COURT ORDER

On 5 February 2020,

the Supreme Administrative Court
in the following composition:

Presiding judge: judge of the Supreme Administrative Court Jolanta Rudnicka (rapporteur)
Judge of the Supreme Administrative Court Małgorzata Borowiec
Judge of the Supreme Administrative Court Monika Nowicka

upon having heard on 5 February 2020:
at a closed session of the General Administrative Chamber
the motion of A.Z. to have the judge of the Supreme Administrative Court Przemysław Szustakiewicz excluded from examining the case from A.Z.'s cassation appeal
against the judgment of the Voivodeship Administrative Court in Warsaw
of 7 November 2017 Case No. II SA/Wa 1927/16
in the matter of the appeal of A.Z.
against the decision of the Local Government Appeal Board in Warsaw
of [...] September 2016 No. [...]
regarding refusal to provide access to public information
decided:

to dismiss the application.

Case No. I OSK 1394/18

Justification

At the hearing before the Supreme Administrative Court on 14 January 2020, in the case from A.Z.'s cassation appeal against the judgment of the Voivodeship Administrative Court in Warsaw of 7 November 2017, Case No. II SA / Wa 1927/16 regarding access to public information, the applicant in cassation requested the exclusion of judge Przemysław Szustakiewicz. In support of the application, the applicant in cassation referred to the Supreme Court's judgment of 5 December 2019, Case No. III PO 7/18. According to the minutes of the hearing, the applicant in cassation justified his doubt as to the impartiality of that judge by the fact that the Supreme Court questioned in the abovementioned verdict the actions of the National Council of the Judiciary and that the judge of the Supreme Administrative Court, Przemysław Szustakiewicz, was appointed as a judge of the Supreme Administrative Court in the procedure involving this body.
In a letter of 15 January 2020, the judge of the Supreme Administrative Court, Przemysław Szustakiewicz, stated that in the present case, in relation to his person, there are no grounds for exclusion set out in Article18 and Article19 of the Act of 30 August 2002 Law on proceedings before administrative courts – Journal of Laws of 2019, Item 2325, as amended).

The Supreme Administrative Court has considered the following.

I. Significant circumstances affecting the resolution of the application of the applicant in cassation.

1.
The application to exclude a judge of the Supreme Administrative Court Przemysław Szustakiewicz was derived from Article 19 of the Act of 30 August 2002 Law on proceedings before administrative courts (consolidated text, Journal of Laws of 2019, Item 2325, as amended, hereinafter: "LPAC"). This is indicated by the recorded content of the oral justification for this application, which also does not show that the applicant in cassation cited any of the conditions for the exclusion of a judge referred to in Article 18 § 1 (1) – (7) of the LPAC.

Under Article 19 of the LPAC, the court (at the request of a judge or at the request of a party) excludes a judge only if there is such a circumstance that it could raise a reasonable doubt as to his impartiality in a given case. As emphasised in literature, in connection with the fact that the relative conditions for exclusion were not, however, specified exhaustively in Article 19 of the LPAC, it is assumed that "this provision refers to the existence of circumstances that could raise a reasonable doubt as to the impartiality of a judge in a given case, making him potentially suspected of lack of objectivity in its recognition (so-called iudex suspectus). In the literature, it is assumed that the mere existence of a situation justifying to some extent a judge's suspicion of bias may be the reason for his exclusion from the case (J.P. Tarno, Wyłączenie sędziego w postępowaniu sądowo administracyjnym, p. 233). At the same time, the assumption that the subjective conviction of the applicant about the lack of objectivity of a judge may result in excluding the judge from examining the case, would lead to negation of coherence and legal certainty and to unpredictable effects in judicial practice (Proc. of the NSA of 14.06.2012, I OZ 420/12, Legalis). The purpose of this regulation is primarily to ensure the impartiality of the judge and to eliminate the influence that a certain category of connections (personal, economic, business, etc.) can have on judicial decision (see judgment of CT from 13.12.2005, SK 53/04, OTK-A 2005, No. 11, Item 134). The ratio legis of the provisions on the exclusion of a judge thus boils down to "eliminating all causes that could result in the environment in any doubt as to the impartiality and objectivity of the judge in dealing with a specific case" (CT judgment of 20.7.2004, SK 19/02, OTK-A 2004, No. 7, Item 67) "- e.g. in Commentary to Article 19 of the LPAC in: R. Hauser, M. Wierzbowski (red.), Prawo o postępowaniu przed sądami administracyjnymi. Komentarz. Ed. 6, Warszawa 2019.

