski, A. Dalkowska and S. Żyrek, acting as Agents,

– the European Commission, by H. Krämer, P.J.O. Van Nuffel, A. Stobiecka-Kuik and C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 December 2020,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 2, Article 4(3), Article 6(1) and the second subparagraph of Article 19(1) TEU, Article 267 TFEU, Article 15(1), Article 20, Article 21(1), Article 47 and Article 52(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’) and Article 2(1) and (2)(a), Article 3(1)(a) and Article 9(1) of

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The requests have been made in proceedings between A.B., C.D., E.F., G.H. and I.J., and the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS') concerning resolutions by which the latter decided not to propose to the President of the Republic of Poland ('the President of the Republic') the appointment of the persons concerned to positions as judges at the Sąd Najwyższy (Supreme Court, Poland) and to propose the appointment of other candidates to those positions.

Legal context

European Union law

The EU and FEU Treaties

3 Article 2 TEU reads as follows:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

4 Article 4(3) TEU states that:

'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

5 Article 19(1) TEU provides:

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

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

6 According to Article 267 TFEU:

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

(a) the interpretation of the Treaties;

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

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

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

…'

The Charter

7 Title VI of the Charter, under the heading 'Justice', includes Article 47 thereof, entitled 'Right to an effective remedy and to a fair trial', which states as follows:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. …

…'

Directive 2000/78

8 Article 1 of Directive 2000/78 provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

9 Article 2(1) of that directive provides:

'For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.'

10 Article 3(1)(a) of that directive states:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions …'

11 Article 9(1) of Directive 2000/78 provides:

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

Polish law

The Constitution

12 Article 45(1) of the Constitution provides:

‘Everyone is entitled to a fair and public hearing, without undue delay, by an independent and impartial tribunal with jurisdiction.’

13 Article 60 of the Constitution provides:

‘Polish citizens enjoying their full rights as citizens have the right of access, under equal conditions, to public office.’

14 Under Article 179 of the Constitution, the President of the Republic is to appoint judges, on a proposal from the KRS, for an indefinite period.

15 Article 184 of the Constitution provides that the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) and the administrative courts are to have jurisdiction to review the activity of public authorities.

16 Under Article 186(1) of the Constitution:

‘The [KRS] shall be the guardian of the independence of the courts and of the judges.’

17 Article 187 of the Constitution provides:

‘1. The [KRS] shall be composed of:

(1) the First President of the [Sąd Najwyższy (Supreme Court)], the Minister for Justice, the President of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] and a person designated by the President of the Republic,

(2) Fifteen elected members from among the judges of the [Sąd Najwyższy (Supreme Court)], the ordinary courts, the administrative courts and the military courts,

(3) Four members elected by [the Sejm (Lower Chamber of the Polish Parliament)] from among the members [of the Lower Chamber] and two members elected by the Senate from among the senators.

…

3. The elected members of the [KRS] shall have a mandate of four years.

4. The regime applicable to the [KRS], its field of activity, its working procedure and the procedure by which its members are elected shall be laid down by law.’

The Law on the KRS

18 The KRS is governed by the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. of 2011, No 126, item 714), as amended, inter alia, by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, item 3), and by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of ordinary courts and certain other laws) of 20 July 2018 (Dz. U. of 2018, item 1443) ('the Law on the KRS').

19 Under Article 3(1)(1) and (2) of the Law on the KRS, the following fall within the jurisdiction of the KRS:

'1. the examination and assessment of candidates for the positions of judge of the [Sąd Najwyższy (Supreme Court)] and for the positions of judge of the ordinary courts, the administrative courts and the military courts, and for positions of associate judge in the administrative courts;

2. the presentation to the [President of the Republic] of proposals for appointment of judges to the [Sąd Najwyższy (Supreme Court)], in the ordinary courts, the administrative courts and the military courts and for appointment of associate judges in the administrative courts.'

20 Article 9a of that law states:

'1. The Lower Chamber [of the Polish Parliament] shall elect from among the judges of the [Sąd Najwyższy (Supreme Court)], the ordinary, administrative and military courts, 15 members [of the KRS] for a joint four-year term.

2. In the election referred to in paragraph 1, the Lower Chamber shall, as far as possible, take into account the need for representation within [the KRS] of judges from different types and levels of courts.

3. The joint term of office of new members [of the KRS] elected from among the judges shall begin on the day following the day of their election. The members [of the KRS] appointed for the previous term of office shall perform their functions until the day on which the joint term of office of the new members [of the KRS] begins.'

21 Under Article 11a(2) of that law, candidates for the position of member of the KRS, chosen from among the judges, may be presented by a group of at least 2 000 Polish citizens or by a group of at least 25 judges in active service. The procedure for the Lower Chamber to appoint members of the KRS is set out in Article 11d of that law.

22 Article 37(1) of the Law on the KRS provides:

'If several candidates have applied for a single position of judge, [the KRS] shall examine and evaluate all the applications lodged together. In that case, [the KRS] shall adopt a resolution including its decisions for the purposes of presenting one appointment proposal to the position of judge in respect of all candidates.'

23 Article 43 of that law provides:

‘1. A [KRS] resolution shall become final if no appeal lies against it.

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

24 When the initial request for a preliminary ruling was made, Article 44 of that law provided:

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

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

1b. Unless all the participants in the procedure have challenged the resolution referred to in Article 37(1) in individual cases concerning appointment to the office of judge of the [Sąd Najwyższy (Supreme Court)], that resolution becomes final in the part containing the decision to present the proposal for appointment to the office of judge of the [Sąd Najwyższy (Supreme Court)] and in the part comprising the decision not to present the proposal for appointment to the office of judge to that court for participants in the procedure who did not lodge an appeal.…

4. In individual cases concerning appointment to the office of judge of the [Sąd Najwyższy (Supreme Court)], the annulment by the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] of the [KRS] resolution not to present the proposal for appointment to the office of judge at the [Sąd Najwyższy (Supreme Court)] is equivalent to accepting the candidacy of the participant who lodged an appeal in the procedure for the vacant position of judge at the [Sąd Najwyższy (Supreme Court)], for a position for which, on the date of delivery of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] judgment, the procedure before [the KRS] has not ended or, in the absence of such a procedure, for the next vacant position of judge in the [Sąd Najwyższy (Supreme Court)] which is the subject of the announcement.’

25 Paragraph 1a of Article 44 of the Law on the KRS was inserted into that article by the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws, which entered into force on 17 January 2018, and paragraphs 1b and 4 were inserted into that article by the Law of 20 July 2018 amending the Law on the system of ordinary courts and certain other laws, which entered into force on 27 July 2018. Prior to the insertion of those amendments, the appeals referred to in that paragraph 1a were to be lodged with the [Sąd Najwyższy (Supreme Court)] in accordance with Article 44(1).

26 By judgment of 25 March 2019, the Trybunał Konstytucyjny (Constitutional Court, Poland) declared Article 44(1a) of the Law on the KRS incompatible with Article 184 of the Constitution, on the grounds, in essence, that the jurisdiction conferred on the Naczelny Sąd Administracyjny (Supreme Administrative Court) by paragraph 1a was not justified in the light of either the nature of the cases concerned, the organisational characteristics of that court or the procedure applied by that court. In that judgment, the Trybunał Konstytucyjny (Constitutional Court) also stated that that

declaration of unconstitutionality ‘necessarily leads to the termination of all pending court proceedings based on the repealed provision’.

27 Subsequently, Article 44 of the Law on the KRS was amended by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz ustawy - Prawo o ustroju sądów administracyjnych (Law amending the Law on the National Council of the Judiciary and the Law on the System of Administrative Courts) of 26 April 2019 (Dz. U. of 2019, item 914) (‘the Law of 26 April 2019’), which entered into force on 23 May 2019. Paragraph 1 of that article 44 is henceforth worded as follows:

‘A participant in the procedure may appeal to the [Sąd Najwyższy (Supreme Court)] by relying on the unlawfulness of the [KRS] resolution, unless separate provisions provide differently. There shall be no right of appeal in individual cases regarding the appointment of [Sąd Najwyższy (Supreme Court) judges.’

