Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 27 June 2019[1]

**Joined Cases C-585/18, C-624/18 and C-625/18**

**A.K. (C-585/18)**
**v**
**Krajowa Rada Sądownictwa**
**and**
**CP (C-624/18)**
**DO (C-625/18)**
**v**
**Sąd Najwyższy (C-624/18 and C-625/18)**
**joined party:**
**Prokurator Generalny zastępowany przez Prokuraturę Krajową**

(Request for a preliminary ruling from the Sąd Najwyższy (Supreme Court, Poland))

(Reference for a preliminary ruling — Article 267 TFEU — Rule of law — Article 2 TEU — Article 19(1) TEU — Principle of effective judicial protection — Principle of judicial independence — Charter of Fundamental Rights of the European Union — Articles 47 and 51 — National measures establishing the Disciplinary Chamber of the Supreme Court — National measures modifying the manner of appointing the judicial members of the National Council of the Judiciary — Primacy of EU law — Power to disapply national legislation which conflicts with EU law)

1 Original language: English.

## I. Introduction

1. The present cases, like the problems which I considered in my Opinions in *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18) and *Commission* v *Poland (Independence of the ordinary courts)* (C-192/18),[2] are situated within the context of the reform of the Polish justice system instituted by measures adopted in 2017 and which have been the subject of the Commission's reasoned proposal in accordance with Article 7(1) TEU regarding the rule of law in Poland,[3] along with considerable international criticism.[4]

2. They concern actions, based in part on EU law, brought before the Chamber of Labour Law and Social Security of the Sąd Najwyższy (Supreme Court, Poland) by judges affected by Polish measures lowering the judicial retirement age. Those measures were held by the Court, in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18),[5] to be incompatible with Poland's obligations under the second subparagraph of Article 19(1) TEU, given that they are inconsistent with the principles of the irremovability of judges and judicial independence, both of which are protected under EU law.

3. Even though under Member State law the newly created Disciplinary Chamber of the Supreme Court has been designated to adjudicate the actions, the referring court queries whether the Disciplinary Chamber offers sufficient guarantees of independence under EU law to hear such claims. This is in view of the fact that the group of judges eligible for appointment by the President of the Republic to the Disciplinary Chamber are selected by the Krajowa Rada Sądownictwa (National Council of the Judiciary, 'NCJ') which is the body charged with safeguarding judicial independence in Poland. However, the independence of the NCJ has, in turn, been put in doubt by Polish legislation modifying the manner in which its judicial members are appointed. Its composition is now primarily determined by the legislative and executive authorities.

4. There are also more specific concerns about the procedure for selecting judges of the Disciplinary Chamber employed by the NCJ.

2 In addition to the present cases, there are several other cases which have been brought before the Court relating to the reform of the Polish justice system, including requests for preliminary rulings submitted by the Polish Supreme Court (C-522/18, C-537/18 and C-668/18), the Polish Supreme Administrative Court (C-824/18) and Polish lower courts (C-558/18, C-563/18 and C-623/18), along with two infringement actions lodged by the Commission against Poland (C-619/18 and C-192/18). In the interests of clarity, I note that challenges heard by the Court to date on the reform of the Polish justice system have concerned the following: (1) the lowering of the retirement age of Supreme Court judges and granting the President of the Republic the power to extend the active mandate of Supreme Court judges (see judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, and Opinion of Advocate General Tanchev, EU:C:2019:325); (2) alleged discrimination on grounds of sex due to the retirement age of ordinary judges, Supreme Court judges and prosecutors being lowered to a different age for women than for men and granting the Minister of Justice the power to extend the active mandate of ordinary judges (see Opinion of Advocate General Tanchev in *Commission* v *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:529), and (3) the disciplinary regime for judges (see Opinion of Advocate General Tanchev in *Miasto Łowicz and Others*, C-558/18 and C-563/18, which will be delivered on 24 September 2019).

3 COM(2017) 835 final, 20 December 2017 ('the Commission's reasoned proposal'). In that reasoned proposal, the Commission objected in particular to the following measures: (1) the Ustawa o zmianie ustawy o Krajowej Szkole Sądownictwa i Prokuratury, ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the National School of Judiciary and Public Prosecution, the Law on the system of the ordinary courts and certain other laws) of 11 May 2017 (Dz. U. of 2017, heading 1139, as amended); (2) the Ustawa o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of the ordinary courts and certain other laws) of 12 July 2017 (Dz. U. of 2017, heading 1452, as amended); (3) the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, heading 5, as amended); and (4) 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, heading 3, as amended). It is the latter two measures which are at issue in the present cases.

4 See, for example, Council of Europe European Commission for Democracy Through Law (Venice Commission), Opinion No 904/2017 of 11 December 2017 on the Draft law amending the Law on the National Council of the Judiciary, on the Draft law amending the Law on the Supreme Court, proposed by the President of Poland, and on the Law on the system of the ordinary courts, CDL-AD(2017)031 ('Venice Commission Opinion No 904/2017'); United Nations Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, 5 April 2018, A/HRC/38/38/Add.1 ('2018 UN Report on Poland'); Organisation for Security and Co-Operation in Europe (OSCE) Office for Democratic Institutions and Human Rights, Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland, 5 May 2017, JUD-POL/305/2017-Final ('2017 OSCE Final Opinion on Poland') and Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017), 13 November 2017, JUD-POL/315/2017.

5 EU:C:2019:531.

5. The key question for the Court to decide, therefore, in the present cases is whether the Disciplinary Chamber of the Supreme Court meets the requirements of independence under EU law, in light of the manner in which members of the NCJ are appointed and the means for selecting judges to the Disciplinary Chamber.

6. If the Court were to find that the Disciplinary Chamber of the Supreme Court does not meet those requirements, the referring court also wishes to know whether it is entitled under EU law to disapply provisions of Member State law which might be viewed as precluding the referring court from assuming jurisdiction in the main proceedings.

7. Consequently, the Court is essentially invited by the referring court to develop its case-law on Member State obligations to ensure judicial independence under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('Charter') for upholding respect for the rule of law in the Union legal order.

## II. Legal framework

### *A. EU law*

8. The second subparagraph of Article 19(1) TEU states:

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

9. The first and second paragraphs of Article 47 of the Charter state:

'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. …'

### *B. Polish law*

#### *1. The provisions on lowering the Supreme Court retirement age*

10. Article 30(1) of the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 23 November 2002 (Dz. U. No 240 of 2002, heading 2052, as amended) ('2002 Law on the Supreme Court') set the retirement age for Supreme Court judges at 70, unless, no later than 6 months before reaching 70, a judge submitted a declaration to the First President of the Supreme Court indicating his wish to continue in his post and presented a certificate attesting to the state of his health. In that case, under Article 30(5) of that law, that judge could automatically perform his duties until the age of 72.

11. On 20 December 2017, the President of the Republic signed the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, heading 5, as amended) ('2017 Law on the Supreme Court') which entered into force on 3 April 2018.

12. According to Article 37(1) to (4) of the 2017 Law on the Supreme Court, judges of the Supreme Court must in principle retire at the age of 65, unless within the specified time period, they submit a declaration that they are willing to continue in their posts and a certificate of good health, and the President of the Republic consents to their continuing in their posts. According to the procedure set

out in those provisions, the President of the Republic is required, prior to granting consent, to consult the National Council of the Judiciary which provides him with an opinion. Under Article 111(1) of that law, Supreme Court judges who reached the age of 65 by 3 July 2018 were required to retire on 4 July 2018, unless they submitted those documents within a particular time period and the President of the Republic granted consent following the procedure set out in Article 37 thereof.

*2. The provisions on the Disciplinary Chamber*

13. The 2017 Law on the Supreme Court instituted, inter alia, a new chamber of the Supreme Court called the Disciplinary Chamber which was established, pursuant to Article 133 of that law, as of 3 April 2018.

14. Article 20 of the 2017 Law on the Supreme Court provides:

'With regard to the Disciplinary Chamber and the judges who adjudicate in the Disciplinary Chamber, the prerogatives of the First President of the Supreme Court as defined in:

(1) Article 14(1), points 1, 4 and 7, Article 31(1), Article 35(2), Article 36(6), Article 40(1) and (4) and Article 51(7) and (14), shall be exercised by the President of the Supreme Court who shall direct the work of the Disciplinary Chamber;

(2) Article 14(1), point 2, and Article 55(3), second sentence, shall be exercised by the First President of the Supreme Court in agreement with the President of the Supreme Court who shall direct the work of the Disciplinary Chamber.'

15. Article 27 of the 2017 Law on the Supreme Court states:

'1. The following cases shall fall within the jurisdiction of the Disciplinary Chamber:

(1) disciplinary proceedings;

   (a) involving Supreme Court judges;

   …

(2) proceedings in the field of labour law and social security involving Supreme Court judges;

(3) proceedings concerning the compulsory retirement of a Supreme Court judge.'

16. Article 29 of the 2017 Law on the Supreme Court provides:

'Judges shall be appointed to the Supreme Court by the President of the Republic of Poland acting on a proposal from the National Council of the Judiciary.'

17. Article 79 of the 2017 Law on the Supreme Court states:

'Labour law and social insurance cases concerning Supreme Court judges and cases relating to the retirement of a Supreme Court judge shall be heard by:

(1) at first instance — the Supreme Court in the composition of 1 judge of the Disciplinary Chamber;

(2) at second instance — of the Supreme Court in the composition of 3 judges of the Disciplinary Chamber.'

18. Article 131 of the 2017 Law on the Supreme Court, as amended by Article 1, point 14, of the Ustawa o zmianie ustawy o Sądzie Najwyższym (Law amending the Law on the Supreme Court) of 12 April 2018 (Dz. U. of 2018, heading 847) ('First Amending Law of 12 April 2018'),[6] which entered into force on 9 May 2018, states:

'Judges occupying, on the date of entry into force of this Law, posts in other chambers of the Supreme Court may be transferred to posts in the Disciplinary Chamber. No later than the day on which all the judges of the Supreme Court within the Disciplinary Chamber have been appointed for the first time, the judge occupying a post in another chamber of the Supreme Court shall submit to the National Council of the Judiciary a request for transfer to a post in the Disciplinary Chamber, after obtaining the agreement of the First President of the Supreme Court and the President of the Supreme Court who shall direct the work of the Disciplinary Chamber and the Chamber where the judge making the request for transfer holds a post. Until the day on which all the posts in the Disciplinary Chamber have been filled for the first time, a judge of the Supreme Court to the Disciplinary Chamber shall be appointed by the President of the Republic of Poland on the proposal of the National Council of the Judiciary.'

*3. The provisions on the National Council of the Judiciary*

19. According to Article 186(1) of the Polish constitution:

'The National Council of the Judiciary shall safeguard the independence of courts and judges.'

20. Article 187 of the Polish constitution provides:

'1. The National Council of the Judiciary shall be composed as follows:

(1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic;

(2) 15 members chosen from amongst the judges of the Supreme Court, ordinary courts, administrative courts and military courts;

(3) 4 members chosen by the Sejm from amongst its deputies and 2 members chosen by the Senat from amongst its senators.

2. The National Council of the Judiciary shall choose, from amongst its members, a chairman and two deputy chairmen.

3. The term of office of those chosen as members of the National Council of the Judiciary shall be 4 years.

4. The organisational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of electing its members, shall be specified by statute.'

6 The former version of Article 131 of the 2017 Law on the Supreme Court provided: 'Until all posts of judges of the Supreme Court in the Disciplinary Chamber have been filled, a judge from another Chamber shall not be transferred to a post in that Chamber.'