The ratio legis of Article 19 LPAC, indicated by the Constitutional Tribunal in the abovementioned the judgment of 2005, therefore, consists in balancing by the court deciding on the exclusion of a judge whether the circumstances raised by the party (or the judge himself) actually indicate the existence of a category of connections that could affect the impartiality or objectivity of the judge.

2.1.

On 5 December 2019, the Supreme Court issued a judgment in the case Case No. III PO 7/18 (to which the applicant in cassation refers), after having received answers

to legal questions addressed to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union (consolidated version – Official Journal of the European Union C 326/47, hereinafter: "TFEU") on 30 August 2018:

1) Should the Article 267 of the TFEU, paragraph 3, in conjunction with Article 19 (1) and Article 2 of the TUE and Article 47 of the CFR be interpreted as meaning that the chamber of the court of last instance of a Member State formed from scratch – competent to hear the case of the appellant national court judge – in which only judges chosen by the national body to guard the independence of the courts are to be ruled (National Council of the Judiciary) which, due to the constitutional model of its formation and mode of operation, does not guarantee independence from legislative and executive power, is a sovereign and independent court within the meaning of European Union law?;

2) In the event of a negative answer to the first question, should the Article 267 paragraph 3 of the TFEU in conjunction with Article 19 (1) and Article 2 of the TUE and Article 47 of the CFR be interpreted as meaning that the wrong chamber of the court of last instance of a Member State meeting the requirements of European Union law for the court seized of an appeal in an EU case should bypass the provisions of the national act excluding its jurisdiction in this case?

2.2.

The Court of Justice of the European Union has accepted the case for examination, assigned it Case Reference C-585/18 and combined it with other questions from the Supreme Court (C-624/18 and C-625/18). By the judgment of the Court (Grand Chamber) of 19 November 2019, in Joined Cases C-585/18, C-624/18 and C-625/18, it was decided that: (1) there are no longer grounds for answering questions asked by The Labour Law and Social Security Chamber of the Supreme Court (Poland) in case C-585/18 and the first of the questions asked by that court in cases C-624/18 and C-625/18; (2) the second and third questions asked by the court in cases C-624/18 and C-625/18 require the following answer: Article 47 of the CFR 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 should be interpreted as precluding disputes concerning the application of Union law from being exclusive authority not constituting an independent and impartial court within the meaning of

the first of these provisions. The latter situation occurs when the objective circumstances in which a given body was created and its features, as well as the manner in which its members were appointed, may convince individuals reasonable doubts as to the independence of that body from external factors, in in particular from the direct or indirect influence of the legislative and executive power, and its neutrality towards the interests it faces, and thus lead to that body's lack of independence or impartiality, which could undermine the trust that the judiciary should inspire in individuals in a democratic society. It is for the referring court to determine, taking into account all relevant information at its disposal, whether that is the case for an authority such as the Disciplinary Chamber of the Supreme Court. Should that be the case, the principle of the primacy of Union law must be interpreted as requiring the referring court to waive the application of a provision of national law reserving jurisdiction for such a body to hear disputes in the main proceedings, so that those disputes may be heard by a court, which meets the abovementioned requirements of independence and impartiality and which would be appropriate in the field if that provision did not prevent it.

The CJEU, in points 120 to 122 of the judgment emphasised that "the requirement of judicial independence, which is an integral part of judging, falls within the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of fundamental importance as a guarantee of the protection of all rights derived from individuals by the Union law, and preservation of the values common to the Member States expressed in Article 2 of the TEU, in particular the value of the rule of law [judgment of 24 June 2019, Commission / Poland (Independence of the Supreme Court), C‑ 619/18, EU: C: 2019: 531, (58) and the case-law cited therein].

