Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 15 December 2022[1]

**Joined Cases C-615/20 and C-671/20**

**Prokuratura Okręgowa w Warszawie**
**v**
**YP and Others (C-615/20),**
**M.M. (C-671/20)**

(Request for a preliminary ruling from the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland))

(Reference for a preliminary ruling – Rule of law – Effective judicial protection in the fields covered by EU law – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of the Fundamental Rights of the European Union – Independence of judges – Authorisation to initiate criminal proceedings against a judge and suspension of that judge's functions by the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) – National courts prohibited from examining the legitimacy of courts and tribunals or from assessing the legality of the appointment of judges and judicial powers arising from such an appointment – Primacy of EU law – Duty of sincere cooperation – Principles of legal certainty and the authority of *res judicata*)

Table of contents

I. Introduction . . . . . 2

II. Legal framework – Polish law . . . . . 3

A. The Constitution . . . . . 3

B. The amended Law on the Supreme Court . . . . . 4

C. The amended Law on the organisation of the ordinary courts . . . . . 4

D. The Law on the KRS . . . . . 6

[1] Original language: English.

E. The Code of Criminal Procedure . . . 7

III. The facts of the main proceedings and the questions referred for a preliminary ruling . . . 7

A. Case C-615/20 . . . 7

B. Case C-671/20 . . . 13

IV. Procedure before the Court . . . 15

V. Assessment . . . 16

A. Admissibility . . . 16

B. Substance . . . 18

1. Preliminary remarks . . . 18

2. The first, second and third questions in Case C-615/20 . . . 18

3. The second question in Case C-671/20 . . . 23

4. The fourth question in Case C-615/20 and the first, third and fourth questions in Case C-671/20 . . . 26

VI. Conclusion . . . 29

## I. Introduction

1. These requests for preliminary rulings again raise issues as to the compatibility with EU law of certain aspects of the recent reform of the Polish judicial system. They concern authorisations granted by the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) [2] to prosecute and to suspend a judge from office, thereby preventing him or her from ruling on certain criminal cases to which he or she had been assigned. For that purpose, the referring court [3] asks the Court of Justice to interpret Article 2 and the second subparagraph of Article 19(1) TEU, Article 47 of the Charter of Fundamental Rights of the European Union, [4] and the principles of primacy of EU law, sincere cooperation [5] and legal certainty. Should the Court decide that, as a matter of EU law, the Disciplinary Chamber could not lawfully grant those authorisations the referring court seeks to ascertain the consequences that conclusion has for the composition of the court seised of the criminal proceedings.

2 'the Disciplinary Chamber'.

3 Which is the same in Case C-615/20 and C-671/20 but sitting in different formations.

4 'the Charter'.

5 Referred to in Article 4(3) TEU.

## II. Legal framework – Polish law

### *A. The Constitution*

2. By Article 45(1) of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland):

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

3. Article 144(2) and (3) of the Constitution of the Republic of Poland provides:

'2. In order to be valid, official acts of the President of the Republic must be countersigned by the President of the Council of Ministers who thereby assumes responsibility before the Sejm [(Lower Chamber of the Polish Parliament)].

3. The provisions of paragraph 2 above shall not apply in the following cases:

…

(17) the appointment of judges;

…'

4. Article 179 of the Constitution of the Republic of Poland is in the following terms:

'Judges shall be appointed for an indefinite period by the President of the Republic on a proposal [of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; "the KRS")].'

5. According to Article 180(1) of the Constitution of the Republic of Poland, judges are irremovable.

6. Article 181 of the Constitution of the Republic of Poland states:

'A judge may be held criminally liable or be deprived of liberty only with the prior consent of a court determined by law. A judge may not be detained or arrested, except in the case of apprehension in the commission of an offence if his or her detention is essential to ensure the proper course of proceedings. The president of the court having territorial jurisdiction shall be informed forthwith of the detention and may order the immediate release of the person detained.'

7. Article 187 of the Constitution of the Republic of Poland provides:

'1. The [KRS] shall be composed as follows:

(1) the First President of the [Sąd Najwyższy (Supreme Court)], the Minister [for] Justice, the President of the [Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)] and an individual appointed by the President of the Republic,

(2) 15 judges chosen from among the judges of the [Sąd Najwyższy (Supreme Court)], the ordinary courts, the administrative courts and the military courts,

(3) Four members chosen by [the Sejm (Lower House of the Polish Parliament)] from among its Deputies and two members chosen by [the Senat (Upper House of the Polish Parliament)] from among its Senators.

…

3. The term of office of those chosen as members of the [KRS] shall be four years.

4. The organisational structure, the scope of activity and procedures for work of the [KRS], as well as the manner of choosing its members, shall be specified by statute.'

8. Article 190(1) of the Constitution of the Republic of Poland states:

'The decisions of the [Trybunał Konstytucyjny (Constitutional Court, Poland)] are binding *erga omnes* and final.'

### *B. The amended Law on the Supreme Court*

9. Article 27(1) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U of 2018, item 5) which was amended by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws) of 20 December 2019 (Dz. U. of 2020, item 190) ('the Amending Law') ('the amended Law on the Supreme Court') provides:

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

…

(1a) cases relating to authorisation to initiate criminal proceedings against judges, trainee judges, prosecutors and associate prosecutors or to place them in provisional detention.

…'

### *C. The amended Law on the organisation of the ordinary courts*

10. Article 41b of the ustawa – Prawo o ustroju sądów powszechnych (Law on the organisation of the ordinary courts) of 27 July 2001 (Dz. U. of 2001, No 98, item 1070) provides:

'1. The authority competent to examine a complaint or a request concerning the activity of a court shall be the president of the court.

…

3. The authority competent to examine a complaint concerning the activity of the president of a sąd rejonowy (district court), the president of a sąd okręgowy (regional court) or the president of a sąd apelacyjny (court of appeal) shall be, respectively, the president of the sąd okręgowy (regional court), the president of the sąd apelacyjny (court of appeal) and the [KRS].'

11. Article 42a of that law, as amended by the Amending Law ('the amended Law on the organisation of the ordinary courts'), is as follows:

'1. In the context of the activities of the courts or the organs of the courts, it shall not be permissible to call into question the legitimacy of the tribunals and courts, the constitutional organs of the State or the organs responsible for reviewing and protecting the law.

2. An ordinary court or other authority cannot establish or assess the legality of the appointment of a judge or of the power to exercise judicial functions that derives from that appointment.'

12. In accordance with Article 47a(1) of that law, cases are to be assigned to judges and trainee judges at random. Under Article 47b(1) of that law, a change in the composition of a court may take place only where it is impossible for that court to examine the case in its current composition or if there is a lasting obstacle to the examination of the case by that court in its current composition. In such a case, the provisions of Article 47a are to apply to the reassignment of the case. Article 47b(3) of that law states that the decision to change the composition of a court is to be taken by the President of that court or by a judge authorised by him or her.

13. Article 80 of the amended Law on the organisation of the ordinary courts provides that:

'1. Judges may be arrested or be the subject of criminal proceedings only with the authorisation of the disciplinary court that has jurisdiction. This provision does not concern arrest in flagrante delicto, if that arrest is essential in order to ensure the proper conduct of the proceedings. Pending the adoption of a decision authorising the initiation of criminal proceedings against a judge, only urgent measures may be carried out.

…

2c. The disciplinary court shall adopt a decision authorising the initiation of criminal proceedings against a judge if the suspicions against him or her are sufficiently substantiated. The decision shall rule on the authorisation to initiate criminal proceedings against the judge and shall state the reasons on which it is based.

2d. The disciplinary court shall examine the application for authorisation to initiate criminal proceedings against a judge within 14 days of receipt thereof.'

14. By Article 107(1) of that law:

'A judge shall be accountable, at the disciplinary level, for breach of professional obligations (disciplinary faults), including in cases of:

…

(3) acts calling into question the existence of the employment relationship of a judge, the effectiveness of the appointment of a judge or the legitimacy of a constitutional organ of the Republic of Poland;

…'

15. As set out in Article 110(2a) of the amended Law on the organisation of the ordinary courts:

'The disciplinary court in the territory of which the judge facing the proceedings performs his or her duties shall have jurisdiction *ratione territoriae* to hear and determine the cases referred to in Article 37(5) and in point 3 of Article 75(2). In the cases referred to in Article 80 and Article 106zd, the court having jurisdiction shall be, at first instance, the Sąd Najwyższy [(Supreme Court)] sitting as a single judge of the Disciplinary Chamber and, at second instance, the Sąd Najwyższy [(Supreme Court)] sitting in a formation of three judges of the Disciplinary Chamber.'

16. Article 129 of that law provides:

'1. The disciplinary court may suspend a judge against whom disciplinary proceedings or incapacity proceedings have been initiated from his or her duties and may also do so if it adopts a resolution permitting the judge to be held criminally liable.

2. If the disciplinary court adopts a resolution permitting a judge to be held criminally liable for a deliberate crime prosecuted by public indictment, it shall suspend the judge from his or her duties automatically.

3. The disciplinary court, when suspending a judge from his or her duties, shall reduce the amount of his or her remuneration by between 25% and 50% for the duration of that suspension; this does not concern persons in relation to whom incapacity proceedings have been initiated.

3a. If the disciplinary court adopts a resolution permitting a retired judge to be held criminally liable for a deliberate crime prosecuted by public indictment, it shall reduce the amount of his or her remuneration by between 25% and 50% for the duration of the disciplinary proceedings.

