Reports of Cases

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

Case C-204/21

European Commission
v

Republic of Poland

(Article 258 TFEU – Failure of a Member State to fulfil obligations – Disciplinary regime applicable to judges – Rule of law – Independence of judges – Effective legal protection in the fields covered by EU law – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Article 267 TFEU – Review of compliance with EU requirement of being an independent and impartial tribunal – Exclusive jurisdiction of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court, Poland) – Independence of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court) – Right to respect for private life – Right to the protection of personal data – Regulation (EU) 2016/679)

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[1] Original language: English.

I. Scope of the action

1. This action under Article 258 TFEU arises out of the enactment on 20 December 2019 of the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws) [2] ('the Amending Law') by the Republic of Poland. In substance, the European Commission contends that certain provisions of the Amending Law infringe the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), Article 267 TFEU, the principle of primacy of EU law and the right to respect for private life and the right to protection of personal data, guaranteed by Article 7 and Article 8(1) of the Charter and by Article 6(1)(c) and (e), Article 6(3) and Article 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [3] ('the GDPR').

2. The Commission's action consists of five complaints.

3. The first three complaints, which are connected, allege that the Amending Law limits or excludes the possibility for a national court to ensure that individuals claiming rights under EU law have access to an independent and impartial tribunal previously established by law, thereby infringing the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter and Article 267 TFEU. The first two complaints also claim that the Amending Law infringes the principle of primacy. In cases that relate to the application or the interpretation of EU law, Member States are required to ensure respect for the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law. Where it is alleged that that right has been infringed, individuals must, in principle, be able to bring that complaint before a national court. It follows that, in cases engaging individual rights at EU law, any national court must be able to ascertain an infringement of the right of individuals to have their case heard by an independent and impartial tribunal previously established by law. Any limitation or exclusion of the possibility for a national court to satisfy itself that individuals

2 Dz. U. of 2020, item 190. The Amending Law entered into force on 14 February 2020.

3 OJ 2016 L 119, p. 1.

relying on rights which they derive from EU law have access to an independent and impartial tribunal previously established by law constitutes a breach of the obligations created by the aforementioned provisions. [4]

4. The fourth complaint relates to the jurisdiction the Amending Law conferred on the Izba Dyscyplinarna (Disciplinary Chamber of the Supreme Court, Poland; 'the Disciplinary Chamber') of the Sąd Najwyższy (Supreme Court, Poland; 'the Supreme Court') ('the Disciplinary Chamber') over matters relating to the status of judges. The Commission claims that since the Disciplinary Chamber does not meet the requisite standards of judicial independence and impartiality, the law in question affects the independence of judges whose status is subject to review by the Disciplinary Chamber and thereby infringes the second subparagraph of Article 19(1) TEU.

5. The fifth complaint concerns the obligation the Amending Law imposes on judges to provide information on their public and social activities in associations and non-profit foundations, including membership of a political party, prior to their appointment, and the publication of that information. The Commission considers that those obligations are disproportionate and infringe the right to respect for private life and the right to protection of personal data, guaranteed by Article 7 and Article 8(1) of the Charter and by Article 6(1)(c) and (e), Article 6(3) and Article 9(1) of the GDPR.

II. Legal context – Polish law

A. The amended Law on the Supreme Court

6. The ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 [5] established two new chambers within the Supreme Court: the Disciplinary Chamber and the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (the Extraordinary Review and Public Affairs Chamber; 'the Extraordinary Chamber').

7. So far as is relevant to these proceedings, the Amending Law amended the Law on the Supreme Court by inserting paragraphs 2 to 6 into Article 26, point 1a into Article 27(1), paragraph 3 into Article 45, paragraphs 2 to 5 into Article 82 and changing Article 29 and Article 72(1).

8. Article 26(2) to (6) of the amended Law on the Supreme Court provides:

'2. The [Extraordinary Chamber] shall have jurisdiction to hear applications or declarations concerning the exclusion of a judge or the designation of the court before which proceedings must be conducted, including complaints alleging a lack of independence of the court or the judge. The court dealing with the case shall submit forthwith a request to the President of the [Extraordinary Chamber] so that the case may be dealt with in accordance with the rules laid down in separate provisions. The submission of a request to the President of the [Extraordinary Chamber] shall not stay the ongoing proceedings.

4 Judgments 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'), and 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) ('the *Simpson* judgment').

5 Dz. U. of 2018, item 5; it entered into force on 3 April 2018.

3. The request referred to in paragraph 2 shall not be examined if it concerns the establishment or the assessment of the legality of the appointment of a judge or of his or her authority to carry out judicial functions.

4. The [Extraordinary Chamber] shall have jurisdiction to hear actions for a declaration that final judgments of the [Supreme Court], the ordinary courts, the military courts and the administrative courts, including the [Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)], are unlawful, if the unlawfulness consists in the calling into question of the status of the person appointed to a judicial post who adjudicated in the case.

5. The provisions relating to a finding that a final judgment is unlawful shall apply *mutatis mutandis* to the proceedings in the cases referred to in paragraph 4 and the provisions relating to the re-opening of judicial proceedings closed by a final judgment shall apply to criminal cases. It shall not be necessary to establish the probability or occurrence of harm caused by the delivery of the judgment forming the subject matter of the action.

6. An action for a declaration that a final judgment is unlawful, referred to in paragraph 4, may be brought before the [Extraordinary Chamber] without being brought before the court that delivered the contested judgment, even where a party has not exhausted the available remedies, including an extraordinary action before the [Supreme Court].'

9. Article 27(1) of 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.

(2) cases relating to employment and social security law that concern judges of the [Supreme Court];

(3) cases relating to the compulsory retirement of a judge of the [Supreme Court].'

10. Article 29(2) and (3) of the amended Law on the Supreme Court states:

'2. In the context of the activities of the [Supreme Court] or its organs, 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.

3. The [Supreme 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.'

11. Article 45(3) of the amended Law on the Supreme Court provides:

'The declaration referred to in Article 88a of the [amended Law on the organisation of the ordinary courts] shall be submitted by the judges of the [Supreme Court] to the First President of

the [Supreme Court], and by the First President of the [Supreme Court] to the [Krajowa Rada Sądownictwa (National Council of the Judiciary; "the KRS")].'

12. By Article 72(1) of the Law on the Supreme Court:

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

(1) obvious and gross violations of the law;

(2) acts or omissions of such a kind as to prevent or seriously undermine the functioning of a judicial authority;

(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.'

13. In accordance with Article 73(1) of that law, the Disciplinary Chamber is the disciplinary court of second (and last) instance for judges of the ordinary courts and the disciplinary court of first and second instance for judges of the Supreme Court.

14. Article 82 of the amended Law on the Supreme Court provides as follows:

'…

2. When it examines a case in which a question of law relating to the independence of a judge or of a court arises, the [Supreme Court] shall stay the proceedings and refer that question to a formation composed of all the members of the [Extraordinary Chamber].

3. If, when examining an application referred to in Article 26(2), the [Supreme Court] entertains serious doubts as to the interpretation of the legal provisions that must form the basis of the decision, it may stay the proceedings and refer a question of law to a formation composed of all the members of the [Extraordinary Chamber].

4. When it adopts a decision referred to in paragraph 2 or 3, the [Extraordinary Chamber] shall not be bound by the decision of a different formation of the [Supreme Court], unless that decision has acquired the force of a legal principle.

5. A decision adopted by all the members of the [Extraordinary Chamber] on the basis of paragraph 2 or 3 shall be binding on all formations of the [Supreme Court]. Any departure from a decision which has acquired the force of a legal principle shall require that a new decision be adopted by the [Supreme Court] in plenary session, the adoption of that decision requiring the presence of at least two thirds of the judges of each of the chambers. Article 88 shall not apply.'

B. The amended Law on the organisation of the ordinary courts

15. The Amending Law amended the ustawa – Prawo o ustroju sądów powszechnych (Law on the organisation of the ordinary courts) of 27 July 2001 [6], inter alia, by inserting Article 42a, inserting paragraph 4 into Article 55, and amending Article 107(1) and Article 110(2a).

16. The text of Article 42a of 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.

…'

17. Article 55(4) of the amended Law on the organisation of the ordinary courts provides that:

'Judges may adjudicate in all cases in the place to which they are posted and also in other courts in the cases defined by law (jurisdiction of the judge). The provisions relating to the allocation of cases and to the appointment and modification of the formations of the court shall not limit a judge's jurisdiction and cannot be a basis for determining that a formation is contrary to the law, that a court is improperly composed or that a person not authorised or competent to adjudicate forms part of that court.'

18. By Article 88a of the amended Law on the organisation of the ordinary courts all Polish [7] judges must disclose certain information for subsequent publication in the Biuletyn Informacji Publicznej (Public Information Bulletin):

'1. A judge shall be required to submit a written declaration mentioning:

(1) his or her membership of an association, including the name and registered office of the association, the positions held and the period of membership;

(2) the position held within a body of a non-profit foundation, including the name and registered office of the foundation and the period during which the position was held;

(3) his or her membership of a political party prior to his or her appointment to a judge's post and his or her membership of a political party during his or her term of office before 29 December 1989, including the name of the party, the positions held and the period of membership.

6 Dz. U. of 2001, No 98, item 1070.

7 Article 45(3) of the Law on the Supreme Court applies Article 88a of the amended Law on the organisation of the ordinary courts to judges of the Supreme Court and Article 8(2) of the ustawa – Prawo o ustroju sądów administracyjnych (Law on the organisation of the administrative courts) applies that same provision to judges of the administrative courts and of the Supreme Administrative Court.

2. The declarations referred to in paragraph 1 shall be submitted by judges to the president of the competent court of appeal and by presidents of the courts of appeal to the [Minister Sprawiedliwości (Minister for Justice)].

3. The declarations referred to in paragraph 1 shall be submitted within 30 days of the date on which the judge takes office and within 30 days of the date of the occurrence or cessation of the circumstances referred to in paragraph 1.

4. The information contained in the declarations referred to in paragraph 1 shall be public and made available in the Public Information Bulletin referred to in the Law of 6 September 2001 on access to public information no later than 30 days from the date on which the declaration is submitted to the authorised body.'

19. Under Article 107(1) of the amended Law on the organisation of the ordinary courts:

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

…

(2) acts or omissions of such a kind as to prevent or seriously undermine the functioning of a judicial authority;

(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;

…'

20. Article 110(2a) of the amended Law on the organisation of the ordinary courts provides that:

'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 [Supreme Court] sitting as a single judge of the Disciplinary Chamber and, at second instance, the [Supreme Court] sitting in a formation of three judges of the Disciplinary Chamber.'

C. The amended Law on the organisation of the administrative courts

21. The Amending Law amended the ustawa – Prawo o ustroju sądów administracyjnych (Law on the organisation of the administrative courts) of 25 July 2002,[8] inter alia, by inserting paragraphs 1a and 1b into Article 5, paragraph 2 into Article 8 and by amending Article 29(1) and Article 49(1).

[8] Dz. U. of 2002, item 1269.

22. Article 5(1a) and (1b) of the amended Law on the organisation of the administrative courts states:

'1a. In the context of the activities of an administrative court or its organs, 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.

1b. An administrative 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.'

23. Article 8(2) of the amended Law on the organisation of the administrative courts provides that:

'The declaration referred to in Article 88a of the [amended Law on the organisation of the ordinary courts] shall be submitted by the judges of a [wojewódzki sąd administracyjny (regional administrative court)] to the competent president of a regional administrative court, by the president of a regional administrative court and the judges of the [Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)] to the President of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)], and by the President of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] to the [KRS]'.

24. Under Article 29(1) of that law, the disciplinary offences provided for in points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts are also to apply to the judges of the administrative courts.

25. In accordance with Article 49(1) of the amended Law on the organisation of the administrative courts, the disciplinary offences provided for in Article 72(1) of the amended Law on the Supreme Court are also to apply to the judges of the Naczelny Sąd Administracyjny ('the Supreme Administrative Court').

D. The Amending Law – Transitional provisions

26. In accordance with Article 8 of the Amending Law, Article 55(4) of the amended Law on the organisation of the ordinary courts applies to cases begun or terminated before the date of the entry into force of the Amending Law, that is to say, 14 February 2020.

27. By Article 10 of the Amending Law:

'1. The provisions of the [Law on the Supreme Court], in the version resulting from this Law, shall also apply to cases amenable to examination by the [Extraordinary Chamber] that were begun and have not been terminated by a final judgment, including a decision on appeal, before the date of entry into force of the present Law.

2. The court dealing with a case referred to in paragraph 1 shall refer it immediately, and no later than seven days after the entry into force of the present law, to the [Extraordinary Chamber], which may revoke the acts previously carried out in so far as they prevent examination of the case from proceeding in accordance with the law.

3. Acts carried out by the courts and by the parties or participants in the proceedings in the cases referred to in paragraph 1 after the date of entry into force of the present Law, in breach of paragraph 2, shall not produce procedural effects.'

III. The pre-litigation procedure

28. Taking the view that, by the adoption of the Amending Law, the Republic of Poland had failed to fulfil its obligations under the combined provisions set out at point 1 of the present Opinion, on 29 April 2020 the Commission addressed a letter of formal notice to that Member State. The Republic of Poland replied by a letter dated 29 June 2020, whereby it disputed all of the allegations that it had infringed EU law.

29. On 30 October 2020, the Commission issued a reasoned opinion in which it maintained its contention that the Amending Law infringed the provisions of EU law set out in the letter of formal notice.

30. On 3 December 2020, the Commission issued a supplementary letter of formal notice in respect of the judicial activities of the Disciplinary Chamber in cases relating to the status of judges and trainee judges pursuant to Article 27(1)(1a), (2) and (3) of the amended Law on the Supreme Court as inserted by the Amending Law.

31. In its reply of 30 December 2020 to the Commission's reasoned opinion of 30 October 2020, the Republic of Poland denied the alleged infringements. On 4 January 2021, the Republic of Poland replied to the Commission's supplementary letter of formal notice of 3 December 2020, claiming that the complaints concerning the lack of independence of the Disciplinary Chamber were unfounded.

32. On 27 January 2021, the Commission issued a supplementary reasoned opinion in respect of the judicial activities of the Disciplinary Chamber in cases relating to the status of judges and trainee judges. By letter of 26 February 2021, the Republic of Poland replied that the complaint contained in the supplementary reasoned opinion was unfounded.

IV. The procedure before the Court

33. By application lodged on 1 April 2021, the Commission brought the present action before the Court under Article 258 TFEU. The Commission seeks five declarations that:

'– by adopting and maintaining in force Article 42a(1) and (2) and Article 55(4) of [the amended Law on the organisation of the ordinary courts], Article 26(3) and Article 29(2) and (3) of [the amended Law on the Supreme Court], Article 5(1a) and (1b) of [the amended Law on the organisation of the administrative courts], and Article 8 of the Amending Law, which prohibit any national court from reviewing compliance with the EU requirements relating to an independent and impartial tribunal previously established by law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of [the Charter], in the light of the case-law of the European Court of Human Rights [("the ECtHR")] concerning Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 [("the ECHR")], and under Article 267 TFEU and the principle of primacy of EU law;

– by adopting and maintaining in force Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and Article 10 of the Amending Law, which place the examination of complaints and questions of law concerning the lack of independence of a court or judge under the exclusive jurisdiction of the [Extraordinary Chamber], the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU and the principle of primacy of EU law;

– by adopting and maintaining in force points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and points 1 to 3 of Article 72(1) of the amended Law on the Supreme Court, under which the examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law may be classified as a "disciplinary offence", the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU;

– by conferring on the [Disciplinary Chamber], whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office, such as, first, applications for authorisation to initiate criminal proceedings against judges and trainee judges or to detain them and, second, cases relating to employment and social security law that concern judges of the Supreme Court and cases relating to the compulsory retirement of those judges, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

– by adopting and maintaining in force Article 88a of the amended Law on the organisation of the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law on the organisation of the administrative courts, the Republic of Poland has infringed the right to respect for private life and the right to protection of personal data, guaranteed by Article 7 and Article 8(1) of the Charter and by Article 6(1)(c) and (e), Article 6(3) and Article 9(1) of [the GDPR].'

34. The Commission also requests that the Republic of Poland be ordered to pay the costs.

35. In its defence, lodged on 17 June 2021, the Republic of Poland contends that the Court should dismiss the present action as unfounded in its entirety and order the Commission to pay the costs of the proceedings.

36. The Commission and the Republic of Poland lodged a reply and a rejoinder on 28 July 2021 and 7 September 2021, respectively.

37. By separate document lodged on 1 April 2021, the Commission brought an application for interim measures pursuant to Article 279 TFEU, asking the Court to order the Republic of Poland, pending the judgment of the Court on the substance of these proceedings, to suspend the application of a number of the provisions introduced by the Amending Law.

38. By order of 14 July 2021,[9] the Vice-President of the Court granted the Commission's application for interim measures pending delivery of the judgment closing the present proceedings and reserved the costs.[10]

39. On 16 August 2021, the Republic of Poland, considering that the judgment of the Trybunał Konstytucyjny (Constitutional Court, Poland) of 14 July 2021, delivered in Case P 7/20 ('the judgment of the Trybunał Konstytucyjny (Constitutional Court), Case P 7/20') constituted a change in circumstances, requested the Court to cancel its order of 14 July 2021 pursuant to Article 163 of the Rules of Procedure of the Court of Justice. That Member State also requested that the Grand Chamber of the Court examine the application.[11]

40. By order of 6 October 2021,[12] the Vice-President of the Court dismissed the Republic of Poland's requests and reserved the costs. In her order, the Vice-President of the Court stated that the principle of the primacy of EU law requires all Member State bodies to give full effect to EU provisions and that the law of the Member States may not undermine the effect accorded to those provisions. Under the second subparagraph of Article 19(1) TEU, which is clear, precise and unconditional, every Member State must ensure that courts or tribunals that are liable to rule on the application or interpretation of EU law meet the requirements of effective judicial protection. National provisions on the organisation of justice in the Member States may be subject to review in the light of the second subparagraph of Article 19(1) TEU in the context of an action for failure to fulfil obligations, and, consequently, to interim measures seeking their suspension in that context. That assessment is unaltered by the fact that a national constitutional court declares such interim measures contrary to the constitutional order of the Member State concerned. By virtue of the principle of the primacy of EU law, a Member State cannot rely on rules of national law, even of a constitutional order, to undermine the unity and effectiveness of EU law.[13]

41. In the meantime, on 7 September 2021, the Commission claimed that, from the information the Republic of Poland had provided by letter of 16 August 2021, it was not apparent that it had adopted all of the measures necessary to implement the interim measures set out in the order of 14 July 2021. The Commission argued that, in order to ensure the full effectiveness of the order of 14 July 2021, the effective application of EU law and compliance with the principles of the rule of law and the integrity of the EU legal order, it was necessary that the Court order the Republic of

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

10 The Republic of Poland was required, inter alia, to suspend:
– the application of the provisions under which the Disciplinary Chamber has jurisdiction to adjudicate on applications for authorisation to initiate criminal proceedings against judges or trainee judges;
– the effects of the decisions already adopted by the Disciplinary Chamber which authorise the initiation of criminal proceedings against, or the arrest of, a judge, and to refrain from referring cases to a court which does not meet the requirements of independence;
– the application of the provisions on the basis of which the Disciplinary Chamber has jurisdiction to adjudicate in cases relating to the status of judges of the Supreme Court and the performance of their office and to refrain from referring those cases to a court which does not meet the requirement of independence;
– the application of provisions which allow the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law;
– the application of national provisions in so far as they prohibit national courts from verifying compliance with the requirements of EU law relating to an independent and impartial tribunal previously established by law;
– the application of provisions establishing the exclusive competence of the Extraordinary Chamber to examine complaints alleging the lack of independence of a judge or a court.