(...) the requirement of independence has two aspects. The first aspect, of an external nature, requires that the authority perform its tasks fully autonomously, without subordination within the service hierarchy, without subordination to anyone, in a manner free from orders or guidelines from any source, thus remaining protected from interference and pressures from the outside that may threaten the independence of the judgment of its members and affect their decisions [judgments: of 25 July 2018, Minister for Justice and Equality (Deficiencies of judicial system), C‑216/18 PPU, EU: C: 2018: 586, (63) and the case-law cited therein; and also of 24

June 2019, Commission / Poland (Independence of the Supreme Court),C-619/18, EU: C: 2019: 531, (72)].

The second, internal aspect, in turn, is connected with the concept of impartiality and concerns the same distance to the parties to the dispute and their respective interests in relation to its subject. This aspect requires compliance with objectivity and the absence of any interest in resolving the dispute, except for strict application of the law [judgments: of 25 July 2018, Minister for Justice and Equality (Deficiencies of judicial system), C--216/18 PPU, EU: C : 2018: 586 (65) and the case-law cited therein; and also of 24 June 2019, Commission / Poland (Independence of the Supreme Court),C- 619/18, EU:C:2019: 531, (73)]"

At the same time, the Court of Justice of the European Union indicated in (124) and (125) of the judgment the need to guarantee the independence of the courts against the legislative and executive authorities, in accordance with the principle of separation of powers characterising the functioning of the rule of law (judgment of 10 November 2016, Poltorak, C-452/16 PPU, EU: C: 2016: 858, (35)). It explicitly stated that judges should be protected from interference or outside pressure that could threaten their independence, in particular by excluding not only all direct influence in the form of recommendations, but also more indirect forms of influence that may affect the decisions of the judges concerned [see also judgment of 24 June 2019, Commission / Poland (Independence of the Supreme Court),C-619/18, EU: C: 2019: 531, point (112) and the case-law cited therein].

The CJEU also pointed out that in order for a court to be considered "independent" within the meaning of Article 6 (1) of the ECHR, attention should be paid, inter alia, to the way of appointing its members and the length of their term of office, to the existence of guarantees protecting them against external pressures and whether the given body shows signs of independence (ECtHR judgment of 6 November 2018 in the case Ramos Nunes de Carvalho e Sá against Portugal, CE: ECHR: 2018: 1106JUD005539113, § 144 and the case-law cited therein).

As explained by the CJEU, the premise of "impartiality" within the meaning of Article 6 (1) of the ECHR, can be assessed in a variety of ways, namely through a subjective approach, taking into account the personal beliefs and behaviour of the judge, i.e. by examining whether he has shown bias or personal bias in a given case, as well as through an objective approach of determining whether the court provides, in particular due to its composition, sufficient guarantees to exclude any reasonable

doubt as to its impartiality. As for the objective assessment, it is about asking yourself whether, regardless of the judge's individual behaviour, certain verifiable facts give rise to suspicions about his bias. Even appearances can make a difference in this regard. Also here, the stake is the trust that in democratic society courts should evoke in individuals, starting with the parties to the proceedings (see in particular the ECtHR rulings: of 6 May 2003 in the case of Kleyn and Others v. The Netherlands, CE: ECHR: 2003: 0506JUD003934398, § 191 and the case-law cited therein; and of 6 November 2018 in the case of Ramos Nunes de Carvalho e Sá v. Portugal, CE: ECHR: 2018: 1106JUD005539113, §§ 145, 147, 149 and the case-law cited therein).
In this context, the statement by the Court of Justice of the European Union contained in paragraphs (137) – (140) and (142) – (146) of the judgment of the European Union Court of Justice of the European Union, which is particularly relevant for the interpretation of the application of European Union law and the interpretation of national law of states in this regard.
The Court has clearly stated that making the appointment of the Supreme Court judge by the President of the Republic of Poland dependent on the existence of a recommendation by the National Council of the Judiciary in this respect may objectively outline the framework of recognition that the President of the Republic of Poland has when exercising the prerogatives entrusted to him in this respect. The framework of this recognition is marked by the actual independence of the National Council of the Judiciary from the legislative and executive authorities and from the body to which it is to submit such a request for appointment. The degree of independence of the National Council of the Judiciary from the legislative and executive authority in the performance of tasks entrusted to it by national legislation (as the body to which, under Article 186 of the Constitution, was entrusted the mission of safeguarding the independence of the courts and the independence of judges), as it may be relevant when assessing whether the judges it appointed would be able to meet the requirements of independence and impartiality arising from Article 47 of the Charter of Fundamental Rights.
Therefore, the CJEU decided that it would be for the national court to determine - on the basis of all the facts, both factual and legal, regarding the circumstances in which members of the National Council of the Judiciary were elected, and the manner in which this body specifically fulfils its role – whether the National Council of the Judiciary provides sufficient guarantees of independence from legislative and