21. The NCJ is governed by the Ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. No 126 of 2011, heading 714, as amended and consolidated, Dz. U. of 2019, heading 84) ('Law on the NCJ'). That law was amended, inter alia, by the Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the NCJ and certain other laws) of 8 December 2017 (Dz. U. of 2018, heading 3, as amended) ('2017 Amending Law on the NCJ') which entered into force on 17 January 2018.[7]

22. By virtue of Article 1, point 1, of the 2017 Amending Law on the NCJ, that law inserted Article 9a of the Law on the NCJ which provides:

'1. The Sejm shall elect from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts 15 members of the Council for a joint four-year term of office.

2. When carrying out the election referred to in paragraph 1, the Sejm shall, as far as possible, take into account the need for representation within the Council of judges from different types and levels of courts.

3. The joint term of office of new members of the Council elected from among the judges shall begin on the day following the day of their election. The members of the Council 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 Council begins.'

23. By virtue of Article 1, points 2 and 3, of the 2017 Amending Law on the NCJ, that law repealed Article 11 of the Law on the NCJ[8] and introduced Articles 11a to 11e of the Law on the NCJ relating to the procedure for electing the 15 judicial members of the NCJ.

24. According to Article 11a(2) of the Law on the NCJ:

'The entities entitled to propose candidates for membership of the Council shall include a group of at least: (1) 2 000 citizens of the Republic of Poland who are 18 years of age or over, have full legal capacity and enjoy full public rights; (2) 25 judges, excluding retired judges.'

25. Article 11d of the Law on the NCJ further provides:

'1. The Marshal of the Sejm shall request that the deputies' clubs designate, within 7 days, candidates for membership of the Council.

2. A deputies' club shall designate a maximum of nine candidates for membership of the Council from among the judges whose names have been submitted pursuant to the procedure laid down in Article 11a.

3. If the total number of candidates designated by the deputies' clubs is lower than 15, the Presidium of the Sejm shall designate candidates from among the names submitted pursuant to the procedure laid down in Article 11a, such that the resulting number of candidates is 15.

7 According to Article 10 of the 2017 Amending Law on the NCJ, certain provisions, including Article 11a of the Law on the NCJ, entered into force on 3 January 2018.

8 Under ex Article 11 of the Law on the NCJ, the 15 judicial members were elected by the judges from among the judges of the Supreme Court (2 members), the administrative courts (2 members), the appellate courts (2 members), the regional and district courts (8 members) and the military courts (1 member).

4. The competent committee of the Sejm shall compile the list of candidates by electing, from among the candidates designated in accordance with paragraphs 2 and 3, 15 candidates for membership of the Council, with the proviso that the list shall include at least one candidate designated by each deputies' club operating within 60 days of the first session of the Sejm during the parliamentary term in which the election is carried out, provided that that candidate was designated by the club according to the procedure of designation referred to in paragraph 2.

5. The Sejm shall elect members of the Council for a joint 4-year term of office at the next session of the Sejm, by a majority of three fifths of the votes cast in the presence of at least half of the statutory number of deputies, voting for the list of candidates referred to in paragraph 4.

6. If members of the Council are not elected according to the procedure laid down in paragraph 5, the Sejm shall elect members of the Council by an absolute majority of the votes cast in the presence of at least half of the statutory number of deputies, voting for the list of candidates referred to in paragraph 4. …'

26. Under Article 6 of the 2017 Amending Law on the NCJ:

'The term of office of the members of the [NCJ] referred to in Article 187(1)(2) of the Constitution of the Republic of Poland, elected on the basis of the current provisions, shall last until the day before the beginning of the term of office of the new members of the [NCJ], but shall not exceed 90 days from the date of entry into force of this Law, unless it has previously ended because of the expiry of the term of office.'

27. The Ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of the ordinary courts and certain other laws) of 20 July 2018 (Dz. U. of 2018, heading 1443) ('Law of 20 July 2018') added paragraph 3 to Article 35 of the Law on the NCJ which provides:

'1. If more than one candidate has applied for a position of judge or trainee judge, the team shall draw up a list of recommended candidates.

2. In establishing the order of the candidates on the list, the team shall first take into account the assessment of the candidates' qualifications and in addition:

(1) professional experience, including experience in the application of legal provisions, academic production, opinions issued by superiors, recommendations, publications and other documents attached to the application form;

(2) the opinion of the college of the competent court and the assessment of the competent general assembly of judges.

3. The absence of the documents referred to in paragraph 2 shall not prevent the establishment of a list of recommended candidates.'

28. The 2017 Amending Law on the NCJ added Article 44(1a), and the Law of 20 July 2018 added Article 44(1b), to Article 44 of the Law on the NCJ which provides:

'1. A participant in the proceedings may appeal to the Supreme Court on the ground that the Council's resolution is unlawful, unless otherwise provided for in separate provisions. …

1a. In individual cases concerning an appointment to the office of judge of the Supreme Court, an appeal may be lodged with the Supreme Administrative Court. In these cases, it is not possible to appeal to the Supreme Court. An appeal to the Supreme Administrative Court may not be based on an allegation of 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 office of judge of the Supreme Court.

1b. If not all the participants in the proceedings have challenged the resolution referred to in Article 37(1), in individual cases concerning the appointment to the office of judge of the Supreme Court, the resolution shall become final, for the part comprising the decision to submit the proposal for appointment to the office of judge of the Supreme Court and for the part comprising the decision not to submit a proposal for appointment to the office of judge of the same Court, in the case of participants in the proceedings who have not lodged an appeal. …'

*4. The Law of 21 November 2018*

29. On 17 December 2018, the President of the Republic signed the Ustawa o zmianie ustawy o Sądzie Najwyższym (Law amending the Law on the Supreme Court) of 21 November 2018 (Dz. U. of 2018, heading 2507) ('Law of 21 November 2018') which entered into force on 1 January 2019. Under Article 1 of that law, Article 37(1a) to (4) and Article 111(1) of the 2017 Law on the Supreme Court are repealed, and Article 37(1) of that same law is modified to the effect that only judges of the Supreme Court who took office as judges of that court after the date of entry into force of the Law of 21 November 2018 retire at the age of 65, whereas the provisions of Article 30 of the 2002 Law on the Supreme Court apply to judges of the Supreme Court who took office before that date.

30. Article 2(1) of the Law of 21 November 2018 provides:

'From the date of entry into force of this Law, any judge of the Supreme Court or a judge of the Supreme Administrative Court who has been retired pursuant to Article 37(1) to (4) or of Article 111(1) or (1a) of the [2017 Law on the Supreme Court] is reinstated in the functions he exercised on the date of entry into force of the [2017 Law on the Supreme Court]. The performance of the duties of a judge of the Supreme Court or of a judge of the Supreme Administrative Court shall be deemed to have continued without interruption.'

31. Article 4 of the Law of 21 November 2018 further provides:

'1. The proceedings initiated under Articles 37(1) and 111(1) to (1b) of the [2017 Law on the Supreme Court] and the appeal proceedings pending in these cases on the date of entry into force of this Law shall be closed.

2. Proceedings to establish the existence of an employment relationship as a judge of the Supreme Court or a judge of the Supreme Administrative Court on active duty, relating to the judges referred to in Article 2, paragraph 1, initiated and pending on the date of entry into force of this Law, shall be closed. …'

## III. Facts, main proceedings and questions referred

32. Case C-585/18 concerns an appeal brought by A.K., a judge in the Supreme Administrative Court, against the NCJ. According to the order for reference, A.K. had reached the age of 65 by 3 July 2018 and submitted a declaration to continue in his post pursuant to Articles 37 and 111(1) of the 2017 Law on the Supreme Court. Those measures were held by the Court to be incompatible with EU law

in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*.[9]

33. Under the procedure set out in Article 37 of the 2017 Law on the Supreme Court, the NCJ issued a resolution, expressing a negative opinion. A.K. lodged an appeal against that resolution, along with a request to suspend its enforceability, before the Chamber of Labour Law and Social Security of the Supreme Court. In support of that appeal, A.K. alleges, inter alia, breach of the second subparagraph of Article 19(1) TEU, the second paragraph of Article 47 of the Charter 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.[10] In the latter context, A.K. argues that he has been discriminated against on the basis of age.

34. Cases C-624/18 and C-625/18 concern actions brought by CP and DO, judges of the Supreme Court, against the Supreme Court. According to the orders for reference, those judges had reached the age of 65 by 3 July 2018, but did not submit declarations to continue in their posts pursuant to Articles 37 and 111(1) of the 2017 Law on the Supreme Court.

35. Having been informed that the President of the Republic declared them to be retired as from 4 July 2018, CP and DO lodged actions before the Chamber of Labour Law and Social Security of the Supreme Court seeking declarations that their employment relationship as judges in active service had not been transformed from that date into that of retired judges. They also sought interim relief. In support of those actions, CP and DO allege, inter alia, breach of the prohibition of discrimination on grounds of age laid down in Article 2(1) of Directive 2000/78.[11] Here, too, CP and DO are challenging measures which were held by the Court to be incompatible with EU law in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*.[12]

36. The Chamber of Labour Law and Social Security of the Supreme Court ('Chamber of Labour Law and Social Security'), before which A.K., CP and DO (together, 'the applicants') lodged their actions, makes, inter alia, the following observations.

37. Prior to the entry into force of the 2017 Law on the Supreme Court, the Chamber of Labour Law and Social Security[13] had jurisdiction to examine appeals against NCJ resolutions, and disputes arising from the employment relationship of Supreme Court judges were decided by the labour courts. Pursuant to subparagraphs 2 and 3 of Article 27(1) of the 2017 Law on the Supreme Court, jurisdiction over those cases was transferred to the Disciplinary Chamber of the Supreme Court ('Disciplinary Chamber').[14] Yet, on the dates that the orders for reference were made, no judges had been appointed to the Disciplinary Chamber, so it did not in fact exist.

38. Thus, with respect to Cases C-624/18 and C-625/18, the referring court queries whether, given the absence of judges appointed to the Disciplinary Chamber, it can disapply national provisions conferring jurisdiction on the Disciplinary Chamber and take jurisdiction itself, due to the need to ensure effective protection of the litigants' rights under EU law with respect to age discrimination.[15] The referring court

9 EU:C:2019:531.

10 OJ 2000 L 303, p. 16. Article 9(1) of Directive 2000/78 states: 'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by the 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.'

11 Article 2(1) of Directive 2000/78 states: '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.' Article 1 of that directive refers, inter alia, to discrimination on grounds of age.

12 EU:C:2019:531.

13 The referring court notes that, prior to the entry into force of the 2017 Law on the Supreme Court, that chamber was called the Chamber of Labour Law, Social Security and Public Affairs.

14 With respect to Case C-585/18, the referring court indicates that this applies to Supreme Administrative Court judges.

15 The referring court refers to the judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49; of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257; and of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163.

states that, since there is no court which would be able to provide legal protection in the main proceedings, those provisions, in so far as they exclude the Chamber of Labour Law and Social Security, should be regarded as incompatible with Article 47 of the Charter and Article 9(1) of Directive 2000/78. It also indicates that this question could become irrelevant because, while the main proceedings are taking place, posts were being filled in the newly created chambers of the Supreme Court.

