Your Honour, Ladies and Gentlemen,

We are standing before you in defence of the independence of Polish judges, who have been subject to constant attacks and harassment, as well as legislative changes, which are in conflict with Polish and European law, for 5 years, and they are the subject of numerous disciplinary proceedings and hate campaigns with the involvement of the public media, while performing their constitutional and treaty duties. We, in Poland, are witnessing a unique revolution in Poland against the rule of law.

We stand before the Court as representatives of a Polish and European judge who found himself in Josef K's position in Franz Kafka's Trial. A judge who appealed against a decision of a politicised court president to a politicised National Council of the Judiciary, and then to a politically elected member of the new Chamber of the Supreme Court, who dismissed his case without the case files, regardless of the fact that the case is already being examined by another chamber of the Supreme Court. The Polish judiciary is currently relying on the heroism of the individual and the courage of individual judges, as the systemic protection of their independence has been dismantled. You are the last court whose judgment can save the independence of the courts in Poland. And this is precisely that moment. The Polish judiciary cannot wait any longer.

Contrary to the Government's and the Public Prosecution Office's position, a question from the referring court is admissible, because it is this Court that has the sole and exclusive competence to give a binding response to the question of the criteria that an independent court should meet under EU law and to specify the consequences of judgments issued by a person and body that do not satisfy these criteria. For this reason, the decision you will issue is absolutely crucial to the whole of the European Union. This is not only a Polish matter. This is a matter for all of us Europeans. If this fails, the actions we are currently witnessing in Poland will become an acceptable part of the EU legal order and will therefore contribute to the understanding of the rule of law throughout the Union. This can cause irreversible changes in the Union's legal system, and the *de facto* collapse of the rule of law throughout Europe.

For several years, courts in the Netherlands, Germany, Slovakia, Spain and Ireland have been deciding to suspend the execution of the European Arrest Warrant with respect to Poland because of their belief that the judiciary is no longer independent of the executive and

legislative authorities. Such decisions have been made so far in individual cases, but, in September, the court in Amsterdam decided to suspend the extradition of suspects and people convicted in Poland in **all** cases regarding the European Arrest Warrant at the request of Polish courts until the requests for the preliminary rulings referred to the Court have been answered. This also shows that the Court's judgment in the A.K. case turned out to be insufficient, which will be discussed later.

With reference to the **first issue**, the Court should acknowledge **the direct effectiveness of Article 19**, as it previously recognised the direct effect of **Article 47** of the Charter of Fundamental Rights. The natural consequence of recognising that Article 19 TEU is directly effective will be the statement that a judge selected by the politicised NCJ in breach of the law is not a European judge.

The matter applies to Judge Waldemar Żurek, who is a symbol of the tireless battle for the preservation of the rule of law in Poland. A judge, who is deserving, admired and awarded in Poland and Europe. But who is also persecuted and repressed in his own country. For what? Precisely for his commitment to the defence of the fundamental values, including those of Article 2 TEU. In this case, it can be seen very clearly why the Court should recognise the direct effectiveness of Article 19. In such a sensitive case as the professional activity of a judge, he should be unconditionally guaranteed the opportunity to appeal to an independent and impartial court, which is previously established by law. Effective judicial protection must be guaranteed in the domestic legal order, as well as in the practical functioning of the law. Any harassment of a Polish judge, the severity of which is exacerbated by the inability to appeal to an independent court, is a direct breach of the principle of effective judicial protection.

The attack on Judge Żurek's independence and professional status is an attack on the independence of a national court, which is a part of the Union's justice system. Judge Żurek must remain impartial so that, when applying EU law, his bench remains independent and impartial, and satisfies the requirements of Article 19.

The Court has recognised the direct effectiveness of **Article 47 of the Charter** in its judgments (*A.K. et al.*, para. 162; *Torubarov*, para. 56). Just as Article 47 of the Charter, Article 19 TEU is **clear and precise, complete and sufficiently specific** to incite a direct effect.

Transferring this to these proceedings, it should be reiterated that in *Simpson and HG*, paragraph 75, it was found that the legislative, and especially the executive authorities, could not **arbitrarily** appoint judges at their own discretion. In turn, in *A.K. and others*, paragraph 153, the Court held that, in the opinion of the public and the parties to the court proceedings, **legitimate doubts** as to the independence and impartiality of judges and courts must be ruled out. This is precisely the **essence of the requirement** to appoint a judge and a court by law and to ensure that they are independent and impartial within their jurisdiction.

Therefore, the standard of a rational party to court proceedings adopted in the case law indicates that the **parties to the court proceedings are the protected entities, while the objectified expectations of the parties as to the qualities of the court and the judge constitute the model of this protection**. Just as the parties to proceedings are entitled to contest the legality of any national act of law regarding the application of an EU act to them before a court, they must also be **entitled to initiate the verification of the attributes of the judge and the court adjudicating in their case**.

Consequently, Article 19 should be understood as **the right of a party to court proceedings, in this case Judge Żurek, to raise objections about the status and qualities of any judge and court** who may decide on matters related to the application or interpretation of EU law, **which is derived directly from that regulation**.

With reference to the **second issue** identified by the Court, the Court's response should encompass both the requirement that a court is 'established by law' and the requirement that the judge and the court are independent and impartial. The Court's guidance should also specify the relationship between these criteria. Both requirements are of a **constitutive** nature – **without satisfying them, the body cannot be considered a court in the meaning of EU law**.