4. If disciplinary proceedings have been dismissed or have ended in acquittal, compensation shall be paid in full in respect of all the components of remuneration or emoluments.'

### *D. The Law on the KRS*

17. According to Article 9a of the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. of 2011, No 126, item 714), as amended by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, item 3) ('the Law on the KRS'):

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

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

3. The collective term of the new members of the [KRS] elected among the judges shall begin the day following their election. Outgoing members of the [KRS] shall exercise their posts until the day on which the collective term of the new members of the [KRS] begins.'

18. By virtue of the transitional provision contained in Article 6 of the Law amending the Law on the National Council of the Judiciary and certain other laws, which entered into force on 17 January 2018:

'The term of office of the members of the [KRS] referred to in Article 187(1)(2) of the Constitution of the Republic of Poland, elected pursuant to provisions now in force, shall continue until the day preceding the term of the new members of the [KRS], without, however, exceeding 90 days from the date of the entry into force of the present law, unless that term has not already expired.'

### *E. The Code of Criminal Procedure*

19. Article 439(1) of the ustawa – Kodeks postępowania karnego (Law on the Code of Criminal Procedure) of 6 June 1997 (Dz. U. of 1997, item 555) ('the Code of Criminal Procedure') provides:

'Irrespective of the limits of the appeal and the grounds of appeal put forward and the impact of the infringement on the content of the ruling, the appeal court shall set aside the ruling under appeal if:

(1) a person who is not authorised to give a ruling or is incapable of doing so or who is excluded from ruling pursuant to Article 40 has taken part in the ruling;

(2) the composition of the court was inappropriate or one of its members was not present throughout the duration of the hearing;

…'

20. Under Article 523(1) of the Code of Criminal Procedure, an appeal on a point of law may be brought only on the basis of the infringements referred to in Article 439 thereof or of another gross violation of the law where that violation could have had a significant effect on the content of the ruling.

## III. The facts of the main proceedings and the questions referred for a preliminary ruling

### *A. Case C-615/20*

21. The Prokuratura Okręgowa w Warszawie (Regional Prosecutor, Warsaw, Poland) ('the Regional Public Prosecutor') charged YP and 13 other individuals with a number of offences under the Criminal Code that caused harm to 229 victims. The case[6] is proceeding as against 11 defendants. The case file consists of 197 volumes and several dozen volumes of annexes. The trial has been conducted over 100 days, during which the defendants, victims and over 150 witnesses have given evidence. Only a few witnesses and three experts remain to be heard. Judge I.T. sat in the case and participated in the trial.

6 Case VIII K 105/17.

22. On 14 February 2020, the Wydział Spraw Wewnętrznych Prokuratury Krajowej (National Public Prosecutor's Office, Internal Affairs Division, Poland) ('the NPPO') sought authorisation from the Disciplinary Chamber[7] to prosecute Judge I.T. for a public failure to fulfil his duties and acting ultra vires by allowing representatives of the media to record a hearing of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), the reading in court of the order made in that case and the oral reasons given therefor. According to the NPPO, Judge I.T. disclosed information to unauthorised persons about a preliminary investigation that the Regional Public Prosecutor had conducted. Since Judge I.T. obtained that information in the course of his duties, the NPPO took the view that his actions had harmed the public interest.

23. Acting as a court of first instance, on 9 June 2020, the Disciplinary Chamber dismissed the NPPO's request for authorisation to prosecute Judge I.T. The NPPO appealed against that decision. On 18 November 2020, the Disciplinary Chamber, on this occasion acting as a court of second instance, lifted Judge I.T.'s immunity from prosecution, suspended him from office and reduced his remuneration by 25% for the duration of his suspension.[8] The suspension will continue until the conclusion of the criminal proceedings against him.

24. Due to his suspension from the exercise of his functions, Judge I.T. may not hear any of the cases that had been assigned to him, including Case VIII K 105/17. In accordance with the principle of the constant composition of court formations enshrined in the Code of Criminal Procedure, only the formation of the court[9] that conducted the entire trial is competent to deliver judgment. The proceedings in Case VIII K 105/17 must thus restart from scratch. In particular, the judge appointed to replace Judge I.T. must hear all of the evidence adduced at the trial to date. According to the referring court, that situation is contrary to Article 47 of the Charter, in particular the right to an effective judicial remedy and the right of every person to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.[10]

25. The order for reference recites that, in its judgment of 5 December 2019[11] and in its orders of 15 January 2020,[12] the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber), Poland),[13] which ruled on the proceedings out of which the *A. K.* judgment arose, held that, in its current composition, the KRS is not independent of the legislature and of the executive, and that the Disciplinary Chamber – whose members were appointed upon a proposal of the KRS in its current composition – is not a 'tribunal' within the meaning of Article 47 of the Charter, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and Article 45(1) of the Constitution of the Republic of Poland. In a joint resolution of 23 January 2020, the combined Civil, Criminal and Labour and Social Insurance Chambers of the Sąd Najwyższy (Supreme Court) confirmed the position of the Labour and Social Insurance Chamber, holding that a formation of the Disciplinary Chamber in which a person appointed upon a proposal of the KRS in its current composition sits is defective. The joint chamber further resolved that, due to its structural characteristics, the Disciplinary Chamber is not a 'tribunal' for the purposes of the

7 Pursuant to the legislation in force, the Disciplinary Chamber had jurisdiction to hear applications for authorisation to prosecute or detain a judge both at first and at second instance.

8 Case II DO 74/20 ('the Disciplinary Chamber's resolution').

9 That is to say the same judges or judges and jurors.

10 Referring to, inter alia, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982) ('the *A. K.* judgment').

11 Case III PO 7/18.

12 Cases III PO 8/18 and III PO 9/18.

13 'the Labour and Social Insurance Chamber'.

aforementioned provisions and its rulings are not 'judicial rulings'. By decision of 23 September 2020,[14] the Disciplinary Chamber held that the *A. K.* judgment 'cannot be regarded as binding in the Polish legal system' as the Labour and Social Insurance Chamber had operated in 'unlawful formations', in the main proceedings that gave rise to the request for a preliminary ruling.

26. The referring court, in which Judge I.T. sits, is part of the Polish judicial system and rules on cases in 'fields covered by Union law' within the meaning of the second subparagraph of Article 19(1) TEU.[15] The Disciplinary Chamber's decision to lift Judge I.T.'s immunity from criminal prosecution and to suspend him from carrying out his duties, with the consequence that Case VIII K 105/17 must be heard from the outset by a different formation, causes the referring court to doubt whether the Disciplinary Chamber constitutes an independent and impartial tribunal previously established by law.

27. In the referring court's view, rules governing the disciplining[16] and the dismissal[17] of judges are subject to the requirement of effective judicial protection under the second subparagraph of Article 19(1) TEU. The referring court has doubts as to whether national rules authorising the criminal prosecution of judges or their detention are equally subject to the requirement of effective judicial protection. It is of the view that the initiation of criminal proceedings against a judge should be subject to the same requirements as the initiation of disciplinary proceedings for the following reasons. First, authorisation to prosecute may be given only if, in the view of the disciplinary court, there is a sufficiently justified suspicion that a criminal offence has been committed. Second, once such authorisation has been issued, the disciplinary court may[18] suspend the judge in question, thereby preventing him or her from ruling on cases until those criminal proceedings are at an end. Third, for the duration of that suspension, the disciplinary court is obliged to reduce the judge's remuneration by between 25% and 50%. Fourth, the grant of an authorisation to prosecute a judge does not direct any time limit for filing an indictment in that case. As a consequence of that authorisation, a judge may be suspended and his or her remuneration reduced for an indefinite period of time. An assessment of all of those circumstances may justify a conclusion that the procedure to lift a judge's immunity from prosecution and/or detention has consequences similar to measures adopted under the disciplinary regime for judges. That procedure should therefore be equally subject to the requirement of effective judicial protection under the second subparagraph of Article 19(1) TEU.

28. According to the referring court, all public prosecutors in Poland report to the Minister for Justice who, by law, holds the post of Prokurator Generalny (Prosecutor General). Whilst a public prosecutor is ostensibly independent in the performance of his or her duties, he or she is obliged to execute the orders, guidelines and instructions of the public prosecutor to whom he or she reports, who may be the Minister for Justice, including in proceedings before the Disciplinary Chamber.

14 II DO 52/20.

15 See judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 35 and the case-law cited).

16 Order of the Court of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277, paragraphs 34 and 35 and the case-law cited) ('the order of 8 April 2020').

17 Judgment of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924, paragraph 114 and the case-law cited).

18 And shall so do where a judge is charged with an offence committed with intent, prosecuted on public indictment.

29. The request for preliminary ruling represents that, under the Constitution of the Republic of Poland, the Minister for Justice is a member of the KRS. Most of the 15 of the 25 members of the KRS the Sejm selected from amongst judges had close links to the Minister for Justice at the time of their selection and they retain those links. The KRS as so composed subsequently participated in the nomination of all of the members of the Disciplinary Chamber, which include both former public prosecutors and lawyers who publically supported the Minister for Justice's actions.

30. According to the Court's settled case-law, the concept of 'independence', which is inherent in the task of adjudication, requires that a body act as a third party in relation to parties to proceedings before it.[19] Given the composition of the Disciplinary Chamber, the current composition of the KRS, the hierarchical nature of the system of public prosecution and the provisions governing the authorisation of the prosecution or detention of a judge, the referring court has significant doubts as to whether the Disciplinary Chamber acts as a third party in relation to the public prosecutor.