28 Furthermore, Article 3 of the Law of 26 April 2019 provides that ‘proceedings in cases concerning appeals against [KRS)] resolutions in individual cases regarding the appointment of [Sąd Najwyższy (Supreme Court)] judges, which have been initiated but not concluded before this Law comes into force, shall be discontinued by operation of law’.

The New Law on the Supreme Court

29 Article 30 of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 23 November 2002 (Dz. U. of 2002, item 240) set the retirement age for judges of the Sąd Najwyższy (Supreme Court) at 70 years.

30 The ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5) (‘the New Law on the Supreme Court’) entered into force on 3 April 2018.

31 As is apparent from Articles 37 and 111 of the New Law on the Supreme Court, the retirement age for judges of the Sąd Najwyższy (Supreme Court) was lowered to 65 years, subject to the possibility for the President of the Republic to allow the persons concerned to continue in office beyond that age.

32 Following the order of the Court of 17 December 2018, *Commission* v *Poland* (C-619/18 R, EU:C:2018:1021), the ustawa o zmianie ustawy o Sądzie Najwyższym (Law amending the Law on the Supreme Court) of 21 November 2018 (Dz. U. of 2018, item 2507), repealed that authorisation mechanism, limited the application of the new retirement age fixed at 65 solely to judges who had entered into the service of the Sąd Najwyższy (Supreme Court) after 1 January 2019 and allowed the reinstatement into that court of judges who had entered into service before that date and who had been retired under the provisions referred to in the previous paragraph.

The disputes in the main proceedings and the initial request for a preliminary ruling

33 By resolutions of 24 and 28 August 2018, the KRS decided not to present to the President of the Republic proposals for the appointment of A.B. and C.D., for the purpose of assigning a position as judge at the Criminal Chamber of the Sąd Najwyższy (Supreme Court), and of E.F., G.H. and I.J., for the purpose of assigning seven positions as judges at the Civil Chamber of that court. Those resolutions moreover contained proposals for the appointment of other candidates to the positions concerned.

34 A.B., C.D., E.F., G.H. and I.J. lodged appeals against those resolutions before the Naczelny Sąd Administracyjny (Supreme Administrative Court) and applied, as a precautionary measure, for their suspension. By decisions of 25 and 27 September 2018 and 8 October 2018, that court ordered that the execution of those resolutions be suspended.

35 In its order for reference, the Naczelny Sąd Administracyjny (Supreme Administrative Court) states, first of all, that, unlike the provisions that were previously applicable, Article 44(1b) of the Law on the KRS provides that, in individual cases concerning appointment to a position as judge at the Sąd Najwyższy (Supreme Court), unless all participants in the competition procedure have challenged the resolution referred to in Article 37(1) of that law, that resolution becomes final as regards the part thereof containing the decision to present a proposal for appointment for participants in the procedure who did not lodge an appeal. However, the referring court observes, in that regard, that those participants include those whose appointment has been put forward and who, therefore, have no interest in lodging an appeal against such a resolution, meaning that the part of that resolution putting forward candidates for appointment will de facto always become final in that way.

36 Next, the referring court considers that Article 44(1a) of the Law on the KRS defines the judicial function which it is called upon to perform in relation to such resolutions in very general terms and without establishing clear assessment criteria.

37 Lastly, the referring court states that it follows from Article 44(4) of the Law on the KRS that, if the part of a resolution of the KRS concerning the non-presentation of a proposal to appoint a candidate to a position as judge at the Sąd Najwyższy (Supreme Court) is annulled, it is possible to accept the application of the person concerned for such a position only in so far as, on the date of that annulment, a procedure is still pending before the KRS, failing which such an application will be accepted only in respect of the next positions as judges which are declared vacant in that court. Any possibility of re-examining the application for the vacant position for which the person concerned has applied and of assigning that position to that person following his or her appeal is thus precluded in practice.

38 In those circumstances, the referring court considers that the appeal thus available to a candidate who has not been put forward by the KRS for appointment to a position as judge at the Sąd Najwyższy (Supreme Court) is entirely ineffective. According to the referring court, in order for such an appeal to be effective, it is necessary, first, that the appeal lodged by such a candidate have the effect of suspending the resolution of the KRS, so that the resolution cannot become final and be submitted to the President of the Republic with a view to the appointment of the candidates put forward until the Naczelny Sąd Administracyjny (Supreme Administrative Court) has ruled on that appeal. Secondly, if the appeal is upheld, the KRS should be required to re-examine the appellant’s application with a view to the possible assignment of the position concerned.

39 In the light of the foregoing, the referring court has doubts as to whether the national rules referred to in paragraphs 35 to 37 of this judgment comply with EU law. It considers, in that regard, that it follows from the Court’s case-law that it is incumbent upon Member States, in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU, to ensure the application of and respect for EU law and, in this respect, as provided for in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection for individuals in the fields covered by EU law. Such protection constitutes an essential characteristic of the rule of law referred to in Article 2 TEU and must be guaranteed in compliance with the conditions arising under Article 47 of the Charter and Article 9(1) of Directive 2000/78.

40 According to the referring court, the purpose of Article 44(1b) and (4) of the Law on the KRS should, as regards the final nature of the resolutions of the KRS proposing an appointment to a position as a judge at the Sąd Najwyższy (Supreme Court), be assessed in the light also of the New Law on the Supreme Court, Articles 37 and 111 of which have reduced the retirement age of judges in office at the Sąd Najwyższy (Supreme Court) to 65 years, while making the possibility of continuing to hold office beyond that age subject to authorisation by the President of the Republic.

41 Furthermore, the referring court observes that the national rules applicable to judicial remedies as regards resolutions of the KRS proposing appointments to positions of judges other than that of judge at the Sąd Najwyższy (Supreme Court) have remained unchanged and do not provide for the restrictions mentioned in paragraphs 35 to 37 of this judgment. There is thus, as between candidates for appointment to a position of judge at the Sąd Najwyższy (Supreme Court) and candidates for appointment to a position of judge in a court other than the Sąd Najwyższy (Supreme Court), a difference in access to judicial review of resolutions of the KRS by virtue of which the latter candidates are not put forward for appointment by that body. Such a difference could, if it is not justified by any objective in the public interest, infringe the right of access to the civil service on an equal basis and the right of appeal whose aim is to safeguard that right, which are enshrined in Articles 45 and 60 of the Constitution.

42 According to the referring court, the difference thus applied is, moreover, still less justifiable given that the Sąd Najwyższy (Supreme Court) enjoys a crucial position since it is called upon to exercise judicial supervision over all lower courts, meaning that it is particularly important that the conduct of the procedure for selecting judges who are assigned to that court should be subject to a genuine and rigorous review by the court having jurisdiction.

43 In that regard, the lack of effectiveness of the judicial review thus observed in relation to the procedure for appointment to judicial positions at the Sąd Najwyższy (Supreme Court) gives rise to additional concerns in view of the new composition of the KRS. As is apparent from Article 9a of the Law on the KRS, the 15 representatives of the judiciary sitting in that body were no longer chosen by their peers, as was previously the case, but by the Lower Chamber of the Polish Parliament, from among candidates put forward by a group consisting of at least 2 000 Polish citizens or by a group of 25 judges, which creates a risk that members of the KRS might be subject to influence from the political forces represented in the Lower Chamber of the Polish Parliament. Furthermore, as regards the composition of the KRS as recently established, doubts exist, in the absence of any transparency in that regard, as to whether the abovementioned conditions relating to the presentation of applications for a position as a member of the KRS were indeed complied with.