11 In that judgment, the Trybunał Konstytucyjny (Constitutional Court) held, inter alia, that the second subparagraph of Article 4(3) TEU, read in conjunction with Article 279 TFEU, is incompatible with Articles 2 and 7, Article 8(1) and Article 90(1) of the Constitution of the Republic of Poland, read in combination with Article 4(1) thereof. The Trybunał Konstytucyjny (Constitutional Court) considered that the Court of Justice exceeded its own competences – and thus ruled ultra vires – when it imposed on the Republic of Poland interim measures relating to the organisation and jurisdiction of the Polish courts, as well as the procedure to be followed before those courts. Order of 6 October 2021, *Poland* v *Commission* (C-204/21 R-RAP, EU:C:2021:834, paragraphs 10 and 11).

12 *Poland* v *Commission* (C-204/21 R-RAP, EU:C:2021:834).

13 Order of 6 October 2021, *Poland* v *Commission* (C-204/21 R-RAP, EU:C:2021:834, paragraphs 18 to 24).

Poland to pay a daily penalty payment in an amount likely to encourage that Member State to give full effect to the said interim measures as soon as possible. The Republic of Poland contended that it had adopted all of the measures necessary to enforce the order of 14 July 2021.

42. By order of 27 October 2021,[14] the Vice-President of the Court ordered the Republic of Poland to pay the Commission a periodic penalty payment of EUR 1 000 000 per day, from the date of notification of that order until 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 present proceedings and reserved the costs.

43. By decision of 30 September 2021, the President of the Court granted the Kingdom of Belgium, the Kingdom of Denmark the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden leave to intervene in the present case in support of the form of order sought by the Commission. Those Member States submitted written observations to the Court.

44. By decision of 7 October 2021, the President of the Court granted the present case priority treatment under Article 53(3) of the Rules of Procedure.

45. On 28 June 2022, a hearing was held at which the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland, the Kingdom of Sweden, and the Commission presented oral argument and answered questions from the Court.

V. Legal context

46. With a view to the resolution of the issues before the Court in this infringement action, reference should be made to the following well-established propositions of law.

47. The European Union is founded upon values common to the Member States in a society where justice prevails.[15] Mutual trust between the Member States and, in particular, their courts and tribunals, is based on the premiss that a set of common values is shared. It follows that a Member State's compliance with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights derived from the application of the Treaties to that Member State.[16]

48. Respect for the rule of law is one of these common values, of which Article 19(1) TEU is a concrete manifestation. Its second subparagraph requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. The first sentence of the second paragraph of Article 47 of the Charter, which reflects the general principle of effective judicial protection, also provides that everyone is entitled to a fair and public hearing

14 *Commission* v *Poland* (C-204/21 R, not published, EU:C:2021:878).

15 Article 2 TEU.

16 Article 49 TEU provides that any European State that respects the values referred to in Article 2 TEU and is committed to promoting them may apply to become a member of the European Union. Judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraphs 61 to 63).

within a reasonable time by an independent and impartial tribunal previously established by law.[17] Moreover, the second subparagraph of Article 19(1) TEU and Article 47 of the Charter have direct effect and confer rights on individuals that they may rely on before national courts.[18]

49. It is for the Member States[19] to establish a system of legal remedies and procedures to ensure effective legal protection[20] in the fields covered by EU law whereby the courts and tribunals within that system that may rule on the application or interpretation of EU law satisfy the requirements of effective judicial protection.[21] Member States thus have the task of designating the courts and/or institutions empowered to review the validity of national provisions, to prescribe legal remedies and procedures to contest their validity and, where an action is well founded, to strike them down and to determine the effects thereof.[22] Save where EU law provides otherwise, it does not impose any particular judicial model[23] on Member States, nor does it require that they adopt any specific system of remedies, provided that the remedies available comply with the principles of equivalence and effectiveness.[24] When exercising that competence, Member States must comply with their obligations under EU law.[25] That approach reflects the principles of subsidiarity and proportionality in Article 5 TEU and the procedural autonomy of the Member States.[26]

17 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 122). While Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, in a given case, on a right which he or she derives from EU law, the second subparagraph of Article 19(1) TEU seeks to ensure that the system of legal remedies in each Member State guarantees effective judicial protection in the fields covered by EU law irrespective as to whether the Member State is implementing EU law within the meaning of Article 51(1) of the Charter: judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraphs 36, 45 and 52).

18 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 145 and 146).

19 In its rejoinder, the Republic of Poland claims that, in accordance with the judgment of the Trybunał Konstytucyjny (Constitutional Court), Case P 7/20, the Court acted ultra vires by adopting interim measures pursuant to its order of 14 July 2021, as the organisation of justice in the Member States is a matter for their exclusive competence. The Republic of Poland considers that, in the light of the settled case-law of the Trybunał Konstytucyjny (Constitutional Court,) and of the Verfassungsgerichtshof (Constitutional Court, Belgium), the Ústavní soud (Constitutional Court, Czech Republic), the Højesteret (Supreme Court, Denmark), the Bundesverfassungsgericht (Federal Constitutional Court, Germany), the Tribunal Constitucional (Constitutional Court, Spain), the Conseil d'État (Council of State, France), the Corte costituzionale (Constitutional Court, Italy) and the Curtea Constituțională (Constitutional Court, Romania) by reference to the principle of constitutional identity, the Member States' constitutional courts 'have the final word' on the powers transferred under the Treaties. The European Union's powers are circumscribed by the principle of conferral, which is a principle of EU law that encompasses both the constitutional principles of the Member States and the European Union's obligation to respect their respective national identities.

20 The effective judicial protection of individuals' rights under EU law, to which the second subparagraph of Article 19(1) TEU refers, is a general principle of EU law stemming from the constitutional traditions common to the Member States, enshrined in Articles 6 and 13 ECHR and reaffirmed by Article 47 of the Charter. That latter provision must therefore be taken into consideration in interpreting the second subparagraph of Article 19(1) TEU. 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 102 and the case-law cited).

21 In the present proceedings it is undisputed that the Supreme Court, the ordinary courts and the administrative courts in Poland may be required to rule on questions concerning the application and interpretation of EU law in cases before them, and thus in cases falling within fields covered by EU law pursuant to the second subparagraph of Article 19(1) TEU. 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 111 to 114).

22 See, to that effect, judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána* (C-378/17, EU:C:2018:979, paragraph 34).

23 See, by analogy, the *A. K.* judgment (paragraph 130).

24 Member States are thus responsible for ensuring that, pursuant to Article 47 of the Charter, the right to effective judicial protection of the rights individuals derive from EU law is effectively protected: the *A. K.* judgment (paragraph 115 and the case-law cited). See also judgment of 22 October 1998, *IN. CO. GE.'90 and Others* (C-10/97 to C-22/97, EU:C:1998:498, paragraph 14). There is a degree of overlap between the principle of effectiveness and the right to an effective remedy pursuant to Article 47. See, to that effect, Opinion of Advocate General Bobek in *An tAire Talmhaíochta Bia agus Mara, Éire agus an tArd-Aighne* (C-64/20, EU:C:2021:14, point 42). See also, by analogy, judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 46 to 48).

25 See, to that effect, the *A. K.* judgment (paragraph 115 and the case-law cited). The judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraph 36), states that may be the case with regard to national rules governing the appointment of members of the judiciary and the judicial review of that procedure. See also judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 48).

26 Judgment of 2 March 2021, *Prokuratuur (Conditions of access to data relating to electronic communications)* (C-746/18, EU:C:2021:152, paragraph 42).

50. The second subparagraph of Article 19(1) TEU precludes national provisions on the organisation of justice that reduce the protection of the value of the rule of law, in particular, guarantees of judicial independence. The Court has, moreover, held that a Member State cannot amend its legislation so as to reduce the protection of the rule of law. Member States must thus refrain from adopting rules that undermine the independence of the judiciary. [27]

51. The requirement that courts are independent, which is inherent in the task of adjudication, is a constituent of the right to effective judicial protection, which in turn is part of the fundamental right to a fair trial for which Article 47 of the Charter provides. Viewed in that context, the independence of Member State judges is of fundamental importance to the EU legal order. [28]

52. The requirement that the courts are independent 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 aspect, internal in nature, is linked to impartiality. It seeks to ensure that, as regards the subject matter of legal proceedings, courts maintain an equal distance from the parties thereto and their respective interests. That aspect of independence requires that courts be objective and have no interest in the outcome of the proceedings other than the strict application of the rule of law. [29]

53. The requirement of impartiality also has two aspects. First, the members of the court or tribunal must themselves be subjectively impartial, that is, none of them may show bias or personal prejudice. In the absence of evidence to the contrary a presumption of personal impartiality applies. Second, the court or tribunal must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in that respect. [30]

54. Finally, by requiring that a tribunal be 'previously established by law', Article 47 of the Charter seeks to ensure that the organisation of the judicial system is regulated by law emanating from the legislature in compliance with the rules governing the exercise of its power, thereby precluding such organisation being left to the discretion of the executive. That requirement covers not only the legal basis for the very existence of a tribunal, but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, such as rules governing the composition of a panel hearing a case. [31]

27 Judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraphs 63 to 65). See also Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014 (EU:C:2014:2454, paragraph 168).

28 This is of cardinal importance as a guarantee that all of the rights individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. Judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraphs 48 to 51 and the case-law cited).

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

30 Judgment of 24 March 2022, *Wagenknecht* v *Commission* (C-130/21 P, EU:C:2022:226). The Court has stated that, according to the case-law of [the ECtHR], under the subjective test of impartiality regard must be had to the personal convictions and behaviour of a particular judge, that is, by examining whether he or she gave any indication of personal prejudice or bias in a given case. Under the objective test of impartiality, it must be ascertained whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt as to its impartiality. It must therefore be determined whether, quite apart from the judge's conduct, there are ascertainable facts that may raise doubts as to his or her impartiality. In that respect, even appearances may be of a certain importance. The *A. K.* judgment (paragraph 128 and the case-law of the ECtHR cited).

31 Judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 205 and the case-law cited). The guarantees of independence and impartiality required by EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. 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 117).

55. The requirement that a tribunal be established by law is infringed where an irregularity committed during the appointment of judges [32] is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue influence to undermine the integrity of the appointment process. That is the case where the application of fundamental rules that form an integral part of the establishment and functioning of that judicial system is in play. [33] Such an irregularity may give rise to a reasonable doubt in the minds of individuals as to the independence [34] and the impartiality of the judge or judges so appointed.

56. The requirements of independence, impartiality and of prior establishment by law are inherently linked and overlap. A breach of one of those requirements may entail a breach of another or indeed of all of them. [35]

57. Member States, in particular, their judicial arms, must protect the rights granted to individuals pursuant to the second subparagraph of Article 19(1) TEU and Article 47 of the Charter in two ways.

58. First, it is a corollary of the right to an independent and impartial tribunal previously established by law that everyone has the possibility to invoke that right. [36] Moreover, where the existence of an independent and impartial tribunal is disputed on a ground that does not immediately appear to be manifestly devoid of merit, [37] every court [38] 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. [39] In exceptional

32 The ECtHR stated in its judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, §§ 227 and 232), that the process of appointing judges necessarily constitutes an inherent element of the concept of a 'tribunal established by law' for the purposes of Article 6(1) ECHR. The independence of a tribunal within the meaning of that provision may be measured, inter alia, by the manner of the appointment of its members. See also judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraph 57 and the case-law cited).

33 See the *Simpson* judgment (paragraph 75), and 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 130). 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, paragraphs 71 to 73), on the secondment of judges. Not every error touching upon the appointment of a judge is such as to cast doubts on his or her independence and impartiality and, accordingly, on whether a formation including that judge can be considered an 'independent and impartial tribunal previously established by law' for the purposes of EU law: judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraph 123). See also judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraphs 71 to 74).

34 The phrase 'established by law' reflects, in particular, the principle of the rule of law. It covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned. Judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraphs 118, 119, 121 and the case-law cited).

35 See for example, judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraphs 117 to 122 and the case-law cited).

36 The *Simpson* judgment (paragraph 55).

37 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).

38 Including the Court of Justice, the General Court and the courts and tribunals of the Member States. 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 of 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.

39 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).

cases the courts of one Member State may be called on to assess whether a person's fundamental right to an independent and impartial tribunal previously established by law has been breached in another Member State. [40]

59. Second, courts must respect the principle of the primacy of EU law. [41] Within the exercise of the jurisdiction conferred upon them, courts called upon to apply EU law are obliged to adopt all measures necessary to ensure that EU law is fully effective, if need be by disapplying any national provisions or national case-law that is contrary to EU law. [42] In order to disapply a provision of national law, the court entrusted by national law with applying EU law must be in a position to assess and establish whether a provision of national law is contrary to EU law. In accordance with the principle of primacy of EU law, [43] there is a clear distinction between the exercise of a power to disapply, in a specific case, a provision of national law deemed contrary to EU law and a power to strike down such a provision, with the consequence that that provision is no longer valid for any purpose. [44]

60. As regards the role of national constitutions and national constitutional courts raised in the rejoinder, [45] the Court has ruled that the European Union must respect the Member States' national identities in accordance with Article 4(2) TEU. EU law does not require Member States to choose a particular constitutional model. However, the Member States' respective

40 See, by analogy, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 73). See also judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100)

41 The *A. K.* judgment (paragraph 157).

42 Judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 22), and of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 252 and the case-law cited).

43 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 166). The judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 61), states that a national court hearing a case within its jurisdiction is, as an organ of a Member State, under an obligation to disapply, in the case pending before it, any provision of national law that is contrary to a provision of EU law with direct effect.

44 Judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána* (C-378/17, EU:C:2018:979, paragraph 33). See also, by analogy, judgment of 22 March 2022, *Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court – Appointment)* (C-508/19, EU:C:2022:201, paragraph 81), which ruled that a request for a preliminary ruling in proceedings seeking a declaration that a person does not have a service relationship as a judge and, consequently, could not lawfully designate the disciplinary court or tribunal having jurisdiction to hear disciplinary proceedings brought against another judge, was inadmissible as such an action seeks, in essence, to invalidate the appointment of the judge in question *erga omnes*, even though Polish law does not authorise, and has never authorised, challenges to the appointment of a judge by way of an action for the annulment or the invalidation of his or her appointment.

45 In response to a question put by the Court for response at the hearing, the Commission submits that the arguments raised in the rejoinder are entirely rebutted by the judgment of 22 February 2022, *RS (Effects of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, in particular, paragraphs 19, 39, 40, 53, and 58). Polish courts must thus disapply case-law of the Trybunał Konstytucyjny (Constitutional Court) that undermines the primacy of EU law. The Kingdom of Belgium considers that the judgment of the Trybunał Konstytucyjny (Constitutional Court), Case P 7/20 is based upon an incorrect premiss. When exercising their competences in relation to the organisation of justice, Member States must comply with EU law, in particular the second subparagraph of Article 19(1) TEU. The Court, not national constitutional courts, has exclusive jurisdiction to interpret EU law, including the principle of primacy. Article 4(2) TEU does not permit national constitutional courts to verify whether EU law impinges upon national identity. Moreover, a national constitutional court cannot rule that the Court has acted ultra vires and refuse to give effect to its judgments. Deference to all national constitutional rules would undermine the obligation of the European Union to respect the equality of Member States and the uniform and effective application of EU law. The Kingdom of Denmark rejects any analogy the Republic of Poland draws between the case-law of the Trybunał Konstytucyjny (Constitutional Court) and that of the Højesteret (Supreme Court) or the constitutional courts of other Member States since the Republic of Poland is alone in challenging the very principle of the rule of law. The Kingdom of the Netherlands observes that, in its the judgment of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland* (CE:ECHR:2021:0507JUD000490718), the ECtHR held that the Trybunał Konstytucyjny (Constitutional Court) is not a tribunal established by law but is rather a political body whose rulings are not binding. See also judgment of 22 February 2022, *RS (Effects of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraph 44). In accordance with the principle of primacy, the Trybunał Konstytucyjny (Constitutional Court) may not disapply EU law or Court judgments. Moreover, a Member State may not invoke its own constitutional identity if it conflicts with the core values of the European Union in Article 2 TEU: judgment of 16 February 2022, *Poland* v *Parliament and Council* (C-157/21, EU:C:2022:98, paragraphs 264 to 266). Finally, a failure by a Member State to respect judicial independence affects EU cooperation on a wide scale. The Kingdom of Sweden considers that Member States must give full effect to the principle of judicial independence pursuant to the second subparagraph of Article 19(1) TEU, which is clear, precise and unconditional. The application of that principle is unrelated to any issue of national constitutional identity.

constitutional orders must ensure the independence of their courts. Provided that a constitutional court can guarantee effective judicial protection, the second subparagraph of Article 19(1) TEU does not preclude national rules whereby the ordinary courts of a Member State are bound by a constitutional court decision that national legislation is consistent with that Member State's constitution. The same cannot be said where the application of those national rules prevents such ordinary courts from assessing the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that provides for the primacy of EU law. By virtue of the latter principle, a Member State cannot rely on rules of national law, even of a constitutional order, in order to undermine the unity and effectiveness of EU law. The principle of the primacy of EU law binds all emanations of the Member States, and domestic law, including its constitutional provisions, cannot present themselves as an obstacle thereto. It is for the Court to clarify the scope of the principle of the primacy of EU law in the exercise of its exclusive jurisdiction to give definitive interpretations of EU law. [46]

61. In the present Opinion I shall first address the Commission's second complaint, which relates to an alleged monopoly of jurisdiction to adjudicate upon allegations of a lack of independence in a court and thus to determine the right of access to an independent court. That complaint is narrower in scope than the first, which concerns the right to an independent and impartial tribunal previously established by law in accordance with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. Furthermore, the decision proposed with respect to the second complaint may have consequences for that to be taken with regard to the first.