31. Furthermore, in the light of the order of 8 April 2020, the referring court also has reservations as to whether the Disciplinary Chamber should hear applications for authorisation to prosecute or to detain judges. It considers that the concept of 'disciplinary cases concerning judges' referred to in the first indent of point 1 of the operative part of that order also includes cases authorising the prosecution and detention of judges. In any event, given that the composition of the Disciplinary Chamber remains unchanged, all cases pending before that body are heard by a formation that does not meet the requirements of independence pursuant to the second indent of point 1 of the operative part of the order of 8 April 2020.

32. In view of the foregoing, the referring court considers that the Disciplinary Chamber's authorisation is not a 'judicial ruling' since that chamber neither meets the requirements for effective judicial protection for the purposes of EU law nor ensures 'both stability of the law and legal relations and the sound administration of justice'.[20] It accordingly does not consider itself bound by the Disciplinary Chamber's orders. Since the validity of the Disciplinary Chamber's authorisation has a direct impact upon whether the referring court is itself an independent and impartial tribunal previously established by law, it seeks the Court's guidance. In that context, the referring court seeks to ascertain whether the obligation to refuse to treat a ruling of the Disciplinary Chamber as binding applies equally to other State bodies[21] and, accordingly, whether an unjustified refusal to allow a judge in respect of whom such a prosecution has been authorised to sit on a court infringes EU law.

33. In those circumstances, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must EU law – in particular Article 47 of [the Charter] and the right to an effective remedy before a tribunal and the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law expressed therein – be interpreted as precluding the national legislation set out in detail in questions 2 and 3 below, namely, [Article 80, Article 110(2a) and Article 129 of the amended Law on the organisation of the ordinary courts] and Article 27(1)(1a) of the [amended Law on the Supreme Court],

19 Judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraph 62 and the case-law cited).

20 See judgment of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2020:260, paragraphs 88 and 89).

21 Such as the Minister for Justice, the presidents of courts, the Trybunał Konstytucyjny (Constitutional Court) or disciplinary bodies.

which [allow the Disciplinary Chamber] to lift a judge's immunity and suspend a judge from his or her duties, and thus to effectively prevent a judge from ruling on the cases assigned to him or her, particularly since:

(a) the [Disciplinary Chamber] is not a "tribunal" within the meaning of Article 47 of the Charter, Article 6 of [the ECHR] and Article 45(1) of the [Constitution of the Republic of Poland] (judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court*), C-585/18, C-624/18 and C-625/18, EU:C:2019:982);

(b) members of the [Disciplinary Chamber] have particularly close links to the legislature and the executive (order of 8 April 2020, *Commission* v *Poland*, C-791/19 R, EU:C:2020:277);

(c) the Republic of Poland was obliged to suspend the application of certain provisions of the Law on the Supreme Court concerning the chamber known as the [Disciplinary Chamber] and to refrain from referring cases pending before that Chamber to a panel whose composition does not meet the requirements of independence (order of 8 April 2020, *Commission* v *Poland*, C-791/19 R, EU:C:2020:277).

(2) Must EU law – in particular Article 2 TEU and the value of the rule of law expressed therein and the requirements for effective legal protection under the second subparagraph of Article 19(1) TEU – be interpreted as meaning that "the rules governing the disciplinary regime of those who have the task of adjudicating" also cover provisions relating to the criminal prosecution or detention of a judge of a national court, such as Article 181 of the [Constitution of the Republic of Poland] in conjunction with Articles 80 and 129 of the [amended Law on the organisation of the ordinary courts], according to which provisions:

(a) the criminal prosecution or deprivation of liberty (detention) of a judge of a national court, in principle at the request of a public prosecutor, requires authorisation from the disciplinary court having jurisdiction;

(b) a disciplinary court, having authorised the criminal prosecution or deprivation of liberty (detention) of a judge of a national court, is allowed (and in some cases is obliged to) suspend this judge from his or her duties;

(c) when suspending a judge of a national court from his or her duties, the disciplinary court is at the same time obliged to reduce his or her remuneration, within the limits set by the relevant provisions, for the duration of the suspension?

(3) Must EU law – in particular the provisions referred to in question 2 – be interpreted as precluding legislation of a Member State, such as Article 110(2a) of the [amended Law on the organisation of the ordinary courts] and Article 27(1)(1a) of the [amended Law on the Supreme Court], according to which cases relating to authorisation for the criminal prosecution or deprivation of liberty (detention) of a judge of a national court fall within the exclusive jurisdiction of a body such as the Disciplinary Chamber at both first and second instance, taking in particular into account (individually or jointly) the following facts:

(a) the establishment of the Disciplinary Chamber coincided with a change in the rules for selecting members of a body such as the [KRS], which is involved in judicial appointments and upon whose proposal all members of the Disciplinary Chamber were appointed;

(b) the national legislature has made it impossible to transfer to the Disciplinary Chamber current judges of the national court of last instance (the [Sąd Najwyższy (Supreme Court)]) within which that Chamber operates, such that only new members appointed upon the proposal of the newly selected [KRS] may sit in the Disciplinary Chamber;

(c) the Disciplinary Chamber enjoys a particularly high degree of autonomy within the [Sąd Najwyższy (Supreme Court)];

(d) the [Sąd Najwyższy (Supreme Court)], in its rulings implementing the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), confirmed that the newly selected [KRS] is not independent of the legislature and of the executive and that the Disciplinary Chamber is not a "tribunal" within the meaning of Article 47 of the Charter, Article 6 ECHR and Article 45(1) of the [Constitution of the Republic of Poland];

(e) a request for authorisation for criminal prosecution or deprivation of liberty (detention) of a judge of a national court is, in principle, submitted by a public prosecutor whose superior is an executive body such as the Minister Sprawiedliwości (Minister for Justice), which executive body may issue binding instructions to public prosecutors concerning procedural acts, and at the same time members of the Disciplinary Chamber and of the newly selected [KRS] have, as the [Sąd Najwyższy (Supreme Court)] found in the rulings referred to in point 2(d), particularly close links to the legislature and to the executive, and thus the Disciplinary Chamber cannot be regarded as a third party in relation to the parties to the proceedings;

(f) the Republic of Poland was obliged to suspend the application of certain provisions of the Law on the Supreme Court concerning the Disciplinary Chamber and to refrain from referring cases pending before this Chamber to a panel whose composition does not meet the requirements of independence in accordance with the order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277)?

(4) Where authorisation is granted for the criminal prosecution or detention of a judge of a national court, which involves suspending that judge from his or her duties and reducing his or her remuneration for the duration of his or her suspension, must EU law – in particular the provisions referred to in question 2 and the principles of primacy, sincere cooperation under Article 4(3) TEU and legal certainty – be interpreted as precluding such authorisation, in particular as regards the suspension of that judge from his or her duties, from having binding effect if it was granted by a body such as the Disciplinary Chamber, and therefore:

(a) all State bodies (including the referring court whose composition includes the judge covered by that authorisation as well as the bodies which have powers to designate and modify the composition of national courts) must disregard that authorisation and allow the judge of a national court covered by that authorisation to sit on the adjudicating panel of that court;

(b) the court whose composition includes the judge covered by that authorisation is a tribunal previously established by law or an independent and impartial tribunal, and therefore can, as a "tribunal", rule on questions concerning the application or interpretation of EU law?'

### *B. Case C-671/20*

34. The facts out of which this request for a preliminary ruling arises are similar to those in Case C-615/20.

35. The Regional Public Prosecutor charged M.M. with seven criminal offences including, inter alia, failure to file for bankruptcy, failure to satisfy creditors' claims, bank fraud and failure to file a company's financial statements. By decision of 9 June 2020, the Regional Public Prosecutor ordered the creation of a compulsory mortgage over real property owned jointly by M.M. and his wife as security for potential fines and court fees. M.M. appealed against that decision.

36. In the light of the Disciplinary Chamber's resolution, the President of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) ordered [22] the President of the chamber in which Judge I.T. sat to change the formation of the bench in all of the cases [23] initially assigned to that judge. [24] The President of that chamber reassigned the cases that were initially assigned to Judge I.T. Following that reassignment, the referring court referred a number of questions to the Court for a preliminary ruling.

37. The referring court observes that, in accordance with the *Simpson* judgment, [25] every court must verify of its own motion whether it is an independent and impartial tribunal previously established by law. It has doubts as to whether it constitutes a 'tribunal previously established by law' as the alteration of its composition by order of the President of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) following Judge I.T.'s suspension was a direct result of the Disciplinary Chamber's resolution. Due to its 'structural characteristics', that chamber is not a 'tribunal' pursuant to national or EU law. The referring court considers that only an effective review of the Disciplinary Chamber's resolution will enable it to assess whether it is a court previously established by law and can rule in the proceedings before it. The referring court considers that it may infringe the right of the parties to a court and result in the annulment of its decision on appeal [26] if a formation in which an unauthorised person sat delivered judgment, either because the court was improperly composed [27] or due to an infringement of EU law.

38. The referring court considers that an assessment as to whether it complies with the requirement of prior establishment by law requires an examination of the binding effect of the Disciplinary Chamber's resolution. Both national legislation and the case-law of the Trybunał Konstytucyjny (Constitutional Court), according to which national courts cannot review the appointment of a judge, including the lawfulness of the role of the President of the Republic of

22 The legal basis of that order, dated 24 November 2020, was Article 47b(1) and (3) of the amended Law on the organisation of the ordinary courts.