39. In any event, the referring court harbours doubts as to whether the procedure for the selection of judges to the Disciplinary Chamber offers sufficient guarantees of independence as required under EU law, given that the judges must be appointed by the President of the Republic on a proposal of the NCJ.[16] It points out that the 2017 Amending Law on the NCJ introduced a mechanism for selecting the judicial members of the NCJ, whereby those members are selected by the Sejm (the lower chamber of the Polish Parliament), and no longer by judges. In consequence, Supreme Court judges are selected in Poland by a body whose composition is primarily determined by the legislative and executive authorities.

40. The referring court further states that the election of the current NCJ members is not transparent, the NCJ's judicial members are not representative of the entire judicial community, the NCJ's activities show the absence of positions taken in defence of the independence of the Supreme Court and its judges and, as illustrated by the proceedings in Case C-585/18, the NCJ's practice when deciding on requests of Supreme Court judges who have reached the age of 65 and who wish to continue in their posts, consists of issuing negative opinions which do not give sufficient reasons to enable the President of the Republic to form an opinion about the candidate in question.

41. With regard to the selection procedure of judges appointed to the Disciplinary Chamber, the referring court indicates that the Supreme Court is excluded from participating in that procedure and that until the day on which all the posts in the Disciplinary Chamber have been filled for the first time, only judges of the Supreme Court appointed by the President of the Republic can sit in that chamber. It also mentions, inter alia, that the terms of the procedure have been altered. By virtue of Articles 35 and 44 of the Law on the NCJ, respectively, the requirement for candidates to submit certain documents relating to their qualifications as part of the process of drawing up a list of recommended candidates has been abolished, and a rule was introduced that if a resolution in an individual case concerning appointment to a Supreme Court judicial post is not appealed by all the participants to the proceedings, the part of the resolution concerning the decision to submit the motion for appointment to a Supreme Court judicial post becomes valid. The referring court states that this, therefore, precludes effective judicial review. Moreover, it considers that the NCJ's recommended candidates for the Disciplinary Chamber include persons beholden to the political authorities.

42. If the Court finds that the Disciplinary Chamber does not meet the requirements of independence provided for in EU law, the referring court wishes to know whether it can disapply the provisions of national law precluding it from having jurisdiction in the disputes.[17] With respect to Cases C-624/18 and C-625/18, the referring court considers that, to ensure the effectiveness of EU law, the Chamber of Labour Law and Social Security's general jurisdiction over labour cases involving discrimination entitles it to hear the actions in the main proceedings involving claims of age discrimination under Directive 2000/78.[18]

16 The referring court mentions in particular the judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586.

17 The referring court refers to the judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, and of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257.

18 The referring court refers to the judgments of 22 May 2003, *Connect Austria*, C-462/99, EU:C:2003:297, and of 2 June 2005, *Koppensteiner*, C-15/04, EU:C:2005:345.

43. It was in those circumstances that the Sąd Najwyższy (Supreme Court), in Case C-585/18, decided to stay the proceedings, and to refer the following questions to the Court for a preliminary ruling:

'(1) On a proper construction of the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter of Fundamental Rights], is a newly-created chamber of a court of last instance of a Member State which has jurisdiction to hear an appeal by a national court judge and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts (the National Council of the Judiciary), which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, an independent court or tribunal within the meaning of EU law?

(2) If the answer to the first question is negative, should the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter of Fundamental Rights], be interpreted as meaning that a chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court seised with an appeal in an EU case should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?'

44. The Sąd Najwyższy (Supreme Court), in Cases C-624/18 and C-625/18, also decided to stay the proceedings, and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 47 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 9(1) of [Directive 2000/78], be interpreted as meaning that, where an appeal is brought before a court of last instance in a Member State against an alleged infringement of the prohibition of discrimination on the ground of age in respect of a judge of that court, together with a motion for granting security in respect of the reported claim, that court — in order to protect the rights arising from EU law by ordering an interim measure provided for under national law — must refuse to apply national provisions which confer jurisdiction, in the case in which the appeal was lodged, on an organisational unit of that court which is not operational by reason of a failure to appoint judges adjudicating within it?

(2) In the event that judges are appointed to adjudicate within the organisational unit having jurisdiction under national law to hear and determine the action brought, on a proper construction of the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the Charter of Fundamental Rights of the European Union, is a newly-created chamber of a court of last instance of a Member State which has jurisdiction to hear the case of a national court judge at first or second instance and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts, namely the [NCJ], which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, an independent court or tribunal within the meaning of EU law?

(3) If the answer to the second question is negative, should the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that a chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court seised with an appeal in an EU case should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?'

## IV. Procedure before the Court

45. By decision of the Court, the present cases were joined for the purposes of the written and oral procedure and the judgment.

46. By order of 26 November 2018, the President of the Court granted the referring court's requests to deal with the present cases under the accelerated procedure pursuant to Article 23a of the Statute of the Court of Justice of the European Union ('Statute') and Article 105(1) of the Court's Rules of Procedure. [19]

47. Written observations on the questions referred in the present cases were submitted by the Prokurator Generalny zastępowany przez Prokuraturę Krajową (General Prosecutor represented by the National Prosecutor's Office, Poland, 'General Prosecutor'), the Republic of Latvia, the Republic of Poland, the EFTA Surveillance Authority and the European Commission.

48. With the exception of the Republic of Latvia, those parties, as well as the applicants, presented oral argument at the hearing held on 19 March 2019 ('the first part of the hearing').

49. At the first part of the hearing, the General Prosecutor requested the recusal of the President of the Court, Judge Koen Lenaerts, from the present cases. By decision of 29 March 2019, the Court, presided by the Vice-President, rejected that request.

50. By letter dated 28 March 2019, the NCJ, which did not participate in the first part of the hearing, requested that another hearing be held. On 10 April 2019, the Court decided to continue the hearing in the present cases in particular to allow the NCJ to present its oral arguments.

51. The NCJ and the Sąd Najwyższy (Supreme Court), as parties to the proceedings, along with the applicants, the General Prosecutor, the Republic of Poland, the EFTA Surveillance Authority and the European Commission, presented oral argument at the hearing held on 14 May 2019 ('the second part of the hearing'). [20]

## V. Summary of the observations of the parties

### *A. Procedural objections*

52. The General Prosecutor and Poland argue that the questions referred are inadmissible because they have become devoid of purpose due to the Law of 21 November 2018. By virtue of that law, the provisions of Polish law underlying the disputes in the main proceedings have been repealed and those disputes cease to exist. [21] Poland also emphasises that the proceedings are void under Polish law, since they fall within the Disciplinary Chamber's jurisdiction under Articles 27 and 79 of the 2017 Law on the Supreme Court.

19 *A.K. and Others*, C-585/18, C-624/18 and C-625/18, EU:C:2018:977.

20 At the second part of the hearing, the President of the Court stated that while the Disciplinary Chamber cannot participate in the proceedings in the present cases in accordance with the Court's Rules of Procedure, since it is not among the parties to the main proceedings, as indicated in the references for a preliminary ruling received from the referring court, the Court decided to accept documents filed on 14 May 2019 by the NCJ from the Disciplinary Chamber, including in particular Resolution No 6 of the Assembly of the Judges of the Disciplinary Chamber of the Supreme Court of 13 May 2019 containing the position of that Chamber on the present cases, which I address in my analysis below (see points 140 and 141 of this Opinion).

21 Poland refers in particular to the judgments of 9 December 2010, *Fluxys*, C-241/09, EU:C:2010:753, and of 27 June 2013, *Di Donna*, C-492/11, EU:C:2013:428; order of 3 March 2016, *Euro Bank*, C-537/15, EU:C:2016:143.

53. Poland and the Commission further submit that it is unnecessary for the Court to answer Question 1 in Cases C-624/18 and C-625/18, since judges have been appointed to the Disciplinary Chamber and that chamber is now exercising judicial functions.

54. The General Prosecutor and Poland also contend that the questions referred are inadmissible because the situation in the main proceedings does not concern EU law. In particular, the General Prosecutor stresses that Article 19(1) TEU does not confer competence on the EU with regard to the operation of judicial councils, and the present cases differ from the Court's judgment in *Associação Sindical dos Juízes Portugueses*.[22] In the General Prosecutor's view, Article 47 of the Charter cannot constitute the basis for standards binding on Poland, since the Polish legislation on the Supreme Court and the NCJ in issue do not amount to an incidence of implementation of EU law under Article 51(1) of the Charter. According to the General Prosecutor, there is also a conflict with Article 1(1) of Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to the Republic of Poland and the United Kingdom.[23]

55. The applicants and the Sąd Najwyższy (Supreme Court) argue that the questions referred remain necessary, since the Law of 21 November 2018 does not address the issues to be decided. According to the Sąd Najwyższy (Supreme Court), Article 4 of that law does not automatically result in discontinuance of the disputes, and the referring court is the competent chamber ratione materiae in the main proceedings.

56. The Commission contends that the questions referred, apart from Question 1 in Cases C-624/18 and C-625/18, are necessary for the referring court to rule on a preliminary question (*quaestio in limine litis*) relating to the determination of the competent chamber of the Supreme Court to adjudicate the disputes. In its view, the Law of 21 November 2018 does not affect the answer to the questions referred, the case-law relied on by Poland differs from the present cases, and a national legislator cannot interfere with the preliminary ruling mechanism.

57. The Commission further submits that the situation in the main proceedings, in which the applicants claim rights with respect to age discrimination under Directive 2000/78, fall within the fields covered by EU law under the second subparagraph of Article 19(1) TEU, and Article 47 of the Charter is also applicable on those grounds.

### *B. Substance*

#### *1. Question 1 in Cases C-624/18 and C-625/18 and the practical non-operation of the Disciplinary Chamber*

58. For Poland, this question should be answered in the negative. In its view, the applicants' rights were not violated, and the referring court's refusal to apply the national provisions reserving jurisdiction for the Disciplinary Chamber leads to a situation in which none of the chambers of the Supreme Court has jurisdiction to hear the disputes. It also asserts, inter alia, that Article 47 of the Charter and Article 9(1) of Directive 2000/78 do not assist the applicants in support of a course of action which would be contrary to Polish constitutional law.

22 Judgment of 27 February 2018, C-64/16, EU:C:2018:117.

23 OJ 2016 C 202, p. 312 ('Protocol No 30').

59. Latvia and the EFTA Surveillance Authority propose that the Court should provide an affirmative answer to this question. According to the EFTA Surveillance Authority, where a court with exclusive jurisdiction to deal with a matter within the scope of EU and EEA law is not yet operational, there is de facto no court to hear the case; this amounts to a denial of access to justice, and the referring court is obliged under EU law to disregard the national provisions concerned and assume jurisdiction to ensure that EU claims are adjudicated. [24]

*2. Question 1 in Case C-585/18 and Question 2 in Cases C-624/18 and C-625/18 and the independence of the Disciplinary Chamber*

60. The applicants submit that the Disciplinary Chamber does not meet the criteria necessary to ensure effective judicial protection under the second subparagraph of Article 19(1) TEU and the right to an independent and impartial tribunal under Article 47 of the Charter, since the NCJ has been appointed in a manner which makes it dependent on the political authorities. In their view, the NCJ's selection of judges raises serious doubts about the independence of those judges which undermines citizens' trust in the judiciary. They also consider that the notion of independence is to be interpreted according to its context; that being so, the Court's case-law on independence of a 'court or tribunal' under Article 267 TFEU is not of decisive importance.