VI. Legal analysis

A. Second complaint – The exclusive jurisdiction of the Extraordinary Chamber to examine complaints and questions of law concerning the lack of independence of a court or a judge

1. Arguments of the parties

62. By its second complaint, the Commission argues that, by placing the examination of complaints and questions of law concerning the lack of independence of a court or a judge under the exclusive jurisdiction of the Extraordinary Chamber, the Republic of Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, under Article 267 TFEU and the principle of primacy of EU law. The complaint is based upon the adoption and maintenance in force of Article 26(2) and (4) to (6) and Article 82(2) to (5) of the Law on the Supreme Court, in the version resulting from the Amending Law, as well as Article 10 of the Amending Law.

63. At the hearing, the Commission confirmed that it considers that the Extraordinary Chamber has exclusive jurisdiction to review questions on the independence of courts, formations of courts and judges. It stated that such questions may not be examined on appeal before other courts. The

[46] Judgment of 22 February 2022, *RS (Effects of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraphs 43 to 46, 51 and 52). Paragraph 55 of that judgment emphasises that compliance with the principle of primacy is necessary to ensure respect for the equality of Member States before the Treaties, which precludes the possibility of relying on a unilateral measure as against the EU legal order. It is also an expression of the principle of sincere cooperation in Article 4(3) TEU, which requires the disapplication of any provision of national law that may be contrary to EU law, irrespective as to when that provision was adopted.

Commission also observed that the monopoly on the review of independence by the Extraordinary Chamber is extremely limited since Article 26(3) of the amended Law on the Supreme Court provides that the Extraordinary Chamber has no jurisdiction to review questions on independence relating to the appointment of a judge or his or her authority to carry out judicial functions. The Commission also confirmed that the first three complaints do not contradict one another, as the Republic of Poland claims, since the applicable provisions of Polish law ensure that it is not possible to review the procedure for the appointment of a judge.

64. The second complaint consists of four parts. First, Article 26(2) of the amended Law on the Supreme Court confers exclusive jurisdiction on the Extraordinary Chamber to rule on applications for the recusal of judges from, and the designation of courts having jurisdiction to hear, a case where it is alleged a court or a judge lacks independence. A court before which such an application is made must refer that application to the Extraordinary Chamber without delay. The Extraordinary Chamber's ruling binds that court irrespective as to whether that Chamber has jurisdiction to rule on the substance of the case.

65. In paragraph 166 of the *A. K.* judgment, the Court held that a court hearing a dispute which, according to national law, should be examined by a court which does not meet the requirements of independence or impartiality, is under an obligation to disapply that national provision in order to ensure effective judicial protection within the meaning of Article 47 of the Charter and to enable that dispute to be resolved by a court that meets those requirements.

66. By conferring exclusive jurisdiction on the Extraordinary Chamber to determine these issues, Article 26(2) of the amended Law on the Supreme Court deprives national courts, except the Extraordinary Chamber, of the right to refer a question to the Court pursuant to Article 267 TFEU on the requirement of independence within the meaning of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. The Commission considers that Article 26(2) of the amended Law on the Supreme Court prevents national courts from examining, of their own motion[47] or at the request of a party to the proceedings,[48] whether a judge hearing a case governed by EU law satisfies the requirement of independence within the meaning of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. The independence of a court or judge is a horizontal issue that may arise in any case and any court hearing a case concerning EU law should be able to examine it. Nor is the grant of exclusive jurisdiction to determine such issues justified by a need to establish specialised courts for that purpose.

67. Second, the Commission argues that, pursuant to Article 82(2) of the amended Law on the Supreme Court, the Extraordinary Chamber has exclusive jurisdiction to rule on questions of law in cases pending before the Supreme Court relating to the independence of a judge or a court. In accordance with Article 82(3) to (5) of the amended Law on the Supreme Court, in such cases the Extraordinary Chamber, sitting in plenary formation, adopts a decision that binds all formations of the Supreme Court and can be overturned only by resolution of the a plenary formation of the Supreme Court taken by at least two thirds of the judges of each of its chambers. When it adopts its decision, the Extraordinary Chamber is not bound by any other Supreme Court decision, save where the latter has the status of a 'ruling of principle'. The Commission considers that the foregoing provisions deprive the other Supreme Court chambers from ruling on such matters and thereby breach the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

47 The *A. K.* judgment (paragraph 166). See also the *Simpson* judgment (paragraph 57).

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

68. Third, the Commission claims that Article 26(4) to (6) of the amended Law on the Supreme Court also breaches those provisions of EU law since it confers on the Extraordinary Chamber exclusive jurisdiction to hear actions seeking a declaration that final rulings or judgments of any Polish court, including the other chambers of the Supreme Court and of the Supreme Administrative Court, are unlawful where the alleged illegality relates to the status of the judge who ruled on the case. Such actions may be brought before the Extraordinary Chamber without being heard by the court that issued the judgment in question, irrespective of whether a party has exhausted any other available remedies.

69. Fourth, the Commission claims that the transitional provisions of Article 10 of the Amending Law also breach EU law. Under those provisions, the Polish courts were required to refer to the Extraordinary Chamber, before 21 February 2020, the cases pending on 14 February 2020 that concerned matters falling within the exclusive jurisdiction of the Extraordinary Chamber pursuant to Article 26(2) and (4) to (6) and Article 82(2) to (4) of the amended Law on the Supreme Court. Following the referral of such cases, the Extraordinary Chamber, 'may revoke previous acts in so far as they prevent further examination of the case in accordance with the law'. The Amending Law further deprives acts carried out in such cases after 14 February 2020, in particular by judges, of procedural effect.

70. The Commission considers that the powers of the Extraordinary Chamber referred to above infringe Article 267 TFEU and the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter. They are also contrary to the obligation on national courts to apply the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, in accordance with the principle of the primacy of EU law.

71. The Commission emphasises that, as concerns questions relating to the independence of judges and courts, all national courts must be able to apply the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter in order to guarantee individuals the fundamental right to an effective remedy. In the context of a dispute before it, a court of a Member State acting within its jurisdiction is under an obligation to apply the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and to disapply any national provision contrary to a provision of EU law that has direct effect. The national provisions at issue deprive all Polish courts, with the exception of the Extraordinary Chamber, of the right to rule on incidental questions, such as the recusal of a judge in the formation of a court and the designation of a court's jurisdiction. Those provisions also prevent national courts from ensuring effective judicial protection through the disapplication of national provisions that confer jurisdiction, in cases that fall within the scope of EU law, on courts and judges that do not satisfy the requirements of Article 19(1) TEU and Article 47 of the Charter.

72. The Commission also considers that, since 14 February 2020, the provisions challenged in these proceedings deprive other national courts of their right and, in the case of the courts of last instance, of their obligation, to refer questions for a preliminary ruling under Article 267 TFEU as regards the interpretation of the requirements of the independence and impartiality of a court or tribunal as a matter of EU law. In particular, national courts other than the Extraordinary Chamber are deprived of the opportunity to resolve those issues. Nor are Article 26(4) to (6) and Article 82(2) to (4) of the Law on the Supreme Court limited to incidental questions since they confer exclusive jurisdiction on the Extraordinary Chamber. That right and that obligation are inherent to the system of cooperation established by Article 267 TFEU, and to the duties that the second subparagraph of Article 19(1) TEU confers on a judge charged with applying EU law.

73. According to the Commission, the transitional provisions in Article 10 of the Amending Law also infringe Article 267 TFEU since they prevent national courts from maintaining questions referred for a preliminary ruling prior to 14 February 2020. Article 10(2) of the Amending Law allows the Extraordinary Chamber to revoke acts carried out by a national court and, in particular, to withdraw questions that the latter had referred for a preliminary ruling. It is clear from the Court's case-law that, in order to ensure the effectiveness of the powers Article 267 TFEU confers upon a national court, it must be able to maintain a request for a preliminary ruling.

74. The reply emphasises that the Commission does not question the right of national legislatures to make laws on the jurisdiction of courts. Rather, it questions the monopoly granted to the Extraordinary Chamber to examine a court's or a judge's compliance with the requirement of independence under EU law when such matters may arise before all national courts. The Commission does not maintain that a court seised of a question concerning the requirement of independence pursuant to EU law must always examine it. In a Member State with 10 000 judges, jurisdiction to apply the second subparagraph of Article 19(1) TEU and Article 47 of the Charter may not, however, be reserved to a chamber of 20 judges. The Commission also observes that the Extraordinary Chamber was established pursuant to the Law on the Supreme Court of 8 December 2017 and that its members were appointed on the proposal of the KRS. Given that the role of the KRS in the appointment of judges often gives rise to requests for their recusal, the Extraordinary Chamber itself may not be impartial and objective in matters of judicial independence. [49]

75. At the hearing, the Commission, in response to a question from the Court, confirmed that the question of independence of a court, a formation or a judge cannot be raised before a higher court on appeal. The Extraordinary Chamber thus has exclusive jurisdiction over all questions relating to the independence of a court, a formation or a judge.

76. The Republic of Poland considers that the second complaint is unfounded and should be rejected in its entirety.

77. As regards the alleged breach of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the Republic of Poland considers that the Commission misinterprets the *A. K.* judgment. It follows from that judgment that, if a case involving EU law has been referred to a court which lacks jurisdiction and a party submits that the examination of the case by a court having jurisdiction will breach its rights under Article 47 of the Charter, the court lacking jurisdiction may accede to that objection and refer the case to another independent court which would have jurisdiction were it not for the rules that reserved jurisdiction to a court which is not independent. According to the Republic of Poland, the *A. K.* judgment does not decide that the second subparagraph of Article 19(1) TEU prevents Member States from adopting rules on the jurisdiction of courts. Moreover, the respective positions of a court that must refer a case to the court that has jurisdiction to hear it, and that of a court seised of an application for recusal directed against the judge, confronted with a question of law or a doubt about the legality of a final decision, are fundamentally different. The Commission's position would result in a breach of the

[49] See the *A. K.* judgment (paragraph 122). The Kingdom of Denmark considers that the Extraordinary Chamber, in a similar manner to the Disciplinary Chamber, is not independent. Both chambers were established by the same law whereby their members are appointed following a procedure that involves the KRS, which itself is not independent. 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, paragraphs 150, 152 and 153). See also the judgment of the ECtHR of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (CE:ECHR:2021:1108JUD004986819, §§ 353 to 355), which held that, for the purposes of Article 6 ECHR, the Extraordinary Chamber is not a tribunal established by law.

right to a court established by law and, in cases concerning the recusal of a judge, of the right to an independent court. The allocation of jurisdiction to courts in all cases coming before them is a *sine qua non* of access to a court established by law.

78. The Republic of Poland emphasises that the Member States have exclusive competence to adopt provisions on the jurisdiction of their courts. While Member States must comply with the second subparagraph of Article 19(1) TEU, that provision cannot regulate the allocation of jurisdiction as between national courts. The Republic of Poland observes that the Commission has not challenged the independence of the Extraordinary Chamber. The second complaint is thus based on an assertion that national courts have a right to hear certain categories of cases, which right, in the opinion of the Commission, would undermine the substantive jurisdiction conferred on other courts. In that regard, it observes that the referring courts involved in the case that gave rise to the *A. K.* judgment did not have jurisdiction to rule on the substance of the cases before them and transferred them to a court with jurisdiction to do so. That transfer is regulated by Article 200(1)[4] of the Code of Civil Procedure, which provides that each court must examine whether it has jurisdiction and, if not, refer the case to the court with jurisdiction to determine that question.

79. As regards Article 26(2) of the amended Law on the Supreme Court on the recusal of judges, the Republic of Poland claims that a judge or a formation of a court hearing an application for its recusal must refer that application to another formation or to a higher court. Article 26(2) of the amended Law on the Supreme Court therefore does not deprive the appropriate judge, formation or court of jurisdiction to rule on such incidental questions. At the hearing, the Republic of Poland, in response to a question from the Court, confirmed that the issue of the independence of a court, a formation or a judge may be raised on appeal.

80. In the opinion of the Republic of Poland, an action for a declaration that a final judgment is unlawful pursuant to Article 26(4) to (6) of the amended Law on the Supreme Court is not a preliminary or incidental question, but must be brought before a specialised court with jurisdiction to determine that issue. The procedure is initiated by way of an extraordinary action against a final judgment that a party alleges infringed substantive law or procedural rules and caused it damage. According to the Republic of Poland, affording any person the possibility to raise such a matter before any court in any procedure would undermine, inter alia, the principles of *res judicata* and legal certainty. It is obvious the court that delivered the judgment under challenge cannot entertain such an application. Nor is it evident from the *A. K.* judgment why the Commission considers that, in order for there to be an effective remedy in the event of a breach of Article 47 of the Charter, the court that delivered the judgment the subject matter of that challenge must hear that application. Conferral of jurisdiction upon a specialised chamber to hear such questions strengthens the parties' procedural safeguards and does not undermine the right to a court.

81. The Republic of Poland submits that the Commission's submissions on Article 82(2) to (5) of the amended Law on the Supreme Court and the competence of the Extraordinary Chamber on questions of law relating to the independence of a judge or a court are unfounded. Pursuant to Article 1 point 1 letter a) of the amended Law on the Supreme Court, the Supreme Court has jurisdiction to adopt resolutions resolving all questions of law in cases that fall within its jurisdiction. Article 82(2) to (5) of the amended Law on the Supreme Court moreover confers jurisdiction on the Extraordinary Chamber to interpret the law. It therefore does not limit the right of other courts to assess facts. In addition, courts have a right, but not an obligation, to submit such questions to the Extraordinary Chamber.

82. The Republic of Poland submits that Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and Article 10 of the Amending Law do not limit the courts' jurisdiction to refer questions for preliminary ruling to the Court pursuant to Article 267 TFEU. In any event, the Extraordinary Chamber is a court of final instance which, pursuant to Article 267 TFEU, is required to refer a question for a preliminary ruling in the event of doubt regarding the interpretation of the second subparagraph of Article 19(1) TEU.

83. The Republic of Poland considers that since the Commission has failed to explain how the provisions of national law in question in the second complaint breach the principle of primacy, that plea should be rejected. [50]

84. As for the transitional measures in Article 10 of the Amending Law, the Republic of Poland claims that that provision has already expired. The Commission produced no evidence, based on either the text of that provision or the practice of the Extraordinary Chamber, to show that that chamber has or could use that provision in order to withdraw requests for preliminary rulings made by other Polish courts or to undermine the effectiveness of Court judgments. Moreover, Article 200(1) of the Code of Civil Procedure and by Article 35(1) of the Code of Criminal Procedure, the legality of which the Commission has not challenged, govern the jurisdiction of the courts.

85. The rejoinder points out that the Commission's claims as described in point 74 of the present Opinion on the lack of independence of the Extraordinary Chamber were not contained in the application. As new pleas, they must be rejected pursuant to Article 127(1) of the Rules of Procedure.

2. Assessment

(a) Admissibility

86. The Commission's allegations of the lack of independence of the Extraordinary Chamber due to the involvement of the KRS in the appointment of the judges sitting in that chamber and its limited human resources due to the fact that it consists of 20 judges only [51] were raised for the first time in the reply. [52]

87. Suffice it to point out that, in accordance with Article 127(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact that came to light in the course of the procedure.

50 Judgment of 26 April 2005, *Commission* v *Ireland* (C-494/01, EU:C:2005:250, paragraph 41).

51 In that regard, the Commission appears to question whether the right to effective judicial protection of rights derived under EU law can be assured in every case allocated to the Extraordinary Chamber under the disputed provisions of national law. See, by analogy, the *A. K.* judgment (paragraph 115 and the case-law cited).

52 Neither the application nor the pre-contentious stage of the proceedings raises these issues.

88. During the pre-contentious stage of these proceedings, and at the time it introduced the present action, the Commission knew [53] that the Extraordinary Chamber had been established pursuant to the Law on the Supreme Court of 8 December 2017. The Commission thus knew the number of judges sitting in that chamber and the manner of their appointment, notably the role of the KRS. In so far as the Commission's allegations pertain to those matters, they must be rejected as inadmissible.

89. The *Disciplinary regime for judges* judgment [54] found that there were legitimate doubts as to the independence of the KRS and of its role in the appointment of the members of the Disciplinary Chamber of the Supreme Court. According to the Court, this, together with other factors, gave rise to reasonable doubts in the minds of individuals as to the independence and impartiality of that Disciplinary Chamber. The Court thus held that, by failing to ensure the independence and impartiality of the Disciplinary Chamber, the Republic of Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

90. Whilst the Commission's omission to make an analogous claim with respect to the Extraordinary Chamber at any stage in the course of these proceedings is a matter for it, it appears somewhat surprising. In that context, it may be observed that the Court's judgment on the Republic of Poland's failure to guarantee the independence and impartiality of the Disciplinary Chamber was based on a number of factors not limited to doubts about the independence of the KRS. [55] Thus even if the Court could rely on its finding on the independence of the KRS in the *Disciplinary regime for judges* judgment, [56] this would in itself be insufficient to justify a finding in these proceedings that the Extraordinary Chamber is not independent. [57]

91. Moreover, in its judgment of 8 November 2021 in *Dolińska-Ficek and Ozimek v. Poland*, [58] the ECtHR unanimously held that the Republic of Poland had violated Article 6(1) ECHR since the Extraordinary Chamber was not a 'tribunal established by law'. [59] In reaching that conclusion, the ECtHR relied extensively on the Court's case-law concerning recent reforms of the judiciary in Poland. The ECtHR's ruling was based on a finding that there had been manifest breaches of domestic law that had adversely affected the operation of fundamental rules of procedure for the appointment of judges to the Extraordinary Chamber. Those irregularities in the appointment process compromised the legitimacy of the Extraordinary Chamber to such an extent that it lacked the attributes of a 'tribunal' that is 'lawful' for the purposes of Article 6(1) ECHR. In that regard, the ECtHR stated in unequivocal terms that 'the recommendation of candidates for

53 In that regard, see the *A. K.* judgment; judgments of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596) ('the *Disciplinary regime for judges* 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); and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153). The Commission also appeared in several preliminary references that raised these and analogous issues.