23 Except Case VIII K 105/17.

24 Save for Case VIII K 105/17, which gave rise to the request for a preliminary ruling in Case C-615/20.

25 Judgment of 26 March 2020, *Review Simpson* v *Council* and *HG* v *Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 57 and the case-law cited) ('the *Simpson* judgment').

26 By the Sąd Najwyższy (Supreme Court).

27 See Article 439(1)(1) and (2), read in conjunction with Article 523(1) of the Code of Criminal Procedure.

Poland [28] and the KRS in the appointment procedure, [29] prohibit the conduct of that examination. Moreover, the conduct of such a review is deemed to be a disciplinary offence. The referring court has doubts as to whether EU law precludes such national legislation and the aforementioned case-law of the Trybunał Konstytucyjny (Constitutional Court).

39. The referring court is also uncertain as to whether it is bound by the Disciplinary Chamber's resolution and any consequences that it may have for its composition, including the effectiveness in law of Judge I.T.'s suspension. The Court has repeatedly emphasised the importance, in both the EU legal order and that of its Member States, of 'the principle of the authority of *res judicata*'. To ensure both the stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive cannot be called into question. EU law thus does not require a national court to disapply domestic rules of procedure that confer the authority of *res judicata* on a judgment, even where to do so would make it possible to remedy a domestic situation that is incompatible with EU law. [30]

40. The referring court considers that the nature of the Disciplinary Chamber is such that its resolution of 18 November 2020 is not a 'judicial ruling' as that term applies only to rulings of a body that meets the requirements for effective judicial protection under EU law. The ability of the Disciplinary Chamber to suspend a judge – in practice for an indefinite period of time – does not in any way ensure the stability of the law and legal relationships and certainly does not contribute to the proper administration of justice. In addition, the referring court inquires as to whether the obligation to refuse to grant binding effect to the Disciplinary Chamber's rulings also applies to rulings of other State bodies such as the Minister for Justice, the public prosecutor, the presidents of courts and the Trybunał Konstytucyjny (Constitutional Court). It accordingly asks whether an unjustified refusal to allow a judge in respect of whom such a prosecution has been authorised to sit in a formation of a court infringes EU law.

41. In those circumstances, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must EU law – in particular Article 2 TEU and the value of the rule of law expressed therein, the second subparagraph of Article 19(1) TEU and the principles of primacy, sincere cooperation and legal certainty – be interpreted as precluding the application of a Member State's legislation, such as Article 41b(1) and (3) of the [amended Law on the organisation of the ordinary courts], in such a manner that the president of a court may, independently and without judicial review, decide to change the composition of a court as a result of an authorisation granted by a body such as the [Disciplinary Chamber] for the criminal prosecution or detention of a judge included in the original panel (Regional Court Judge I.T.), which involves the mandatory suspension of that judge from his or her duties and entails, in particular, prohibiting that judge from sitting on panels in the cases assigned to him or her, including the cases assigned to him or her before the authorisation was granted?

(2) Must EU law – in particular the provisions cited in question 1 – be interpreted as precluding:

28 'the President of the Republic'.

29 See judgment TK, 4 March 2020 (Case P 22/19), and order TKz, 20 April 2020 (Case U 1/20).

30 Judgment of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2020:260, paragraphs 88 and 89 and the case-law cited).

(a) legislation of a Member State such as Article 42a(1) and (2) and point 3 of Article 107(1) of the [amended Law on the organisation of the ordinary courts], which prohibits a national court from reviewing, in the course of that court's review of its compliance with the requirements of being a tribunal previously established by law, the binding effect and legal circumstances of the authorisation granted by the Disciplinary Chamber referred to in question 1, which are a direct cause of the change in the composition of the court, while at the same time stipulating that an attempt to conduct such a review will give rise to disciplinary proceedings being instituted against the judge conducting it?

(b) the case-law of a national body, such as the Trybunał Konstytucyjny (Constitutional Court), according to which acts by national bodies such as the [President of the Republic] and the [KRS] related to the appointment of members of a body such as the Disciplinary Chamber are not subject to judicial review, including review from the point of view of EU law irrespective of the seriousness and extent of the infringements, and the appointment of a person to a judicial post is final and conclusive?

(3) Must EU law – in particular the provisions cited in question 1 – be interpreted as precluding the authorisation referred to in question 1 from having binding effect, in particular as regards the suspension of a judge from his or her duties, due to the fact that it was granted by a body such as the Disciplinary Chamber, and therefore:

(a) all State bodies (including the referring court as well as the bodies which have powers to designate and modify the composition of national courts, in particular a court president) must disregard that authorisation and allow the judge of a national court covered by that authorisation to sit on the adjudicating panel of that court;

(b) a court whose composition does not include the judge originally appointed to it – solely because he or she is covered by that authorisation – is not a tribunal previously established by law and therefore cannot, as a "tribunal", rule on questions concerning the application or interpretation of EU law?

(4) From the point of view of the answers to the above questions, is it relevant that the Disciplinary Chamber and the Trybunał Konstytucyjny (Constitutional Court) do not guarantee effective judicial protection due to their lack of independence and the established infringements of the rules concerning the appointment of their members?'

## IV. Procedure before the Court

42. By decision of 21 January 2021, the President of the Court joined Cases C-615/20 and C-671/20 for the purposes of the written and oral procedure and of the judgment.

43. The referring court sought expeditious treatment for the requests for a preliminary ruling in Cases C-615/20 and C-671/20 pursuant to Article 105(1) of the Rules of Procedure. By decisions of 9 December 2020 and 21 January 2021 respectively, the President of the Court rejected those requests. They were nevertheless afforded priority treatment under Article 53(3) of the Rules of Procedure.

44. Written observations were submitted by YP, the Regional Public Prosecutor, the Belgian, Danish, Dutch, Polish, Finnish, and Swedish Governments and the European Commission. With the exception of YP, all of the aforementioned parties presented oral argument and replied to questions put by the Court at the hearing on 28 June 2022.

## V. Assessment

### *A. Admissibility*

45. The Regional Public Prosecutor and the Polish Government contend that the questions referred for a preliminary ruling are inadmissible. Absent any connecting factor between the matters at issue in the proceedings before the referring court and the provisions of EU law of which it seeks an interpretation, an answer to those questions is unnecessary to allow that court to rule on the cases before it.[31] The Polish Government adds that even were the Court to authorise the referring court to ignore the Disciplinary Chamber's resolution, no provision of Polish law permits the replacement of a judge assigned to a case or the transfer of those cases to another judge.

46. The Commission and the Swedish Government claim that the requests for a preliminary ruling are admissible as the Court's answer is necessary to enable the formation of the referring court to resolve *in limine litis* whether it has jurisdiction to rule on the criminal actions in the main proceedings.

47. In accordance with the Court's settled case-law, questions on the interpretation of EU law referred by a national court enjoy a presumption of relevance. The Court may refuse to rule on such questions only where it is quite obvious that the interpretation of EU law sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions asked of it.[32]

48. It is clear from both the text and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a case is pending before it in which it is called upon to give a decision capable of taking that preliminary ruling into account. A reference for a preliminary ruling is justified by the necessity to resolve a dispute and is not to facilitate the delivery of advisory opinions on general or hypothetical questions.[33] The Court has also emphasised that it may be necessary to answer questions referred in order to provide referring courts with an interpretation of EU law that enables them to settle procedural questions of national law before they can rule on the substance of disputes pending before them.[34]

31 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 48). According to the Polish Government, the criminal cases pending before the referring court concern purely internal matters to which Article 47 of the Charter and Article 19(1) TEU do not apply.

32 Judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 20).

33 Judgments of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraph 38), and of 27 February 2014, *Pohotovosť* (C-470/12, EU:C:2014:101, paragraphs 28 and 29).

34 Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraph 48 and the case-law cited).

49. The questions referred to the Court in these proceedings seek to establish whether, in the light of the characteristics of the Disciplinary Chamber, in particular the manner of the appointment of its members, EU law precludes provisions of national law whereby that chamber may authorise the prosecution of a judge thereby resulting in his or her suspension. If that is the case, what consequences follow, as a matter of EU law, for the legality of the formation of the court hearing the dispute in the main proceedings? In such circumstances, the referring court seeks to ascertain whether it complies with the requirement of prior establishment by law. Given that, in accordance with the *Simpson* judgment, [35] a court may be obliged to check whether, as composed, it constitutes an independent and impartial tribunal previously established by law where a serious doubt arises in that regard, the interpretation of EU law sought by the referring court is required to enable it to resolve a procedural question raised *in limine litis* prior to ruling on the criminal proceedings of which it is seised. [36]

50. The submission that in the event the Disciplinary Chamber's resolution is deemed contrary to EU law, Polish law does not permit the replacement of a judge assigned to a case or the transfer of cases goes to the substance of the order for reference relating to the scope and the effect of EU law and its primacy. Arguments on the substance of a case do not provide a basis to declare a request for a preliminary ruling inadmissible. [37]

51. At the hearing, the Polish Government relied on the judgment in *Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court – Appointment)* [38] to support its argument that the references for preliminary ruling are inadmissible. In that judgment the Court held that a request for a preliminary ruling was inadmissible on the basis, inter alia, that the questions referred on the existence of a service relationship between a judge and the Disciplinary Chamber related to a dispute other than that which was the subject of the proceedings before the referring court. In order to determine the scope of the questions asked and to provide an appropriate answer, the Court would have been obliged to review matters that went beyond the scope of the dispute in the proceedings before the referring court. The Court also held that the request for a preliminary ruling in that case effectively sought the invalidation *erga omnes* of the appointment of a judge of the Sąd Najwyższy (Supreme Court), even though national law did not authorise challenges to the appointment of a judge by way of a direct action for the annulment of such an appointment. As point 49 of the present Opinion makes clear, that is not the case here.