61. In particular, the applicants identify three elements which give the impression that the NCJ is dependent on the political authorities. First, the judges eligible for appointment by the President of the Republic to the Disciplinary Chamber were selected by the NCJ following the premature termination of the mandates of the former NCJ members which they say is in violation of Article 187(3) of the Polish constitution affording a four-year term of office. [25] Second, they point out that the 15 judicial members are appointed by the Sejm, and not by judges, contrary to European guidelines, [26] with the result that 23 out of 25 members of the NCJ come from the legislative and executive authorities. Third, they stress that the reform of the NCJ was introduced in parallel with other reforms of the Polish judiciary which led, inter alia, to the initiation of the Article 7(1) TEU mechanism against Poland [27] and the NCJ's suspension from the European Network of Councils for the Judiciary. [28] They also criticise arguments based on solutions adopted in other Member States, as the situation in Poland is distinguishable taking account of those three elements.

62. The NCJ argues that the Court must be guided by facts, not impressions, and the Disciplinary Chamber satisfies the criteria, including independence, in the Court's case-law on Article 267 TFEU. In its view, the NCJ does not influence the Disciplinary Chamber, since any connection between the two bodies ends once the NCJ recommends specific candidates. It also asserts that the Polish legislation on the NCJ improves the representativeness of the judicial members and allows groups of judges to put forward their candidacies.

63. The General Prosecutor submits that the changes to the manner of appointing NCJ members and selecting judges of the Disciplinary Chamber do not jeopardise the independence of the Polish judiciary. The General Prosecutor stresses, inter alia, that the Sejm's appointment of the NCJ's judicial members furthers several constitutional principles, along with democratic legitimacy. According to the General Prosecutor, the NCJ is not a judicial body within the meaning of Article 173 of the Polish constitution, so the Polish legislation on the NCJ does not violate judicial independence and,

24 The EFTA Surveillance Authority refers to the judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, and of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257.

25 The applicants refer in that regard to ECtHR, 12 March 2019, *Ástráðsson v. Iceland*, CE:ECHR:2019:0312JUD002637418.

26 The applicants refer in particular to the Council of Europe Committee of Ministers Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities, 17 November 2010 ('2010 Recommendation').

27 See footnote 3 of this Opinion.

28 European Network of Councils for the Judiciary (ENCJ), Position Paper of the Board of the ENCJ on the membership of the KRS of Poland, adopted on 16 August 2018, available at http://www.encj.eu/ ('ENCJ Position Paper'). See footnote 93 of this Opinion.

moreover, that legislation guarantees the impartiality of the NCJ's activities. In particular, the General Prosecutor asserted at the first part of the hearing that Article 44(1b) of the Law on the NCJ establishes an effective system allowing judicial candidates who have been rejected to appeal, while not blocking the selection procedure for vacant posts.

64. The General Prosecutor further submits that the solutions adopted in Poland are similar to those in other Member States, and there should not be double standards among Member States. The General Prosecutor underlines that the Disciplinary Chamber has broad support in Polish society, and there are guarantees in Polish law to ensure its independence. The General Prosecutor also asserted at the first part of the hearing, in reference to Article 131 of the 2017 Law on the Supreme Court, that the President of the Republic appoints new judges in order to order to fill the posts in the Supreme Court of the Disciplinary Chamber for the first time, since the appointment of a judge to the Supreme Court is linked to a post in a specific chamber and thus it is not possible to appoint a judge who is a member of another chamber of that court, unless that judge resigns.

65. Latvia takes the view that the Court should provide a negative answer to this question. It emphasises that the independence of courts and judges is not an end to itself, but an instrument to ensure and strengthen democracy and the rule of law, as well as a necessary precondition to the right to a fair trial, as recognised in, inter alia, Latvian law. [29]

66. Poland argues that the third paragraph of Article 267 TFEU, Article 19(1) TEU, Article 2 TEU and Article 47 of the Charter must be interpreted as meaning that the independence of a judge of a national court is not affected in any way by his appointment in the context of a national procedure involving the participation of a judicial council, the establishment of which falls within the exclusive competence of the Member State concerned. In its view, the procedure for the selection of judges of the Supreme Court in Poland, including the Disciplinary Chamber, complies with the Court's case-law on independence under Article 267 TFEU. [30] As it stressed at the first and second parts of the hearing, the standards of independence under Article 267 TFEU should not be interpreted differently from those under Article 19(1) TEU and Article 47 of the Charter, and as the NCJ is not a court, the requirements of judicial independence do not apply to it.

67. According to Poland, judges in Poland, including those of the Disciplinary Chamber, are appointed by the President of the Republic, on a proposal of the NCJ, for an indefinite period; in exercising his constitutional prerogative to appoint judges, the President of the Republic is not bound by the opinion of the NCJ, and acts in accordance with the Polish constitution. [31] That procedure, in its view, does not diverge from those in other Member States, along with the EU Courts, where participation of judicial representatives is limited, and the fact that judges are selected by the NCJ which is composed of judges and politicians does not affect the independence of the judges appointed by the President of the Republic. It further contends that the independence of the judges of the Disciplinary Chamber results from an elaborate system of guarantees, linked in particular to their appointment for an unlimited time, irremovability, immunity, obligations to remain apolitical and abstain from professional activities, and remuneration.

29 Latvia refers in particular to the judgment of 18 January 2010 by the Satversmes tiesa (Constitutional Court), No 2009-11-01.

30 Poland refers in particular to the judgments of 17 September 1997, *Dorsch Consult*, C-54/96, EU:C:1997:413; of 21 March 2000, *Gabalfrisa and Others*, C-110/98 to C-147/98, EU:C:2000:145; of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801; and of 31 January 2013, *D and A*, C-175/11, EU:C:2013:45.

31 Poland refers in particular to Article 179, combined with Article 144(3), point 17, of the Polish constitution.

68. Poland further argues, inter alia, that the election of the 15 judicial members of the NCJ by the Sejm enhances the democratic legitimacy and representativeness of the NCJ, and the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 25 March 2019 (K 12/18) dispelled doubts about its conformity with the Polish constitution. It also pointed out at the first part of the hearing that the former NCJ's terms of office were shortened due to the new method of selecting the judicial members and the need to unify their mandates, and in practice, most terms were shortened by a small amount of time.

69. The EFTA Surveillance Authority submits that the Disciplinary Chamber is not an independent court within the meaning of Article 267 TFEU. In particular, it asserts that States must organise their judicial systems in conformity with EU and EEA law, and account should be taken of a principle of non-regression of judicial independence, as reflected in EU law and European guidelines. [32] In its view, changing the composition of the body tasked with selecting judges so that it is made up of a majority of members appointed by the legislative and executive authorities creates a link with those authorities which is likely to compromise the independence of judges appointed under that procedure. This is especially the case, according to the EFTA Surveillance Authority, when the modification in membership is part of broader changes weakening the independence of the judiciary, and the mere appearance of susceptibility to external influence resulting from these circumstances undermines public confidence in the courts. [33]

70. The Commission contends that the requirements of independence and impartiality under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter should be interpreted as meaning that a judicial body such as the Disciplinary Chamber, which is established in the circumstances of the main proceedings and competent to rule on disputes on the status of judges, does not satisfy those requirements. [34] In its view, Article 267 TFEU is not relevant, since the qualification of a body making a reference as a 'court or tribunal' is not at issue here.

71. The Commission acknowledges that in principle the involvement of a political body in the appointment process of judges is not in itself likely to affect the independence or impartiality of the judges appointed. [35] Yet, it points out that the appearance of independence and impartiality is one of the components of judicial independence. [36] In the present cases, it submits that several elements taken together produce a 'structural breach', that is, a structural discontinuity resulting from a plurality of legislative changes introduced at the same time in Poland, with the result that it is not possible to remove any legitimate doubt as to the impermeability of the Disciplinary Chamber to external factors and its neutrality to conflicting interests.

72. According to the Commission, those elements include, first, the Disciplinary Chamber is created *ex nihilo* with a separate status from the other chambers of the Supreme Court; second, until the moment when all posts in the Disciplinary Chamber are filled for the first time, only judges appointed by the President of the Republic can compose the Disciplinary Chamber; third, it is part of a legislative package on the reform of the justice system in Poland, and fourth, that chamber is competent to rule on disputes concerning the status of judges, including their retirement and decisions in disciplinary

32 The EFTA Surveillance Authority refers to Articles 2, 7 and 49 TEU, Article 53 of the Charter and Council of Europe, European Charter on the statute of judges, 8-10 July 1998, DAJ/DOC(98)23 ('1998 European Charter'), point 1.1.

33 The EFTA Surveillance Authority refers in particular to the decision of the EFTA Court of 14 February 2017, *Pascal Nobile v DAS Rechtsschutz-Versicherungs*, E-21/16, paragraph 16.

34 The Commission refers to the judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586.

35 The Commission refers to ECtHR, 25 March 1992, *Campbell and Fell v. United Kingdom*, CE:ECHR:1992:0325JUD001359088.

36 The Commission refers in particular to ECtHR, 22 October 1984, *Sramek v. Austria*, CE:ECHR:1984:1022JUD000879079; European Commission for Democracy Through Law (Venice Commission), Rule of Law Checklist, Study No 711/2013, 18 March 2016, CDL-AD(2016)007 ('2016 Rule of Law Checklist'), point 75; and 2010 Recommendation, footnote 26, points 46 and 47.

proceedings against judges, aspects which have been substantially amended by that package. In its view, the changes to the NCJ's composition contribute to that structural breach, and the judgment of 25 March 2019 (K 12/18) of the Trybunał Konstytucyjny (Constitutional Court) is irrelevant for assessing the independence of the Disciplinary Chamber under EU law.

*3. Question 2 in Case C-585/18 and Question 3 in Cases C-624/18 and C-625/18 and the assumption of jurisdiction because the Disciplinary Chamber is not an independent tribunal*

73. The applicants submit that the referring court should interpret national law in a way which would give the applicants the opportunity to have their cases examined by a competent court.

74. The EFTA Surveillance Authority contends that it is contrary to EU and EEA law to leave a matter concerning that law to be decided by a court which does not meet the requirements of independence established by the European Courts. Thus, in its view, even if assuming jurisdiction in a situation where the competent court does not qualify as an independent court under EU and EEA law may go beyond filling a procedural gap, this may be justified as a temporary solution where it is imperative for the protection of rights afforded under EU and EEA law.[37]

75. The Commission argues that the primacy of EU law requires that national provisions, conferring jurisdiction in a case involving EU law on a court which does not meet the requirements of independence and impartiality under Article 19(1) TEU and Article 47 of the Charter, remain inapplicable. It considers that, in light of the importance of the principle of judicial independence, the referring court must disregard national provisions which it considers contrary to that principle.[38]

## VI. Analysis

### *A. Overview of approach*

76. I have come to the conclusion that the requirements of judicial independence set out in Article 47 of the Charter should be interpreted as meaning that a chamber of a national last instance court, such as the Disciplinary Chamber, which is established under the circumstances prevailing in the main proceedings, does not satisfy those requirements. The approach I will employ in reaching this conclusion is as follows.

77. As explained below at point 84 of this Opinion, I have reached the view that the situation arising in the main proceedings is one in which a Member State is implementing Article 47 of the Charter within the meaning of Article 51(1) thereof. Therefore, strictly speaking, it is not necessary for the Court to decide whether there has also been a breach more broadly of the second subparagraph of Article 19(1) TEU. That said, I will conduct an assessment with respect to violation of the second subparagraph of Article 19(1) TEU in Section D.4 of this Opinion, mindful of the fact that the second subparagraph of Article 19(1) TEU and the guarantee of judicial independence inherent therein is a concrete expression of the core value of the rule of law under Article 2 TEU.[39]

37 The EFTA Surveillance Authority refers to the judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, and of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257.