44 Lastly, the referring court states that the fact that the KRS is composed, as regards the 15 members representing the judiciary, of 14 representatives of the judges of the ordinary courts and one representative of the judges of the administrative courts, and does not include any representative of the judges of the Sąd Najwyższy (Supreme Court) – contrary to the provisions of Article 187(2) of the Constitution – is also problematic. The same is true of the fact that those 14 judges of the ordinary courts include the Presidents and Vice-Presidents of such courts who are appointed by the executive and have replaced persons dismissed by the executive, which could mean that the executive's influence has thus increased in the KRS.

45 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Should Article 2 TEU, in conjunction with the third [subparagraph] of Article 4(3), Articles 6(1) and 19(1) TEU, in conjunction with Article 47 of the [Charter] and Article 9(1) of [Directive 2000/78] and the third paragraph of Article 267 TFEU, be interpreted as meaning that an infringement of the rule of law and of the right to an effective remedy and to effective judicial protection occurs in a situation where the national legislature, in granting the right of appeal to a court in individual cases concerning service in the office of judge of the court of last instance of a Member State [the Sąd Najwyższy (Supreme Court)], stipulates that a decision made during the selection procedure preceding the submission of a motion for appointment to the position of judge of [that] court is final and effective where not all parties to the selection procedure have appealed against the decision made with respect to the joint consideration and assessment of all candidates for appointment as [Sąd Najwyższy (Supreme Court)] judges, who also include a candidate who has no interest in appealing that decision, namely a candidate designated in the motion for appointment to the aforementioned position, which as a result:

– undermines the effectiveness of the remedy and the competent court’s ability to carry out a genuine review of the aforementioned selection procedure, and

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

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

– an infringement of the rule of law, of the principle of equal treatment and of equal and non discriminatory access to the civil service, namely access to the office of judge [at the Sąd Najwyższy (Supreme Court)], occurs in a situation where, although a right of appeal to a competent court in individual cases concerning service in the office of judge of the aforementioned court is available, as a consequence of the rules governing the finality of the resolutions described in the first question, the appointment to a vacant position as judge [at the Sąd Najwyższy (Supreme Court)] may take place without the competent court conducting a review of the aforementioned selection procedures assuming such a review is initiated, and the absence of such a review, by infringing the right to an effective remedy, infringes the right of equal access to the civil service, and does not therefore serve the objectives of the public interest, and

– must be interpreted as meaning that a situation in which the composition of the body in a Member State whose purpose is to safeguard the independence of the judiciary ([the KRS]), and before which the procedure concerning service in the office of judge [at the Sąd Najwyższy (Supreme Court)] takes place, is designed in such a way that representatives of the judiciary in that body are elected by the legislature, undermines the principle of institutional balance?’

Procedure before the Court and the supplementary request for a preliminary ruling

The application for an expedited procedure and the benefit of priority treatment

46 In its order for reference, the Naczelny Sąd Administracyjny (Supreme Administrative Court) requested that the present reference be dealt with under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice. In support of its request, that court stated that such a procedure is justified in the light of the importance and nature of the disputes in the main proceedings and the decisions which it is called upon to deliver in those proceedings.

47 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may decide, after hearing the Judge-Rapporteur and the Advocate General, that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

48 It must be borne in mind, in that regard, that such an expedited procedure is a procedural instrument intended to address matters of exceptional urgency (orders of the President of the Court of 20 December 2017, *M. A. and Others*, C-661/17, not published, EU:C:2017:1024, paragraph 17 and the case-law cited, and of 1 October 2018, *Miasto Łowicz and Prokuratura Okręgowa w Płocku*, C-558/18 and C-563/18, not published, EU:C:2018:923, paragraph 18).

49 Furthermore, it is also apparent from the Court's case-law that the expedited procedure may not be applied where the sensitive and complex nature of the legal problems raised by a case does not lend itself easily to the application of such a procedure, in particular where it is not appropriate to shorten the written part of the procedure before the Court (order of 8 April 2020, *Commission* v *Poland*, C-791/19 R, EU:C:2020:277, paragraph 102 and the case-law cited).

50 In the present case, on 31 January 2019, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, that it was not appropriate to grant the request for an expedited procedure, since the order for reference did not contain sufficient evidence to establish exceptional circumstances capable of justifying a ruling within a short period of time on the request for a preliminary ruling. It is apparent from the information in the order for reference that the disputes in the main proceedings concern appeals lodged by candidates for appointment to a position as judge at the Sąd Najwyższy (Supreme Court) against resolutions of the KRS which did not put them forward for such appointment and that the referring court moreover ordered that the execution of those resolutions be suspended.

51 In those circumstances, it did not appear, on the basis of the information and explanations thus provided by the referring court, which, as is apparent from paragraph 46 of this judgment, referred only, without providing further details, to the importance and nature of the disputes in the main proceedings, that the present case, which also raises questions that are of a high degree of sensitivity and complexity, was so urgent as to justify derogating, exceptionally, from the ordinary rules of procedure applicable to references for a preliminary ruling.

52 In response to a request for additional information sent by the Court to the referring court, the latter stated, in a letter of 14 February 2019, that, although the suspension of execution of the resolutions at issue in the main proceedings had thus been ordered, on 10 October 2018 the President of the Republic had nonetheless appointed to judicial posts at the Sąd Najwyższy (Supreme Court) eight new judges who had been put forward by the KRS in those resolutions. Those eight new judges were not, however, actually assigned to the chambers concerned of the Sąd Najwyższy (Supreme Court), since the presidents of those chambers, in the light of the doubts surrounding the lawfulness of the appointment of the persons concerned and on grounds of legal certainty, suspended their assignment pending the judgments to be delivered by the referring court in the disputes in the main proceedings.

53 In the light of those clarifications, the President of the Court decided, on 26 February 2019, to give the present case priority, pursuant to Article 53(3) of the Rules of Procedure.

The request for a supplementary preliminary ruling and the reopening of the written part of the procedure

54 After the conclusion of the written part of the procedure, the referring court issued a decision on 26 June 2019 by which it stayed the proceedings on an application made to it by the Prokurator Generalny (Prosecutor General, Poland) for a declaration that there was no need to adjudicate on the action, based (i) on the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 25 March 2019 referred to in paragraph 26 of this judgment, and (ii) on Article 3 of the Law of 26 April 2019 reproduced in paragraph 28 of this judgment.

55 As regards the declaration of unconstitutionality of Article 44(1a) of the Law on the KRS contained in the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 25 March 2019, the referring court considers that that declaration has effects only for the future and that it cannot undermine the right to a judicial remedy which individuals have, as is the case in the disputes in the main proceedings, exercised before that declaration and in relation to facts prior to that declaration. Moreover, the referring court states that it follows expressly from that judgment that the Trybunał Konstytucyjny (Constitutional Court) calls into question not the actual need for such a judicial remedy which, on the contrary, stems from the Constitution and its own case-law, but only the designation of the court having jurisdiction over that remedy. It thus follows from that judgment that a court other than the referring court must, in that case, at least retain jurisdiction in this instance.

56 The referring court states that the new difficulty with which it is now faced results, therefore, rather from the Law of 26 April 2019 which (i) declared that disputes such as those in the main proceedings were to be discontinued by operation of law and (ii) precluded, in future, any possibility of a remedy in individual cases concerning appointment to a position of judge at the Sąd Najwyższy (Supreme Court) rather than entrusting the examination of such cases to another court.

57 According to the referring court, the provisions of EU law referred to in the two questions put to the Court in its initial request for a preliminary ruling and the need arising from those provisions (i) to guarantee, in compliance with the rule of law, the existence of the right to an effective judicial remedy and (ii) not to render ineffective the preliminary ruling cooperation initiated by that request, could preclude such national legislative provisions which have thus made national law even less compatible with those provisions of EU law.

