



**Successive amendments to the Polish Law on the National Council of the Judiciary which have the effect of removing effective judicial review of that council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court are liable to infringe EU law**

*Where an infringement has been proved, the principle of the primacy of EU law requires the national court to disapply such amendments*

By resolutions adopted in August 2018, the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS') decided not to present to the President of the Republic of Poland proposals for the appointment of five persons ('the appellants') to positions as judges at the Sąd Najwyższy (Supreme Court, Poland) and to propose other candidates for those positions. The appellants lodged appeals against these resolutions before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), the referring court. Such appeals were governed at that time by the Law on the National Council of the Judiciary ('the Law on the KRS'), as amended by a law of July 2018. Under those rules, it was provided that unless all the participants in a procedure for appointment to a position as judge at the Supreme Court challenged the relevant resolution of the KRS, that resolution became final with respect to the candidate presented for that position, so that the latter could be appointed by the President of the Republic. Moreover, any annulment of such a resolution on appeal of a participant not proposed for appointment could not lead to a fresh assessment of that participant's situation for the purposes of any assignment of the position concerned. In addition, under those rules, such an appeal could 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. In its initial request for a preliminary ruling, the referring court, taking the view that such rules preclude in practice any effectiveness of the appeal lodged by a participant who has not been proposed for appointment, decided to refer questions to the Court on whether those rules comply with EU law.

After that initial referral, the Law on the KRS was once again amended, in 2019. Pursuant to that reform, it became impossible to lodge appeals against decisions of the KRS concerning the proposal or non-proposal of candidates for appointment to judicial positions of the Supreme Court. Moreover, that reform declared such still pending appeals to be discontinued by operation of law, *de facto* depriving the referring court of its jurisdiction to rule on that type of appeal and of the possibility of obtaining an answer to the questions that it had referred to the Court for a preliminary ruling. Accordingly, in its complementary request for a preliminary ruling, the referring court referred a question to the Court for a preliminary ruling on whether those new rules are compatible with EU law.

#### Findings of the Court

In the first place, the Court, sitting as the Grand Chamber, holds, first of all, that both the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU and the principle of sincere cooperation laid down in Article 4(3) TEU preclude legislative amendments, such as those, cited above, effected in 2019 in Poland, where it is apparent that they have had the specific effects of preventing the Court from ruling on questions referred for a preliminary ruling such as those put by the referring court and of precluding any possibility of a national court repeating in the future questions similar to those questions. The Court states, in that

regard, that it is for the referring court to assess, taking account of all the relevant factors and, in particular, the context in which the Polish legislature adopted those amendments, whether that is the case here.

Next, the Court considers that the Member States' obligation to provide remedies sufficient to ensure effective legal protection for individuals in the fields covered by EU law, provided for in the second subparagraph of Article 19(1) TEU, may also preclude that same type of legislative amendments. That is the case where it is apparent – which again it is for the referring 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 on the basis of the KRS resolution 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. Such amendments would then be liable 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.

In reaching that conclusion, the Court recalls that the guarantees of independence and impartiality required under EU law presuppose the existence of rules governing the appointment of judges. Moreover, the Court draws attention to the decisive role of the KRS in the process of appointment to a position as judge of the Supreme Court, since the proposal act that it adopts is an essential condition for a candidate to be appointed subsequently. Thus, the degree of independence enjoyed by the KRS in respect of the Polish legislature and the executive may be relevant in order to ascertain whether the judges which it selects will be capable of meeting the requirements of independence and impartiality. Furthermore, the Court states that the possible absence of any legal remedy in the context of a process of appointment to judicial positions of a national supreme court may prove to be problematic where all the relevant contextual factors characterising such an appointment process in the Member State concerned may 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. In that regard, the Court specifies that if the referring court were, on the basis of all the relevant factors that it mentioned in its order for reference and, in particular, of the legislative amendments that have recently affected the process of appointing members of the KRS, to conclude that the KRS does not offer sufficient guarantees of independence, the existence of a judicial remedy available to unsuccessful candidates would be necessary in order to help safeguard the process of appointing the judges concerned from direct or indirect influence and, ultimately, to prevent the doubts referred to above from arising.

Lastly, the Court holds that if the referring court reaches the conclusion that the 2019 legislative amendments were adopted in breach of EU law, the principle of the primacy of that law requires the referring court to disapply those amendments, whether they are of a legislative or constitutional origin, and to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made.

In the second place, the Court takes the view that the second subparagraph of Article 19(1) TEU precludes legislative amendments, such as those, cited above, made in 2018 in Poland, where it is apparent that they 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 to external factors, 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.

It is ultimately for the referring court to rule on whether that is the case here. With regard to the considerations which the referring court will have to take into account in that regard, the Court states that the national provisions concerning the judicial remedy available in the context of a process of appointment to judicial positions of a national supreme court may prove to be problematic in the light of the requirements arising from EU law where they undermine the effectiveness which existed until then. The Court observes, first, that, following the 2018 legislative amendments, the appeal in question is devoid of any real effectiveness and offers no more than an appearance of a judicial remedy. Secondly, the Court states that, in this instance, the contextual

factors associated with all the other reforms that have recently affected the Supreme Court and the KRS must also be taken into account. In that regard, the Court notes, in addition to the doubts previously mentioned in relation to the independence of the KRS, the fact that the 2018 legislative amendments were made very shortly before the KRS in its new composition was called upon to decide on applications, such as the appellants', submitted in order to fill numerous judicial positions at the Supreme Court which have been declared vacant or newly created as a result of the entry into force of various amendments to the Law on the Supreme Court.

Lastly, the Court specifies that, if the referring court reaches the conclusion that the 2018 legislative amendments infringe EU law, it will be for that court, under the principle of the primacy of that law, to disapply those amendments and to apply instead the national provisions previously in force while itself exercising the review envisaged by those latter provisions.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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