54 See paragraphs 104 to 108.

55 Doubts in respect of the independence of the KRS were based upon a number of factors, including that 23 of its 25 members had been appointed by the Polish executive or legislature or were members thereof. The Court has held that the fact that a body, such as a National Council of the Judiciary made up of a majority of members chosen by the legislature, is involved in the procedure to appoint judges cannot, in itself, give rise to any doubt as to the independence of the judges so appointed. The independence of a national court or tribunal is to be assessed in the light of all relevant factors, including the conditions governing the appointment of its members. Judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraphs 55 and 56).

56 See paragraphs 104 to 108.

57 See also judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paragraph 75).

58 Judgment of the ECtHR of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (CE:ECHR:2021:1108JUD004986819). The judgment was based upon two applications lodged at the ECtHR on 12 September 2019 and 22 October 2019 respectively and thus well before the lodgement of the application. The judgment became final under Article 44(2) ECHR on 8 February 2022.

59 The ECtHR applied the three-step test laid down in its judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418).

judicial appointment to the [Extraordinary Chamber] – a condition *sine qua non* for appointment by the President of the Republic of Poland [60] – was entrusted to the [KRS], a body that lacked sufficient guarantees of independence from the legislature and the executive'. [61]

92. The judgment of the ECtHR is not binding on the Court as the EU has not acceded to the ECHR. However, under Article 52(3) of the Charter, the Court must ensure that its interpretation of the second paragraph of Article 47 of the Charter safeguards a level of protection which does not fall below that established in Article 6(1) ECHR, as interpreted by the ECtHR. [62] The standard set by the final judgment in *Dolińska-Ficek and Ozimek v. Poland* [63] may thus be relevant in any future proceedings before the Court. It may also be observed in passing that, in accordance with Article 46 ECHR, the Republic of Poland must abide by the final judgment in *Dolińska-Ficek and Ozimek v. Poland* [64] and take appropriate measures to comply with it swiftly. [65]

(b) Substance

93. The Commission relies heavily upon the *A. K.* judgment in order to substantiate its second complaint. In that case, the Disciplinary Chamber's exclusive jurisdiction to hear actions brought by national judges based on EU law [66] was questioned due to that chamber's alleged lack of independence and impartiality by reference to Article 19(1) TEU and Article 47 of the Charter. Since there is considerable disagreement between the Commission and the Republic of Poland as regards the interpretation of that judgment, I cite paragraphs 165 and 166 thereof:

'165. A provision of national law which granted exclusive jurisdiction to hear and rule on a case in which an individual pleads, as in the present cases, an infringement of rights arising from rules of EU law in a particular court which does not meet the requirements of independence and impartiality arising from Article 47 of the Charter would deprive that individual of any effective remedy within the meaning of that article and of Article 9(1) of Directive 2000/78, and would fail to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter …

166. It follows that, where it appears that a provision of national law reserves jurisdiction to hear cases, such as those in the main proceedings, to a court which does not meet the requirements of independence or impartiality under EU law, in particular, those of Article 47 of the Charter, another court before which such a case is brought has the obligation, in order to ensure effective judicial protection, within the meaning of Article 47, in accordance with the principle of sincere

60 Hereinafter 'the President of the Republic'.

61 Judgment of the ECtHR of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (CE:ECHR:2021:1108JUD004986819, § 349). See also judgment of the ECtHR of 22 July 2021, *Reczkowicz v. Poland* (CE:ECHR:2021:0722JUD004344719, § 276), in which the ECtHR held that the process of judicial appointments to the Disciplinary Chamber was inherently defective due to the involvement of the KRS. That judgment became final under Article 44(2) ECHR on 22 November 2021.

62 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 123 and the case-law cited).

63 Judgment of the ECtHR of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (CE:ECHR:2021:1108JUD004986819).

64 Judgment of the ECtHR of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (CE:ECHR:2021:1108JUD004986819).

65 Paragraph 368 of the ECtHR judgment states that it is inherent in its findings that the violation of the applicants' rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the KRS and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges so appointed.

66 The national judges challenged their early retirement due to the entry into force of national legislation that allegedly breached Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

cooperation enshrined in Article 4(3) TEU, to disapply that provision of national law, so that that case may be determined by a court which meets those requirements and which, were it not for that provision, would have jurisdiction in the relevant field, namely, in general, the court which had jurisdiction, in accordance with the law then in force, before the entry into force of the amending legislation which conferred jurisdiction on the court which does not meet those requirements …'[67]

94. It is evident from the foregoing that the *A. K.* judgment did not impugn the exclusive jurisdiction national law conferred on the Disciplinary Chamber to rule on cases brought by judges in relation to rights granted under Directive 2000/78. Rather, the Court held that national law may not reserve exclusive jurisdiction to a court that does not meet the requirements of independence and impartiality required by Article 47 of the Charter.[68] It is also clear from the aforecited passages that the Court did not consider that any other national court that met those requirements would or should have had jurisdiction to rule on the matter. The Court simply held that the court that enjoyed jurisdiction under national law to rule on such matters under earlier legislation had jurisdiction to hear the case.[69]

95. The *A. K.* judgment confirms the right of each Member State, in accordance with the principle of procedural autonomy, to define its own judicial architecture and to establish procedural rules for actions that permit individuals to safeguard the rights they derive from EU law. Aside from the established requirement that the national courts must be independent, impartial and previously established by law,[70] the rules governing such actions must respect the principles of equivalence and effectiveness. The requirements stemming from those principles apply to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on EU law and to the procedural rules that govern such actions. Observance of those requirements falls to be analysed by reference to the role of the rules concerned in the procedure viewed as a whole, to the conduct of that procedure and to the special features of those rules before national courts.[71]

96. The Commission has not argued that Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and Article 10 of the Amending Law do not comply with the principle of equivalence. Rather, the Commission's complaint focuses on the principle of effectiveness and notably on the right to an effective remedy. It asserts, as a matter of principle, that questions relating to the independence of a court or a judge are horizontal issues that may arise in every case and that all national courts hearing a case concerning EU law should be able to examine them. Jurisdiction to determine such issues ought accordingly not to be reserved to specialised courts.

67 Were the Court to find that the Extraordinary Chamber is not independent, it follows from paragraph 165 of the *A. K.* judgment that, by adopting and maintaining in force Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and Article 10 of the Amending Law, which confers exclusive jurisdiction upon the Extraordinary Chamber to examine complaints and questions of law concerning, inter alia, the lack of independence of a court or a judge, the Republic of Poland would have failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.

68 All national courts which rule on cases that fall within the scope of EU law must comply with the requirements of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. To that effect, see judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraphs 63 and 64).

69 See, by analogy, 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 149).

70 Which argument the Commission failed to make on time in these proceedings.

71 Judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraphs 22 to 24 and the case-law cited). When the Member States implement EU law, they are required to ensure compliance with the right to an effective remedy enshrined in the first paragraph of Article 47 of the Charter, which provision reaffirms the principle of effective judicial protection: judgment of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114, paragraph 34).

97. An examination of Article 26(2) of the amended Law on the Supreme Court discloses that it grants the Extraordinary Chamber exclusive jurisdiction to rule on complaints alleging, inter alia, the lack of independence of a judge or a court and to provide a remedy in that context. All courts, including those dealing with a case concerning EU law, must therefore transfer a complaint [72] alleging a lack of independence of a court or a judge to the President of the Extraordinary Chamber. That transfer does not stay the proceedings before the court hearing the matter. [73]

98. The phrase 'shall have jurisdiction' in Article 26(2) of the amended Law on the Supreme Court is unequivocal and, in my view, suffices to ensure that the question of the independence of a court, a formation or a judge lies within the exclusive jurisdiction of the Extraordinary Chamber. [74] The text of that provision thus does not appear to support the Republic of Poland's claim that questions on independence can be raised on appeal. Moreover, when the Court raised this matter at the hearing, the Republic of Poland failed to adduce convincing evidence that such points can be properly taken in appeal proceedings. That having been said, the Commission has not claimed, nor does it appear from Article 26(2) of the amended Law on the Supreme Court, that the issue of the independence of a judge or a court must be brought before the Extraordinary Chamber by way of a separate, independent action. Rather, an issue pursuant to Article 26(2) of the amended Law on the Supreme Court is treated as a procedural incident or a motion before the Extraordinary Chamber. The Commission has not argued that the requirement to transfer such a procedural incident or motion to the Extraordinary Chamber is so burdensome as to undermine the full effectiveness of the rights granted to individuals under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. Nor is there any evidence to suggest that the transfer of those issues to the Extraordinary Chamber creates procedural disadvantages liable to render excessively difficult the exercise of the rights Article 19(1) TEU and Article 47 of the Charter confer on individuals. Whilst it may be the case that questions relating to the independence of a court, a formation or a judge are horizontal issues that are not required to be heard before specialised courts, there is nothing unlawful about their being determined by another court or formation. Such a practice may even promote the enhanced and uniform application of the applicable rules, thereby ensuring effective legal protection in fields covered by EU law in full respect of the principle of primacy.

99. If the national rule in question undermined the effectiveness of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter [75] by, for example, granting a monopoly to rule on the independence of a court to another court which itself lacked independence, the principle of primacy of EU law would require the court seised of such an action [76] to adopt all the measures necessary to ensure that those provisions of EU law are fully effective by, if necessary, disapplying national provisions or national case-law contrary thereto. [77]

72 Nothing in Article 26(2) of the amended Law on the Supreme Court suggests – and the Commission has not argued – that the court hearing a matter may not raise a complaint on lack of independence, which may then refer a request to the President of the Extraordinary Chamber.

73 While a complaint must be submitted to the Extraordinary Chamber forthwith, there is no indication in the file before the Court whether the law determines a period of time within which the Extraordinary Chamber must resolve it. Whilst such matters ought to be addressed with expedition, the Commission's complaint is silent on this point.

74 See also, by analogy, the following text in that provision 'the court dealing with the case shall submit forthwith a request to the President of the [Extraordinary Chamber]'.

75 And thus the right to effective legal protection. See point 48 of the present Opinion.

76 In a field covered by EU law.

77 See, to that effect, judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána* (C-378/17, EU:C:2018:979, paragraphs 48 to 50). See also the *A. K.* judgment (paragraph 164), and 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 148 and 149).

100. In the absence of a breach of the principle of equivalence or effectiveness, I therefore consider that national jurisdictional rules that limit or restrict the courts or formations that can rule on questions of the independence of a court, a formation or a judge, do not breach the second subparagraph of Article 19(1) TEU and Article 47 of the Charter or the principle of primacy of EU law.

101. It follows that Article 26(2) of the amended Law on the Supreme Court does not prevent national courts from examining whether they satisfy the requirement of independence within the meaning of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.[78] It simply grants exclusive jurisdiction to the Extraordinary Chamber to rule on the independence of a court, a formation or a judge upon the transfer of such a question to it.

102. The Commission's arguments summarised in points 67 and 68 of the present Opinion with regard to Article 26(4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court merely describe the content of those provisions.[79] As is clear from point 66 of the present Opinion, the Commission asserts, as a matter of principle, that questions on the independence of judges and courts are horizontal in nature. Accordingly, those provisions of national law infringe the second subparagraph of Article 19(1) TEU and Article 47 of the Charter by depriving all Polish courts, with the exception of the Extraordinary Chamber, of the right to rule on questions on the independence of courts or judges that arise in proceedings to which those provisions of national law refer. The Commission has, however, not demonstrated that those provisions of national law and the procedures and rules on jurisdiction laid down therein undermine the full effectiveness of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter or the principle of primacy of EU law. Rather it has failed to rebut the arguments of the Republic of Poland that the treatment of such proceedings by a specialised court complies with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

103. As for the Commission's allegation that Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court infringe Article 267 TFEU, aside from the fact that those provisions do not refer to that article in any way, it has not shown that they prevent or hinder, in law or in fact,[80] a national court, other than the Extraordinary Chamber, seised of a case where the matter of independence of a court, a formation or a judge is raised, from making a request for a preliminary ruling pursuant to Article 267 TFEU.[81]

104. In that regard, 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 that is capable of taking account of that preliminary ruling.[82]

78 In accordance with the *Simpson* judgment.

79 At the hearing, the Republic of Poland, in response to a question put to it by the Court, confirmed that the Extraordinary Chamber has exclusive jurisdiction to rule on questions of independence in the context of those procedures.

80 The *Disciplinary regime for judges* judgment (paragraphs 222 to 234) held that the Republic of Poland had failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU by restricting the right of courts and tribunals to submit requests for a preliminary ruling to the Court through the possibility that such requests would trigger disciplinary proceedings. See also judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 56 to 59).

81 Judgment of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 42 and the case-law cited). In the *A. K.* judgment (paragraphs 110 to 113), the Court held admissible a request for a preliminary ruling from the Izba Pracy i Ubezpieczeń Społecznych (Labour and Social Insurance Chamber) of the (Supreme Court), notwithstanding that the Republic of Poland claimed that chamber had encroached on the Disciplinary Chamber's exclusive jurisdiction.

82 Judgment of 27 February 2014, *Pohotovosť* (C-470/12, EU:C:2014:101, paragraph 28).

105. It follows that, beyond the exercise of the exclusive jurisdiction Article 26(2) and (4) to (6) [83] and Article 82(2) to (5) of the amended Law on the Supreme Court confer upon the Extraordinary Chamber, the question of the independence of courts, formations and judges is a horizontal matter that may arise before any court or tribunal, as the Commission has rightly submitted. A court seised of questions on the independence of a court, a formation or a judge in proceedings before it may, where necessary, request a preliminary ruling from the Court.

106. Article 267 TFEU gives national courts the widest discretion to refer matters to the Court where they consider that a case pending before them raises questions that involve the interpretation of provisions of EU law necessary to resolve the case before them. National courts are free to exercise that discretion at whatever stage of the proceedings that they consider appropriate. [84] In addition, it is settled case-law that, even where national law requires a court to follow the rulings of another court, that fact alone does not deprive the first court of the right to refer questions on the interpretation and validity of EU law for a preliminary ruling under Article 267 TFEU. The first court is free, in particular where it considers that another court's ruling could require it to give a judgment contrary to EU law, to refer questions to the Court. [85] Moreover, a judgment in which the Court gives a preliminary ruling is binding on the national court as regards the interpretation of the provisions of EU law in question for the purposes of the decision in the main proceedings. [86]

107. It follows from the foregoing that courts in the Republic of Poland can refer to the Court any question they consider necessary for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of a procedure such as that laid down in Article 26(2) of the amended Law on the Supreme Court. They can also adopt any measure necessary to ensure provisional judicial protection of the rights conferred under EU law and disapply, at the end of the procedure, the national legislative provision at issue or the judgment of the Extraordinary Chamber if they consider it to be contrary to EU law. As a court of final instance the Extraordinary Chamber is, in principle, obliged to make a reference to the Court under the third paragraph of Article 267 TFEU where a question relating to the interpretation of the TFEU is raised before it.

108. As for the Commission's allegations concerning the transitional measures in Article 10 of the Amending Law, it is settled case-law that the question as to whether a Member State has failed to fulfil its obligations is to be determined by reference to the situation that prevailed at the end of the period for compliance laid down in the reasoned opinion. [87] Article 10 of the Amending Law

83 For example, an action for the annulment of a final decision pursuant to Article 26(4) to (6) of the amended Law on the Supreme Court based on the alleged unlawful status of a judge is an extraordinary action before the Extraordinary Chamber. Suffice it to state that were such a matter raised before the court that delivered final judgment, that court must, if doubts arise on the interpretation of EU law, request a preliminary ruling pursuant to Article 267 TFEU.

84 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 56). Article 267 TFEU precludes any national rules or practice that prevent national courts from exercising the discretion or complying with the obligation, as the case may be, laid down in Article 267 TFEU, to make a reference for a preliminary ruling. Judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 260).

85 Judgment of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 42).

86 Accordingly, a national court that made a reference for a preliminary ruling under Article 267 TFEU cannot be prevented from forthwith applying EU law in accordance with the decision or the case-law of the Court, since otherwise the effectiveness of that provision would be impaired: judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 257). The national court must therefore, if necessary, disregard the rulings of a higher national court if it considers, having regard to the Court's interpretation, that those rulings are inconsistent with EU law, if necessary refusing to apply a national rule that requires it to comply with the decisions of that higher court. Judgment of 22 February 2022, *RS (Effects of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraph 75).

87 See, by analogy, judgment of 18 May 2006, *Commission* v *Spain* (C-221/04, EU:C:2006:329, paragraphs 24 to 26).

entered into force on 14 February 2020. The Commission, in response to a question of the Court at the hearing, confirmed that it had no evidence that that provision continued to produce effects after the expiry of the period laid down in the reasoned opinion, namely 30 December 2020. It therefore accepted that Article 10 of the Amending Law had 'expired' by that date. It follows that the Commission's complaint in respect of Article 10 of the Amending Law is inadmissible.

109. In any event, in the absence of any evidence that would question the legitimacy of the transfer of exclusive jurisdiction to the Extraordinary Chamber to rule on the matter of the independence of a court, a formation or a judge pursuant to Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court, the Commission's claims in respect of the transitional measures contained in Article 10 of the Amending Law, which merely provide for the temporal application of the aforementioned provisions, cannot prosper.