executive bodies. Such an assessment will take into account the fact that the new National Council of the Judiciary was created by way of shortening the four-year term of office of members who had previously been members of this body. It is also important that although 15 members of the National Council of the Judiciary elected from among the judges were previously selected by the judiciary, they are currently designated by the legislative authority from among candidates who can be nominated by a group of 2,000 citizens or 25 judges, which causes such reform leads to an increase in the number of members of the National Council of the Judiciary from political powers or elected by them to 23 out of 25 members that this body has. In addition, the existence of any irregularities that may have been affected by the process of appointing the National Council of the Judiciary members in the new composition is also important.

The CJEU also explained that in order to assess the above circumstances related to the National Council of the Judiciary, as the body indicating the President of the Republic of Poland candidates for judges to be appointed to office, the manner in which the National Council of the Judiciary fulfils its constitutional task of guarding the independence of courts and independence of judges and performs its individual competence, in particular whether it does it in a way that may cast doubt on its independence from the legislative and executive branch.

Since the decisions of the President of the Republic of Poland regarding the appointment of judges (even though the CJEU referred this to the judges of the Supreme Court) cannot be subject to judicial review, it will be for the national court to determine whether the manner in which the Act on the National Council of the Judiciary sets out in its Article 44 (1) and (1a), the scope of the appeal that may be lodged against a resolution of the National Council of the Judiciary involving decisions on the application for appointment to the office of a judge of that court, enables effective judicial review of such resolutions, at least to the extent that it is possible to establish that there has been no exceeding or abuse of power, violation of law or making a manifest error of assessment (see the similar ECtHR's judgment of 18 October 2018 in the case Thiam v. France, CE: ECHR: 2018: 1018JUD008001812, §§ 25, 81).

It should be reminded that judges of voivodship courts and the Supreme Administrative Court should also meet the standards required for the EU judges. This

is particularly important in the context of the fact that administrative judges apply EU law (regulations) or assess and supervise its correct implementation (directives).

2.3.

As a rule, the cited judgment of the Supreme Court in the case Case No. III PO 7/18 concerned the further holding of the post of judge of the Supreme Administrative Court. However, the Supreme Court – making by its very nature the legal assessment of the subject matter of the case – also assessed the correctness of the appointment of the Disciplinary Chamber of the Supreme Court and the selection of judges - members of this Chamber. Nevertheless, as a result of the Supreme Court's own assessment of national and EU law in this context, taking into account the justification of the abovementioned judgment of the EU Court, the Supreme Court also found (points 60, 79 and 88 of the grounds of the judgment) that the current National Council of the Judiciary does not provide sufficient guarantees of independence from the legislative and executive branches in the procedure of appointing judges. This negative assessment of the National Council of the Judiciary was also justified by the positions of national and European institutions related to justice, widely discussed in the justification of the judgment.

3.

On 23 January 2020, in case Case No. BSA I-4110-1/20, a resolution was adopted on the composition of the combined Civil, Criminal, as well as Labour and Social Insurance Chambers of the Supreme Court on resolving discrepancies in the interpretation of law appearing in the case-law of the Supreme Court. The combined Chambers of the Supreme Court resolved that:

„1. The composition of court which is inappropriate within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure or contradiction of the composition of the court with the provisions of law within the meaning of Article 379 (4) of the Code of Civil Procedure also occurs when a person appointed to the office of a judge of the Supreme Court at the request of the National Council of the Judiciary formed in accordance with the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, Item 3).