58 In those circumstances, by its decision of 26 June 2019, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer a supplementary question to the Court of Justice for a preliminary ruling (‘the third question’), worded as follows:

‘Should Article 2 TEU, read in conjunction with the third [subparagraph] of Article 4(3), Article 6(1) and Article 19(1) thereof, Article 47 of the [Charter], Article 9(1) of Directive 2000/78 … and the third paragraph of Article 267 TFEU, be interpreted as meaning that an infringement of the rule of law and of the right of access to the courts and the right to effective judicial protection occurs in a situation where the national legislature removes from the legal order the relevant provisions concerning the jurisdiction of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] and the right of appeal to that court against resolutions [of the KRS] and also introduces a solution whereby proceedings in the cases concerning those appeals, which have

been initiated and are still pending on the date when the amendments (derogations) are introduced, are to be discontinued by operation of law, which as a result:

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

– where the national court originally having jurisdiction in those cases has referred questions to the Court … for a preliminary ruling following the successful initiation of the procedure for reviewing the [KRS] resolutions, undermines the right of access to the courts also in so far as, in the individual case pending before the court (originally) having jurisdiction to hear and determine it, it then denies that court both the possibility of successfully initiating preliminary ruling proceedings before the Court … and the right to wait for a ruling from the Court, thereby undermining the EU principle of sincere cooperation?'

59 That request for a supplementary preliminary ruling was notified to the interested parties and the written part of the procedure was reopened in order to enable them to submit their observations on the third question.

The requests that the oral part of the procedure be reopened

60 After the date of delivery of this judgment had been notified to the referring court and to the interested parties, the Public Prosecutor and the Polish Government requested that the oral part of the procedure be reopened, by documents lodged at the Court Registry on 4 and 15 February 2021 respectively.

61 In support of his request, the Public Prosecutor states, in essence, that he disagrees with certain assertions concerning the need for judicial review of the procedures for the appointment of judges set out in the Advocate General's Opinion, assertions that the Public Prosecutor considers to be questionable, imprecise and contradictory, and which, moreover, are based on considerations that have not been sufficiently debated between the interested parties. According to the Public Prosecutor, the analysis contained in that Opinion also differs in certain respects from that presented in the Opinion of Advocate General Hogan in the *Repubblika* case (C-896/19, EU:C:2020:1055). Lastly, the Advocate General referred to the judgment of the European Court of Human Rights of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418). However, this is a new fact which has not been debated by the interested parties.

62 In its request, the Polish Government states that it also disagrees with the Advocate General's submissions, which adopt too broad an interpretation of the second subparagraph of Article 19(1) TEU and which, moreover, diverge from those set out in the Opinion of Advocate General Hogan in the *Repubblika* case (C-896/19, EU:C:2020:1055) and in the order of the Vice-President of the Court of 10 September 2020, *Council* v *Sharpston* (C-424/20 P(R), not published, EU:C:2020:705). A reopening of the oral part of the procedure would also allow interested parties to comment on the possible implications of the judgment of 1 December 2020 of the European Court of Human Rights, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418).

63 In that regard, it should be noted, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court of Justice make no provision for the interested parties referred to in Article 23 of that statute to submit observations in response to the Advocate General's Opinion (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 26 and the case-law cited).

64 Second, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's submissions or by the reasoning which led to those submissions. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 27 and the case-law cited).

65 However, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the interested persons.

66 In the present case, the Court considers, however, after hearing the Advocate General, that it has, following the written procedure and the hearing which has been held before the Court, all the information necessary in order to give judgment. Moreover, the present case does not have to be decided on the basis of an argument which has not been debated between the parties. Lastly, it considers that the requests to reopen the oral part of the procedure do not disclose any new fact which is of such a nature as to be a decisive factor for the decision of the Court in that case. Accordingly, there is no need to order that the oral part of the procedure be reopened.

Consideration of the questions referred

The jurisdiction of the Court

67 According to the Public Prosecutor, the issue of judicial remedies concerning procedures for the appointment of judges is an area falling within the exclusive competence of the Member States, outside the scope of EU law. Therefore, according to the Public Prosecutor, that area does not fall within the jurisdiction of the Court of Justice.

68 In that regard, it should be noted that, although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law (judgments of 24 June 2019, *Commission* v *Poland (Independance of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 52 and the case-law cited, and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 36 and the case-law cited). That may be the case, in particular, as regards national rules relating to the substantive conditions and procedural rules governing the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures (see, to that effect, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, 'the judgment in *A. K. and Others*', EU:C:2019:982, paragraphs 134 to 139 and 145).

69 Moreover, the objections thus put forward by the Public Prosecutor relate, in essence, to the actual scope of the provisions of EU law referred to in paragraph 1 of this judgment and, therefore, to the interpretation of those provisions. An interpretation of that nature clearly falls within the

jurisdiction of the Court under Article 267 TFEU (see, by analogy, judgment in *A. K. and Others*, paragraph 74).

70 It follows from the foregoing that the Court has jurisdiction to rule on the present requests for a preliminary ruling.

The third question

71 By its third question, which must be examined in the first place, the referring court is asking, in essence, whether (i) the provisions of Article 2, in conjunction with the third subparagraph of Article 4(3) and the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 9(1) of Directive 2000/78, and (ii) Article 267 TFEU, must be interpreted as precluding amendments to the national legal order which, first, deprive a national court of its jurisdiction to rule in the first and last instance on appeals lodged by candidates for positions as judges at a court such as the Sąd Najwyższy (Supreme Court) against decisions of a body such as the KRS not to put forward their applications, but to put forward those of other candidates to the President of the Republic for appointment to such positions, which, secondly, declare such appeals to be discontinued by operation of law while they are still pending, ruling out the possibility of their being continued or lodged again, and which, thirdly, in so doing, deprive such a national court of the possibility of obtaining an answer to the questions that it has referred to the Court for a preliminary ruling. If that is the case, the referring court wishes to know whether the principle of the primacy of EU law must be interpreted as requiring it to disapply those amendments and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made.

Admissibility of the third question

72 In the first place, the Public Prosecutor and the Polish Government contend that the third question is inadmissible on the ground that an answer to it is not ‘necessary to enable [a judgment to be given]’, within the meaning of Article 267 TFEU, since there are no longer any disputes in the main proceedings in which the referring court is called upon to give such a judgment.

73 They contend that Article 44(1a) of the Law on the KRS, on which the referring court’s jurisdiction to hear the disputes in the main proceedings had previously been based, was definitively rescinded with *erga omnes* effect by the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 25 March 2019, which stated that the proceedings brought on the basis of that provision had accordingly to be discontinued. Article 3 of the Law of 26 April 2019 subsequently ordered that those proceedings be discontinued by operation of law. Moreover, any further examination of such appeals before another court or lodging of those appeals again is also precluded by virtue of Article 44(1) of the Law on the KRS, as amended by the Law of 26 April 2019.

74 In that regard, it should be noted, on the one hand, as regards, more specifically, the rule thus contained in Article 3 of the Law of 26 April 2019, that the Court has already held, in relation to similar national provisions, that those provisions cannot, in principle and without a decision of the court which has made a reference to the Court ordering the discontinuance of the case in the main proceedings or to the effect that there is no need to rule on that case, lead the Court to find that it is no longer necessary for it to answer the questions before it which were referred for a preliminary ruling (judgment in *A. K. and Others*, paragraph 102).

75 Moreover, it is apparent from the Court’s case-law that it considers a reference for a preliminary ruling submitted, pursuant to Article 267 TFEU, as being validly pending before it so

long as the reference has not been withdrawn by the court from which it emanates (see, to that effect, judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 10).

76 On the other hand, it must be noted that, by the third question, the referring court, which has, moreover, decided to stay the proceedings on the application for a declaration that there is no need to adjudicate on the disputes in the main proceedings, specifically seeks to ascertain whether the legislative changes resulting from the Law of 26 April 2019 are compatible with EU law and, if that is not the case, whether EU law then permits it to disregard those changes and, consequently, to reject that application for a declaration that there is no need to adjudicate and to pursue the examination of those disputes.