38 The Commission refers to the judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, and of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21.

39 See, in particular, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 32, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 47.

78. I approach my analysis in this way because, as pointed out in my Opinion in *Commission* v *Poland (Independence of the ordinary courts)* (C-192/18), in principle 'a structural infirmity that additionally entails implementation of EU law by a Member State will fall to be determined by both provisions.'[40]

79. Finally, an analysis of the protection afforded by the second subparagraph of Article 19(1) TEU also follows from the broad material scope that the Court has given that provision (see point 87 of this Opinion).

80. My reasoning will be detailed below in Sections C, D and E of this Opinion, but I will first examine the procedural objections put forward by the parties in the present cases in Section B.

## *B. Jurisdiction of the Court*

81. I observe that two procedural objections have been raised in the present cases, the first alleging in substance that the situation in the main proceedings does not fall within the scope of EU law, and the second alleging that the questions referred have become devoid of purpose. Both appear to relate to the jurisdiction of the Court, although the objections were raised as pertaining to the admissibility of references for preliminary rulings.[41]

### *1. Situation in main proceedings falls within the scope of EU law*

82. In my view, the situation of the main proceedings clearly falls within the scope of EU law.

83. The applicants in the main proceedings are alleging breach of the prohibition against discrimination on grounds of age, as protected by Directive 2000/78. In order to seek the enforcement of that claim, they are entitled to access to an independent tribunal under Article 47 of the Charter.[42]

84. This is a textbook case of a situation which is 'governed' by EU law within the meaning of the Court's case-law.[43] There is a subject-matter nexus between the situation arising under Member State law and the EU measure relied on.[44] Because recourse to an independent tribunal is being sought to secure the enforcement of Directive 2000/78, and more specifically the right not to be discriminated against on the basis of age protected therein, the main proceedings concern a situation in which a Member State is implementing EU law under Article 51(1) of the Charter.[45] Consequently, the main proceedings fall within the scope of application of Article 47 of the Charter.

40 EU:C:2019:529, point 116.

41 See, in that regard, Opinions of Advocate General Wahl in *Gullotta and Farmaci di Gullotta Davide & C.*, C-497/12, EU:C:2015:168, points 16 to 25, and of Advocate General Szpunar in *Rendón Marín and CS*, C-165/14 and C-304/14, EU:C:2016:75, point 48. For a general discussion, see Nils Wahl and Luca Prete, 'The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings' (2018) 55 *Common Market Law Review* 511.

42 See, in that regard, judgment of 6 November 2012, *Commission* v *Hungary*, C-286/12, EU:C:2012:687.

43 See, for example, judgments of 7 March 2017, *X and X*, C-638/16 PPU, EU:C:2017:173, paragraph 45, and of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 63 and the case-law cited. For a summary of the legal rules to determine when Member States are implementing EU law under Article 51(1) of the Charter, see order of 7 September 2017, *Demarchi Gino*, C-177/17 and C-178/17, EU:C:2017:656, paragraphs 19 to 21 and the case-law cited.

44 See judgment of 19 April 2018, *Consorzio Italian Management e Catani Multiservizi*, C-152/17, EU:C:2018:264, paragraph 34 and the case-law cited. For a general discussion, see Angela Ward, 'Article 51 — Field of Application', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) pp. 1413 to 1454.

45 See, in that regard, judgment of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811.

85. I will therefore conduct the main part of my analysis on the basis of Article 47 of the Charter. That said, as explained at points 93 to 101 of my Opinion in *Commission* v *Poland (Independence of the ordinary courts)* (C-192/18),[46] given that Article 47 of the Charter and the second subparagraph of Article 19(1) TEU share common legal sources and are circumscribed by the broader matrix of general principles of EU law, there is a '*constitutional passarelle*' between the two provisions, and the case-law concerning them inevitably intersects.[47] It is this intersecting case-law on which I will rely in my analysis.

86. In addition, the situation in the main proceedings falls within the material scope of the second subparagraph of Article 19(1) TEU.

87. In its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18),[48] the Court confirmed that, 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. Thus, once a body, such as the Sąd Najwyższy (Supreme Court), may be called upon to rule on questions concerning the application or interpretation of EU law and as a 'court or tribunal' defined by EU law comes within the Member State's judicial system in the fields covered by EU law, the Member State concerned is obliged under the second subparagraph of Article 19(1) TEU to ensure that such body meets the requirements of effective judicial protection, including the requirement of judicial independence which is inherent in the task of adjudication and which forms part of the 'essence' of the right to effective judicial protection.

88. Finally, as established by the Court's judgment in *N.S. and Others*,[49] Protocol No 30 does not call into question the applicability of the Charter in Poland, so Article 47 thereof is not precluded in the main proceedings. Further, Protocol No 30 relates to the Charter and does not encapsulate Article 19(1) TEU to the extent to which it is applicable.[50] I therefore exclude it from my analysis of the second subparagraph of Article 19(1) TEU which appears below in Section D.4 of this Opinion.

89. In view of the foregoing, the procedural objection alleging that the situation in the main proceedings does not fall within the scope of EU law should be rejected.

### *2. The need for the Court to give a ruling*

90. In my view, apart from Question 1 in Cases C-624/18 and C-625/18 and the practical non-operation of the Disciplinary Chamber, the questions referred are not devoid of purpose.

91. Under settled case-law, it is clear from both the wording and scheme of Article 267 TFEU that the preliminary ruling procedure presupposes that a dispute is actually pending before the referring court in which it is called upon to give a decision that is capable of taking account of the Court's ruling.[51] The justification for the reference for a preliminary ruling is not that it enables advisory opinions on

46 EU:C:2019:529.

47 This is evident in the Court's judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, in particular paragraphs 43, 46, 47, 55 and 57. There, the Court referred to the judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, in which the interpretation of the second subparagraph of Article 19(1) TEU was at issue, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, a dispute entailing the implementation of EU law and Article 47 of the Charter, in support of the same legal principles.

48 EU:C:2019:531, in particular paragraphs 50, 51, 55 to 59 and the case-law cited. I note that one Advocate General has taken the view that 'any such transversal, horizontal measures that will by definition affect each and every operation of the national judiciaries are a matter of EU law'. Opinion of Advocate General Bobek in *Torubarov*, C-556/17, EU:C:2019:339, point 55.

49 Judgment of 21 December 2011, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 119 and 120. See also Opinions of Advocate General Trstenjak in *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:611, points 167 to 171, and of Advocate General Kokott in *Bonda*, C-489/10, EU:C:2011:845, points 21 to 23.

50 See judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 53.

51 See judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 46 and the case-law cited.

general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute.[52] Although the Court places as much reliance as possible on the national court's assessment of the extent to which the questions referred are necessary, it must be in a position to make any assessment inherent in the performance of its own duties, particularly in order to determine whether it has jurisdiction.[53]

92. Consequently, in the context of Article 267 TFEU, the Court finds that a question referred becomes devoid of purpose and thus there is no longer a need for it to give a ruling[54] generally where, during the course of the procedure, there is a changed legal and/or factual framework pertaining to the substance of the questions referred, such as where the national legislation in question no longer applies or where the applicant's claims have been decided, with the result that the Court's answer to those questions is no longer necessary to enable the referring court to give judgment in the main proceedings.[55]

93. Following from this, in the present cases, I agree with Poland and the Commission that Question 1 in Cases C-624/18 and C-625/18 has become devoid of purpose due to the changed factual framework forming the basis of that question. It is not disputed that, following the referring court's decisions to refer, judges of the Disciplinary Chamber were appointed by the President of the Republic on 20 September 2018, and the Disciplinary Chamber is operational and exercising its judicial functions. I also point out that the referring court observed that this question could become irrelevant on such grounds (see point 38 of this Opinion).

94. In those circumstances, the Court should find that it is no longer necessary to reply to Question 1 in Cases C-624/18 and C-625/18, since its reply to that question is redundant. I underline, however, that this in no way prejudices the authority of the referring court to assume jurisdiction in the main proceedings on the basis of my answer to Question 2 in Case C-585/18 and Question 3 in Cases C-624/18 and C-625/18 and the assumption of jurisdiction that must necessarily follow for the referring court from my conclusion that the Disciplinary Chamber is not an independent tribunal (see Section E of this Opinion).

95. The other questions posed by the referring court — Questions 1 and 2 in Case C-585/18 and Questions 2 and 3 in Cases C-624/18 and C-625/18 — have, however, not become devoid of purpose.

96. In that regard, by decision of the Court, a request was sent to the referring court, asking whether, in the light of the entry into force of the Law of 21 November 2018 and Poland's submissions that that law would have the consequence that there is no longer any need for the Court to rule in the present cases, it considered that an answer to the questions addressed to the Court in those cases remained necessary to enable it to give its judgments in the main proceedings.

97. In its reply of 25 January 2019 to that request, the referring court confirmed that an answer to the questions submitted remains necessary to enable it to give judgment. In particular, it indicated, first, those questions concern problems not dealt with by the Law of 21 November 2018; second, that law does not repeal *ex tunc* the disputed national provisions and their legal effects; and third, Article 4 of that same law restricts the possibility to obtain answers to the questions referred and cannot be used as a legal basis for closing the proceedings.

52 See order of 10 January 2019, *Mahmood and Others*, C-169/18, EU:C:2019:5, paragraph 23 and the case-law cited.

53 See judgment of 24 October 2013, *Stoilov i Ko*, C-180/12, EU:C:2013:693, paragraphs 37 and 38.

54 See, in that regard, Opinion of Advocate General Kokott in *García Blanco*, C-225/02, EU:C:2004:669, points 35 to 39.

55 See, for example, orders of 10 June 2011, *Imran*, C-155/11 PPU, EU:C:2011:387, and of 10 January 2019, *Mahmood and Others*, C-169/18, EU:C:2019:5.

98. In those circumstances, it is not obvious that the interpretation of EU law sought by the referring court is unnecessary for resolving the disputes before it. As confirmed by the referring court's reply, there are genuine disputes pending before the referring court, which cannot be called into question by the parties to the main proceedings,[56] and the Court's answer will help the referring court to determine the competent court to adjudicate those disputes.[57]

99. Moreover, I point out that the case-law relied on by Poland (see point 52 of this Opinion) is inapposite to the present cases. In that case-law, the relevant changes affected the substance of the questions referred.[58] Here, the questions posed by the referring court are not resolved by the Law of 21 November 2018, as that law does not concern the rules governing the Disciplinary Chamber or the composition of the NCJ. In other words, those rules are still in place.

100. As regards the alleged effects of Articles 2 and 4 of the Law of 21 November 2018 on the disputes in the main proceedings, it should also be borne in mind that, in the context of Article 267 TFEU, it is not for the Court to rule on matters of national law, nor to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and their procedure.[59] National courts of last instance, as is the referring court, are in principle required under the third paragraph of Article 267 TFEU to refer questions to the Court on the interpretation of EU law, and national provisions cannot interfere with that obligation.[60]

101. For the foregoing reasons, there is a need for the Court to give a ruling on Questions 1 and 2 in Case C-585/18 and Questions 2 and 3 in Cases C-624/18 and C-625/18, and the procedural objection alleging that those questions have become devoid of purpose should be rejected.

### *C. Question 1 in Cases C-624/18 and C-625/18 and the practical non-operation of the Disciplinary Chamber*

102. Should the Court decide not to adopt my analysis that this question has become devoid of purpose, the observations which follow are intended to reply briefly and in the alternative to that question.