110. The Commission also seeks a declaration that, by applying the national provisions complained of in the present complaint, the Republic of Poland infringed the primacy of EU law. It is sufficient to observe that the claim in relation to primacy concerns the implementation by the Republic of Poland of the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 267 TFEU. It is therefore not a separate head of claim and it is unnecessary to adjudicate upon it. [88]

111. I accordingly propose that the Court dismiss the second complaint.

B. First complaint – The prohibition on national courts reviewing compliance with the EU law requirement of an effective remedy before an independent and impartial tribunal previously established by law

1. Arguments of the parties

112. The Commission claims that, by prohibiting national courts from reviewing compliance with the EU law requirement of an effective remedy before an independent and impartial tribunal previously established by law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, in the light of the case-law of the ECtHR concerning Article 6(1) ECHR and under Article 267 TFEU and the principle of primacy of EU law.

113. The Commission argues first, that Article 42a(1) and (2) of the amended Law on the organisation of the ordinary courts, Article 29(2) and (3) of the amended Law on the Supreme Court and Article 5(1a) and (1b) of the amended Law on the organisation of the administrative courts prohibit those national courts from reviewing the legality of the appointment of judges or the legitimacy of judicial bodies in the Republic of Poland, and thus whether a court in which a judge sits has been previously established by law within the meaning of Article 19(1) TEU, in conjunction with Article 47 of the Charter, read in the light of the ECtHR judgment, *Guðmundur Andri Ástráðsson v. Iceland*. [89] In its reply, the Commission contends that the text of the aforecited provisions of Polish law does not appear to distinguish between judicial review of the act of appointment of a judge by the President of the Republic and judicial review to ensure that the

88 See, by analogy, judgment of 4 December 1986, *Commission* v *France* (220/83, EU:C:1986:461, paragraphs 30 and 31).

89 Judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, (CE:ECHR:2020:1201JUD002637418). See also the *Simpson* judgment (paragraph 75).

guarantees provided by the second subparagraph of Article 19(1) TEU are met. The propriety of the procedure leading to the appointment of a judge affects not only the validity of the act of appointment but also the application of the EU law requirement of access to an independent and impartial tribunal previously established by law pursuant to the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. Paragraph 134 of the *A. K.* judgment stated that it is necessary to ensure that both the substantive conditions and the detailed procedural rules for the appointment of judges cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of those judges to external factors and as to their neutrality with respect to the interests before them.

114. Second, the Commission claims that Article 55(4) of the amended Law on the organisation of the ordinary courts prevents Polish courts from assessing whether members of a formation may legitimately exercise judicial functions. It prohibits courts from finding, either of their own motion or at the parties' request, on the basis of the 'provisions relating to the allocation of cases and to the appointment and modification of the formations of the court', that a formation of the court is contrary to the law, that it is inadequately staffed or that a person is unauthorised or incompetent to adjudicate. That provision therefore prevents courts from verifying, by reviewing the legality of a judgment, whether a court is an independent and impartial tribunal previously established by law and thus whether it had jurisdiction to hear the case. In addition, pursuant to Article 8 of the Amending Law, Article 55(4) of the amended Law on the organisation of the ordinary courts also applies to pending cases. The reply clarified that, pursuant to Article 55(4) of the amended Law on the organisation of the ordinary courts, once a judge is appointed in accordance with the rules on the allocation of cases, that judge is deemed to have jurisdiction lawfully to rule in a case. This prevents the requirements of an independent and impartial tribunal previously established by law from being examined in an appeal against a judgment.

115. The Commission considers that the aforementioned national provisions prevent a Polish court from complying with its obligation to verify, of its own motion or at the request of a party, whether, due to its composition, it constitutes an independent and impartial tribunal previously established by law. In addition, those provisions prevent courts from ascertaining, where that issue is important for their own judgment (for example, in an action to annul a decision due to the irregular composition of a court), whether another court complies with the EU requirements of an independent and impartial tribunal previously established by law within the meaning of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, read in the light of the case-law of the ECtHR on Article 6(1) ECHR, having regard to the circumstances surrounding the appointment of a judge or the legitimacy of a judicial body.

116. According to the Commission, judicial review of the requirement of an independent tribunal established by law in accordance with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter does not require the introduction of a specific mechanism for that purpose. Nor does it necessarily require that a national judge annul the act of appointment of a judge or dismiss the person appointed. It is thus irrelevant that, pursuant to the Constitution of the Republic of Poland, the act of appointment of a judge cannot be called into question. It is for the national court hearing the matter to determine the consequences of any breach of the requirement of an independent tribunal previously established by law on the basis of the applicable national law, taking due account of the effectiveness of EU law and matters such as the principle of legal certainty.

117. The Republic of Poland claims the Commission has not made out its claim on the alleged infringement of Article 267 TFEU and the principle of primacy. In addition, it argues that the Commission did not refer to Article 26(3) of the amended Law on the Supreme Court and did not explain how that provision infringes EU law.

118. The Republic of Poland draws a clear distinction between the judicial review of the act of appointment of a judge and its effects and the judicial review of the safeguards that a court must ensure pursuant to the second subparagraph of Article 19(1) TEU. Polish law does not authorise the first form of judicial review and the Court took no objection to this in its *A. K.* judgment. [90] Under the Constitution of the Republic of Poland and the consistent case-law of the Polish courts, the power to appoint judges is a prerogative of the President of the Republic. That power is not, and has never been, subject to judicial review on the ground that to permit such challenges undermines the principle of the irremovability of judges. This is in line with the Court's case-law, which states that the conditions for dismissal of a judge must be provided for by law, justified and proportionate. It is also consistent with the case-law of the ECtHR, according to which the organisation of justice should not be left to the discretion of the judiciary. By contrast, Polish law provides for judicial review of the right to an independent tribunal and of the provision of the guarantees provided by EU law. The Republic of Poland adds that the Commission's interpretation of the contested provisions is unsupported by case-law.

119. The Republic of Poland considers that Article 42a(1) and (2) and Article 55(4) of the amended Law on ordinary courts, Article 29(2) and (3) of the amended Law on the Supreme Court and Article 5(1a) and (1b) of the amended Law on the organisation of the administrative courts do not restrict national courts' power to review the availability of the guarantee granted to individuals by the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.

120. In that regard, the Republic of Poland observes, first, that in the event of doubt as to the impartiality of a judge, his or her recusal may be sought pursuant to Articles 48 to 54 of the Code of Civil Procedure, [91] Articles 40 to 44 of the Code of Criminal Procedure [92] or Articles 18 to 24 of the Law on Administrative Procedure. [93]

121. Second, a case where the jurisdiction of a particular court is called into question or doubts are raised as to an individual's right to an independent and impartial court established by law may be referred to another court having jurisdiction under national law [94] that complies with the second subparagraph of Article 19(1) TEU.

122. Third, if the composition of the court seised was contrary to law or if a recused judge sat in a case, the appellate court is required to set aside the proceedings of its own motion and to annul that judgment in accordance with Article 379(4) of the Code of Civil Procedure, Article 349(1)(1) of the Code of Criminal Procedure and Article 183(2)(4) of the Law on Administrative Procedure, respectively. A finding of a breach of Article 47 of the Charter may lead to an appellate court

90 See paragraph 145. 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, paragraph 128).

91 Ustawa – Kodeks postępowania cywilnego (Law establishing the Code of Civil Procedure) of 17 November 1964 (Dz. U. of 2020, item 1575, as amended).

92 Ustawa – Kodeks postępowania karnego (Law establishing the Code of Criminal Procedure) of 6 June 1997 (Dz. U. of 2021, item 534, as amended).

93 Ustawa– Prawo o postępowaniu przed sądami administracyjnymi (Law establishing the procedure before the administrative courts) of 30 August 2002 (Dz. U. of 2019, item 2325, as amended).

94 See Article 200(1) of the Code of Civil Procedure and Article 35(1) of the Code of Criminal Procedural.

annulling the proceedings and setting aside a judgment on the ground that it was not delivered by an independent and impartial court previously established by law. The appellate court may not, however, impugn the mandate or the jurisdiction of the judge who issued the condemned judgment.

123. In its rejoinder, the Republic of Poland indicated that the purpose of Article 42a(1) and (2) of the amended Law on ordinary courts, Article 29(2) and (3) of the amended Law on the Supreme Court and Article 5(1a) and (1b) of the amended Law on the organisation of the administrative courts is to prevent judges' mandates or employment relationships being called into question in proceedings other than those envisaged by the Constitution of the Republic of Poland and the laws implementing it. Article 45 of the Constitution of the Republic of Poland, international treaties and the Charter moreover guarantee the right to an independent and impartial tribunal previously established by law. National legislation falls to be interpreted in the light of all of those provisions. Irregularities in the appointment of a judge or a breach of the right to a tribunal previously established by law do not entail the annulment of the act of appointment of a judge or of the proceedings in which that judge participated. [95]

124. The Republic of Poland considers that the Commission misinterprets Article 55(4) of the amended Law on the organisation of the ordinary courts. It claims that that provision does not prevent a review as to whether a court is correctly composed. It merely codifies the case-law of the Supreme Court which provides that, where a case is dealt with in breach of the provisions on the allocation of cases between the judges of a court which has jurisdiction, that does not constitute a ground for extraordinary review under Article 387 of the Code of Civil Procedure and Article 439(1)(2) of the Code of Criminal Procedure as it would lead to the proceedings and the judgment under review being set aside. An infringement of that nature may, nonetheless, constitute a ground for ordinary review. A party may accordingly seek the annulment of a judgment on the basis that an infringement of the applicable Rules of Procedure negatively affected the outcome of the case from his or her perspective. Moreover, a party may seek a judge's recusal if his or her participation in the case infringes the right to an impartial court.

125. The Republic of Poland claims that, contrary to the Commission's assertion in point 114 of the present Opinion, Article 55(4) of the amended Law on the organisation of the ordinary courts does not refer to review by the courts of the question as to whether a court that issued a judgment was an independent and impartial court previously established by law. That provision merely concerns the consequences of a breach of the rules on the allocation of cases and the composition of courts. It follows that the Commission's complaint in respect of Article 8 of the Amending Law, which provides that Article 55(4) of the amended Law on the organisation of the ordinary courts also applies to pending cases, must also be rejected.

2. Assessment

(a) Admissibility

126. The Republic of Poland submits that the infringements of Article 267 TFEU and the principle of primacy of EU law alleged in the Commission's first complaint are not made out. In addition, it claims that the Commission failed to provide any justification or proof that

[95] See the *Simpson* judgment. See also judgment of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418).

Article 26(3) of the amended Law on the Supreme Court infringed EU law. The Republic of Poland also considers that the Commission produced its explanations or evidence in support of those allegations out of time and the Court ought not to take account of them.

127. In proceedings brought under Article 258 TFEU for failure to fulfil obligations, it is for the Commission to prove that an obligation has not been fulfilled by placing before the Court all the information required to enable the Court to establish that fact, the Commission not being entitled to rely upon any presumption. [96] By virtue of Article 21 of the Statute of the Court of Justice of the European Union and Article 120(c) of the Rules of Procedure, the application under Article 258 TFEU must indicate the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based. [97] The merits of an Article 258 TFEU action are thus to be examined exclusively by reference to the claims advanced in the application.

128. In its first complaint, the Commission merely referred to Article 267 TFEU without explaining, even in summary form, how the provisions of Polish law that it identified infringed that provision. That the Commission, in its reasoned opinion of 30 October 2020, explained the relevance of Article 267 TFEU in the context of this complaint does not suffice for the purposes of Article 21 of the Statute of the Court and Article 120(c) of the Rules of Procedure. Moreover, contrary to the claim in the reply, the Court cannot presume the existence of a 'functional link' between the alleged infringement of Article 267 TFEU and the provisions of Polish law in question. In so far as the Commission may have explained that 'functional link' in the context of its second complaint, that complaint is made in respect of different provisions of Polish law.

129. By contrast, I consider that paragraph 75 of the application explains in summary form why the Commission considered that the provisions of Polish law identified in its first complaint infringe the principle of primacy of EU law. Moreover, since Article 26(3) of the amended Law on the Supreme Court essentially repeats Article 29(3) thereof, [98] it was sufficient that the Commission refer to Article 26(3) in its first complaint since it may be clearly deduced from the terms in which that complaint was expressed, taken as a whole, why it considered that the latter provision infringed EU law.

130. In the light of the foregoing, I propose that the Court reject, as inadmissible, the Commission's arguments in respect of Article 267 TFEU in the context of the first complaint.

(b) Substance

(1) Preliminary remarks – The scope of the Commission's first and second complaints

131. The Republic of Poland claims that the grounds raised in the Commission's second complaint are inconsistent with and contradict its first complaint. The Commission considers that that claim is groundless.

96 Judgment of 28 January 2016, *Commission* v *Portugal* (C-398/14, EU:C:2016:61, paragraph 47).

97 See, to that effect, judgment of 11 November 2010, *Commission* v *Portugal* (C-543/08, EU:C:2010:669, paragraphs 20 and 21 and the case-law cited).

98 Which in turn repeats the text of Article 42a(2) of the amended Law on the organisation of the ordinary courts and of Article 5(1b) of the amended Law on the organisation of the administrative courts.

132. The second complaint concerns the exclusive jurisdiction that national law grants to the Extraordinary Chamber to rule on questions on the independence of courts, formations of courts and judges. The first complaint criticises, inter alia, the fact that certain provisions of Polish law prohibit all national courts, including the Extraordinary Chamber,[99] from reviewing the legality of the appointment of judges in Poland. The first complaint therefore asserts that no court in Poland has jurisdiction to review the legality of the appointment of judges in Poland pursuant to EU law. I therefore consider that the Commission's first two complaints are consistent with one another.

(2) The right to an effective remedy before an independent and impartial tribunal previously established by law

133. The Republic of Poland does not dispute that the ordinary courts, the Supreme Court and the administrative courts must comply with the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, in the light of the case-law of the ECtHR concerning Article 6(1) ECHR and the principle of primacy of EU law. In addition, it does not contest that the courts in question must verify respect for the right to an independent and impartial court previously established by law in accordance with the *Simpson* judgment. The Republic of Poland claims that the national provisions the Commission identified merely prevent the act of appointment of a judge by the President of the Republic from being impugned. In that context, it highlights a number of other provisions of Polish law which afford judges the possibility to verify respect for access to an impartial tribunal previously established by law.

134. Contrary to the Republic of Poland's claims, in the present proceedings the Commission neither challenges the President of the Republic prerogative to appoint judges nor that the act of appointment of a judge may not be impugned under Polish law.[100]

135. In paragraph 133 of the *A. K.* judgment, the Court observed that the fact that the President of the Republic appoints judges does not create a relationship of subordination of the latter to the former or doubts as to the impartiality of the persons so appointed, if, once appointed, judges are free from influence. Furthermore, paragraphs 129 to 136 of the judgment in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*[101] state that, although it may not be possible to exercise a right to a legal remedy in the context of an appointment process to judicial posts at a national supreme court, that may not create problems for the application, of the requirements arising from EU law, provided other effective judicial remedies are available. The position may be different where judicial remedies that previously existed have been abolished and other relevant factors characterising an appointment process in a specific national legal and factual context give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed under that process.[102]

99 See, inter alia, Article 26(3) of the amended Law on the Supreme Court.

100 See Article 179 of the Constitution of the Republic of Poland, which provides that the President of the Republic is to appoint judges, on a proposal from the KRS, for an indefinite period. Article 180 of the Constitution of the Republic of Poland provides that judges are irremovable. Under Article 186 of the Constitution of the Republic of Poland, the KRS is empowered to ensure the independence of the courts and judiciary.

101 Judgment of 2 March 2021 (C-824/18, EU:C:2021:153).

102 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 156).

136. The Commission's first complaint is thus limited to the allegation that all ordinary courts, administrative courts and the Supreme Court, including the Extraordinary Chamber,[103] are prohibited from reviewing, either of their own motion or at the request of a party, whether a court ensures the right of individuals to an effective remedy in fields covered by EU law before an independent and impartial tribunal previously established by law.[104] According to the Commission, the contested provisions have at least two pernicious effects. First, they prevent courts from reviewing such questions, irrespective of the nature and scope of the remedy that might be available at national law. Second, they also prevent courts from disapplying national provisions contrary to the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

137. The Commission and the Republic of Poland disagree on the scope of the provisions of national law at issue in the first complaint.

138. The text of Article 42a(2) of the amended Law on the organisation of the ordinary courts, Articles 26(3) and 29(3) of the amended Law on the Supreme Court and Article 5(1b) of the amended Law on the organisation of the administrative courts explicitly prohibits the courts in question from establishing or assessing the legality of the appointment of a judge. Those same provisions also prohibit those courts from establishing or assessing the power to exercise judicial functions that derives from that appointment.

139. Article 42a(1) of the amended Law on the organisation of the ordinary courts, Article 29(2) of the amended Law on the Supreme Court and Article 5(1a) of the amended Law on the organisation of the administrative courts also provide that those courts may not 'call into question the legitimacy of the tribunal or courts … or the organs responsible for reviewing and protecting the law'. Article 55(4) of the amended Law on the organisation of the ordinary courts and Article 8 of the Amending Law[105] prevent provisions on the organisation of the allocation of cases and the appointment and modification of court formations from being relied on in order to limit a judge's jurisdiction or to find that a formation is contrary to law, that a court is improperly composed or that a person unauthorised or incompetent to adjudicate is part of that court.

140. The text of those provisions 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 judge has been legally appointed or can exercise judicial functions regardless of the nature of the alleged illegality, the act or procedure challenged or the remedy available. The text of those provisions is thus so broad as to sweep away the possibility for national courts to examine questions as to the independence of the composition of a court as the *Simpson* judgment[106] requires.

141. Despite the fact national courts are obliged to refer questions on the independence of a judge or a court to the Extraordinary Chamber under Article 26(2) of the amended Law on the Supreme Court, Article 26(3) of that law explicitly excludes the Extraordinary Chamber from assessing the legality of the appointment of a judge or his or her authority to carry out judicial functions. Moreover, in accordance with Article 42a(1) of the amended Law on the organisation of the

103 See Article 26(3) of the amended Law on the Supreme Court.

104 See paragraph 62 of the application.

105 Which appears to apply Article 55(4) of the amended Law on the organisation of the ordinary courts retrospectively.

106 See paragraph 55.

ordinary courts, Article 29(2) of the amended Law on the Supreme Court and Article 5(1a) of the amended Law on the organisation of the administrative courts, no Polish court may call the legitimacy of a court into question. The application of corresponding remedies under national law is therefore equally circumscribed.