77 It follows from the foregoing that an answer to the third question is necessary in order to enable the referring court to adopt, in accordance with the guidance deriving from that answer, decisions on which the outcome of the disputes in the main proceedings will depend, meaning that the objections thus raised by the Public Prosecutor and the Polish Government must be rejected.

78 In the second place, the Polish Government submits that the third question is inadmissible on the ground that the European Union's lack of competence concerning procedures for the appointment of judges in the Member States precludes an interpretation of EU law as obliging the Member States to confer on candidates for a position as judge a right of appeal against a decision not to appoint them, as the existence or otherwise of such a right of appeal does not moreover affect the independence of the judges actually appointed at the end of the appointment procedure concerned. In the Polish Government's submission, a judgment such as that sought from the Court in the present case has normative rather than interpretative effect, since it is a question of enabling the referring court to rule on the disputes in the main proceedings despite the absence of legal provisions of general application conferring on it jurisdiction in the matter. It states that such a consequence is contrary to Article 4(2) TEU, which requires the European Union to respect the national identities of Member States inherent in their constitutional structures, and undermines the independence of the Trybunał Konstytucyjny (Constitutional Court), which declared the provision on which the referring court's jurisdiction was based to be unconstitutional.

79 In that regard, it has already been observed, in paragraph 68 of this judgment, that, when exercising their competence, in particular that relating to the enactment of national rules governing the process of appointing judges, the Member States are required to comply with their obligations deriving from EU law.

80 Moreover, it must be stated that the arguments thus put forward by the Polish Government relate, in essence, to the scope and, therefore, to the interpretation of the provisions of EU law to which the third question relates, and to the effects which may flow from those provisions, in the light, in particular, of the primacy of EU law. Such arguments, which relate to the substance of the question referred, cannot therefore, by their very nature, lead to the inadmissibility of the question.

81 Moreover, a judgment in which the Court were to affirm the existence, under EU law, of an obligation for the referring court to disapply the national rules at issue, by continuing to assume the jurisdiction previously vested in it, would be binding on that court, and could not be affected by provisions of domestic law, including constitutional provisions (see, by analogy, judgment in *A. K. and Others*, paragraph 112).

82 In the third place, the Public Prosecutor takes the view that, contrary to the requirements of Article 94 of the Rules of Procedure, the referring court has not indicated the links it considers to exist between the national provisions applicable in the disputes in the main proceedings and the

provisions of EU law of which it seeks an interpretation. In particular, it states that that court does not examine whether, or how, an obligation on a Member State to ensure judicial review of the proposals for appointment at issue in the main proceedings should be introduced. In the Public Prosecutor's view, the sole possibility of disapplying Article 3 of the Law of 26 April 2019 would be ineffective in that regard, since, even in that case, any possibility for that court to rule on the substance of the disputes before it would still be precluded by the effect of the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 25 March 2019.

83 In that regard, it must, however, be noted, while recalling what has already been stated in paragraph 81 of this judgment, that it is apparent from the matters referred to in paragraphs 26 to 28 and 54 to 57 above that the request for a supplementary preliminary ruling contains all the elements necessary, in particular those relating to the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 25 March 2019, to enable the Court to rule on the third question.

84 In the light of all the foregoing, the third question is admissible.

Substance

– *Directive 2000/78 and Article 47 of the Charter*

85 It should be noted at the outset that, as the KRS, the Public Prosecutor, the Polish Government and the European Commission have argued, Directive 2000/78, and in particular Article 9(1) thereof, is not applicable to the disputes in the main proceedings.

86 Indeed, as is apparent from Article 1 and Article 2(1) thereof, that directive concerns only discrimination as regards employment and occupation which is based on religion or belief, disability, age or sexual orientation. It is not apparent from the information in the order for reference that the disputes in the main proceedings could concern a difference in treatment based on one of those grounds. In that regard, the only difference in treatment liable to concern the appellants in the main proceedings which is mentioned by the referring court relates to the fact that the applicable rules on judicial remedies against resolutions of the KRS proposing to the President of the Republic a candidate for appointment as a judge differ depending on whether those resolutions concern an appointment to a position of judge at the Sąd Najwyższy (Supreme Court) or an appointment to a position of judge in another court.

87 As regards, moreover, Article 47 of the Charter, it must be recalled that that provision, which constitutes a reaffirmation of the principle of effective judicial protection, enshrines the right to an effective remedy before a tribunal for everyone whose rights and freedoms guaranteed by EU law are infringed (see, to that effect, judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 55 and the case-law cited).

88 Thus, the recognition of that right, in a given case, presupposes, as is apparent from the first paragraph of Article 47 of the Charter, that the person invoking that right is relying on rights or freedoms guaranteed by EU law (judgment of 6 October 2020, *État luxembourgeois (Judicial protection against requests for information in tax law)*, C-245/19 and C-246/19, EU:C:2020:795, paragraph 55).

89 However, it is not apparent from the information in the order for reference that the disputes in the main proceedings concern the recognition of a right conferred on the appellants in the main proceedings under a provision of EU law. In particular, and as was stated in paragraphs 85 and 86 of this judgment, the provisions of Directive 2000/78 are not applicable to the disputes in the main

proceedings, with the result that those provisions are also not capable of justifying the applicability of the Charter, in particular Article 47 thereof, in the context of those disputes.

– *Article 267 TFEU and Article 4(3) TEU*

90 With regard to Article 267 TFEU, it should be recalled that the keystone of the judicial system established by the Treaties is the preliminary ruling procedure provided for in that provision, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited, and judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 41).

91 According to the Court's settled case-law, Article 267 TFEU gives in that regard national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them (judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 26, and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 42 and the case-law cited).

92 Moreover, in the case of a court or tribunal such as the referring court against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 267 TFEU, that discretion is even replaced, subject to certain exceptions recognised by the Court's case-law, by an obligation to make a reference to the Court for a preliminary ruling (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 32 and the case-law cited, and the judgment in *A. K. and Others*, paragraph 103).

93 As is apparent from settled case-law, a rule of national law cannot prevent a national court from exercising that discretion, or complying with that obligation, which are an inherent part of the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU and of the functions of the court responsible for the application of EU law entrusted by that provision to the national courts (see, to that effect, judgment in *A. K. and Others*, paragraph 103 and the case-law cited). Similarly, in order to ensure the effectiveness of that discretion and that obligation, a national court must be able to maintain a reference for a preliminary ruling after it has been made (see, to that effect, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 58).

94 Furthermore, a national rule the effect of which may inter alia be that a national court will choose to refrain from referring questions for a preliminary ruling to the Court in order to avoid having the case withdrawn from it is detrimental to the prerogatives thus granted to national courts and tribunals by Article 267 TFEU and, consequently, to the effectiveness of the cooperation between the Court and the national courts and tribunals established by the preliminary ruling mechanism (see, to that effect, judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 25).

95 Consequently, while it is in principle permissible for a Member State, for example, to amend its domestic rules conferring jurisdiction, with the possible consequence that the legislative basis on which the jurisdiction of a national court which has made a reference for a preliminary ruling has been established will disappear, or to adopt substantive rules that have the incidental consequence

of rendering the case in which such a reference was made devoid of purpose, a Member State cannot, however, without infringing Article 267 TFEU, read in conjunction with the third subparagraph of Article 4(3) TEU, make amendments to its national legislation the specific effects of which are to prevent requests for a preliminary ruling addressed to the Court from being maintained after they have been made, and thus to prevent the latter from giving judgment on such requests, and to preclude any possibility of a national court repeating similar requests in the future.

96 It is ultimately for the referring court to rule whether that is the case here. It must be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions. According to settled case-law, the Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions (judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 71 and the case-law cited, and the judgment in *A. K. and Others*, paragraph 132).