103. This question essentially concerns whether EU law vests the referring court with authority in the main proceedings when, at the time that the applicants sought to enforce their rights with respect to age discrimination under Directive 2000/78, the court designated to enforce those rights had not yet been established in practice.

104. The answer to this question is in the affirmative for the following reasons.

105. First, in *Unibet*,[61] the Court held that the Member States are only obliged to create new legal remedies under national law for individuals to enforce EU law rights when none exist. It does not appear to be in dispute that this was the situation in the main proceedings, given that the Disciplinary Chamber was not functioning on account of the fact that judges had not yet been appointed. The

56 See judgment of 27 February 2014, *Pohotovosť*, C-470/12, EU:C:2014:101, paragraph 30.

57 See, in that regard, judgment of 18 October 2011, *Boxus and Others*, C-128/09, C-134/09 and C-135/09, EU:C:2011:667, paragraph 28.

58 See judgments of 9 December 2010, *Fluxys*, C-241/09, EU:C:2010:753, paragraphs 32 to 34, and of 27 June 2013, *Di Donna*, C-492/11, EU:C:2013:428, paragraphs 27 to 32; order of 3 March 2016, *Euro Bank*, C-537/15, EU:C:2016:143, paragraphs 27 to 30, 34 to 36.

59 See judgment of 7 July 2016, *Genentech*, C-567/14, EU:C:2016:526, paragraph 22.

60 See judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraphs 32 to 34.

61 Judgment of 13 March 2007, C-432/05, EU:C:2007:163, in particular paragraphs 40 and 41. See also, for example, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 103 and 104.

referring court has framed this problem by reference to the obligation imposed on national courts under the case-law to disapply national provisions which conflict with EU law to ensure its full effectiveness.[62] Suffice it to say that this imperative serves to underscore the Court's judgment in *Unibet*.

106. Further, Article 47 of the Charter, as affirmed by Article 9(1) of Directive 2000/78,[63] guarantees the right of access to a court.[64] By hearing the actions brought by the applicants in the main proceedings, the referring court is guaranteeing this access.

### *D. Question 1 in Case C-585/18 and Question 2 in Cases C-624/18 and C-625/18 and the independence of the Disciplinary Chamber*

#### *1. Operation of Article 47 of the Charter*

107. As explained above, the situation in the main proceedings is one in which a Member State is implementing EU law within the meaning of Article 51(1) of the Charter and thus will be assessed by reference to Article 47 thereof. Yet, the case-law concerning the second paragraph of Article 19(1) TEU inevitably intersects with that of Article 47 of the Charter (see point 85 of this Opinion). Guidelines issued by European and international bodies, embodying principles shared by the Member States relating to judicial independence, also provide a useful point of reference.[65] These are the sources on which I will draw in deciding whether the arrangements at issue in the main proceedings are consistent with the requirements of judicial independence under EU law.

108. Given that the situation in the main proceedings falls to be determined by reference to Article 47 of the Charter, it is important to recall the provisions of the Charter which are relevant to its operation. The second paragraph of Article 47 of the Charter corresponds to Article 6(1) ECHR on the right to a fair trial. Pursuant to Article 52(3) of the Charter, the meaning and scope given to that provision of the Charter must be the same, or more extensive, as the meaning and scope of that provision of the ECHR, as determined by the text of the ECHR and the case-law of the European Court of Human Rights ('ECtHR').[66] Due to Article 52(3) of the Charter and the explanations accompanying Article 47 thereof, EU law must provide the 'minimum threshold of protection' guaranteed by Article 6(1) ECHR with respect to the right to an independent and impartial tribunal under the ECtHR's case-law.[67]

109. Finally, with respect to Poland's arguments, the interpretation of Article 267 TFEU does not appear necessary for the outcome of the disputes in the main proceedings, since no question has been raised which requires the Court's determination, in particular, whether a body falls within the notion of a 'court or tribunal' for the purposes of Article 267 TFEU or a national court's right or obligation to refer under that provision.

62 Judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49.

63 See, for example, judgment of 8 May 2019, *Leitner*, C-396/17, EU:C:2019:375, paragraph 61 and the case-law cited.

64 See, for example, judgment of 30 June 2016, *Toma*, C-205/15, EU:C:2016:499, paragraph 42.

65 See Advocate General Tanchev in *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:325, point 72.

66 See Explanations Relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), Explanations on Article 47, p. 30, and on Article 52, p. 34.

67 See judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 72. I observe in passing that, in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, EU:C:2019:531, in particular paragraphs 76 and 79, the Court subjected the principle of the irremovability of judges to a proportionality test. Here, I note that, pursuant to Article 52(3) of the Charter, EU law protects the principles of irremovability and independence of judges to the minimum threshold of protection afforded under the case-law of the ECtHR.

110. While the Court observed recently in its case-law that 'the independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU', and that this mechanism 'may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence',[68] the Court was in no way suggesting that the sources governing independence were to be found exclusively in case-law elaborated under Article 267 TFEU.

111. Moreover, the Court's assessment of the independence criterion in determining whether a body meets the criteria of a 'court or tribunal' for the purposes of submitting a reference for a preliminary ruling under Article 267 TFEU is a *qualitatively different exercise* than the assessment of whether the requirements of judicial independence have been complied with under Article 47 of the Charter, as well as the second subparagraph of Article 19(1) TEU.[69]

112. In the framework of the preliminary ruling mechanism of Article 267 TFEU, the Court is working out a question related to the procedure before it concerning the bodies entitled to submit references and which is linked to the objectives underlying that mechanism to establish a dialogue between the Court and the national courts and to ensure the uniform interpretation of EU law.[70]

113. In the framework of Article 47 of the Charter, as well as the second subparagraph of Article 19(1) TEU, the Court is engaging in a substantive assessment as to whether, in particular, the measure in question impairs judicial independence according to the requirements laid down by those provisions.

114. Most importantly, and as noted above, due to Article 52(3) of the Charter, EU law guarantees judicial independence, at minimum, to the standard set by Article 6(1) ECHR (see point 108 of this Opinion). That being so, if the case-law elaborated by the Court with respect to the criterion of independence under Article 267 TFEU (in the context of determining whether a particular body can make a reference for a preliminary ruling to the Court) were to fall short of the 'minimum threshold of protection' guaranteed by Article 6(1) ECHR,[71] it would in any event have to brought up to that standard.

### *2. Content of the guarantee of judicial independence under EU law*

115. It is useful to recall that the Court has recognised that Article 47 of the Charter reaffirms the principle of effective judicial protection, which is a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR,[72] and through which the rule of law as a value of the Union under Article 2 TEU is protected.[73] The content of the guarantee of judicial independence under EU law is as follows.

68 See, in particular, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 43, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 54.

69 See, in that regard, judgment of 4 February 1999, *Köllensperger and Atzwanger*, C-103/97, EU:C:1999:52, paragraph 24; Opinions of Advocate General Wahl in *Torresi*, C-58/13 and C-59/13, EU:C:2014:265, points 45 to 54, and of Advocate General Bobek in *Pula Parking*, C-551/15, EU:C:2016:825, points 81 to 107.

70 See, for example, judgments of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraphs 22 and 23, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 45 and the case-law cited. For a general discussion, see Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice*, Second Edition (Oxford University Press, 2014) pp. 60 to 106.

71 See judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 72.

72 See, for example, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 49 and the case-law cited.

73 See, in particular, judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 48, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 58.

116. First, under the Court's case-law, the 'guarantees of independence and impartiality require 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, in order 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'. [74]

117. The Court has also held that the requirement of judicial independence means that the *disciplinary regime* governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. In that regard, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, rules which provide for the involvement of an *independent body* in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, especially the rights of the defence, and rules which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary. [75]

118. On this basis, measures relating to the appointment of judges and the disciplinary regime governing judges are important aspects of the guarantees of judicial independence under EU law, and the existence of an independent body in the context of the disciplinary regime is part of those guarantees. It should therefore be considered that even if a body tasked with selecting judges, such as the NCJ, does not itself carry out the role of a court, the rules regarding, inter alia, its composition and functioning in so far as they bear on those aspects, may be taken into account for assessing whether a national court in which it has had a substantial role in selecting its members offers sufficient guarantees of independence under Article 47 of the Charter.

119. The ECtHR has consistently held that, in order to determine whether a tribunal can be considered 'independent' within the meaning of Article 6(1) ECHR, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. [76]

120. As I observed in my Opinions in *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18) and *Commission* v *Poland (Independence of the ordinary courts)* (C-192/18), [77] the independence and impartiality of a judge under Article 6(1) ECHR extends to an objective assessment of whether the tribunal itself offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. Appearances are of a certain importance, so that 'justice must not only be done, it must also be seen to be done'. What is at stake is the confidence which courts in a democratic society must inspire in the public. Further, in deciding in a given case if there is a legitimate reason to fear that the appearance of objective independence is not met, the ECtHR has held that what is decisive is whether this fear is objectively justified. [78]

74 See, for example, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 66; Opinion 1/17 of 30 April 2019, *EU-Canada CET Agreement*, EU:C:2019:341, paragraph 204. My emphasis. These guarantees of independence and impartiality are linked to the external and internal aspects, respectively, of independence established in the case-law: see, for example, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraphs 71 to 73 and the case-law cited.

75 See, for example, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 67; order of 12 February 2019, *RH*, C-8/19 PPU, EU:C:2019:110, paragraph 47. My emphasis.

76 See, for example, ECtHR, 6 November 2018, *Nunes De Carvalho v. Portugal*, CE:ECHR:2018:1106JUD005539113, paragraph 144 and the case-law cited.

77 EU:C:2019:325, point 71; EU:C:2019:529, point 111 (citing ECtHR, 25 September 2018, *Denisov v. Ukraine*, CE:ECHR:2018:0925JUD007663911, paragraphs 60 to 64, and ECtHR, 6 November 2018, *Nunes De Carvalho v. Portugal*, CE:ECHR:2018:1106JUD005539113, paragraphs 144 to 150). See also Bangalore Principles of Judicial Conduct, 2002, in particular points 1.3, 1.6 and 3.2.

78 See ECtHR, 6 May 2003, *Kleyn and Others v. The Netherlands*, CE:ECHR:2003:0506JUD003934398, paragraph 194 and the case-law cited.

121. In its case-law on Article 6(1) ECHR, the ECtHR has considered the manner in which judicial members are appointed to judicial councils or similar bodies when assessing whether a given body is independent. For example, in *Denisov v. Ukraine*,[79] it emphasised that, in view of the importance of reducing the influence of political organs on the composition of the body, it is relevant to assess the manner in which judges are appointed to that body, having regard to the authorities which delegated them and the role of the judicial community in that process. On that basis, it held that the composition of the body concerned disclosed a number of structural shortcomings which compromised the requirements of independence and impartiality under Article 6(1) ECHR. In particular, it took into account that the majority of the body consisted of non-judicial members appointed directly by the legislative and executive authorities, the number of judicial members elected by their peers was limited and executive authorities were included as *ex officio* members.

122. Moreover, in *Ástráðsson v. Iceland*,[80] the ECtHR found the existence of a flagrant breach of the applicable national rules on the appointment of judges where the other branches, in particular the executive, exercised undue discretion which undermined the integrity of the appointment process in violation of Article 6(1) ECHR. In that regard, it emphasised that the domestic legislative framework was intended to safeguard judicial independence in relation to the executive branch and to minimise the risk of party-political interests unduly influencing that process. It concluded that that process was to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and contravened a fundamental tenet of the rule of law that a tribunal must be established by law.