142. In addition, while the prohibitions laid down in Article 55(4) of the amended Law on the organisation of the ordinary courts and Article 8 of the Amending Law may, as the Republic of Poland claims, in many cases concern purely organisational matters including the management of cases and workload, it may equally be the case that such matters give rise to concerns as to whether a court has been previously established by law or whether it is impartial. A sweeping prohibition upon even raising or addressing such matters in the circumstances described in the impugned legislation extends beyond what the Republic of Poland claims are the stated aims of those provisions and hinders the availability of judicial remedies to cure such a breach. It follows that the provisions of national law in question are so broad in their terms as to govern all aspects of the review of the right to an independent and impartial tribunal previously established by law guaranteed by the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

143. The Republic of Poland produced in evidence, at the Court's request, a large number of other provisions of national law which provide, inter alia, for the recusal of judges, the referral of a case to another court and the annulment of proceedings by appellate courts on the basis that those proceedings do not comply with the requirements of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. For example, Article 48 of the Code of Civil Procedure and Article 40 of the Code of Criminal Procedure provide for the automatic recusal of judges in certain specified circumstances. Pursuant to Article 49 of the Code of Civil Procedure and Articles 41 and 42 of the Code of Criminal Procedure, a judge may ask to be recused or a party may request the recusal of a judge. In accordance with Article 379(4) of the Code of Civil Procedure and Article 439 of the Code of Criminal Procedure, the participation of a judge who is subject to automatic recusal will lead to the annulment of the relevant proceedings.

144. In that context, it may be observed that the Republic of Poland indicated that the Trybunał Konstytucyjny (Constitutional Court) has, on a number of occasions, limited the scope of the national rules on the recusal of judges. Article 49 of the Code of Civil Procedure thus partly lapsed on 9 June 2020, in so far as it permitted the recusal of a judge based on his or her irregular appointment by the President of the Republic on the proposal of the KRS.[107] That same provision also partly lapsed on 28 February 2022, in so far as it recognised, as a circumstance likely to give rise to a legitimate doubt as to the impartiality of a judge in a particular case, the procedure for his or her appointment by the President of the Republic on the proposal of the KRS.[108] Article 41(1) and Article 42(1) of the Code of Criminal Procedure lapsed on 12 March 2020 in so far as they permitted the examination of an application for a judge's recusal by reason of an irregularity in his or her appointment by the President of the Republic on the proposal of the KRS.[109] This case-law imposes clear restrictions on the possibility of a judge being recused by reason of an irregularity in his or her appointment, as distinct from impugning the act of appointment of a judge by the President of the Republic.

[107] Judgment of the Trybunał Konstytucyjny (Constitutional Court) of 2 June 2020 (Case P 13/19) (Dz. U. of 2020, item 1017).

[108] Judgment of the Trybunał Konstytucyjny (Constitutional Court) of 23 February 2022 (Case P 10/19) (Dz. U. of 2022, item 480).

[109] In which judges selected on the basis of Article 9a of the ustawa o Krajowej Radzie Sądownictwa (Law on the KRS) of 12 May 2011 (Dz. U. of 2011, No. 126, item 714), as amended, inter alia, 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), and by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of ordinary courts and certain other laws) of 20 July 2018 (Dz. U. of 2018, item 1443). See, judgment of the Trybunał Konstytucyjny (Constitutional Court) of 4 March 2020 (Case P 22/19) (Dz. U. of 2020, item 413).

145. Nor do the various provisions of Polish law on the recusal of judges detract from the fact that the language of Article 42a(1) and (2) and Article 55(4) of the amended Law on the organisation of the ordinary courts, Article 26(3) and Article 29(2) and (3) of the amended Law on the Supreme Court, Article 5(1a) and (1b) of the amended Law on the organisation of the administrative courts and Article 8 of the Amending Law is extremely broad and is not limited to proceedings aimed at impugning the act of appointment of a judge. Those provisions instead purport to prevent a court reviewing the composition of the bench or any act leading to the appointment of a judge, thus denying the availability of any legal remedy in the event of a breach of the requirements of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

146. Even were one to accept that other provisions of national law appear to permit courts to review, at least to some extent, compliance with the guarantees provided by the second subparagraph of Article 19(1) TEU and Article 47 of the Charter,[110] their coexistence with the provisions of national law that the Commission challenged in its first complaint and the limitations the case-law of the Trybunał Konstytucyjny (Constitutional Court) imposed on their application create considerable legal uncertainty, thereby undermining the possibilities for courts and parties to access an independent and impartial court previously established by law, contrary to the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. The Commission also seeks a declaration that, by applying the national provisions to which it refers in the present complaint, the Republic of Poland infringed the primacy of EU law. As indicated in my answer to the second complaint,[111] the claim in relation to primacy is not a separate head of claim and it is unnecessary to adjudicate upon it as such.

147. I therefore advise the Court that the national provisions in question in the first complaint are capable of undermining the jurisdiction of Polish courts to review compliance with the requirements relating to an independent and impartial tribunal previously established by law in breach of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and thus infringe those provisions of EU law.

C. Third complaint – Making examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law a disciplinary offence

1. Arguments of the parties

148. This complaint relates to the addition of two disciplinary offences to points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts[112] and points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court,[113] together with the Amending Law that inserts into point 1 of Article 72(1) of the amended Law on the Supreme Court a disciplinary offence consisting of 'obvious and gross violations of the law'. According to the Commission, points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court deem the assessment by a national court of the independence of another judge or judicial body and their status as a 'tribunal previously established by law' to be a disciplinary offence. This

110 Here the national provisions relating to the impartiality and the recusal of judges.

111 See point 110 of the present Opinion.

112 Article 29(1) of the amended Law on the organisation of the administrative courts extends the application of points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts to judges of the administrative courts.

113 Article 49(1) of the amended Law on the organisation of the administrative courts extends the application of points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court to judges of the Supreme Administrative Court.

amounts to a failure by the Republic of Poland to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU.

149. The Commission starts from the position that a national court cannot be considered to have committed a disciplinary offence and to be at risk of suffering disciplinary measures when it complies with the obligations laid down in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

150. According to the Commission, the first disciplinary offence contained in the provisions cited in point 148 of the present Opinion concerns acts or omissions that prevent or seriously undermine the functioning of a judicial authority. The second concerns acts that call into question the existence of an employment relationship of a judge, the effectiveness of a judge's appointment or the legitimacy of a constitutional organ of the Republic of Poland.

151. Ordinary and administrative court judges who commit those offences are at risk of dismissal or of transfer to another court. A judge can be fined or removed from office for what are described as minor offences. [114] Supreme Court judges and Supreme Administrative Court judges are subject to unconditional dismissal for such offences. [115] The Commission observes that, according to the Republic of Poland, the purpose of the disciplinary offences in question is to ensure the 'effectiveness' of Article 42a and Article 55(4) of the amended Law on the organisation of the ordinary courts and Article 29(2) and (3) of the amended Law on the Supreme Court, [116] and to guarantee that national courts comply with the new powers that have been conferred on the Extraordinary Chamber exclusively. [117]

152. The Commission claims that an examination by a court of the propriety of the procedure for the appointment of judges in accordance with the *Simpson* judgment [118] may be classified as an act 'calling into question the existence of the employment relationship of a judge [or] the effectiveness of the appointment of a judge' pursuant to point 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and point 3 of Article 72(1) of the amended Law on the Supreme Court and thus give rise to disciplinary proceedings.

153. Moreover, as it indicated in the context of its second complaint, the Commission considers it necessary that all national courts can assess the independence of a court or of a judge hearing a particular case. That assessment is currently reserved to the exclusive competence of the Extraordinary Chamber. Any national court that infringes the provisions of national law referred to in the second complaint by invoking the principle of primacy of EU law may be subject to disciplinary proceedings pursuant to point 2 of Article 107(1) of the amended Law on the organisation of the ordinary courts and point 2 of Article 72(1) of the amended Law on the Supreme Court, that is, for an act or omission which prevents or seriously undermines the functioning of a judicial authority.

114 See Article 109(1a) of the amended Law the organisation of the ordinary courts.

115 That is to say acts or omissions that prevent, or seriously undermine, the functioning of a judicial authority or acts that call into question the existence of an 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. Those judges are subject to a financial penalty or removal from office where they are found to have committed minor offences: Article 75(1)(a) of the amended Law on the Supreme Court.

116 See the Commission's first complaint.

117 See the Commission's second complaint.

118 See paragraph 55. See Commission's first complaint.

154. A finding by a court that a tribunal is not previously established by law due to irregularities in the procedure that led to the appointment of a judge may constitute an act that calls into question 'the effectiveness of the appointment of a judge' and thus be classified as an offence pursuant to points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts or points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court.

155. The disciplinary offences points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court create also touch upon the content of judicial decisions that assess the independence and impartiality of another judge or court or the status of a 'tribunal previously established by law'. That state of affairs is contrary to the *Minister for Justice and Equality (Deficiencies in the system of justice)* [119] judgment where the Court held that judicial independence requires that the disciplinary regime not be used as a system of political control over the content of judicial decisions.

156. The same provisions of national law also facilitate the treatment as disciplinary offences of requests by a court for a preliminary ruling pursuant to Article 267 TFEU on the interpretation of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter arising from doubts about the legality of a court's jurisdiction. [120]

157. The Commission considers that those disciplinary offences do not comply with the *A. K.* judgment, as the Republic of Poland claims. If the application of the criteria laid down in paragraphs 132 to 154 of that judgment leads to the conclusion that a court is not independent and impartial in accordance with Article 47 of the Charter, a national court must refrain from applying national provisions that confer jurisdiction on such a court. Conduct of that kind could be considered a disciplinary offence pursuant to point 2 of Article 107(1) of the amended Law on the organisation of the ordinary courts and point 2 of Article 72(1) of the amended Law on the Supreme Court since it could amount to an act or an omission that is likely to prevent, or to jeopardise seriously, the functioning of a judicial authority. In addition, contrary to the Republic of Poland's submissions, the Court did not rule in paragraph 133 of the *A. K.* judgment that the appointment of judges by the President of the Republic cannot be subject to judicial review. The Court stated that the mere fact that a judge is appointed by the President of the Republic Poland is not such as to give rise to doubts as to his or her impartiality, if, once appointed, the person concerned is not subject to external pressure and does not receive instructions in the performance of his or her duties.

158. The Amending Law inserted into point 1 of Article 72(1) of the amended Law on the Supreme Court a disciplinary offence consisting of 'obvious and gross violations of the law'. That disciplinary offence already applied to judges of the ordinary courts pursuant to point 1 of Article 107(1) of the Law on the organisation of the ordinary courts. The *Disciplinary regime for judges* judgment examined the compatibility of the latter provision with the second subparagraph of Article 19(1) TEU. The disciplinary offence of an 'obvious and gross violation of the law' is a vague concept capable of restricting the content of judicial decisions. It cannot be excluded that point 1 of Article 72(1) of the amended Law on the Supreme Court, when read in the context of the increased activity of disciplinary officials and executive pressure on the activity

[119] Judgment of 25 July 2018 (C-216/18 PPU, EU:C:2018:586, paragraph 67).

[120] See judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 55 to 59).

of disciplinary bodies following the amendments pursuant to the Law on the Supreme Court of 8 December 2017,[121] could be used to exercise political control over the judicial activity of Supreme Court judges.

159. In its reply, the Commission emphasises that the third complaint relates to the content and terms of legislative provisions in question rather their judicial appreciation or their application. In the *Disciplinary regime for judges* judgment[122] the Court held that it is essential that rules be laid down which define, in a sufficiently clear and precise manner, the forms of conduct that may trigger the disciplinary liability of judges, in order to guarantee their independence and to avoid exposing them to the risk that disciplinary liability may be triggered solely because of the decisions they take. The words 'acts calling into question' in point 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and point 3 of Article 72(1) of the amended Law on the Supreme Court are not limited to challenging the act of appointment of a judge by the President of the Republic.

160. The Commission also claims that the Republic of Poland does not dispute the similarities between point 1 of Article 72(1) of the amended Law on the Supreme Court and point 1 of Article 107(1) of the amended Law on the organisation of the ordinary courts. The reasoning in the *Disciplinary regime for judges* judgment applies a fortiori to point 1 of Article 72(1) of the amended Law on the Supreme Court.

161. The Republic of Poland claims that the third complaint is unfounded as the Commission has failed to discharge the burden of proof pursuant to Article 258 TFEU. It notes, in particular, that the Commission relies on the text of the national provisions in question and has produced no evidence with regard either to their implementation or the case-law that interprets them.

162. Point 2 of Article 107(1) of the amended Law on the organisation of the ordinary courts and point 2 of Article 72(1) of the amended Law on the Supreme Court are based on French law.[123] The Commission has never challenged the compatibility of those provisions with EU law. Moreover, according to the Republic of Poland, it cannot be inferred from those national law provisions that they apply to cases in which EU law, including Article 19(1) TEU, is applied. The application of EU law is not an act or an omission that would prevent or seriously undermine the functioning of a judicial authority.

163. The Republic of Poland contends that the Commission's interpretation of point 2 of Article 107(1) of the amended Law on the organisation of the ordinary courts and point 2 of Article 72(1) of the amended Law on the Supreme Court is also contradicted by the objective those provisions pursue, which is to ensure that judges who are members of a profession based on public trust do not behave in a manner incompatible with the dignity of their office. Since it is the duty of a court to apply the law and to refer questions for a preliminary ruling, the Commission's claim that those acts might constitute a disciplinary offence is incorrect. Nor do those provisions permit the review of judicial decisions or the imposition of disciplinary liability on a judge as a consequence of an examination as to whether the right to a court is guaranteed. The Commission's position is thus unfounded from a linguistic, logical and empirical stance and national case-law does not support it.

121 As described in the case giving rise to the *Disciplinary regime for judges* judgment.

122 See paragraph 140.

123 In particular, Article 10 of order No 58-1270 of 22 December 1958 laying down the organic law on the status of the judiciary.

164. As regards point 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and point 3 of Article 72(1) of the amended Law on the Supreme Court, [124] the Republic of Poland considers that the Commission confuses a national court's review of compliance with the requirements of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, with the effect of that review, which amounts to questioning the exercise by the President of the Republic of his or her prerogative to appoint a particular judge.

165. The disciplinary offences in question do not consist of an examination as to whether an individual's right to a tribunal has been respected pursuant to the second subparagraph of Article 19(1) TEU. Those provisions of national law instead preclude a court questioning the validity of a judicial appointment in the context of a procedure other than that provided for by the Constitution of the Republic of Poland or provisions adopted on the basis thereof.

166. The provisions of national law at issue do not preclude the availability of remedies to address an infringement of a party's rights under Article 47 of the Charter, such as the annulment of a judgment, the recusal of a judge or the referral of a case to another court that complies with that provision of the Charter in accordance with the *A. K.* judgment. Nor do those provisions prevent requests for preliminary rulings pursuant to Article 267 TFEU. Since their adoption, the Polish courts have made a number of requests for preliminary rulings on the interpretation of the second subparagraph of Article 19(1) TEU. The Commission does not maintain that any of the courts that made those requests were subject to disciplinary proceedings and the Republic of Poland confirms that is the case.

167. The Republic of Poland also confirms that point 1 of Article 72(1) of the amended Law on the Supreme Court corresponds to point 1 of Article 107(1) of the Law on the organisation of the ordinary courts, which provides that a judge shall incur disciplinary liability for 'obvious and gross violations of the law'. The latter provision has been in force, unchanged, since 1 October 2001. It has not to date, given rise to any objections. Point 1 of Article 72(1) of the amended Law on the Supreme Court thus merely standardises the definition of disciplinary misconduct already applicable to judges of the ordinary courts. According to the Republic of Poland, it would be unacceptable were the legislator to exonerate Supreme Court judges – who must meet the highest standards of legal behaviour and knowledge – from being answerable in disciplinary proceedings for offences consisting of obvious and gross violations of the law.

168. In accordance with the Supreme Court's case-law, a breach of legal rules is 'obvious' where 'the error of the court is easy to establish, it has been committed in relation to the provision in question, although the meaning of that provision must not give rise to doubts even on the part of persons with an average legal qualification and its application does not require further analysis' [125] or 'where, in the mind of any lawyer, without further considerations, it does not give rise to any doubt as to the fact that there has been an infringement of a rule of law'. [126] It is thus clear from both the text of point 1 of Article 72(1) of the amended Law on the Supreme Court and the case-law thereon that compliance with the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 267 TFEU do not constitute an obvious and gross violation of the law.

[124] Which concern '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'.

[125] Supreme Court judgments of 8 March 2012 (Case SNO 4/12) and of 11 December 2014 (Case SNO 61/14).

[126] Supreme Court judgment of 22 June 2015 (Case SNO 36/15).

169. The rejoinder points out that, contrary to the Commission's claims in point 159 of the present Opinion, the Court's case-law [127] requires that an assessment of national legislation must take into account its application in practice, including any national case-law on its interpretation.

2. Assessment

(a) Preliminary observations on the scope of the Commission's second and third complaints

170. The Republic of Poland asserts that the grounds the Commission raises in its second complaint are inconsistent with, and contradict, its third complaint. The Commission asks the Court to reject that claim. The second complaint concerns the exclusive jurisdiction that certain provisions of national law grant to the Extraordinary Chamber to rule on questions on the independence of courts, formations and judges. The third complaint is that the examination by a court of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law are classified as a disciplinary offence. Those two complaints are obviously different. I therefore do not agree that there is an obvious contradiction between them and propose that the Court rejects the objection taken by the Republic of Poland in that regard.