97 In that regard, and in the first place, it follows from the order for reference that Article 3 of the Law of 26 April 2019, which declares that there is no need to adjudicate on appeals such as those in the main proceedings, and Article 44(1) of the Law on the KRS, in the version resulting from the Law of 26 April 2019, which precludes the possibility of such appeals being lodged in the future, appear to be such as to prevent the referring court from maintaining, after it has been made, a request for a preliminary ruling referred to the Court and thus to prevent the latter from giving a ruling on that request, and to preclude any future repetition by a national court of questions similar to those raised in that reference.

98 In the second place, as regards the context in which those provisions were adopted, a number of points may be noted from the file before the Court.

99 First, it should be recalled that the Polish legislature has recently already adopted a legislative measure declaring that there is no need to adjudicate in other disputes pending before a national court and which also concerned the compatibility of legislative reforms that had affected the Polish judicial system with provisions of EU law relating to the independence of the courts, whereas, in those disputes also, questions were referred to the Court for a preliminary ruling on such compatibility (see, in that regard, judgment in *A. K. and Others*, paragraphs 90 and 102 to 104).

100 Secondly, it is apparent from the information available to the Court that the Polish authorities have recently stepped up initiatives to curb references to the Court for a preliminary ruling on the question of the independence of the courts in Poland or to call into question the decisions of the Polish courts which have made such references.

101 In that regard, it should be recalled that the Polish courts that referred questions to the Court for a preliminary ruling in the cases that gave rise to the judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234) indicated before the Court that the two judges who made those references had been the subject of an investigation prior to the initiation of potential disciplinary proceedings relating in particular to possible '*ultra vires* conduct' for having made those references (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraphs 20 and 21).

102 In addition, the Rzecznik Praw Obywatelskich (Ombudsman, Poland) referred in the context of the present case to the fact that, on 5 October 2018, the Public Prosecutor, who also holds the

position of Minister for Justice, brought an action before the Trybunał Konstytucyjny (Constitutional Court) seeking a declaration that Article 267 TFEU is not compatible with the Constitution in so far as that provision enables the Polish courts to refer to the Court questions for a preliminary ruling concerning the structure and organisation of the judiciary and the conduct of proceedings before national courts or tribunals.

103 Thirdly, as regards the Polish Government's argument that the adoption of the Law of 26 April 2019 was merely the consequence of the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 25 March 2019, by which the latter declared unconstitutional Article 44(1a) of the Law on the KRS on which the referring court's jurisdiction to hear appeals such as those in the main proceedings is based, it is nevertheless apparent from the statements of the referring court, whose task it is to interpret national law in preliminary ruling proceedings, that, in that judgment, the Trybunał Konstytucyjny (Constitutional Court) stated that the need, arising from Articles 45 and 60 of the Constitution and that court's relevant case-law, to provide for judicial review in respect of procedures for appointment to positions of judges at the Sąd Najwyższy (Supreme Court) remained intact.

104 It is also apparent from the order for reference that, by ruling out, contrary to the guidance thus provided by the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 25 March 2019, that individuals lodging appeals such as those pending in the main proceedings might have them ruled on by a court to which those appeals could have been transferred or before which the parties concerned could have lodged them again, the Polish legislature has in particular definitively ruled out any current or future possibility for the Court to examine questions such as those referred to it in the present case.

105 Fourthly, and as the referring court also observes, the removal of any possibility of a judicial remedy against resolutions of the KRS proposing to the President of the Republic candidates for appointment to judicial positions thus effected by the Law of 26 April 2019 concerns only the resolutions of that body relating to judicial positions at the Sąd Najwyższy (Supreme Court), namely, specifically, resolutions such as those at issue in the main proceedings and which have led the Naczelny Sąd Administracyjny (Supreme Administrative Court) to submit this reference for a preliminary ruling to the Court. The resolutions of the KRS proposing appointments to all other judicial positions in Poland remain subject to judicial review.

106 The factors and considerations thus mentioned in paragraphs 99 to 105 of this judgment may prove to be indicia which, by reason of their convergence and, therefore, their systematic nature, seem capable of clarifying the context in which the Polish legislature adopted the Law of 26 April 2019. As was observed in paragraph 96 of this judgment, since in the context of the preliminary ruling dialogue the final assessment of the facts falls solely to the referring court, it is for that court to assess definitively whether those matters and all other relevant matters of which it may have become aware in that regard support the view that the adoption of that law has had the specific effects of preventing the referring court from maintaining, after they have been made, requests for a preliminary ruling such as that which was initially referred in this case to the Court and thus of preventing the latter from ruling on such requests, and of precluding any possibility of a national court repeating in the future questions for preliminary rulings similar to those contained in the initial request for a preliminary ruling in the present case.

107 If that court were to reach to such a conclusion, it would then be necessary to find that such legislation is detrimental not only to the prerogatives granted to national courts and tribunals in Article 267 TFEU and to the effectiveness of the cooperation between the Court and the national courts and tribunals established by the preliminary ruling mechanism (see, to that effect, judgment

of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 25), but also, and more generally, to the task with which the Court is entrusted under the first subparagraph of Article 19(1) TEU and which consists in ensuring that in the interpretation and application of the Treaties the law is observed, as well as to the third subparagraph of Article 4(3) TEU.

– *Article 2 and the second subparagraph of Article 19(1) TEU*

108 Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and the judicial protection that individuals derive from EU law to national courts and tribunals and to the Court of Justice (judgment of 5 November 2019, *Commission* v *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 98 and the case-law cited).

109 In that regard, as provided for by the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law (see, to that effect, judgment of 5 November 2019, *Commission* v *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 99 and the case-law cited).

110 As is apparent from settled case-law, the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (judgment of 5 November 2019, *Commission* v *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 100 and the case-law cited).

111 As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (judgment of 5 November 2019, *Commission* v *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 101 and the case-law cited).

112 Under the second subparagraph of Article 19(1) TEU, every Member State must thus in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection (judgment of 5 November 2019, *Commission* v *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 103 and the case-law cited).

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

114 In that regard, it is, in the first place, common ground that the Sąd Najwyższy (Supreme Court) and, in particular, its Civil and Criminal Chambers, may be called upon to rule on questions concerning the application or interpretation of EU law and that, as a 'court or tribunal', within the

meaning of EU law, they come within the Polish judicial system in the 'fields covered by Union law' within the meaning of the second subparagraph of Article 19(1) TEU, meaning that they must meet the requirements of effective judicial protection (judgment of 24 June 2019, *Commission* v *Poland (Independance of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 56 and the case-law cited).

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

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

117 According to settled case-law, the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as 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 (judgment in *A. K. and Others*, paragraph 123 and the case-law cited).

118 In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive (judgment in *A. K. and Others*, paragraph 124 and the case-law cited).

119 In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules set out in paragraph 117 above must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (judgment in *A. K. and Others*, paragraph 125 and the case-law cited).

120 In the third place, it should be recalled that the questions referred in the present case concerning the interpretation of the second subparagraph of Article 19(1) TEU relate, in essence, to the issue whether that provision may make it necessary, in the particular context of the process of appointing judges to the Sąd Najwyższy (Supreme Court), to maintain judicial review with regard to resolutions of the KRS such as those at issue in the main proceedings, and to the conditions under which such review should, in that case, be carried out.

121 As was noted in paragraph 117 of this judgment, the guarantees of independence and impartiality required under EU law presuppose, inter alia, the existence of rules governing the appointment of judges.

122 As regards the circumstances in which decisions to appoint judges to the Sąd Najwyższy (Supreme Court) are made, the Court has already had occasion to state that the mere fact that the judges concerned were appointed by the President of the Republic does not give rise to a relationship of subordination of those judges to the latter or to doubts as to the judges' impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (judgment in *A. K. and Others*, paragraph 133 and the case-law cited).