123. On this basis, I observe that, even if the circumstances differ from the present cases, the ECtHR's foregoing case-law on Article 6(1) ECHR takes account of the appearance of independence and the composition of judicial councils and similar bodies in its assessment of independence under that provision.

124. Further, as indicated by recent studies,[81] judicial councils and similar bodies play an essential role in guaranteeing the independence and autonomy of the judiciary in many, though not all, Member States. Although there is no uniform model for judicial councils, they are considered to have some common attributes relating to their mission to safeguard judicial independence and their operation within the judicial systems of their respective jurisdictions to maintain respect for the rule of law and fundamental rights.

125. According to European and international guidelines, I observe that those common attributes include the following aspects. First, the *mission* of judicial councils is to safeguard the independence of courts and judges, which means that they must be free from any influence from the legislative and executive authorities.[82]

79 ECtHR, 25 September 2018, ECLI:CE:ECHR:2018:0925JUD007663911, paragraphs 68 to 70 (quoting ECtHR, 9 January 2013, *Volkov v. Ukraine*, CE:ECHR:2013:0109JUD002172211, paragraphs 109 to 115).

80 ECtHR, 12 March 2019, CE:ECHR:2019:0312JUD002637418, in particular paragraphs 103, 121 to 123.

81 United Nations Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, 2 May 2018 ('2018 UN Report'), points 7 to 31 and citations therein. See also, for example, Council of Europe Consultative Council of European Judges (CCJE), Opinion No 10 (2007) on the Council for the Judiciary at the service of society, 23 November 2007 ('2007 CCJE Opinion'); Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012); David Kosař (guest ed.), Special Issue, 'Judicial Self-Governance in Europe' (2018) 19 *German Law Journal* 1567.

82 See, for example, 2010 Recommendation, footnote 26, point 26; European Network of Councils for the Judiciary (ENCJ), Councils for the Judiciary Report 2010-2011, Recommendation on Councils for the Judiciary, 2011 ('2011 ENCJ Report'), point 3.2; International Association of Judges, The Universal Charter of the Judge, updated on 14 November 2017, Article 2-3; 2018 UN Report, footnote 81, points 32 and 37.

126. Second, there is no single model that a jurisdiction is bound to follow in setting up a judicial council so long as its *composition* guarantees its independence and enables it to function effectively.[83] In particular, judicial councils should in principle be composed of at least a majority of judges elected by their peers to prevent manipulation or undue pressure.[84] The selection procedure should be carried out in an objective and transparent manner, in which a wide representation of the judiciary at all levels is guaranteed, and the involvement of legislative and executive authorities in the selection process is discouraged.[85]

127. Third, in order to guarantee the continuity of functions, the *mandates* of the members of judicial councils should not be replaced at the same time or renewed following parliamentary elections.[86]

128. Fourth, the selection, appointment and/or promotion of judges are among the most widely recognised *functions* of judicial councils, and the procedures must be carried out by judicial councils which are independent of the legislative and executive authorities.[87]

129. Consequently, it may be considered that the provisions governing the composition, mandates and functions of judicial councils are guided by the utmost objective to ensure their role of safeguarding judicial independence, and thus avoiding influence by the legislative and executive authorities in connection with, in particular, the appointment of their members. To my mind, while the Member States have discretion to choose whether to establish a judicial council or similar body, if such a council is established, its independence must be sufficiently guaranteed, inter alia, through such provisions.

### *3. Application to the circumstances of the main proceedings*

130. In the light of the above considerations, I am of the view that the Disciplinary Chamber forming the subject of the main proceedings does not satisfy the requirements of independence set out in Article 47 of the Charter.

131. I observe that the NCJ is a body whose mission is to safeguard the independence of courts and judges under the Polish constitution, and its functions include the selection of judges of the Supreme Court, including the Disciplinary Chamber, for appointment by the President of the Republic (see points 16 and 19 of this Opinion). Thus, the NCJ must be free of influence from the legislative and executive authorities in order to duly perform its tasks.

83 See, for example, European Commission For Democracy Through Law (Venice Commission), Opinion No 403/2006, Judicial Appointments, 22 June 2007, CDL-AD(2007)028, point 28; 2007 CCJE Opinion, footnote 81, point 15; 2018 UN Report, footnote 81, point 66.

84 See, for example, 1998 European Charter, footnote 32, Explanatory Memorandum, point 1.3; 2007 CCJE Opinion, footnote 81, points 17 to 19; 2010 Recommendation, footnote 26, point 27; Council of Europe Consultative Council of European Judges (CCJE), Magna Carta of Judges (Fundamental Principles), 17 November 2010, CCJE(2010) 3 Final, point 13; 2011 ENCJ Report, footnote 82, points 2.1 to 2.3.

85 See, for example, 1998 European Charter, footnote 32, point 1.3; 2007 CCJE Opinion, footnote 81, points 25 to 31; 2011 ENCJ Report, footnote 82, point 2.3; 2018 UN Report, footnote 81, points 75 and 76.

86 See, for example, 2007 CCJE Opinion, footnote 81, point 35; 2018 UN Report, footnote 81, point 83. See also Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality, 13 April 2016, CM(2016)36 final, Explanatory Note, Action 1.1, p. 20 ('Changes to the legal framework for the operation of judicial councils should not lead to the early termination of the mandates of persons elected under the previous framework, except when the change of the legal framework aims to reinforce the independence of the council's composition').

87 See, for example, 1998 European Charter, footnote 32, point 3.1; 2011 ENCJ Report, footnote 82, point 3.3; 2016 Rule of Law Checklist, footnote 36, point 81; 2018 UN Report, footnote 81, point 48.

132. Yet, the manner of appointment of the members of the NCJ itself discloses deficiencies which appear likely to compromise its independence from the legislative and executive authorities. First, this is based on the fact that, according to Article 9a of the Law on the NCJ (see point 22 of this Opinion), the 15 judicial members of the NCJ are no longer appointed by the judges, but instead by the Sejm. This means that the NCJ is composed of a majority of 23 of 25 members coming from the legislative and executive authorities. [88]

133. Moreover, according to Article 11a(2) of the Law on the NCJ, candidates for the judicial members of the NCJ can be proposed by groups of at least 2 000 Polish citizens or 25 judges. Pursuant to Article 11d of that law, the election of those members to the NCJ is carried out by the Sejm by a majority of 3/5 of the votes cast in the presence of at least half of the deputies entitled to vote (see points 24 and 25 of this Opinion).

134. Accordingly, it may be considered that the manner of appointment of the NCJ members entails influence of the legislative authorities over the NCJ, and it cannot be discounted that the Sejm may choose candidates with little or no support from judges, with the result that the judicial community's opinion may have insufficient weight in the process of the election of the NCJ members. [89] Irrespective of the alleged aims of enhancing the democratic legitimacy and the representativeness of the NCJ, this arrangement is apt to adversely affect the independence of the NCJ. [90]

135. It should also be borne in mind that the changes to the manner of appointment of the judicial members of the NCJ were accompanied by the premature termination of the mandates of the members of the NCJ. It has not been disputed that the Law on the NCJ provides for early termination of the judicial members of the NCJ at the moment of the election of the new members (see points 22 and 26 of this Opinion). Notwithstanding the purported aim to unify the terms of office of the NCJ membership, the immediate replacement of the currently sitting members of the NCJ in tandem with the new regime for appointment of the NCJ may be considered to further impair the NCJ's independence from the legislative and executive authorities. [91]

136. The judgment of 25 March 2019 of the Trybunał Konstytucyjny (Constitutional Court) (K 12/18) [92] does not invalidate my analysis. In that judgment, the Trybunał Konstytucyjny (Constitutional Court) held, first, that Article 9a of the Law on the NCJ (see point 22 of this Opinion) concerning the manner of appointment of the judicial members by the Sejm is consistent with several provisions of the Polish constitution, and second, that Article 44(1a) of the Law on the NCJ (see point 28 of this Opinion) concerning the procedure for judicial review of individual negative decisions of the NCJ on the selection of judges, is inconsistent with Article 184 of the Polish constitution. That judgment does not contain material relevant to the requirements of independence of the Disciplinary Chamber under EU law and, in any event, does not by itself remove all of the circumstances contributing to the impairment of the NCJ's independence as elaborated above.

88 That is, 21 NCJ members are appointed by the legislative authorities (15 judicial members + 4 members appointed by the Sejm + 2 members appointed by the Senat, the upper chamber of the Polish Parliament); 1 member is appointed by the President of the Republic; and of the 3 ex officio members, 1 is a member of the executive authority (Minister of Justice) and 2 are members of the judiciary (the First President of the Supreme Court and the President of the Supreme Administrative Court). See point 20 of this Opinion.

89 See, inter alia, the Commission's reasoned proposal, footnote 3, recitals 141 to 143; Venice Commission Opinion No 904/2017, footnote 4, points 24 to 26; 2018 UN Report on Poland, footnote 4, points 67 to 69.

90 It may also be considered that alternative means may be taken to achieve those aims, as indicated by Venice Commission Opinion No 904/2017, footnote 4, point 27; Council of Europe Group of States Against Corruption (GRECO), Addendum to the Fourth Round Evaluation Report on Poland, 22 June 2018, Greco-AdHocRep(2018)3, points 28 and 29.

91 See, for example, Commission's reasoned proposal, footnote 3, recitals 140, 144, 145 and 175; Venice Commission Opinion No 904/2017, footnote 4, points 28 to 31; 2018 UN Report on Poland, footnote 4, point 70.

92 For a summary, see Trybunał Konstytucyjny (Constitutional Court) press release after the hearing, K 12/18, available at http://trybunal.gov.pl/.

137. On this basis, taking into account the fact that judicial councils are crucial for guaranteeing the independence of the judiciary in the jurisdictions where they are established, and that they must themselves be independent and free from interference from the legislative and executive authorities in carrying out their tasks, the role of the NCJ in selecting judges of the Disciplinary Chamber leads me to consider that such a chamber does not offer sufficient guarantees of independence under Article 47 of the Charter. There are legitimate reasons to objectively doubt the independence of the Disciplinary Chamber in light of the role of the legislative authorities in electing the 15 judicial members of the NCJ and the role of that body in selecting judges eligible for appointment by the President of the Republic to the Supreme Court. These doubts cannot be dispelled by the, technically speaking, advisory role of the NCJ in this process.

138. Further, as indicated by the applicants, the EFTA Surveillance Authority and the Commission, there are a number of considerations relating to the selection of the judges of the Disciplinary Chamber which should be taken into account in conjunction with the changes to the manner of appointment of the judicial members of the NCJ.

139. In particular, it has not been disputed that, first, until the moment when all the posts in the Disciplinary Chamber have been filled for the first time, judges of that chamber are appointed by the President of the Republic (see point 18 of this Opinion); second, the Disciplinary Chamber is governed to a certain degree by provisions distinguishing it from the other chambers of the Supreme Court, such as Article 20 of the 2017 Law on the Supreme Court, providing that functions of the First President of the Supreme Court are exercised by the President of the Disciplinary Chamber in respect of the judges sitting in that chamber (see point 14 of this Opinion); third, the arrangements regarding the Disciplinary Chamber were introduced as part of the legislative package of measures on the reform of the Polish justice system (see point 1 of this Opinion); and fourth, the Disciplinary Chamber is tasked with adjudicating cases involving, in particular, the retirement of Supreme Court judges and disciplinary proceedings against judges which are both aspects concerned by that package of measures (see points 15 and 17 of this Opinion).[93] Indeed, the 2017 Amending Law on the NCJ entered into force about three months before the 2017 Law on the Supreme Court (see points 11 and 21 of this Opinion), giving the NCJ this role in selecting the judges eligible for appointment by the President of the Republic to the Disciplinary Chamber.