(b) Disciplinary proceedings

171. As a consequence of the requirements relating to an independent and impartial tribunal previously established by law under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the disciplinary regime applicable to judges must provide guarantees necessary to prevent any risk of it being used as a system to exercise political control over the content of judicial decisions. Rules that define, in particular, the forms of conduct which constitute disciplinary offences and the penalties applicable therefor; provide for the involvement of an independent body in accordance with a procedure that fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, notably the rights of the defence; and envisage the possibility to challenge disciplinary bodies' decisions by way of legal proceedings, constitute a set of guarantees essential to safeguard the independence of the judiciary. [128]

172. The disciplinary regime applicable to judges falls within the organisation of justice and, therefore, within the Member States' competence. Depending on the manner in which a Member State imposes it, the disciplinary liability of judges can contribute to the accountability and effectiveness of the judicial system. In exercising that competence, the Member States must comply with EU law by safeguarding, inter alia, the independence of the courts called upon to rule on questions concerning the application or interpretation of EU law in order to ensure the effective judicial protection of individuals that the second subparagraph of Article 19(1) TEU requires. [129]

173. Safeguarding that independence does not totally exclude any possibility that the disciplinary liability of a judge may, in very rare and entirely exceptional cases, be triggered by his or her judicial decisions. The requirement of independence is not intended to protect totally inexcusable forms of conduct on the part of judges, consisting in violating, either deliberately and

127 See for example, judgment of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219).

128 The *Disciplinary regime for judges* judgment (paragraphs 61 and 134 and the case-law cited).

129 The *Disciplinary regime for judges* judgment (paragraph 136).

in bad faith or due to particularly serious and gross negligence, the national and EU law that they are supposed to apply, or by acting arbitrarily or denying justice when called upon to rule in disputes. [130]

174. In order to preserve judicial independence and to prevent a disciplinary regime from being diverted from its legitimate purpose, it is essential that the fact that a judicial decision may contain an error in the interpretation and/or the application of national and/or EU law, or in the assessment of the facts and the appraisal of the evidence, is itself incapable of triggering disciplinary liability. [131]

175. Invocation of disciplinary liability must thus be governed by objective and verifiable criteria grounded upon the essential requirements of the sound administration of justice and by guarantees designed to avoid any risk of external pressure on the content of judicial decisions, thus helping to dispel, in the minds of individuals, any reasonable doubts as to the imperviousness of the judges concerned and their neutrality with respect to the interests before them. [132] To that end, it is essential that rules be laid down that define, in a sufficiently clear and precise manner, the forms of conduct which may trigger the disciplinary liability of judges, in order to guarantee their independence and to avoid exposing them to the risk of triggering disciplinary liability due to the content of their decisions. [133] The Court has also held that not exposing national judges to disciplinary proceedings or measures for having exercised their discretion to make a reference for a preliminary ruling to the Court under Article 267 TFEU constitutes a guarantee essential to their independence. [134]

176. According to the Court's settled case-law, the scope of national legislative provisions the subject of infringement proceedings must, as a general rule, be assessed in the light of the interpretation that national courts have given to them. [135] In making out its third complaint, the Commission alleges that the terms of the national provisions themselves clearly infringe identifiable provisions of EU law and that it is therefore unnecessary to inquire into the manner in which those provisions are applied in practice. [136] Since the Commission has chosen to present its case in this fashion, I see no reason in logic why the Court cannot receive and rule upon it on that basis, at the risk of the Commission failing to succeed on that issue.

177. The Republic of Poland claims that the text of point 2 of Article 107(1) of the amended Law on the organisation of the ordinary courts and of point 2 of Article 72(1) of the amended Law on the Supreme Court is similar to equivalent provisions of French law and observes that the Commission has never impugned the latter's validity. Moreover, the Republic of Poland argues that point 1 of Article 72(1) of the amended Law on the Supreme Court does not grant a greater margin of discretion to the body charged with ruling on a dispute than the equivalent provisions of Belgian, Danish and Dutch law.

130 See, by analogy, the *Disciplinary regime for judges* judgment (paragraph 137).

131 See, by analogy, the *Disciplinary regime for judges* judgment (paragraph 138).

132 See, by analogy, the *Disciplinary regime for judges* judgment (paragraph 139).

133 The *Disciplinary regime for judges* judgment (paragraph 140).

134 Judgment of 22 February 2022, *RS (Effects of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraph 85 and the case-law cited).

135 The *Disciplinary regime for judges* judgment (paragraph 142 and the case-law cited).

136 In order to rebut certain arguments raised in the defence, the reply referred briefly to the disciplinary regime in general in Poland together with the lack of independence of the Disciplinary Chamber. The reply confirms that the application did not rely on those matters.

178. In that regard, it is sufficient to observe that the present infringement proceedings are directed against the Republic of Poland. Since the lawfulness of rules in force in other Member States is not before the Court in these infringement proceedings, that Member State cannot rely upon them in order to demonstrate that it has not breached EU law. [137]

179. In so far as it concerns points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court, the Commission's third complaint is closely linked to its second. The Commission considers that all national courts must be able to assess whether the requirements of independence, impartiality and prior establishment by law are met. The Commission's reading of the aforesaid provisions is that such an assessment may be deemed to constitute an act that seriously undermines the functioning of a judicial authority or calls into question the existence of an employment relationship of a judge or the effectiveness of his or her appointment.

180. As indicated in my proposed response to the second complaint, I consider that, in the absence of an infringement of the principles of equivalence or effectiveness, national jurisdictional rules that limit or restrict the courts or formations thereof which can rule on questions on the independence of a court, formation or judge do not, in principle, infringe the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. Provided the jurisdictional rules are clear and precise, in the usual course of proceedings a court, formation or judge ought not to usurp the powers conferred upon another jurisdiction.

181. In my view the text of points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and of points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court is so broad and imprecise as to be reasonably open to an interpretation that an examination by a judge of compliance with any of the requirements of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of an independent and impartial tribunal previously established by law [138] may constitute a disciplinary offence. It may be credibly argued that a court, acting within its jurisdiction, which examines whether it, or another court, complies with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter or refers questions to the Court for a preliminary ruling pursuant to Article 267 TFEU, [139] could be considered to have prevented or seriously undermined the functioning of a judicial authority or questioned the effectiveness of a judge's appointment.

182. Point 2 of Article 107(1) of the amended Law on the organisation of the ordinary courts and point 2 of Article 72(1) of the amended Law on the Supreme Court refer to acts or omissions which may prevent or seriously undermine the functioning of a judicial authority. They do not specify that those acts or omissions must be unlawful under either national or EU law. The Republic of Poland's claim that an act carried out within the limits, and in application, of the law may not constitute a disciplinary offence pursuant to those provisions thus appears to be untenable. Nor do the provisions in question allow the reader to ascertain the existence of a disciplinary offence or, in this case, the asserted absence of same, with the clarity and precision required by law.

137 See, by analogy, judgment of 15 July 2004, *Commission* v *Germany* (C-139/03, not published, EU:C:2004:461).

138 The *Simpson* judgment requires the conduct of such an examination.

139 In addition, a national judge may not incur disciplinary liability on the ground that he or she has declined to apply national law in order to give effect to a preliminary ruling from the Court. See, by analogy, judgment of 22 February 2022, *RS (Effects of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraph 88).

183. Point 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and point 3 of Article 72(1) of the amended Law on the Supreme Court also refer to acts that call 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. Those provisions are so broadly drawn as to bring within their ambit matters that go beyond impugning the act of appointment of a judge by the President of the Republic. The texts capture, on my reading, all attempts to challenge any aspect of the procedure leading to the appointment of a judge [140] including, for example, whether the requirement that a court be previously established by law has been respected in accordance with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. Given the breadth of points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and of points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court, there is a clear risk that making a reference for a preliminary ruling involving those provisions of EU law could be deemed a disciplinary offence.

184. The same considerations apply to the examination of a court's impartiality. Whilst Polish law contains numerous provisions on the recusal of judges, judgments of the Trybunał Konstytucyjny (Constitutional Court) have limited the scope of those provisions considerably. [141] An examination of a request to recuse a judge based on an irregularity in the procedure leading to his or her appointment thus appears to be capable of constituting a disciplinary offence.

185. As for point 1 of Article 72(1) of the amended Law on the Supreme Court, it is undisputed that the text, scope and purpose of that provision are the same as point 1 of Article 107(1) of the amended Law on the organisation of the ordinary courts. In paragraphs 140 and 141 of the *Disciplinary regime for judges* judgment, the Court held that Article 107(1) of the Law on the organisation of the ordinary courts did not meet the requirements of clarity and precision. After examining the application of that provision in the light, inter alia, of the domestic case-law the Republic of Poland had adduced, the Court held that the term 'obvious and gross violations of the law' did not prevent the disciplinary liability of judges from being triggered solely by reason of the supposedly incorrect content of their decisions and limiting such liability to entirely exceptional situations.

186. In the present case, the Republic of Poland relies upon the Supreme Court's case-law on Article 107(1) of the Law on the organisation of the ordinary courts to show that point 1 of Article 72(1) of the amended Law on the Supreme Court may not be interpreted so as to impose disciplinary sanctions as a consequence of compliance with the requirements imposed by the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

187. The case-law on Article 107(1) of the Law on the organisation of the ordinary courts cited by the Republic of Poland, the most recent of which dates from 2015, [142] was adopted by the chamber of the Supreme Court that exercised jurisdiction prior to the reform of that court by the Law on the Supreme Court of 8 December 2017, [143] and not by the Disciplinary Chamber in its current form.

140 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, for instance, be asserted that an examination of the role of the KRS in the procedure that led to the appointment of a judge constitutes a disciplinary offence.

141 See judgments of the Trybunał Konstytucyjny (Constitutional Court) of 4 March 2020 (Case P 22/19) (Dz. U. of 2020, item 413); of 2 June 2020 (Case P 13/19) (Dz. U. of 2020, item 1017); and of 23 February 2022 (Case P 10/19) (Dz. U. of 2022, item 480), discussed in point 144 of the present Opinion.

142 Supreme Court judgment of 22 June 2015 (Case SNO 36/15).

143 Dz. U. of 2018, item 5. See, to that effect, the *Disciplinary regime for judges* judgment (paragraph 145).

188. Moreover, as the reply indicates, in the *Disciplinary regime for judges* judgment [144] the Court found that, in a recent decision, [145] the current Disciplinary Chamber had adopted a broad interpretation of Article 107(1) of the Law on the organisation of the ordinary courts that departed from the Supreme Court's previous case-law and reduced the protection of the rule of law. [146] It is settled case-law that where national legislation has been the subject of different judicial constructions, some of which apply that legislation in compliance with EU law and others which do not, such legislation is, at the very least, insufficiently clear and precise to ensure that it will be applied in compliance with EU law. [147]

189. In accordance with Article 73(1) of the amended Law on the Supreme Court, the Disciplinary Chamber is the disciplinary court of second (and last) instance for judges of the ordinary courts and the disciplinary court of first and second instance for judges of the Supreme Court. Given that the Disciplinary Chamber does not meet the requirements of independence and impartiality pursuant to the second subparagraph of Article 19(1) TEU, [148] there is an increased risk that point 1 of Article 72(1) of the amended Law on the Supreme Court [149] will be interpreted so as to facilitate the use of the disciplinary regime to influence judicial decisions. [150]

190. Since I advise the Court that, in enacting point 1 of Article 72(1) of the amended Law on the Supreme Court, the Republic of Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, I propose that it uphold the third complaint.

D. Fourth complaint – The jurisdiction of the Disciplinary Chamber to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office

1. Arguments of the parties

191. By its fourth complaint, which relates to a number of provisions of Article 27(1) of the amended Law on the Supreme Court, the Commission claims that the Republic of Poland infringed the second subparagraph of Article 19(1) TEU by conferring on the Disciplinary Chamber, whose independence and impartiality are not guaranteed in accordance with the Court's case-law, [151] jurisdiction to rule on cases having a direct impact on the status of judges and trainee judges and the performance of their office.

144 The *Disciplinary regime for judges* judgment (paragraphs 126, 127 and 149 et seq.).

145 See Decision of 4 February 2020, II DO 1/20, in which the Disciplinary Chamber held that a judge may, in principle, be accused of a disciplinary offence on the basis of Article 107(1) of the Law on the organisation of the ordinary courts for having ordered the Sejm, allegedly in obvious and gross violation of the law, to produce documents relating to the process for appointing members of the KRS in its new composition. The *Disciplinary regime for judges* judgment (paragraphs 150 and 151).

146 The *Disciplinary regime for judges* judgment (paragraph 152).

147 The *Disciplinary regime for judges* judgment (paragraph 153 and the case-law cited).

148 The *Disciplinary regime for judges* judgment (paragraphs 113 and 147).

149 Which defines disciplinary offences in terms that neither meet the requirements of clarity and precision set out in point 175 of the present Opinion nor ensure that disciplinary liability of judges due to their decisions is strictly limited to very exceptional circumstances, as described in point 173 of the present Opinion.

150 See, to that effect, the *Disciplinary regime for judges* judgment (paragraph 145).

151 Paragraph 171 of the *A. K.* judgment states that the requirements of an independent and impartial tribunal are not met where the objective circumstances in which that court was formed, its characteristics and the means by which its members are appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, notably as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it. That may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law.

192. The Commission considers that an overall assessment of a number of elements concerning the composition and jurisdiction of the Disciplinary Chamber, the conditions under which its members were appointed, in particular the role of the KRS, the constitutional body responsible for ensuring the independence of courts and judges, and the fact that the measures were simultaneously adopted under Polish law, reveal a 'systemic rupture' with the previous regime. That gives rise not only to legitimate doubts as to the independence of the Disciplinary Chamber, its imperviousness to external factors and its impartiality in relation to the interests involved in the cases in which it has jurisdiction, but also directly undermines the independence of the judges under its jurisdiction.

193. The Commission observes that the newly created Disciplinary Chamber was entrusted with certain categories of cases concerning the status of judges that were previously under the jurisdiction of the ordinary courts or of other courts. In addition, all of the members of the Disciplinary Chamber were appointed under a procedure that involved the newly composed KRS. In that regard, the four-year mandate of 15 members of the KRS was cut short and the procedure for selecting future members was amended in order to increase the influence of the Sejm over its composition. The Commission also highlights that the insertion of paragraphs 1b and 4 in Article 44 of the Law on the KRS [152] limited the effectiveness of the judicial review of KRS resolutions putting forward candidates for the position of judge at the Supreme Court to the President of the Republic. [153] Finally, the Commission also refers to the increased organisational, functional and financial autonomy of the Disciplinary Chamber as compared with the other four chambers of the Supreme Court.

194. The fourth complaint is directed at three provisions: first, Article 27(1)(1a) of the amended Law on the Supreme Court concerning applications for authorisation to initiate criminal proceedings against judges and trainee judges or to detain them; second, Article 27(1)(2) of the amended Law on the Supreme Court relating to employment and social security law applicable to Supreme Court judges, third, Article 27(1)(3) of the amended Law on the Supreme Court governing the compulsory retirement of judges.

195. According to the Commission, the Court has held that judicial independence means that the rules governing the disciplinary regime of those who have the task of adjudicating upon disputes must provide the necessary guarantees to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Rules which define the conduct amounting to disciplinary offences and the penalties applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging disciplinary bodies' decisions, constitute a set of guarantees essential for safeguarding judicial independence. [154]

196. The Commission claims that when the Disciplinary Chamber decides at first and second instance on lifting the judicial immunity of a judge prior to the initiation of criminal proceedings against him or her, it must examine whether there are reasonable grounds to suspect that the alleged offence has been committed. The Disciplinary Chamber must also rule on additional measures, including the suspension of the judge in that context. In so doing, the Disciplinary Chamber directly interferes with the exercise of that judge's judicial activity. Since the

152 The KRS is governed by the Law on the KRS of 12 May 2011, as amended. See footnote 109 of the present Opinion.

153 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, paragraphs 160 to 164).

154 Order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277, paragraph 34 and the case-law cited).

suspension of a judge may last for an indefinite period of time, during which his or her remuneration is reduced by between 25% and 50%, the prospect that those additional measures may be taken can be a means of exerting pressure on judges, thereby affecting the content of their judgments.

197. The Commission further submits that the exclusive jurisdiction of the Disciplinary Chamber over employment law, social insurance and retirement cases, including matters relating to remuneration, leave and absences, grounds of illness, allowances and retirement on grounds of illness or physical or mental impairment, has a direct influence on the conditions under which Supreme Court judges exercise their judicial activities.

198. In the Commission's view, the Disciplinary Chamber considers that it has jurisdiction to hear cases which determine the employment relationship of Supreme Court judges in proceedings brought pursuant to Article 189 of the Code of Civil Procedure. As in the case of disciplinary proceedings and decisions to lift the immunity of judges, the Commission considers it is important that an independent court adopt or review such decisions in order to protect judges from unjustified pressure and uncertainties capable of affecting their independence.

199. The reply adopts the reasoning in paragraphs 88 to 110 of the *Disciplinary regime for judges* judgment, where the Court held that, by not guaranteeing the independence and impartiality of the Disciplinary Chamber, the Republic of Poland had undermined the independence of the judges of the ordinary courts and of the Supreme Court, thereby failing to fulfil its obligations under the second subparagraph of Article 19(1) TEU. Whilst the Member States may lay down rules on judicial immunity, those rules may not operate so as to undermine judicial independence. The Commission adds that, in *Reczkowicz v. Poland*,[155] the ECtHR held that the Disciplinary Chamber was not a tribunal previously established by law.

200. The Republic of Poland requests the Court to dismiss the fourth complaint. The fact that an executive authority appoints judges does not subordinate the latter to the former or give rise to doubts as to judges' impartiality, if, once appointed, they are free from influence or pressure when discharging their functions.[156] A global assessment of the procedure for the appointment of the judges of the Disciplinary Chamber and the system of safeguards that protects them after their appointment demonstrates there is no possibility of exerting external pressure upon them.

201. According to the Republic of Poland, its Constitution lays down the procedure for the appointment of all judges, including those of the Disciplinary Chamber. Under Article 179, read in conjunction with Article 144(3)(17), of the Constitution of the Republic of Poland, the President of the Republic appoints judges, on a proposal from the KRS, for an indefinite period. The appointment of judges is a well-established prerogative of the President of the Republic exercised, in accordance with Article 31 of the Law on the Supreme Court, after obtaining the opinion of the First President of the Supreme Court. The President of the Republic publishes a notice in the *Monitor Polski*, the Polish Official Gazette, to announce the number of judicial vacancies to be filled in each chamber of the Supreme Court. Article 30 of the Law on the Supreme Court sets out an exhaustive list of the conditions that candidates for the position of judge at the Supreme Court must meet.[157] Within one month of the date of the publication of the announcement, any person who fulfils the conditions for becoming a Supreme Court judge may apply to the KRS for the position of judge in the chamber identified in the announcement.