123 However, the Court has also stated that it is still necessary to ensure that the substantive conditions and procedural rules governing the adoption of those appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges, and that it is important, inter alia, in that perspective, that those conditions and procedural rules are drafted in a way which meets the requirements set out in paragraph 119 of this judgment (judgment in *A. K. and Others*, paragraphs 134 and 135 and the case-law cited).

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

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

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

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

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

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

130 As is apparent from the judgment in *A .K. and Others*, that may particularly be the case where it appears, on the basis of criteria such as those mentioned by the referring court and which are referred to in paragraph 43 of this judgment, that the independence of a body such as the KRS from the legislature and executive is open to doubt.

131 In paragraphs 143 and 144 of the judgment *A. K. and Others*, the Court thus already identified, from among the relevant factors to be taken into account for the purposes of assessing the requirement of independence which must be satisfied by a body such as the KRS, first, the fact that the KRS, as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time, second, the fact that, whereas the 15 members of the KRS elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the Polish legislature, third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed KRS, and, fourth, the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers. In such a context, the possible existence of special relationships between the members of the KRS thus established and the Polish executive, such as those referred to by the referring court and mentioned in paragraph 44 of this judgment, may similarly be taken into account for the purposes of that assessment.

132 In addition, in the present case, account should also be taken of other relevant contextual factors which may also contribute to doubts being cast on the independence of the KRS and its role in appointment processes such as those at issue in the main proceedings, and, consequently, on the independence of the judges appointed at the end of such a process.

133 It should be observed, in that regard, that the legislative reform which led to the establishment of the KRS in its new composition took place in conjunction with the adoption, which was highly contentious, of the provisions of Articles 37 and 111 of the New Law on the Supreme Court which the referring court has mentioned and which lowered the retirement age of the judges of the Sąd Najwyższy (Supreme Court) and applied that measure to judges currently serving in that court, while empowering the President of the Republic with discretion to extend the exercise of active judicial service of those judges beyond the new retirement age set by that law.

134 It is therefore common ground that the establishment of the KRS in its new composition took place in a context in which it was expected that many positions would soon be vacant in the Sąd Najwyższy (Supreme Court) following, in particular, the retirement of the judges of that court who had reached the newly set age limit of 65 years.

135 In its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), the Court found that, as a result of adopting the measures mentioned in paragraph 133 of this judgment, the Republic of Poland had undermined the irremovability and

independence of the judges of the Sąd Najwyższy (Supreme Court) and failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

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

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

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

139 In the light of what was observed in paragraph 96 of this judgment, it will be for the national court to make a final assessment on the basis of the guidance provided by this judgment and any other relevant circumstances of which it may become aware, taking account, where appropriate, of the reasons and specific objectives alleged before it in order to justify the measures concerned, whether the fact of having declared, by the Law of 26 April 2019, that there is no need to rule on appeals such as those in the main proceedings and the concomitant removal of any possibility of lodging such appeals in the future, is such as to give rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed on the basis of the KRS resolutions at issue in the main proceedings to external factors and, in particular, to the direct or indirect influence of the Polish legislature and executive, and to lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

– *The principle of primacy of EU law*

140 If, following the examination which it is called upon to carry out in the light of the considerations set out in paragraphs 90 to 107 above, the referring court comes to the conclusion that the provisions of the Law of 26 April 2019 at issue in the main proceedings were adopted in breach of Article 267 TFEU and Article 4(3) TEU, it will be for that court to disapply those national provisions.

141 As is apparent from settled case-law, a provision of national law which prevents the procedure laid down in Article 267 TFEU from being implemented must be set aside without the court concerned's having to request or await the prior setting aside of that provision of national law by legislative or other constitutional means (see, to that effect, judgments of 14 December 1995, *Peterbroeck*, C-312/93, EU:C:1995:437, paragraph 13 and the case-law cited, and of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 31 and the case-law cited). The same must

apply with regard to an amendment to national law the specific effects of which are to prevent the Court from ruling on requests for a preliminary ruling submitted to it and to preclude any possibility of a national court repeating similar requests in the future. As was noted in paragraph 95 of this judgment, such a rule infringes Article 267 TFEU in a similar manner.

142 Similarly, if the referring court finds, under the examination which it is called upon to carry out in the light of the considerations set out in paragraphs 108 to 139 of this judgment, that the provisions of the Law of 26 April 2019 at issue in the main proceedings infringe the second subparagraph of Article 19(1) TEU, it will also be for that court to disapply those national provisions on that ground.

143 The second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law (judgment in *A. K. and Others*, paragraph 168 and the case-law cited), meaning that the latter provision must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU (order of 6 October 2020, *Prokuratura Rejonowa w Słubicach*, C-623/18, not published, EU:C:2020:800, paragraph 28).

144 As was already pointed out in paragraph 115 of this judgment, the second paragraph of Article 47 of the Charter expressly refers to access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy

145 By holding, in that regard, that Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such (judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 78, and of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 56), in particular in so far as that provision requires the court called upon to hear an appeal based on EU law to satisfy the requirement of independence laid down by that provision (see, to that effect, judgment in *A. K. and Others*, paragraph 166), the Court has acknowledged inter alia that that requirement presented the clarity, precision and unconditionality required for it to be concluded that it has direct effect.

146 It follows from the foregoing that the second subparagraph of Article 19(1) TEU imposes on the Member States a clear and precise obligation as to the result to be achieved and that that obligation is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law.

147 Lastly, as regards, in the context of the disputes in the main proceedings, the consequences of the declaration of unconstitutionality of Article 44(1a) of the Law on the KRS issued by the Trybunał Konstytucyjny (Constitutional Court) in its judgment of 25 March 2019, it should be recalled that, as was observed in paragraphs 103 and 104 of this judgment, that judgment of the Trybunał Konstytucyjny (Constitutional Court) did not call into question the need, affirmed by that court in its previous case-law, for judicial review of the process of appointment to judicial positions at the Sąd Najwyższy (Supreme Court) and, in particular, of the resolutions of the KRS adopted in the framework of such a process.

148 Moreover, it should be noted, in any event, that the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that. In accordance with settled case-law, rules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law (judgments of

15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 70 and the case-law cited, and of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 49 and the case-law cited).

149 In those circumstances, and in the light, in particular, of the fact that the national legislature has not designated a court or tribunal, other than the referring court, which meets the requirements of independence under EU law and which is called upon to rule on the disputes in the main proceedings after receiving an answer from the Court of Justice to the questions referred to it in its request for an initial preliminary ruling, the only effective manner for that court to remedy the infringements of Article 267 TFEU and the second subparagraph of Article 19(1) TEU resulting from the adoption of the Law of 26 April 2019 is, in this case, to continue to assume the jurisdiction under which it has submitted the request to the Court under the national rules hitherto applicable (see, by analogy, judgment in *A. K. and Others*, paragraph 166 and the case-law cited).

150 In the light of the foregoing, the answer to the third question is as follows:

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

– Article 267 TFEU and Article 4(3) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those amendments have had the specific effects of preventing the Court from ruling on questions referred for a preliminary ruling such as those put to it by that court and of precluding any possibility of a national court repeating in the future questions similar to those questions;

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

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

The first question

151 In the light, in particular, of the clarifications set out in paragraphs 85 to 89 of this judgment, it must be held that, by its first question, the referring court is asking, in essence, whether the second subparagraph of Article 19(1) TEU must be interpreted as precluding national procedural provisions under which:

– notwithstanding the fact that a candidate for a position as judge at a court such as the Sąd Najwyższy (Supreme Court) lodges an appeal against the decision of a body such as the KRS not to accept his or her application, but to put forward that of other candidates to the President of the Republic, that decision is final inasmuch as it puts forward those other candidates, with the result that that appeal does not preclude the appointment of those other candidates by the President of the Republic and that any annulment of that decision inasmuch as it did not put forward the appellant for appointment may not lead to a fresh assessment of the appellant's situation for the purposes of any assignment of the position concerned, and

– moreover, such an appeal may not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made.