2. The composition of court which is inappropriate within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure or contradiction of the composition of the court with the provisions of law within the meaning of Article 379 (4) of the Code of Civil Procedure also occurs when a person appointed to the office of a judge of the court of law or military court at the request of the National Council of the Judiciary formed in accordance with the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, Item 3), if the defectiveness of the appointment process leads, in specific circumstances, to a breach of the standard of independence and impartiality within the meaning of Article 45 (1) of the Polish Constitution, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 (1) of Convention for the Protection of Human Rights and Fundamental Freedoms.
3. Interpretation of Article 439 § 1 (2) of the Code of Criminal Procedure and Article 379 (4) of the Code of Civil Procedure adopted in points 1 and 2 of this resolution does not apply to judgments issued by courts before the date of its adoption and to judgments that will be issued in proceedings pending on that day under the Code of Criminal Procedure before a given court.
4. Point 1 of this resolution shall apply to decisions issued with the participation of judges of the Disciplinary Chamber established in the Supreme Court on the basis of the Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2018, Item 5, as amended), irrespective of the date of issue of these judgments".
Although on the day of adjudication in this case by the Supreme Administrative Court, the written justification for the abovementioned resolution is not yet known, it was announced orally after the announcement of the resolution. The oral justification is known to the referring Court.
The assessment of the significance of this resolution of the Supreme Court for voivodeship administrative courts and the Supreme Administrative Court requires quoting and legally comparative analysis of the content of the provisions cited therein.
Under Article 379 (4) of the Code of Civil Procedure, in the event that the composition of the adjudicating court was contrary to the provisions of law or if a judge excluded pursuant to the Act was involved in the examination of the case - the proceedings are null and void. The Supreme Court found in the abovementioned resolution that in certain situations participation in the composition of the court of a person appointed

to the office of a judge at the request of the National Council of the Judiciary (shaped in accordance with the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts) may constitute inappropriate composition of court, leading to the annulment of the proceedings. However, this will only happen if "the deficiency in the appointment process leads, in specific circumstances, to a breach of the standard of independence and impartiality within the meaning of Article 45 (1) of the Polish Constitution, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 (1) of Convention for the Protection of Human Rights and Fundamental Freedoms".

In other words, the mere fact of participation of the new National Council of the Judiciary in the appointment to the office of a judge, whose impartiality and independence from legislative and executive branches can be reasonable put in doubt, does not prejudge a priori the deficiency of civil proceedings before a court of law. The Supreme Court explicitly ordered to determine whether the composition of the court was proper to examine specific circumstances (and therefore the individual facts) and the effect of such circumstances (and not the "possibility of such effects") in the form of a violation (and not "the possibility of violation") of the standard of independence and impartiality. Moreover, the resolution specifies these standards.

Article 45 (1) of the Polish Constitution provides that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. In Article 47 of the Charter of Fundamental Rights of the European Union (opened for signature in New York on 7 March 1966), the principle of the right to an effective remedy and the right to a fair trial was expressed ("/ .../ Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law"/.../). While under Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (drawn up in Rome on 4 November 1950, as amended by Protocols No. 3, 5 and 8, and supplemented by Protocol No. 2 - Journal of Laws of 1993, No. 61, Item 284) everyone has the right to a fair and public hearing of their case within a reasonable time by an independent and impartial court established by law (...).

As it results from the above, the standards of independence and impartiality of the court are a guarantee for the citizens of fair and honest ruling in the case concerning them. These are standards of both national and European law.

Therefore, since in the abovementioned resolution the Supreme Court indicated the need to assess ad casum each specific doubt about the court composition, in the opinion of the Supreme Administrative Court, it cannot be concluded from the operative part of the resolution of the combined Chambers of the Supreme Court that the appointment a judge at the request of the National Council of the Judiciary formed in the manner specified in the provisions of the abovementioned of the Act of 8 December 2017 is the only and sufficient premise, resulting in absolute invalidity of proceedings before a court of law.