52. I therefore propose that the Court dismiss the objections taken to the admissibility of the questions asked by the referring court.

35 See paragraph 57.

36 See, by analogy, judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraph 49). See also judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraphs 93 and 94).

37 See, by analogy, judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraph 54 and the case-law cited).

38 Judgment of 22 March 2022 (C-508/19, EU:C:2022:201, paragraphs 60 to 71).

## *B. Substance*

### *1. Preliminary remarks*

53. The subject matter of the infringement proceedings [39] in Case C-204/21, C*ommission* v *Poland (Independence and private life of judges)*,[40] overlaps in part with these preliminary ruling proceedings. While infringement proceedings and requests for a preliminary ruling are different procedures with distinct legal effects,[41] I shall refer, where appropriate, to my Opinion in those infringement proceedings to be delivered on the same date as the present Opinion. In particular, points 46 to 60 of my Opinion in Case C-204/21, C*ommission* v *Poland (Independence and private life of judges)* set out what I consider are well-established propositions of law of relevance to the resolution of these proceedings.

### *2. The first, second and third questions in Case C-615/20*

54. By its first, second and third questions in Case C-615/20 the referring court asks, in essence, whether Article 2 TEU, the second subparagraph of Article 19(1) TEU and Article 47 of the Charter apply in cases authorising, inter alia, the prosecution, detention and suspension of judges and trainee judges and the obligatory reduction of their remuneration. If so, are those provisions to be interpreted so as to preclude national rules that confer jurisdiction on the Disciplinary Chamber to rule upon such cases at first and second instance, given that certain characteristics of that chamber, including the manner of the appointment of its members, give rise to doubts as to whether it is a 'tribunal' for the purposes of Article 47 of the Charter?

55. The examination of these questions first requires an assessment of the relevance of Article 47 of the Charter in the context of Case C-615/20 and Case C-671/20. It is settled case-law that a person who invokes the right to an effective remedy pursuant to Article 47 of the Charter in a given case must rely on rights or freedoms guaranteed by EU law or be the subject of proceedings that implement EU law within the meaning of Article 51(1) of the Charter. It is not apparent from the orders for reference in Cases C-615/20 and C-671/20 that YP or M.M. rely on a right that a provision of EU law confers on them or that they are the subject of proceedings that implement EU law. In those circumstances, Article 47 of the Charter does not apply to the cases in the main proceedings. Since, however, the second subparagraph of Article 19(1) TEU requires all Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law,[42] notably within the meaning of Article 47 of the Charter, any interpretation of the first provision must give due consideration to the second.[43]

39 Pursuant to Article 258 TFEU.

40 OJ 2021 C 252, p. 9.

41 The different effects of judgments of the Court pursuant to Articles 258 and 267 TFEU should not be over emphasised. By way of example, in its judgment of 10 March 2022, *Grossmania* (C-177/20, EU:C:2022:175), the Court recently described the combined effects that its judgments under both procedures may have.

42 It is undisputed that the referring court, as a court or tribunal within the meaning of EU law, acts within the Polish legal order in the 'fields covered by Union law' pursuant to the second subparagraph of Article 19(1) TEU and must therefore meet the requirements of effective judicial protection. Judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraph 106 and the case-law cited).

43 Judgment of 22 February 2022, *RS (Effects of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraphs 34 to 37 and the case-law cited).

56. Second, I turn to consider the relevance of two interlocutory orders in two infringement proceedings against the Republic of Poland. In the order of 8 April 2020, the Court ordered the suspension of certain of the Disciplinary Chamber's activities. The referring court in this reference for preliminary ruling expresses reservations as to whether, in the light of the order made in that case, the Disciplinary Chamber could hear cases seeking an authorisation to prosecute and to suspend a judge. It also referred a number of questions concerning the relevance of the suspension as so ordered for the present proceedings. [44]

57. The operative part of the order of 8 April 2020 directs the suspension of certain activities the Disciplinary Chamber carried out under specific provisions [45] of the amended Law on the Supreme Court. Those provisions furnished the legal basis for the Disciplinary Chamber's jurisdiction to rule on disciplinary proceedings against judges. They are entirely different from the legal basis of the Disciplinary Chamber's jurisdiction to authorise the prosecution, detention and suspension of judges and the reduction of their remuneration, the subject matter of the proceedings out of which these references for preliminary ruling arise. [46] I therefore consider the order of 8 April 2020 irrelevant to the issues that arise for determination here. [47]

58. By contrast, the order of the Vice-President of the Court of 14 July 2021 in Case C-204/21 R, *Commission* v *Poland*, [48] appears to be relevant. Its operative part requires the Republic of Poland, inter alia, to suspend the application of Article 27(1)(1a) of the amended Law on the Supreme Court and provisions of the amended Law on the organisation of the ordinary courts that give the Disciplinary Chamber jurisdiction to adjudicate on applications for authorisation to initiate criminal proceedings against judges or trainee judges. [49] That order also requires the Republic of Poland to suspend the effects of any decisions the Disciplinary Chamber already adopted on the basis of the aforementioned provisions and to refrain from referring cases thereunder to a court that is not independent. [50]

59. In order to ensure the effective implementation of the order of 14 July 2021, on 27 October 2021 the Vice-President of the Court ordered the Republic of Poland to pay a periodic penalty payment of EUR 1 000 000 per day from the date of the notification of that order until such time as that Member State complies with the obligations arising from the order of 14 July 2021, or, if it fails to do so, until the date of delivery of the judgment closing the proceedings in Case C-204/21, *Commission* v *Poland (Independence and private life of judges)*. [51]

44 See question 1(c) and question 3(f) in Case C-615/20.

45 Namely point 5 of Article 3, Article 27 and Article 73(1) thereof. In accordance with the order of 8 April 2020, the Republic of Poland was also required to refrain from referring the cases pending before the Disciplinary Chamber to a panel that did not meet the requirements of independence defined, inter alia, in the *A. K.* judgment.

46 See Article 27(1)(1a) of the amended Law on the Supreme Court and Article 80, Article 110(2a) and Article 129 of the amended Law on the organisation of the ordinary courts.

47 In any event, the suspension came to an end with the delivery of judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596) ('the *Disciplinary regime for judges* judgment'). The declaration that the Polish Government had not fulfilled its obligations under the second subparagraph of Article 19(1) TEU by its failure to guarantee the independence and impartiality of the Disciplinary Chamber and, in particular, the criteria the Court relied upon in reaching that finding, are of particular relevance to the present proceedings. See also the *A. K.* judgment.

48 Order of the Vice-President of the Court of 14 July 2021, *Commission* v *Poland* (C-204/21 R, EU:C:2021:593) ('the order of 14 July 2021').

49 Immediately and pending delivery of the judgment closing the proceedings in Case C-204/21, *Commission* v *Poland (Independence and private life of judges)*.

50 As defined in the *A. K.* judgment.

51 Order of the Vice-President of the Court of 27 October 2021, *Commission* v *Poland* (C-204/21 R, not published, EU:C:2021:878).

60. At the hearing the Commission confirmed [52] that the Republic of Poland had not informed it of any measures that Member State had adopted to comply with the order of 14 July 2021. The Commission added that, following the making of that order, Judge I.T. ought to have been reinstated from 14 July 2021 until the delivery of judgment in Case C-204/21, *Commission* v *Poland (Independence and private life of judges)*.

61. Third, the Polish Government represented at the hearing that the Disciplinary Chamber had been abolished by the ustawa o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the Supreme Court and certain other laws) of 9 June 2022 (Dz. U. of 2022, item 1259) ('the Law of 9 June 2022'). Since then a judge may challenge a definitive resolution of the Disciplinary Chamber authorising his or her prosecution before the newly created Izba Odpowiedzialności Zawodowej (Chamber of Professional Responsibility) of the Sąd Najwyższy (Supreme Court) ('the Chamber of Professional Responsibility').

62. By Article 8 of the Law of 9 June 2022, upon its entry into force, [53] the Disciplinary Chamber is abolished and the Chamber of Professional Responsibility is established. The Chamber of Professional Responsibility is to conduct all uncompleted cases that were before the Disciplinary Chamber on 15 July 2022. By virtue of Article 18 of the Law of 9 June 2022, a judge may, within six months of its entry into force, bring a motion before the Chamber of Professional Responsibility to resume proceedings in respect of a resolution of the Sąd Najwyższy (Supreme Court) that authorised his or her prosecution and had been adopted by a formation in which a judge of the Disciplinary Chamber sat.

63. Notwithstanding the abolition of the Disciplinary Chamber, it appears Judge I.T. remains suspended from carrying out his functions under national law although he may [54] bring a motion before the Chamber of Professional Responsibility with a view to challenging the Disciplinary Chamber's resolution. The referring court's questions thus continue to be pertinent. In order to address the legality of Judge I.T.'s suspension, it is necessary to examine both whether the Disciplinary Chamber complies with the requirements of Article 2 TEU and the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and the consequences for the composition of the referring court of any non-compliance with those provisions.

64. Subject to verification by the referring court, from the foregoing it appears that, notwithstanding that the Disciplinary Chamber adopted its resolution at second instance, as a matter of Polish law Judge I.T. may now challenge its validity. It also appears that resolution of the Disciplinary Chamber no longer enjoys the authority of *res judicata*.