140. In that regard, I note that, in the resolution setting out its position on the present cases,[94] the Disciplinary Chamber emphasises, inter alia, that the appointment of judges is the constitutional prerogative of the President of the Republic undertaken in cooperation with the NCJ, and that the Disciplinary Chamber satisfies the requirements of Article 6(1) ECHR, as it is established by law and the provisions on its status, competence and internal organisation guarantee the independence and impartiality of that chamber and its judges. It claims that the independence and impartiality of judges of the Disciplinary Chamber are assured, in particular, by rules on the recusal of judges, and must be assessed in the light of a concrete factual situation.

93 It should be pointed out that, in its Opinion No 904/2017, footnote 4, particularly points 89 to 95, 128 to 131, the Venice Commission considered the combined effects of the Polish legislation on the NCJ and the Disciplinary Chamber, along with other reforms, as posing a grave threat to judicial independence. Also, on 17 September 2018, the European Network of Councils for the Judiciary (ENCJ) suspended the NCJ's membership which was due to the changes in the appointment of its judicial members in conjunction with 13 additional circumstances, including that the Law on the NCJ is part of the overall reform to strengthen the position of the executive and infringe judicial independence: see ENCJ Position Paper, footnote 28, and Press Release, ECNJ Suspends Polish National Judicial Council — KRS, available at http://www.encj.eu/.

94 See footnote 20 of this Opinion.

141. Irrespective of the arguments advanced by the General Prosecutor and Poland, along with the Disciplinary Chamber, regarding the constitutional prerogative of the President of the Republic to appoint judges and the formal guarantees of independence applicable to the Disciplinary Chamber, those arguments are not sufficient to dispel the impression of the lack of the objective independence of that chamber when viewed in light of the considerations referred to in points 132 to 135 and 139 of this Opinion.

142. Moreover, the situation arising in the main proceedings generates an amplified impression of the lack of independence, given that the applicants are seeking an independent and impartial tribunal to remedy an alleged breach of the protections of their irremovability and independence. With respect to the applicant in Case C-585/18, the arrangements as they stand appear to be contrary to the principle of equality of arms.[95] This is so because the applicant has received a negative opinion from the NCJ, and at the same time, the NCJ has a role in the composition of the Disciplinary Chamber, the court before which he is offered a remedy under Polish law. This seems problematic from the point of view of the equality of arms in the light of the conclusions I have reached with respect to the independence shortcomings of the Disciplinary Chamber caused by the manner in which the members of the NCJ are appointed.

143. I would like to underscore, however, that none of this means that the requirements of judicial independence should be interpreted as preventing the Member States from making appropriate reforms to their regimes concerning, in particular, the selection of judges and the composition of their judicial councils or similar bodies, but rather that the Member States must carry out such reforms while complying with their obligations under EU law which includes the obligation to maintain the independence of their courts and judges in conformity with Article 47 of the Charter.

144. That said, arguments advanced by the General Prosecutor and Poland based on alleged similarities between the solutions adopted in Poland and those in other Member States are unpersuasive. As indicated by the applicants, the present cases concern the situation in Poland, taking account in particular of the considerations mentioned in points 132 to 135 and 139 of this Opinion.[96] It should perhaps also be emphasised that there are no double standards among Member States in this context, as any Member State measure which impairs judicial independence under Article 47 of the Charter should not be tolerated in the Union legal order.

### *4. Assessment under the second subparagraph of Article 19(1) TEU*

145. In addition to violation of Article 47 of the Charter, does the breach of the requirements of judicial independence in the circumstances of the main proceedings amount to a structural or generalised infirmity which compromises the essence of judicial independence for the purposes of the second subparagraph of Article 19(1) TEU,[97] thereby more broadly breaching the rule of law as protected by Article 2 TEU?[98]

95 See, for example, judgments of 28 July 2016, *Ordre des barreaux francophones and germanophone and Others*, C-543/14, EU:C:2016:605, paragraphs 40 and 41, and of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 96 and the case-law cited.

96 I note that, according to the 2019 EU Justice Scoreboard, of the 20 Member States surveyed, Poland is the only Member State where appointment of the judicial members of the judicial council is proposed not exclusively by judges and appointed by the Parliament. See Commission Communication, The 2019 EU Justice Scoreboard, COM(2019) 198 final, 26 April 2019, figure 54, pp. 55 and 62. See also 2017 OSCE Final Opinion on Poland, footnote 4, points 43 to 46.

97 Opinion of Advocate General Tanchev, *Commission* v *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:529, point 115 and the case-law cited. See also Opinion of Advocate General Tanchev in *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:325, point 63 fn 41.

98 See, in particular, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 32, and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 47. As I observed in point 40 of my Opinion in *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:517, 'a risk of breach of the right to a fair trial may exist in the issuing Member State even if it is not in breach of the rule of law.'

146. In my Opinion in *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18),[99] I took the view that national measures lowering the retirement age of judges of the Supreme Court, without adequate safeguards to protect the rule against their irremovability and safeguard their independence, amounted in substance to such a structural infirmity, affecting as it did the entire tier of Supreme Court judges. In my Opinion in *Commission* v *Poland (Independence of the ordinary courts)* (C-192/18),[100] I reached the same conclusion with respect to national measures lowering the retirement age of judges of the ordinary courts, affecting as it did that entire tier of the Polish judiciary. Both of those reforms affected the structure of the Polish judiciary in generalised terms.

147. I observe that, in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18),[101] the Court did not appear to address the severity of the breach of rules protecting the irremovability and independence of judges in the context of the second subparagraph of Article 19(1) TEU. No reference was made in that judgment to a structural or generalised breach of those rules.[102]

148. I have come to the conclusion that, in all events, the circumstances of the main proceedings amount to a breach of the second subparagraph of Article 19(1) TEU.

149. I reach this conclusion primarily because the Polish legislation instituting a new chamber of the Supreme Court, here the Disciplinary Chamber, to hear complaints of Supreme Court judges who have been retired from the Supreme Court early and unlawfully under the second subparagraph of Article 19(1) TEU is intimately bound up with the problems which I considered in my Opinion in *Commission v Poland (Independence of the Supreme Court)* (C-619/18) and which affected Supreme Court judges in a general manner. In its judgment of 24 June 2019 in that case,[103] the Court held that the measures concerned breached the second subparagraph of Article 19(1) TEU (see point 2 of this Opinion).

150. The NCJ has a significant role to play in the appointment of the judges of that new chamber which, on close analysis, appears at odds with European and international guidelines on the independence of such bodies from the legislative and executive authorities (see points 124 to 135 of this Opinion). This provides a gateway for a high degree of influence of the political authorities on the appointment of Supreme Court judges which affects the structure of the Polish judiciary in generalised terms.

151. Moreover, it is the newly created Disciplinary Chamber which decides on cases involving judges affected by the measures which the Court recently found in breach of the second subparagraph of Article 19(1) TEU as just mentioned (see point 149 of this Opinion). Given the timing of the new measures on the election of the judicial members of the NCJ and the role that the NCJ plays in determining who is appointed to the Disciplinary Chamber, this potentially prejudices the prospects of Supreme Court judges reaching the newly fixed retirement age of receiving a fair hearing from an independent tribunal to challenge the measures against them.

99 EU:C:2019:325.

100 EU:C:2019:529.

101 EU:C:2019:531.

102 Compare judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, in particular paragraphs 60, 73 and 74.

103 *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531. I observe that, in paragraphs 115 and 116 of that judgment, the Court found that the intervention of the NCJ in the context of a procedure for extending the period during which a judge carries out his duties beyond the normal retirement age may in principle contribute to making that procedure more objective, but 'that is only the case in so far as certain conditions are satisfied, in particular in so far as that body is itself independent of the legislative and executive authorities and of the authority to which it is required to deliver its opinion'.

152. Thus, given the proximity of the problem arising in the present cases and that which I considered in my Opinion in *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18), it, too, should be viewed as structural and generalised and thus going to the 'essence' of judicial independence guaranteed under the second subparagraph of Article 19(1) TEU.

### *E. Question 2 in Case C-585/18 and Question 3 in Cases C-624/18 and C-625/18 and the assumption of jurisdiction because the Disciplinary Chamber is not an independent tribunal*

153. If the Court finds that a chamber of a national last instance court, such as the Disciplinary Chamber in the main proceedings, does not meet the requirements of judicial independence provided for in EU law, the referring court wishes to know whether another national court, such as itself, is required under EU law to disapply the provisions of national law precluding it from having jurisdiction in the disputes.

154. The answer to this question is in the affirmative for the following reasons.

155. Under established case-law, the primacy of EU law means that the national courts called upon, in the exercise of their jurisdiction, to apply provisions of EU law must be under the duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, including procedural provisions, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means.[104] National courts are in particular required to ensure within their jurisdiction the judicial protection flowing from Article 47 of the Charter and to guarantee the full effectiveness of that article by disapplying if need be any contrary provision of national law.[105]

156. It follows that, in the present cases, national provisions conferring jurisdiction to rule in a dispute involving EU law to a chamber of a national last instance court which does not meet the requirements of judicial independence laid down in Article 47 of the Charter and/or the second subparagraph of Article 19(1) TEU must be disapplied. As indicated by the Commission, in light of the importance of judicial independence for ensuring effective judicial protection for individuals under EU law, another chamber of a national last instance court, such as the referring court in the main proceedings, must be able, of its own initiative, to disapply national provisions which are incompatible with that principle. National courts are obliged to supply an effective remedy to enforce EU law when it is otherwise unavailable under national law.[106]

## VII. Conclusion

157. In light of the aforementioned considerations, I propose that the Court of Justice answer the questions referred by the Sąd Najwyższy (Supreme Court, Poland) as follows:

(1) There is no need to give a ruling on Question 1 in Cases C-624/18 and C-625/18.

In the alternative, Article 47 of the Charter of Fundamental Rights of the European Union, in conjunction with 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 meaning that, where an appeal is brought before a court of last instance in a Member State against an alleged infringement of the prohibition of discrimination on the ground of age in respect of a

104 See, for example, judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of the Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 35 and the case-law cited.

105 See judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 79.

106 Judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, in particular paragraphs 40 and 41. See also, for example, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 103 and 104.

judge of that court, together with a motion for granting security in respect of the reported claimed, that court — in order to protect the rights arising from EU law by ordering an interim measure provided for under national law — must disapply national provisions which confer jurisdiction, in the case in which the appeal was lodged, on an organisational unit of that court which is not operational by reason of a failure to appoint judges adjudicating within it.

(2) The requirements of judicial independence laid down in Article 47 of the Charter should be interpreted as meaning that a newly-created chamber of a court of last instance of a Member State which has jurisdiction to hear a case by a national court judge and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts, namely the Krajowa Rada Sądownictwa (National Council of the Judiciary), which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, does not satisfy those requirements.

The same is precluded by the second subparagraph of Article 19(1) TEU.

(3) A chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court seised with an appeal in an EU case is required by the primacy of EU law to disapply provisions of national legislation which preclude it from having jurisdiction in that case.