It should also be emphasised that the resolution on the composition of the combined Chambers of the Supreme Court, namely the Civil, Criminal, as well as Labor and Social Insurance Chamber, clearly stipulates that points 1 and 2 do not apply to judgments issued by courts before the date of its adoption and to judgments to be issued in proceedings pending on this day under the Code of Criminal Procedure before the court of a given composition.

4.

Under Article 365 § 1 of the Civil Procedure Code, final judgments in civil proceedings - including the proceedings before the Supreme Court - are binding not only on the parties and the court which issued them, but also other courts and other state bodies and public administration bodies, as well as other persons in cases provided for in the Act. However, a final judgment has the force of res judicata only as to what was the subject of the resolution in relation to the basis of the dispute, and also only between the same parties (Article 366 of the Code of Civil Procedure). The binding force of a judgment refers only to the content of its operative part, not its justification. Therefore, neither legal views expressed in the justification of the judgment, nor motives and actual findings contained in the justification have binding force (cf. e.g. the decision of the Supreme Court of 7 May 2019, Case No. V CZ 7/19 – www.sn.pl).

On the other hand, in the case of resolutions of the combined Chambers of the Supreme Court, they acquire the force of legal principles upon adoption (Article 87 § 1 of the Act of 8 December 2017 on the Supreme Court, consolidated text: Journal of Laws of 2019, Item 825, as amended). Pursuant to 88 § 1 of the cited Act, they are binding only on the Supreme Court and courts of law if they were issued in the same case (cf. e.g. the judgment of the Supreme Court of 17 May 2017, Case No. V CSK

466/16). However, as the Supreme Court rightly stated in the abovementioned judgment, "there can be no doubt, however, that adopting a different position requires the submission of arguments that could prompt the Supreme Court to consider the need to submit a specific issue to the full composition of the chamber. Otherwise, the function of the Supreme Court, which is to ensure the uniformity of case law, could be annihilated".

5.

The judgment of the Supreme Court cited above, the resolution of the combined Chambers of this Court, as well as the judgment of the CJEU do not concern the effectiveness of the activities of the President of the Republic of Poland (the act of appointment).

II. Recognition by the administrative courts and the Supreme Administrative Court of judgments of the Supreme Court.

In the previous part of the justification, the Supreme Administrative Court referred to a legal issue – the binding force of judgments of courts of law and the Supreme Court. However, in relation to doubts that may arise in the practice of administrative courts, it should be clarified that recognition of the content of a judgment of another court does not always result directly from a legal provision. The systemic separate nature of general and administrative judiciary is not decisively here either.

The Basic Law guarantee all citizens of the Republic of Poland the right to a fair hearing by a competent, independent, impartial and independent court (Article 45 (1) of the Polish Constitution). It simply means that it is the duty of all Polish courts to adjudicate fairly. Therefore, if the decision of the Supreme Court or the Supreme Administrative Court defines, for a given period of time, the impartiality, sovereignty and independence of the courts or judges necessary for fair ruling, such definition has to be taken into account also by administrative courts.

The above also applies to the present case, because both the view of the Supreme Court expressed in the abovementioned judgment of 5 December 2019, as well as the resolution of the combined Chambers of this Court of 23 January 2020 largely deserve to be approved.

The special importance of the Supreme Court (Article 183(1) of the Polish Constitution) corresponds to the special rank of the Supreme Administrative Court in

the scope of the constitutional act entrusted to this Court by the control of public administration activities (Article 184 of the Polish Constitution) and Article 2 § 2 of the LPAC. The Supreme Administrative Court supervises the activities of voivodship administrative courts as regards adjudication pursuant to the procedure specified by statutes and also adopts resolutions explaining legal issues.

Both Courts (same as lower courts) uphold justice. They are complementary links of the judiciary in the Republic of Poland. The task of these courts is to guarantee compliance with law not only by citizens but also by public authorities. For their actual enforceability, such tasks require the courts to be impartial and independent and the judges to be subject only to laws.