65. Turning to the first, second and third questions in Case C-615/20, while the organisation of justice in the Member States, including the rules governing criminal proceedings against judges, falls within their competence, the exercise of that competence must comply with EU law. Where a Member State lays down specific rules governing criminal proceedings against judges, [55] those rules must – in accordance with the requirement of access to an independent and impartial tribunal previously established by law and in order to dispel any reasonable doubt in the minds of

52 Without being contradicted by the Polish Government.

53 Subject to verification by the referring court, that law entered into force on 15 July 2022.

54 In order, for example, to have his suspension lifted.

55 As the Polish Government and the Commission indicated in their observations, in the absence of EU rules on the matter, it is for the Member States to determine whether certain actions by a judge are disciplinary or criminal in nature. EU law thus, in principle, does not preclude a provision such as Article 181 of the Constitution of the Republic of Poland, which envisages lifting a judge's immunity from criminal prosecution and his or her detention by a court established by law. See question 2 in Case C-615/20.

individuals as to the imperviousness of the judges to external factors, in particular any direct or indirect influence the legislature or executive may have on their decisions – be justified by objective and verifiable requirements relating to the sound administration of justice. Such rules must, like those on the disciplinary liability of judges, provide the guarantees necessary to ensure that criminal proceedings are not used as a system of political control over the activity of judges and fully safeguard the rights enshrined in Articles 47 and 48 of the Charter. [56]

66. Under the second subparagraph of Article 19(1) TEU, Member States must ensure that courts or tribunals liable to rule on the application or interpretation of EU law meet the requirements of effective judicial protection. [57] From their very nature the cases that fall within the jurisdiction of the Disciplinary Chamber pursuant to Article 80, Article 110(2a) and Article 129 of the amended Law on the organisation of the ordinary courts and Article 27(1)(1a) of the amended Law on the Supreme Court [58] have an immediate, direct and profound impact on the status of judges and their performance in office. [59] It follows that measures adopted pursuant to those provisions of Polish law with respect to judges of Polish courts liable to rule on the application or interpretation of EU law must be capable of being reviewed by a body that itself meets the requirements of effective judicial protection in accordance with the second subparagraph of Article 19(1) TEU. [60] Since the Disciplinary Chamber had jurisdiction to apply the aforementioned provisions of Polish law, it must offer all the necessary guarantees as regards its independence, impartiality and prior establishment by law in order to prevent any risk that measures it adopts pursuant thereto may be used as a system of political control of the content of judicial decisions. Relying extensively on the factors it had earlier outlined in its *A. K.* judgment, [61] in its *Disciplinary regime for judges* judgment the Court categorically held, by reference to the considerations set out at paragraphs 89 to 110 thereof, that the Disciplinary Chamber did not comply with the requirements of independence and impartiality necessitated by the second subparagraph of Article 19(1) TEU. The Court relied, inter alia, on the fact that the creation of the Disciplinary Chamber *ex nihilo* with exclusive jurisdiction to hear certain disciplinary cases coincided with the adoption of national legislation that undermined the irremovability and independence of judges of the Sąd Najwyższy (Supreme Court). The judgment observed that, compared with the other chambers of the Sąd Najwyższy (Supreme Court), the Disciplinary Chamber enjoyed a particularly high degree of organisational, functional and financial autonomy within that court. The remuneration of judges of the Disciplinary Chamber also exceeded by approximately 40% that of judges assigned to the other chambers of the Sąd Najwyższy (Supreme Court) without any objective justification for such preferential treatment being advanced.

67. Upon its establishment, the Disciplinary Chamber was required to consist exclusively of new judges appointed by the President of the Republic on a proposal from the KRS. [62] The KRS was comprehensively restructured prior to those appointments being made. [63] According to the

56 Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraphs 210 to 213). See question 2(a) in Case C-615/20.

57 See, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 112 and the case-law cited).

58 Relating to authorisation to initiate criminal proceedings against judges or trainee judges or place them in provisional detention, to employment and social security law concerning judges of the Sąd Najwyższy (Supreme Court) and to the compulsory retirement of those judges.

59 See also the order of 14 July 2021 (paragraph 81).

60 See, by analogy, the *Disciplinary regime for judges* judgment (paragraphs 80 and 83).

61 See question 1(a) and question 3(d) in Case C-615/20.

62 Thereby excluding any possibility of transferring to that chamber judges already serving on the Sąd Najwyższy (Supreme Court) even though such transfers were in principle permitted.

63 Twenty-three of the 25 members of the KRS in its new composition were appointed by the Polish executive or legislature or are members thereof. Previously the judges selected 15 members of the KRS from their own ranks.

Court, such changes were liable to create a risk, absent from the selection procedure as previously operated, that the legislature and the executive would have a greater influence over the KRS and undermine that body's independence. The newly constituted KRS was, moreover, established by reducing the four-year term of office of those of its members who had until then constituted that body. The Court also found that the legislative reform of the KRS had been carried out simultaneously with the enactment of a new Law on the Supreme Court,[64] which implemented a wide-ranging reform of that jurisdiction.[65]

68. According to the Court, all of those factors gave rise to reasonable doubts in the minds of individuals as to the imperviousness of the Disciplinary Chamber to external factors, in particular the direct or indirect influence of the Polish legislature and executive upon it and its neutrality with respect to the interests represented before it. Those factors were likely to lead to the Disciplinary Chamber not being considered to be independent or impartial, thereby prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in such a body.[66]

69. A global assessment of the procedure for the appointment of the judges of the Disciplinary Chamber and the conditions under which it operated does not exclude the existence of reasonable doubts as to the possibility that its members may be subject to external pressure.[67] At the time of writing, the legitimate doubts as to the independence and impartiality of the Disciplinary Chamber described in the *Disciplinary regime for judges* judgment and the *A. K.* judgment persist. Those doubts taint not only the disciplinary regime for judges in Poland but also the rules on authorising the prosecution, detention and suspension of judges or trainee judges and the obligatory reduction of their remuneration.

70. The referring court has also described the links between the Polish Minister for Justice and the public prosecutor, the Polish Minister for Justice and the KRS and the KRS and the Disciplinary Chamber.[68] In that regard, it has doubts as to whether the Disciplinary Chamber acts as a third party in relation to the parties to the proceedings before it.[69]

71. It is well established that the independence of courts has two aspects. The first, external in nature, requires a court to exercise its functions autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The second of those aspects, described as internal in nature, is linked to impartiality. It

64 The ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5), in the consolidated version published in the Dziennik Ustaw Rzeczypospolitej Polskiej of 2019 (item 825).

65 Which included, in particular, the creation of two new chambers within that court, one being the Disciplinary Chamber, together with the introduction of a mechanism to lower the retirement age of judges of the Sąd Najwyższy (Supreme Court) and its application to serving judges of that court. The premature termination of the terms of office of certain members of the KRS and the reorganisation of that body took place in a context in which it was expected that numerous posts would become vacant within the Sąd Najwyższy (Supreme Court), and in particular within its Disciplinary Chamber.

66 The Court also held that such a development reduced the protection of the value of the rule of law. The *Disciplinary regime for judges* judgment (paragraph 112).

67 See point 212 of my Opinion in Case C-204/21, C*ommission* v *Poland (Independence and private life of judges)*.

68 See points 28 and 29 of the present Opinion. See also question 3(e) in Case C-615/20. The Court has stated that the role of the KRS in the appointment process of judges of the Disciplinary Chamber is decisive and that its independence from the political authorities is questionable thus giving rise to legitimate doubts as to the independence and impartiality of that chamber. The *Disciplinary regime for judges* judgment (paragraphs 101 and 108).

69 See question 3(f) in Case C-615/20.

seeks to ensure that courts maintain an equal distance from parties to legal proceedings and their respective interests. Courts must be objective and have no interest in the outcome of proceedings before them other than the strict application of the rule of law.[70]

72. The referring court's doubts concern the second aspect of what is an independent tribunal and the perception that, when it adjudicates upon authorisations to prosecute judges and to suspend them, the Disciplinary Chamber is neither independent nor impartial. Subject to verification by the referring court, the direct and indirect institutional links that court describes as between the Polish Minister for Justice, the public prosecutor,[71] the KRS and the Disciplinary Chamber, as outlined in points 28 and 29 of the present Opinion,[72] add to the already considerable risk that the Disciplinary Chamber may not be perceived as an entirely neutral adjudicator when it rules upon these matters. Those links are likely further to undermine the trust which justice in a democratic society governed by the rule of law must inspire.

73. I therefore advise the Court that Article 2 TEU and the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, apply in cases where a court or tribunal authorises, in accordance with national law, inter alia, the prosecution, detention and suspension of judges or trainee judges and the consequential reduction of their remuneration. Those provisions of EU law preclude national rules that grant jurisdiction to authorise the prosecution, detention and suspension of judges or trainee judges and the consequential reduction of their remuneration to a court or tribunal which fails to comply with the requirements of independence, impartiality or prior establishment by law.

### *3. The second question in Case C-671/20*

74. The referring court seeks to ascertain whether EU law, in particular Article 2 TEU and the second subparagraph of Article 19(1) TEU, precludes national provisions such as Article 42a(1) and (2) and point 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts, which, first, prohibit national courts – when checking whether, as composed, they constitute a tribunal previously established by law – from reviewing the legality and binding effect of decisions of the Disciplinary Chamber to authorise the prosecution, detention and suspension of judges and, second, treat such a review as a disciplinary offence. The referring court also inquires whether those provisions of EU law preclude the case-law of the Trybunał Konstytucyjny (Constitutional Court), which prohibits judicial review of the act of appointment of judges by the President of the Republic and the acts the KRS adopts in the course of that appointment process.