Whether there is no need to adjudicate

152 During the initial written part of the procedure, the KRS, the Public Prosecutor and the Polish Government maintained, for reasons essentially identical to those set out in paragraphs 72 and 73 of this judgment, that, in the light of the adoption of the Law of 26 April 2019 and of the disappearance of the national provisions on which the referring court's jurisdiction to hear the disputes in the main proceedings had until then been based, and of the fact that that law declared that there was no need to adjudicate as regards the latter disputes, the first question had become devoid of purpose and that it was no longer necessary to answer that question for the purposes of the resolution of those disputes, with the result that there was no longer any need for the Court to rule on that question.

153 However, in view of the fact that, in the light of the Court's answer to the third question, the referring court might find it necessary to disapply the relevant provisions of that law on the ground that they are contrary to EU law, the objections of those interested parties must be rejected.

Admissibility

154 According to the Public Prosecutor and the Polish Government, the first question is inadmissible on the ground that the European Union has no competence concerning the organisation of justice, with the result that the national rules at issue in the main proceedings fall outside the scope of EU law.

155 Such objections must nevertheless be rejected on grounds analogous to those already set out in paragraphs 68 and 69 of this judgment.

Substance

156 For the purposes of determining whether national provisions such as those contained in Article 44(1a) to (4) of the Law on the KRS are liable to infringe the second subparagraph of Article 19(1) TEU, it is necessary to point out at the outset, while reiterating all the considerations set out in paragraphs 108 to 136 of this judgment, that, as was already observed in paragraph 129 of this judgment, the fact that it may not be possible to exercise a legal remedy in the context of a

process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU. However, the position may be different where provisions undermining the effectiveness of judicial remedies of that kind which previously existed, particularly where the adoption of those provisions, considered together with other relevant factors characterising such an appointment process in a specific national legal and factual context, appear such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process.

157 In view, in that regard, of the principles referred to in paragraph 96 of this judgment, it must be held, in the first place, that, as the referring court observes, an appeal such as that brought before it on the basis of Article 44(1a) to (4) is devoid of any real effectiveness and thus offers only the appearance of a judicial remedy.

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

159 In the second place, account must also be taken of the fact that, in the present case, the national provisions at issue in the main proceedings have significantly altered the state of national law previously in force.

160 First, and as the referring court observes, it is apparent that, prior to the insertion of paragraphs 1b and 4 in Article 44 of the Law on the KRS, appeals against resolutions of the KRS putting forward candidates for judicial positions at the Sąd Najwyższy (Supreme Court) fell within the scope of the general provisions of Article 43 of that law which did not provide for the restrictions now contained in those paragraphs 1b and 4, meaning that the effect of the latter provisions has been, in the case of such resolutions, to undermine the effectiveness of the judicial review provided for until then in the national legislation.

161 Secondly, as the referring court also observes, the amendment inserted in paragraph 1a of Article 44 of the Law on the KRS and which relates to the nature of the review which the Naczelny Sąd Administracyjny (Supreme Administrative Court) may carry out when hearing a case on the basis of that provision has reduced the intensity of the judicial review which previously prevailed.

162 Thirdly, it should be pointed out, as the referring court has done, that the restrictions thus introduced in Article 44(1a) to (4) of the Law on the KRS concern only appeals brought against resolutions of the KRS relating to applications for judicial posts at the Sąd Najwyższy (Supreme Court), whereas the resolutions of the KRS relating to applications for judicial posts in other national courts remain subject to the general system of judicial review referred to in paragraph 160 of this judgment.

163 In the third place, the contextual factors associated with all the other reforms which have recently affected the Sąd Najwyższy (Supreme Court) and the KRS and which were already referred to in paragraphs 130 to 135 of this judgment must also be taken into account in this instance.

164 In that regard, it should also be pointed out that the provisions of Article 44(1b) and (4) of the Law on the KRS, which, as was previously observed, have deprived legal remedies such as those in the main proceedings of any effectiveness, were inserted by the Law of 20 July 2018 amending the Law on the system of ordinary courts and certain other laws and entered into force on 27 July 2018, that is to say very shortly before the KRS in its new composition was called upon to decide on the applications submitted in order to fill numerous judicial positions at the Sąd Najwyższy (Supreme Court) which have been declared vacant or newly created as a result of the entry into force of the New Law on the Supreme Court, and, in particular, on the applications of the appellants in the main proceedings.

165 In the light of what was observed in paragraph 96 of this judgment, it will be for the national court to make an assessment on the basis of the guidance provided by this judgment and any other relevant circumstances of which it may become aware, taking account, where appropriate, of the reasons and specific objectives alleged before it in order to justify the measures concerned, whether national provisions such as those contained in Article 44(1a) to (4) of the Law on the KRS, particularly where they are combined with the elements mentioned in paragraphs 130 to 135 and 157 to 164 of this judgment, are such as to give rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed on the basis of the KRS resolutions to external factors and, in particular, to the direct or indirect influence of the Polish legislature and executive, and as to their neutrality with respect to any interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

166 Furthermore, if the referring court reaches the conclusion that the retrograde impact of those national provisions on the effectiveness of the judicial remedy available against the resolutions of the KRS proposing the appointment of judges in the Sąd Najwyższy (Supreme Court) infringes the second subparagraph of Article 19(1) TEU, it will be for that court, for the same reasons as those set out in paragraphs 142 to 149 of this judgment, to disapply those provisions and to apply instead the national provisions previously in force while itself exercising the review envisaged by those latter provisions.

167 Having regard to all of the foregoing, the answer to the first question is that:

– The second subparagraph of Article 19(1) TEU must be interpreted as precluding provisions amending the state of national law in force under which:

– notwithstanding the fact that a candidate for a position as judge at a court such as the Sąd Najwyższy (Supreme Court) lodges an appeal against the decision of a body such as the KRS not to accept his or her application, but to put forward that of other candidates to the President of the Republic, that decision is final inasmuch as it puts forward those other candidates, with the result that that appeal does not preclude the appointment of those other candidates by the President of the Republic and that any annulment of that decision inasmuch as it did not put forward the appellant for appointment may not lead to a fresh assessment of the appellant’s situation for the purposes of any assignment of the position concerned, and

– moreover, such an appeal may not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made,

where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those provisions are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed, by the President of the Republic, on the basis of the decisions of the KRS, to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

– Where it is proved that the second subparagraph of Article 19(1) TEU has been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply those provisions and to apply instead the national provisions previously in force while itself exercising the judicial review envisaged by those latter provisions.

The second question

168 In the light of all of the foregoing considerations, there is no need to answer the second question.

Costs

169 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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

– **Article 267 TFEU and Article 4(3) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those amendments have had the specific effects of preventing the Court from ruling on questions referred for a preliminary ruling such as those put to it by that court and of precluding any possibility of a national court repeating in the future questions similar to those questions;**

– **the second subparagraph of Article 19(1) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the**

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

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

2. **The second subparagraph of Article 19(1) TEU must be interpreted as precluding provisions amending the state of national law in force under which:**

– **notwithstanding the fact that a candidate for a position as judge at a court such as the Sąd Najwyższy (Supreme Court) lodges an appeal against the decision of a body such as the Krajowa Rada Sądownictwa (National Council of the Judiciary) not to accept his or her application, but to put forward that of other candidates to the President of the Republic of Poland, that decision is final inasmuch as it puts forward those other candidates, with the result that that appeal does not preclude the appointment of those other candidates by the President of the Republic of Poland and that any annulment of that decision inasmuch as it did not put forward the appellant for appointment may not lead to a fresh assessment of the appellant's situation for the purposes of any assignment of the position concerned, and.**

– **moreover, such an appeal may not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made,**

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

Where it is proved that the second subparagraph of Article 19(1) TEU has been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply those provisions and to apply instead the national provisions previously in force while itself exercising the judicial review envisaged by those latter provisions.

[Signatures]

* Language of the procedure: Polish.