Therefore, in such a systemic approach, it would be unacceptable for the Supreme Court and the Supreme Administrative Court to emphasize mutual separation or presenting divergent positions in cases of public significance (regarding, after all, the same right of citizens to an impartial, independent court, whether general or administrative). Such behaviour could lead to non-uniform case-law in issues important for citizens. This, in turn, would lead to a disturbance in the separation of powers necessary to ensure that citizens retain their rights.

As Charles Louis de Secondat (called Montesquieu) once wrote: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."("The Spirit of the Laws").

III. Position of the adjudicating panel of the Supreme Administrative Court regarding the exclusion of judge Przemysław Szustakiewicz from adjudicating in this case.

1.

The Supreme Administrative Court shares the position expressed in the resolution of the combined Chambers of the Supreme Court: Civil, Criminal, as well as Labour and

Social Insurance, on resolving discrepancies in the interpretation of law appearing in the case law of the Supreme Court, as well as in the cited judgment of the CJEU and the judgment of the Supreme Court.

It should be noted that, while that the abovementioned verdict of the Supreme Court and the verdict of the CJEU was largely related to deficiencies in the process of appointing candidates for the position of judge by a negative assessment of the authority competent to submit candidates to the President of the Republic of Poland (current National Council of the Judiciary), the resolution of the enlarged panel of Supreme Court concerned correct court composition and legal consequences (invalidity of court proceedings) in the event of a faulty composition.

In this context (referring to points 1 and 2 of the cited resolution of the Supreme Court), it should be noted that the Supreme Court is a purely cassation court, while the Supreme Administrative Court is both a cassation court (recognising cassation complaints), as well as a court of second instance (court of appeal). Therefore, the accuracy of the resolution of point 2 of the resolution of the enlarged panel of the Supreme Court should be taken into account in proceedings before the Supreme Administrative Court.

It should also be noted that the issue of a judge's lack of impartiality as a condition for having him excluded on the basis of iudex suspectus (Article 49 § 1 of the Code of Civil Procedure, Article 41 § 1 of the Code of Criminal Procedure and 19 of the LPAC) is not the same as the issue of inappropriate court composition within the meaning of Article 379 (4) of the Code of Civil Procedure, Article 439 § 1 (2) of the Criminal Procedure Code and Article 271 (1) of the LPAC. despite that, both these legal circumstances are (also in court judgments) being seen as having the same effect. However, the only reason for the optional exclusion of a judge is a circumstance that raises a reasonable doubt as to the impartiality of a particular judge, but only in a given case. While the improper court composition occurs when the panel consisted of a person who is not a judge or who should not be a judge at all due to the lack of conditions required by law (e.g. due to failure to meet the criteria for appointment to office or faulty assessment - for various reasons - of these criteria by the National Council of the Judiciary, as a result of which the authority presents the President of the Republic of Poland someone who meets the subjective, but not objective criteria for being appointed a judge, etc.) or is not (should not be) a judge of a given court.

The mere fact of a candidate being appointed for the office of judge by the President of the Republic of Poland as a result of being nominated by the body (National Council of the Judiciary) which, due to the constitutional model of its formation and mode of operation, does not guarantee independence from legislative and executive power, does not in itself prejudge the lack of impartiality of the specific judge. However, this may raise justified doubts in the future as to the correctness of the appointment of a given person to perform the office (as a result of the court composition).

Therefore, taking into account the above and assessing (as a result of the request to exclude a judge) doubts as to the impartiality of a judge, it should always be assessed whether the nomination of such a candidate to the President of the Republic of Poland by the National Council of the Judiciary in the current composition did not cause a certain category of connections (personal, economic, business or other) which affect the decision of such a judge in court proceedings. And therefore, indirectly, on his independence, sovereignty and impartiality.