This simultaneously means, **and that is the answer for the third issue**, that the requirement that the body is authorised and established, as well as the requirement that it is independent and impartial, are independent elements which, in the circumstances of specific cases, may be subject to separate verification. The failure to satisfy any one of those requirements should lead to the refusal to acknowledge the body to be a court in the meaning of EU law. After all, these requirements appear in a logical sequence; the verification that the body is authorised is primary and naturally precedes the assessment of whether it is independent and impartial.

In *Simpson and HG*, the Court related the gross breach of the law to the 'real risk' of the abuse of authority. Not only was there a 'real risk' of an abuse of authority in this case, **but advantage has essentially been taken of undue discretionary rights**.

The very process of establishing the Extraordinary Control and Public Affairs Chamber was extremely politicised, both at the stage of forming the National Council of the Judiciary, which subsequently selected judges, and at the stage of the procedure of their selection itself. The premature interruption of the 4-year, constitutionally guaranteed term of office of the previous members of the Council, the unconstitutional election of 15 new judicial members of the NCJ, the lack of sufficient independence of the NCJ from other public authorities, as well as the actual resignation of the NCJ from fulfilling the constitutional role of upholding judicial independence mean that the new **National Council of the Judiciary should be disqualified as an independent and objective body that initiates motions to the president to appoint anyone to a judicial office and to promote judges.**

These breaches were intentional, with the objective of giving the political authorities a dominant influence on filling judicial posts and at least indirectly affecting their judgments.

Importantly, the Chamber of Extraordinary Control and Public Affairs deals with key issues from the point of view of the state system. It approves the results of all elections in Poland and handles matters related to competition protection, the regulation of energy, telecommunications and rail transport, as well as the control of media. It also examines extraordinary complaints, a new legal instrument that enables final and binding judgments that have previously been passed to be challenged. It is actually responsible for controlling the implementation of the Court's judgment in the A.K. case. The so-called 'Muzzle Act' has given this chamber such powers.

Consequently, referring to the **fourth issue**, **first**, the acknowledgement that a person and an authority are not a judge and a court in the meaning of EU law should lead to the refusal to recognise the legal effects of its judgments. Acts performed by non-judges are not *prima facie* judicial decisions and are not legally effective.

Second, a gross breach of the appointment procedure made intentionally should result in the refusal to extend protection to such a person who is not a judge in accordance with the law, which arises from the guarantee of irremovability of a judge. Therefore, such a person should

not be protected by the principle of legal certainty. **The status of a judge is a black and white situation. Either the person is a judge by law or he is not. No public authority can gain benefits from its own lawlessness and accept the acquisition of the judicial status by a type of prescription, namely official acceptance of lawlessness.**

The judgment in A.K. was not performed in Poland. It was not even performed ostentatiously. It started with the repressions of Judge Juszczyszyn, who, while implementing the judgment, demanded that the Chancellery of the Sejm provides the letter of support for the candidates to the NCJ. Next, the so-called 'Muzzle Act' was introduced, which provides for disciplinary liability, among other things, for implementing the Court's judgment and therefore questioning the status of certain judges. Finally, we have a judgment of the Constitutional Tribunal which is subordinated to the executive authority, which held that the resolution of the three combined Chambers of the Supreme Court implementing the judgment in the A.K. case is inconsistent with the Constitution, EU law and the European Convention on Human Rights.

Additionally, at least 14 other Polish judges are suffering the legal consequences of attempting to implement the judgment in A.K. and attempting to verify judges appointed by the neo-NCJ. The Disciplinary Commissioners initiated explanatory and disciplinary proceedings against them merely for referring a legal question to the Supreme Court on the legality of the appointment and the ability of a judge appointed by the current National Council of the Judiciary to adjudicate. Disciplinary consequences are also being applied for requesting personnel files and all documentation regarding the appointment of a judge, or for a decision to adjourn the assessment of a judgment until the legality of the appointment of the assessor issuing the judgment is verified.

Attorneys-at-law are also threatened with disciplinary liability. Disciplinary proceedings were instituted at the request of the Minister of Justice in September against an attorney-at-law from Lublin because he referred to the A.K. judgment when asking a judge to refrain from adjudicating because there were doubts as to whether this would lead to the invalidity of the proceedings because of the risk of the incorrect staffing of the bench.

Furthermore, the disciplinary commissioners have initiated at least 55 disciplinary proceedings against judges throughout Poland, which directly interfere with their adjudication, which, for various reasons, turned out not to be in line with the intentions of the executive authority, including for statements critically referring to the so-called reforms of

the judiciary. In addition, the Commissioners have initiated at least 90 explanatory proceedings against judges. For example, steps were taken to institute disciplinary proceedings against more than 1,200 judges who addressed a letter to the OSCE (Organization for Security and Cooperation in Europe) on the legal status of the Extraordinary Control and Public Affairs Chamber.

In conclusion of our statement, we would like to say that this is the last moment for the Court to unequivocally decide on matters of fundamental significance to the Polish judiciary, but also of importance to the judiciary throughout Europe. The Court is responsible for ensuring the uniform application of EU law.

We appeal to the Court to formulate the judgment so that it is useful for domestic courts where the constitutional order has been deprived of basic guarantees and safeguards. So that it cannot be undermined, ignored and relativized by the rulers in Poland. Otherwise, just as in the judgment in the A.K. case, Polish judges will only be able to refer to the principle of primacy and the direct effect of EU law. And this, in turn, encounters an attack by the authorities and repressions against judges.

In view of the above, we propose that the response to the request for a preliminary ruling should be affirmative and decisive, that a single-person bench consisting of a person appointed to hold the office of judge in gross violation of the rules of law of a Member State regarding the appointment of judges is not an independent and impartial judge, who is previously appointed by law in the meaning of European Union law.

Thank you for your attention.