75. A corollary of the right to an independent and impartial tribunal previously established by law is that everyone has the possibility to invoke that right.[73] Where the existence of an independent and impartial tribunal is disputed on a ground that does not immediately appear to be manifestly

70 The *A. K.* judgment (paragraphs 120 to 122).

71 See point 28 of the present Opinion. An analogy may be drawn with the judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)* (C-508/18, EU:C:2019:456, paragraphs 73 to 90), on the links between the German Minister for Justice and the public prosecutor's office with regard to the risk that the former gives instructions to the latter in specific cases.

72 Coupled with the other factors to which the Court referred in its *Disciplinary regime for judges* judgment.

73 The *Simpson* judgment (paragraph 55).

devoid of merit,[74] every court[75] is obliged to check whether, as composed, it constitutes such a tribunal. That jurisdiction is necessary to sustain the confidence that courts in a democratic society must inspire in those subject to their rulings. Such a check is thus an essential procedural requirement, compliance with which is a matter of public policy and must be verified either when raised by the parties or of the court's own motion.[76] Article 2 TEU and the second subparagraph of Article 19(1) TEU and the requirements laid down in the *Simpson* judgment have a transversal character. They apply whenever a jurisdiction may be required to rule upon cases 'in fields covered by Union law'.[77]

76. The Polish Government considers that neither the *A. K.* judgment nor any national case-law to the effect that the Disciplinary Chamber is not an independent and impartial tribunal previously established by law can call into question the act of appointment of judges of that chamber by the President of the Republic.

77. The text of Article 42a(1) and (2) of the amended Law on the organisation of the ordinary courts set out in point 11 of the present Opinion is not on its face limited to preventing a court from having jurisdiction to strike down, *erga omnes*, the act of appointment of a judge by the President of the Republic. It instead clearly prevents all Polish courts, whether of their own motion or at the request of a party, from raising or addressing, in any circumstances and for whatever reason, whether a court can comply with the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law or whether a judge has been legally appointed or can exercise judicial functions regardless of the nature of the illegality alleged, the act or procedure challenged or the remedy available. In my view, the text of the provisions of the amended Law on the organisation of the ordinary courts is so broad as to prevent a national court examining questions on the composition of any court as the Court's case-law requires.[78]

78. The terms of point 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts appear to reinforce the prohibitions in Article 42a(1) and (2) of the amended Law on the organisation of the ordinary courts. Point 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts seems to capture all attempts to challenge any aspect of the procedure leading to the appointment of a judge[79] including, for instance, respect for the requirement that a court be previously established by law. Since Article 42a(1) and (2) and point 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts prevent those courts from verifying whether they comply with Article 2 TEU and the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter as interpreted in the *Simpson* judgment, those provisions of EU law preclude such provisions of national law.

74 Judgment of 1 July 2008, *Chronopost* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 46).

75 See the *Simpson* judgment (paragraph 57), and judgment of 24 March 2022, *Wagenknecht* v *Commission* (C-130/21 P, EU:C:2022:226, paragraph 15), with respect to the Court of Justice and the General Court. See judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraph 126 to 131), with respect to the courts and tribunals of the Member States.

76 See the *Simpson* judgment (paragraphs 55 and 57) and judgment of 1 July 2008, *Chronopost* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 46).

77 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 29, 36 and 37).

78 The *Simpson* judgment (paragraph 55).

79 See judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 128 et seq. and the case-law cited). It could be asserted, for example, that it is a disciplinary offence to examine the role of the KRS in the procedure leading to the appointment of a judge.

79. As for the case-law of the Trybunał Konstytucyjny (Constitutional Court),[80] whilst the Court acknowledges[81] that the fact that decisions of the President of the Republic appointing judges to the Sąd Najwyższy (Supreme Court) are not amenable to judicial review under Polish law does not per se give rise to problems,[82] it has ruled on numerous occasions that effective judicial review of KRS proposals to appoint judges – including, at the very least, an examination as to whether there was an ultra vires or improper exercise of power, error of law or manifest error of assessment – is necessary where systemic doubts arise in the minds of individuals as to the independence and impartiality of the judges appointed under that procedure.[83] Furthermore, in paragraphs 104 to 107 of the *Disciplinary regime for judges* judgment, the Court described a number of factors, including the important role played by the KRS in the appointment of the members of the Disciplinary Chamber, as giving rise to reasonable doubts in the minds of individuals as to the independence and impartiality of that body. It is clear from that case-law[84] that KRS proposals for the appointment of judges must be subject to judicial review, in the absence of which the Disciplinary Chamber is not considered to be an independent and impartial tribunal previously established by law and does not comply with the requirements, inter alia, of the second subparagraph of Article 19(1) TEU.[85] That case-law binds all Polish courts, including the Trybunał Konstytucyjny (Constitutional Court). In its *Grossmania* judgment, the Court ruled that where it finds that a Member State has failed to fulfil its obligations under the Treaties pursuant to Article 260(1) TFEU, it is required to take the necessary measures to comply with that judgment, which has the force of *res judicata* as regards the issues of fact and law that it actually or necessarily settled. By virtue of the authority of the Court's judgment, a national court considering the scope of provisions of EU law must take into account the elements of law authoritatively determined thereby. Should the appropriate national authorities fail to implement a Court judgment declaring the existence of a failure to fulfil obligations, a national court is required to take all measures to facilitate the full application of EU law in accordance with the contents of that judgment.[86]

80. In accordance with Article 267 TFEU, the judgment the Court will deliver in the present cases is binding on the referring court as regards the interpretation of EU law for the purposes of resolving the dispute before it. The referring court must therefore, if necessary, disregard rulings of the Trybunał Konstytucyjny (Constitutional Court) if it considers that, having regard to the

80 In its judgment of 4 March 2020 (Case P 22/19) (Dz. U. of 2020, item 413), the Trybunał Konstytucyjny (Constitutional Court) held that provisions of national law which permit a motion to exclude a judge from a case, due to his or her defective appointment by the President of the Republic acting upon a proposal of the KRS, are inconsistent with Article 179 read in conjunction with Article 144(3)(17) of the Constitution of the Republic.

81 The *A. K.* judgment (paragraph 145).

82 Paragraph 129 of the Court's judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153), holds that 'the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU'.

83 Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraphs 128 to 136 and the case-law cited).

84 The *A. K.* judgment. See also judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153), and the *Disciplinary regime for judges* judgment.

85 The *Disciplinary regime for judges* judgment concerns the jurisdiction of the Disciplinary Chamber to rule in disciplinary cases concerning judges of the Sąd Najwyższy (Supreme Court) and the ordinary courts. As point 69 of the present Opinion and point 212 of my Opinion in Case C-204/21, *Commission* v *Poland (Independence and private life of judges)* indicate, the reasoning in that case-law also applies to the Disciplinary Chamber's jurisdiction to authorise the prosecution, detention and suspension of judges and trainee judges and the reduction of their remuneration.

86 Judgment of 10 March 2022, *Grossmania* (C-177/20, EU:C:2022:175, paragraphs 35, 36, 38 and the case-law cited).

Court's judgment, those rulings are inconsistent with EU law, if necessary refusing to apply any national rule [87] that requires it to comply with decisions of the Trybunał Konstytucyjny (Constitutional Court). [88]

81. I therefore advise the Court that Article 2 TEU and the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, preclude national provisions such as Article 42a(1) and (2) and point 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts, which, first, prohibit national courts – when checking whether, as composed, they constitute a tribunal previously established by law – from reviewing the legality and binding effect of decisions of the Disciplinary Chamber to authorise the prosecution, detention and suspension of judges and, second, treat such a review as a disciplinary offence.

### *4. The fourth question in Case C-615/20 and the first, third and fourth questions in Case C-671/20*

82. The fourth question the referring court asks in Case C-671/20 affirms that the Trybunał Konstytucyjny (Constitutional Court) does not guarantee effective judicial protection without setting out in sufficient detail why it considers that to be the case, as Article 94 of the Rules of Procedure requires. It follows that the Court is not in a position to assist the referring court by making an assessment as to whether the Trybunał Konstytucyjny (Constitutional Court) complies, inter alia, with the second subparagraph of Article 19(1) TEU. I accordingly advise the Court that, to the extent the fourth question in Case C-671/20 asks it to make that assessment, that question is inadmissible.

83. By its fourth question in Case C-615/20 and its first and third questions in Case C-671/20, the referring court seeks, in essence, to ascertain the consequences of a finding that the Disciplinary Chamber did not comply, inter alia, with the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, for that chamber's jurisdiction to authorise the prosecution, detention, suspension and reduction of the remuneration of judges and trainee judges. The referring court inquires in particular whether the second subparagraph of Article 19(1) TEU and the principles of primacy of EU law, sincere cooperation and legal certainty preclude national provisions such as Article 41b(1) and (3) of the amended Law on the organisation of the ordinary courts, which permit a formation of a court to be changed on foot of a decision of the Disciplinary Chamber to authorise the prosecution, detention, suspension and reduction of the remuneration of a judge. It also asks whether Article 2 TEU, the second subparagraph of Article 19(1) TEU and the principles of primacy of EU law, sincere cooperation and legal certainty require all State bodies, including the referring court, to disregard Disciplinary Chamber decisions so as to allow a judge, whose immunity from prosecution has been lifted and who have been suspended, to sit on a formation of that court. [89] It finally asks whether a judge who replaced the judge on that court who was suspended can rule on questions on the application or interpretation of EU law. [90]

87 See Article 190(1) of the Constitution of the Republic of Poland.

88 See, by analogy, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraphs 73 to 75). See also judgments of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 146), and of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 250).