Proving such connections is undoubtedly difficult. Therefore, the possibility of their objective verification requires, first and foremost, the trial court to clarify whether the personal and professional attributes of a particular judge, as set out in Article 6 § 1 of the Act of 25 July 2002 Law on the system of administrative courts (consolidated text: Journal of Laws of 2019, Item 2167 as amended) – in the case of a voivodeship administrative court judge – and Article 49 of the abovementioned Act in connection with Article 30 § 1 of the Act of 8 December 2017 on the Supreme Court (consolidated text: Journal of Laws of 2019, Item 825, as amended) - in the case of a judge of the Supreme Administrative Court – justify the belief that such a person met all the requirements for presenting his candidacy to the President of the Republic of Poland in order to have him appointed as a judge to a given office. Such an examination will allow to confirm (or refute) whether a given candidate would be presented to the President of the Republic of Poland for appointment to the office of a judge also by the authority being competent and guaranteeing independence from the legislative and executive authority (properly appointed National Council of the Judiciary).

2.

Referring the above comments to the subject of these proceedings, the Supreme Administrative Court in connection with the request to exclude the judge of the Supreme Administrative Court Przemysław Szustakiewicz from examining the case, explains the following.

Przemysław Szustakiewicz, as a judge of the Voivodeship Administrative Court in Warsaw, applied for the vacant position of a judge of the Supreme Administrative Court, announced by the President of the Supreme Administrative Court of on 16 November 2017 (Official Journal of the Republic of Poland of 2017, Item 1058). At the time of joining the competition procedure, the National Council of the Judiciary had not yet acted as a body formed in the manner specified in the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts. In addition, the competition procedure before the Supreme Administrative Court was conducted on the basis of the then applicable rules and regulations arising from the then applicable Act on the National Council of the Judiciary.

In the competition proceedings before the Supreme Administrative Court, judge Szustakiewicz received high qualifications, and in a secret ballot of the General Assembly of Judges of the Supreme Administrative Court, which took place on 24 September 2018, he was awarded by this Assembly with support. Judge Szustakiewicz, adjudicating in the Voivodeship Administrative Court in Warsaw, from 4 May 2004, first as an assessor, and from 26 June 2007, as a judge, obtained high stability of case law.

From 1 November 2011 to the moment of being appoint as a judge of the Supreme Administrative Court, he was delegated to adjudicate in the General Administrative Chamber of the Supreme Administrative Court on one session a month, then followed by two sessions a month.

From 1 November 2011 to 28 February 2017, i.e. for a period of over 5 years, judge Szustakiewicz was delegated to perform the duties of Head of Division IV in the Judicial Office of the Supreme Administrative Court. During this period, ten detailed analyses of administrative court rulings were created under his direction. He was also the author of six draft motions of the President of the Supreme Administrative Court for the resolutions to by voted by the Supreme Administrative Court.

In 2011-13, judge Szustakiewicz actively participated in legislative work on the amendment of the act on the computerisation of entities performing public tasks and other acts. He also actively participated in works on draft legal changes in administrative court proceedings in the field of using electronic tools.

At the time of applying for the position of judge of the Supreme Administrative Court, judge Szustakiewicz also hold post-doctoral degree in law. He was awarded this degree on 15 January 2013 by the resolution of the Council of the Faculty of Law and Administration of the Adam Mickiewicz University in Poznań. He is the author of a number of publications in the field of administrative law.

In the opinion of the Supreme Administrative Court, in the light of the above considerations and findings, the above features and attributes of judge Przemysław Szustakiewicz do not allow to conclude that the presentation of his candidacy by the National Council of the Judiciary in its current composition, shaped in accordance with the provisions of the Act of 8 December 2017 on amendment of the Act on the National Council of the Judiciary and some other acts, result in any way in the creation of concerns about the impartiality of this judge.

Judge Szustakiewicz also meets all other formal requirements resulting from Article 49 of the Act on the structure of administrative courts in connection with Article 30 § 1 of the Act on the Supreme Court.

The Supreme Administrative Court states that there are no reasonable doubts as to the impartiality of the Supreme Administrative Court judge Przemysław Szustakiewicz in the present case. The applicant in cassation did not indicate any other reasons justifying the exclusion of that judge, than the defectiveness of the current National Council of the Judiciary, which submitted to the President of the Republic of Poland an application for the nomination of judge Szustakiewicz.

For the above reasons, the Supreme Administrative Court, under Article 22 § 1 and 2 of the LPAC in connection with Article 193 of the LPAC, decided as set forth in the conclusion hereof.