89 See questions 4(a) and (b) in Case C-615/20 and question 3(a) in Case C-671/20.

90 See question 3(b) in Case C-671/20. YP considers that an authorisation to prosecute a judge may be granted only by an independent and impartial tribunal following an equitable and transparent examination of a case. Since the Disciplinary Chamber did not comply with any of those requirements its resolution is null and void. The Polish Government considers that Judge I.T.'s suspension is valid and his participation in the criminal proceedings would therefore infringe the parties' right to an independent tribunal previously established by law.

84. Points 66 to 69 of the present Opinion explain why, at the time it adopted the resolution regarding Judge I.T., the Disciplinary Chamber was not an independent and impartial tribunal previously established by law and thus did not comply with the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter.[91] The breach of those provisions is particularly grave as a global assessment of the procedure for the appointment of judges of the Disciplinary Chamber and the conditions under which that chamber operated do not exclude the existence of reasonable doubts as to the possibility that external pressure may have been exerted on judges appointed thereto. In my view, that uncertainty undermined the integrity of that chamber and all of the acts that it adopted, including the resolution with regard to Judge I.T.

85. The principle of primacy of EU law requires all Member State bodies to give full effect to EU provisions. Member States' law may thus not undermine the effect accorded to those provisions in their respective territories. A national court hearing a case within its jurisdiction has the obligation to disapply any provision of national law that is contrary to a provision of EU law with direct effect, such as the second subparagraph of Article 19(1) TEU.[92] Moreover, under the principle of sincere cooperation in Article 4(3) TEU, the Member States are required to nullify the unlawful consequences of an infringement of EU law.[93] Applying the principle of primacy of EU law, the Disciplinary Chamber's resolution is null and void.[94]

86. The abolition of the Disciplinary Chamber by the Law of 9 June 2022 does not have the consequence that its resolutions are deemed to be null and void. As a matter of national law, Judge I.T.'s suspension and the reduction of his remuneration remains in place. In order to rectify that situation, he must bring a motion before the newly established Chamber of Professional Responsibility to challenge the Disciplinary Chamber's resolution. It is incumbent on the Polish Government[95] to ensure not only that the jurisdiction of the Disciplinary Chamber is exercised by an independent and impartial tribunal previously established by law but also to nullify the effects of resolutions that chamber adopted[96] without delay.[97] The immediate and effective application of EU law cannot be subject to a requirement to introduce an action before the Chamber of Professional Responsibility. Otherwise, the effectiveness of EU law is undermined in two ways. First, it would depend upon the initiative of the parties to introduce fresh proceedings. Second, Disciplinary Chamber resolutions would remain in force until those proceedings had been resolved.

91 Irrespective of the nature of the jurisdiction it purported to exercise.

92 Since the Court's existing case-law provides a clear answer to the question as to whether the Disciplinary Chamber complies with the second subparagraph of Article 19(1) TEU – in particular in its *Disciplinary regime for judges* judgment – the national court is required to do everything necessary within its jurisdiction to ensure the application of that interpretation. See, to that effect, judgment of 10 March 2022, *Grossmania* (C-177/20, EU:C:2022:175, paragraph 38 and the case-law cited).

93 Judgment of 10 March 2022, *Grossmania* (C-177/20, EU:C:2022:175, paragraph 63).

94 See, by analogy, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraphs 152 to 155).

95 And all emanations of that State, including the referring court.

96 See judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 36).

97 See, by analogy, judgment of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 23), which states, inter alia, that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from a national court having jurisdiction to apply such a law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent EU rules from having full force and effect are incompatible with those requirements of EU law. See also judgment of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraphs 43 and 44 and the case-law cited).

87. As points 62 and 64 of the present Opinion indicate, the Disciplinary Chamber's resolution does not appear to have the authority of *res judicata* as a matter of Polish law. It follows that the Court's case-law on the authority of *res judicata* does not apply to it.[98] From that case-law[99] it is moreover clear that, given the Disciplinary Chamber's resolution was adopted by a body that is not an independent and impartial tribunal previously established by law, the principle of legal certainty or the alleged finality of a judgment is not an obstacle to the legislature or a court treating as null and void the unlawful consequences of that infringement of EU law.[100]

88. I therefore advise that all State bodies, including the referring court – which includes Judge I.T.[101] – as well as bodies that have powers to designate and to modify the composition of national courts,[102] must disregard the Disciplinary Chamber's resolution and allow Judge I.T. to sit on the adjudicating panel of the referring court.[103]

89. These observations are subject to the important proviso that a case was not reassigned to another formation that itself constitutes an independent and impartial tribunal previously established by law. While the effectiveness of EU law would undoubtedly benefit from the elimination of all of the nefarious effects of the Disciplinary Chamber's resolution, including the annulment *ex nunc* of decisions to reassign cases attributed to Judge I.T. to another formation, that approach – which would require that all cases previously assigned to that judge be reopened and/or reheard – would not take into account litigants' rights to legal certainty[104] and to a trial within a reasonable time in accordance with Article 47 of the Charter.

90. It follows that, in the request for a preliminary ruling in Case C-615/20, Judge I.T. should continue to sit in the formation seised of the main proceedings. The Disciplinary Chamber's resolution of 18 November 2020 that purported to suspend him was adopted on the same date as the reference for a preliminary ruling in Case C-615/20, as a consequence of which the proceedings before the referring court were suspended. It is clear from the file before the Court that, notwithstanding Judge I.T.'s suspension, the proceedings out of which Case C-615/20 arose were not reassigned.[105] The case out of which the reference arose in Case C-671/20 was reassigned

98 See judgments of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2020:260, paragraphs 88 and 89), and of 17 September 2020, *Rosneft and Others* v *Council* (C-732/18 P, not published, EU:C:2020:727, paragraph 52 and the case-law cited).

99 See, by analogy, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798, paragraph 160).

100 This does not mean that judges who were subject to proceedings before the Disciplinary Chamber pursuant, for example, to Article 80 of the amended Law on the organisation of the ordinary courts may not be subject to further proceedings pursuant to that provision before an independent and impartial tribunal previously established by law. It is a matter for the relevant State authorities to (re)initiate such proceedings against the judges in question where appropriate.

101 Were it impossible to establish formations of the referring court that included Judge I.T., courts would be unable to verify whether they are independent and impartial tribunals previously established by law, thus rendering unworkable the *Simpson* judgment (paragraphs 55 and 57).

102 In particular a court president. See Article 41b(1) and (3) of the amended Law on the organisation of the ordinary courts.

103 This is without prejudice to the possibility that a judge may bring an action for damages. Polish law appears to provide for the compensation of suspended judges in certain instances: Article 129 of the amended Law on the organisation of the ordinary courts refers.

104 Given the considerable lapse in time since Judge I.T.'s suspension on 18 November 2020, many of the cases initially assigned to him may have already been ruled upon.

105 See paragraph 4 of the observations of the Regional Public Prosecutor.

to another formation of the referring court. There is no suggestion in the file before the Court that that formation is not an independent and impartial tribunal previously established by law. In that event, those proceedings can remain before the new formation. [106]

91. I accordingly advise the Court that Article 2 TEU and the second subparagraph of Article 19(1) TEU and the principles of primacy of EU law, sincere cooperation and legal certainty require all State bodies, including the referring court, to nullify the unlawful consequences of decisions of the Disciplinary Chamber such as its resolution of 18 November 2020 and thus to permit a judge who has been suspended to sit on that court save in those cases that have been reassigned to another formation that constitutes an independent and impartial tribunal previously established by law.

## VI. Conclusion

92. In the light of the above considerations, I propose that the Court answer the questions posed by the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) as follows:

Article 2 TEU and the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union:

– apply in cases where a court or tribunal authorises, in accordance with national law, inter alia, the prosecution, detention and suspension of judges or trainee judges and the consequential reduction of their remuneration. Those provisions of EU law preclude national rules that grant jurisdiction to authorise the prosecution, detention and suspension of judges or trainee judges and the consequential reduction of their remuneration to a court or tribunal which fails to comply with the requirements of independence, impartiality or prior establishment by law;

– preclude national provisions which, first, prohibit national courts – when checking whether, as composed, they constitute a tribunal previously established by law – from reviewing the legality and binding effect of decisions of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) to authorise the prosecution, detention and suspension of judges and, second, treat such a review as a disciplinary offence.

Article 2 TEU and the second subparagraph of Article 19(1) TEU and the principles of primacy of EU law, sincere cooperation and legal certainty require all State bodies, including the referring court, to nullify the unlawful consequences of decisions of the Disciplinary Chamber authorising the prosecution, detention and suspension of judges and thus to permit a judge who has been suspended to sit on that court save in those cases that have been reassigned to another formation that constitutes an independent and impartial tribunal previously established by law.

[106] I am aware that the lapse of time between the Disciplinary Chamber's resolution of 18 November 2020 and the request for a preliminary ruling in Case C-671/20 of 9 December 2020 – and thus the suspension of the main proceedings – is short and that the main proceedings in that case may not have advanced in the meantime. That consideration does not alter my position. Legal certainty and a clear, abstract position on such matters that are applicable in all cases must have priority over claims for expediency in individual cases.