155 Judgment of 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719.

156 See the *A. K.* judgment (paragraph 133).

157 Applications must comply with Article 31(3) of the Law on the Supreme Court.

Having established that the candidates fulfil the conditions and formal requirements, the President of the KRS, pursuant to Article 31(1) of the Law of 12 May 2011 on the KRS, appoints a group of at least three members of the body who are responsible for issuing an opinion on the applications submitted. Having considered the applications submitted under that procedure, the KRS submits a proposal for the appointment of judges to the vacant posts in the Supreme Court to the President of the Republic . Whilst the KRS proposal does not bind the President of the Republic, he or she cannot appoint a person whom the KRS has not proposed as a judge. In this way, the role of the KRS does not differ from that of judicial councils in other Member States.

202. The Republic of Poland emphasises that the independence of the judges of the Disciplinary Chamber derives not only from the procedure for their appointment, but above all from the extensive system of safeguards which ensures that all judges of the Disciplinary Chamber can make their decisions entirely free from external pressure. By Article 179 of the Constitution of the Republic of Poland, judges are appointed for an indefinite period. Article 180 of the Constitution of the Republic of Poland provides that judges are irremovable. A judge may not be dismissed, suspended from office, moved to another jurisdiction or another function against his or her will except in accordance with a judicial decision and only in cases provided for by law. A judge retires after reaching the statutory age and may, in accordance with the rules laid down by law, be retired as a result of illness or infirmity making him or her unable to perform his or her duties. Under Article 181 of the Constitution of the Republic of Poland, a judge is immune from suit and therefore cannot be held criminally liable or deprived of his or her liberty without the prior consent of a court specified by law. Judges are furthermore required to remain apolitical pursuant to Article 178(3) of the Constitution of the Republic of Poland. In accordance with Article 44 of the Law on the Supreme Court, judges of that court (including those of its Disciplinary Chamber) may not, in principle, hold another post. At the same time, Supreme Court judges benefit from appropriate material conditions, intended to compensate for the prohibitions and restrictions imposed on them. Judges of the Disciplinary Chamber are entitled to an additional remuneration amounting to 40% of total basic salary and to an allowance for the performance of duties (except where the judge holds a post as a scientific teacher or scientist, for the period from the date of entry into that post until the end of that post) on account of the rules on the incompatibility of exercising other functions.

203. According to the Republic of Poland, the Commission has not explained how the autonomy of the Disciplinary Chamber gives rise to the possibility that pressure could be exerted on judges sitting in it. The establishment of the Disciplinary Chamber was justified by the inefficiency of disciplinary proceedings and the inability of Supreme Court judges to discipline judicial misconduct. The independence of the Disciplinary Chamber within the Supreme Court, coupled with the absence of any dependence on other powers, demonstrates the unfounded character of the Commission's allegations. Moreover, the Republic of Poland emphasises that the transfer of jurisdiction to the Disciplinary Chamber is linked to the organisation of the judiciary, which falls within the exclusive competence of the Member States. Indeed, in some Member States, [158] judges do not benefit from immunity. Should the Commission consider that judicial immunity is a requirement of EU law, it ought to make that demand to all Member States.

204. The Republic of Poland submits that the procedure for the appointment of judges to the Disciplinary Chamber offers far higher guarantees of independence than the procedures the Court has considered meet the standards laid down by the second subparagraph of Article 19(1)

158 Belgium, Germany, Ireland, France, Cyprus and Finland.

TEU.[159] It insists that there has been no 'systemic rupture' and that the Commission is blatantly applying double standards. The Commission has not explained the concept of 'systemic rupture', which is not a legal concept and is unknown in international case-law. Nor is the reform of the judicial system linked to any 'rupture'. On the contrary, the Disciplinary Chamber performs the functions of a disciplinary court at first or second instance.

2. Assessment

205. While the organisation of justice, including the rules governing criminal proceedings against judges, falls within the competence of the Member States, the exercise of that competence must comply with EU law. Where a Member State lays down specific rules governing criminal proceedings against judges, those rules must – in accordance with the requirement of independence, and in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of the judges to external factors, in particular to any direct or indirect influence of the legislature or executive liable to have an effect 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 cannot be used as a system of political control over the activity of those judges and fully safeguard the rights enshrined in Articles 47 and 48 of the Charter.[160]

206. 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.[161] It is evident from their very nature that cases that fall within the jurisdiction of the Disciplinary Chamber pursuant to Article 27(1)(1a), (2) and (3) of the amended Law on the Supreme Court may have an immediate, direct and profound impact on the status of judges and the performance of their office.[162] Given the serious impact that such measures may have on their lives and careers, it is imperative that measures adopted pursuant to Article 27(1)(1a), (2) and (3) of the amended Law on the Supreme Court in respect of judges liable to rule on the application or interpretation of EU law are reviewed by a body that itself meets the requirements inherent in effective judicial protection in accordance with the second subparagraph of Article 19(1) TEU.[163]

207. It follows that the Disciplinary Chamber, which has jurisdiction to apply Article 27(1)(1a), (2) and (3) of the amended Law on the Supreme Court, must offer all of the necessary guarantees as regards its independence and impartiality in order to prevent any risk that measures adopted pursuant to those provisions may be used as a means for the political control of the content of judicial decisions. It is irrelevant in that context that other Member States have a different regime of judicial immunity from prosecution.[164]

159 See judgments of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535); of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)* (C-658/18, EU:C:2020:572); and of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311). See also order of the Vice-President of the Court of 10 September 2020, *Council* v *Sharpston* (C-424/20 P(R), not published, EU:C:2020:705).

160 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).

161 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).

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

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

164 I agree with the Republic of Finland's observation at the hearing that it does not avail the Republic of Poland to highlight individual aspects of the disciplinary regime for judges in other Member States. In addition to the fact that those regimes are not the subject matter of these proceedings, they must be examined as a whole taking into account, inter alia, the characteristics of the court or courts in question, the context in which they were established and the procedure for the appointment of their members.

208. In its *Disciplinary regime for judges* judgment, the Court categorically held, by reference to a number of factors, that the Disciplinary Chamber did not comply with the requirements of independence and impartiality pursuant to the second subparagraph of Article 19(1) TEU. In that regard, the Court relied extensively on the factors it had already outlined in its *A. K.* judgment to which the application refers. The defence was lodged at the Court Registry on 17 June 2021, that is, approximately one month prior to the delivery of the *Disciplinary regime for judges* judgment. While the reply of 28 July 2021 relied on that judgment in order to bolster the fourth complaint, the rejoinder lodged on 7 September 2021 made no observations on that complaint.

209. The importance of the *Disciplinary regime for judges* judgment [165] for the assessment of the fourth complaint is such that I shall briefly summarise its relevant paragraphs. [166] By reference to the various considerations set out in paragraphs 89 to 110 of that judgment, rather than any individual factor, the Court held that the Republic of Poland had infringed the second subparagraph of Article 19(1) TEU as the Disciplinary Chamber did not meet the requirements of independence and impartiality. [167] It 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 Supreme Court judges. It observed that the Disciplinary Chamber enjoyed a particularly high degree of organisational, functional and financial autonomy within the Supreme Court, in comparison with other chambers of that court. The remuneration of judges of the Disciplinary Chamber exceeds by approximately 40% that of judges assigned to the other chambers of the Supreme Court without any objective justification. 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. [168]

210. Before those appointments were made, the KRS had been comprehensively restructured. [169] According to the 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

165 Judgment of 15 July 2021 (C-791/19, EU:C:2021:596). In accordance with settled case-law, the question as to whether a Member State has failed to fulfil its obligations is determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, in that case on 17 July 2019. See judgment of 18 October 2018, *Commission* v *United Kingdom* (C-669/16, EU:C:2018:844, paragraph 40 and the case-law cited). The reasoned opinions in the present case are clearly subsequent to that date. The Court's findings in the *Disciplinary regime for judges* judgment in relation to the Disciplinary Chamber apply to this case. It is thus particularly noteworthy that the Republic of Poland has not rebutted the Commission's arguments based on that judgment.

166 In its judgment of 5 December 2019 and in its orders of 15 January 2020, the Supreme Court's Labour and Social Insurance Chamber, ruling in the disputes that gave rise to the *A. K.* judgment, held, first, that the KRS is not, as currently constituted, an impartial body independent of the legislature and the executive and, second, that the Disciplinary Chamber is not an independent and impartial tribunal in the light of the circumstances of its creation, the scope of its powers, its composition and the KRS's involvement in its establishment.

167 By order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277), the Court required the Republic of Poland immediately and pending delivery of the judgment closing the proceedings in Case C-791/19, inter alia, to suspend the application of the provisions of the Law on the Supreme Court of 8 December 2017 granting jurisdiction to the Disciplinary Chamber to rule in disciplinary cases concerning judges and to refrain from referring the cases to that chamber. See also the order of 14 July 2021; orders of the Vice-President of the Court of 6 October 2021, *Poland* v *Commission* (C-204/21 R-RAP, EU:C:2021:834), and of 27 October 2021, *Commission* v *Poland* (C-204/21 R, not published, EU:C:2021:878).

168 Thereby excluding any possibility of transferring serving Supreme Court judges to that chamber even though such transfers of judges were, in principle, permitted.

169 23 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.

had constituted that body until then. The Court also found that the legislative reform of the KRS had been carried out at the same time as the enactment of a new Law on the Supreme Court,[170] which implemented a wide-ranging reform of that jurisdiction.[171]

211. 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, and its neutrality with respect to the interests before it. The Court held that those factors were likely to lead to the Disciplinary Chamber not being seen to be independent or impartial, which was likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals.[172]

212. Contrary to the Republic of Poland's claims, a global assessment of the procedure for the appointment of the judges of the Disciplinary Chamber and the conditions under which that chamber operates do not exclude the existence of reasonable doubts as to the possibility that external pressure may be exerted on them. At the time of writing, the legitimate doubts as to the independence and impartiality of the Disciplinary Chamber described in the judgment in *Commission* v *Poland (Independence of the Supreme Court)*[173] and the *A. K.* judgment persist.

213. It follows that, by conferring on the Disciplinary Chamber, the independence and impartiality of which is not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office, such as applications to authorise the initiation of criminal proceedings against judges and trainee judges or to detain them, cases relating to employment and social security law that concern judges of the Supreme Court and cases relating to their compulsory retirement, I advise the Court that the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

E. Fifth complaint – Infringement of the fundamental right of judges to respect for their private life and the right to protection of personal data

1. Arguments of the parties

214. By obliging every judge to supply, within 30 days of receipt of notice of his or her appointment, information regarding membership of a professional body or association, the functions he or she performed within non-profit foundations, and membership of a political party, and publishing that information in the Public Information Bulletin before that judge takes office, the Commission claims the Republic of Poland has infringed the fundamental right of

170 The Law on the Supreme Court of 8 December 2017, in the consolidated version published in the Dziennik Ustaw Rzeczypospolitej Polskiej of 2019 (item 825).

171 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 Supreme Court judges 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 soon be vacant within the Supreme Court, and in particular within the Disciplinary Chamber.

172 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).

173 Judgment of 24 June 2019 (C-619/18, EU:C:2019:531).

judges to respect for their private life and their right to protection of personal data, guaranteed by Article 7 and Article 8(1) of the Charter and by Article 6(1)(c) and (e), Article 6(3) and Article 9(1) of the GDPR.

215. Article 88a of the amended Law on the organisation of the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law on the organisation of the administrative courts require judges to furnish a written declaration concerning their membership of the bodies referred to in points 1 to 3 of paragraph 1 of Article 88a on the amended Law on the organisation of the ordinary courts. That information is published in the Public Information Bulletin no later than 30 days from the date of submission of that declaration.[174] The Commission considers that those provisions concern the processing of personal data as defined in Article 4(1) of the GDPR, namely, information relating to an identified or identifiable natural person. Since the information referred to in Article 88a(1)(3) of the amended Law on the organisation of the ordinary courts relates to the political opinions of a judge prior to his or her appointment as a judge,[175] or to philosophical beliefs linked to membership of an association or foundation[176] it is within special categories of personal data for the purposes of Article 9(1) of the GDPR.

216. According to the Commission, since the processing of judges' personal data is subject to the GDPR, the exception in Article 2(2)(a) thereof upon which the Republic of Poland seeks to rely is inapplicable. In that regard, it suffices to refer to recital 20[177] and Article 37(1)(a) of the GDPR, which, in order to ensure the independence of the judiciary, provide for a derogation to the GDPR only as regards the jurisdiction of supervisory authorities over courts exercising their judicial functions.

217. The Commission further claims that the obligation to communicate and to publish information on membership of a political party prior to appointment as a judge and on the public and social activities of a judge in an association or foundation are incompatible with the general principle of proportionality, as they are neither appropriate nor necessary to achieve the Republic of Poland's stated objective of increasing the impartiality of judges. They are therefore incompatible with both Articles 7 and 8 of the Charter and Article 6(1)(c) and (e), Article 6(3) and Article 9(1) of the GDPR. The obligations in question limit judges' rights to respect for private life[178] and their right to the protection of personal data concerning them.[179] Permitted restrictions on those rights must, in accordance with Article 52(1) of the Charter, be provided for by law and respect the essence of the rights enshrined in Articles 7 and 8 of the Charter. Subject to the principle of proportionality, they must be necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

174 See Article 88a(4) of the amended Law on the organisation of the ordinary courts.

175 Article 178(3) of the Constitution of the Republic of Poland prohibits judges from belonging to a political party.

176 See Article 88a(1)(1) and (2) of the amended Law on the organisation of the ordinary courts.

177 Which provides that 'while this Regulation applies, inter alia, to the activities of courts and other judicial authorities, Union or Member State law could specify the processing operations and processing procedures in relation to the processing of personal data by courts and other judicial authorities. The competence of the supervisory authorities should not cover the processing of personal data when courts are acting in their judicial capacity, in order to safeguard the independence of the judiciary in the performance of its judicial tasks, including decision-making. It should be possible to entrust supervision of such data processing operations to specific bodies within the judicial system of the Member State, which should, in particular ensure compliance with the rules of this Regulation, enhance awareness among members of the judiciary of their obligations under this Regulation and handle complaints in relation to such data processing operations'.

178 Article 7 of the Charter.

179 Article 8 of the Charter.

218. The Commission claims that, according to Article 6(3) of the GDPR, the law of the Member State providing the legal basis for the processing of personal data necessary for compliance with a legal obligation or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller must meet a public interest objective and be proportionate to the legitimate aim pursued.[180] Moreover, the processing of sensitive data revealing the political opinions of a judge prior to his or her appointment, as well as philosophical beliefs related to his or her membership of an association or foundation must be justified by one of the exceptions provided for in Article 9(2) of the GDPR.

219. According to the Commission, it cannot therefore be ruled out that the bodies responsible for ensuring that judges comply with ethical and professional standards, or for appointing panels of judges, may be informed of activities they engage in outside of their duties that may be liable to give rise to conflicts of interest in a particular case. However, the processing of such information should be strictly limited to that purpose and, in particular, should not be used for other purposes that may result in a judge becoming the object of discrimination, or of having external pressure exerted upon him or her, or influence being had over his or her judicial career.

220. The Commission considers that the provisions of national law in question are disproportionate as they are not limited to what is necessary to achieve the objectives pursued, even were they to apply to the internal control of possible conflicts of interest only. In particular, past membership of a political party relates to a judge's life prior to appointment, and thus does not directly affect the exercise of his or her office. As for membership of a political party and the position held in that party before 29 December 1989, it is untenable to assert that such information could be used to assess the impartiality of a judge in cases brought before him or her more than 30 years later. Nor is there any link between access to such data and the appointment procedure since it is submitted after the judge has taken office.

221. In any event, the objective of ensuring that cases are tried by an impartial judge can be achieved by less restrictive means such as the recusal of a judge in cases where doubts are raised as to his or her impartiality. The reply states that judges swear an oath at the time of their appointment to administer justice impartially and conscientiously. Pursuant to Article 82(2) of the amended Law on the organisation of the ordinary courts, judges are also required to uphold the dignity of their position.

222. The reply further observes that the Constitution of the Republic of Poland requires judges to be apolitical and impartial. The Republic of Poland has not justified the need to adopt Article 88a of the amended Law on the organisation of the ordinary courts in the light of that requirement. Information concerning membership of an association, the function performed in a non-profit foundation and membership of a political party is indicative of a judge's political opinions or religious or philosophical beliefs within the meaning of Article 9(1) of the GDPR. Moreover, as the concept of 'association' pursuant to Article 88a of the amended Law on the organisation of the ordinary courts is undefined, it applies to membership of religious associations, thus obliging judges to disclose their beliefs in that context. According to the Commission, that provision has been introduced in order to ensure that the information gathered and processed thereunder will be used for other purposes such as exerting pressure on judges or inciting the suspicion of people who do not share their views.

[180] See, Article 6(3), last sentence, in conjunction with point (b) of the first sentence of Article 6(3) and Article 6(1)(c) and (e) of the GDPR.

223. The Republic of Poland considers that the fifth complaint should be rejected since the contested provisions do not fall within the scope of the GDPR. It relies upon Article 2(2)(a) of the GDPR to support the proposition that the GDPR does not apply to the processing of personal data in the course of an activity which falls outside the scope of EU law. Furthermore, since the organisation of justice falls within the exclusive competence of the Member States, the GDPR does not apply to that activity.

224. In any event, the Republic of Poland considers that the provisions of national law in question comply with the GDPR. Information relating to certain activities of judges outside of the judicial sphere may have a bearing on the exercise of their functions and to the existence of grounds for recusal in a particular case. Contrary to the Commission's claims, former membership of a political party may impact on a judge's current judicial activities and to the existence of grounds for recusal in a particular case. The purpose of those obligations is to provide information to a party and to enable it to submit a reasoned request for recusal. Their purpose is not to prevent a judge from carrying out activities incompatible with judicial independence,[181] but rather to make it possible to verify *ad casum* that a judge involved in a case has not been engaged in activities that might give the impression that he or she is not entirely objective. The national provisions are therefore proportionate to the objective of strengthening the impartiality and the political neutrality of judges, which the Commission itself accepts is the purpose of the contested provisions.

225. According to the Republic of Poland, the objective of obtaining information on affiliation to a political party prior to 29 December 1989 in order to assess the impartiality of a judge adjudicating in cases more than 30 years later is entirely legitimate given that the politicisation of the judiciary was characteristic of the former Communist regimes in Central and Eastern Europe.

226. The Republic of Poland notes that the Commission does not rule out that participation in the activities of a non-profit foundation or organisation may have a direct effect on a judge's current activities, which cannot be equated to the activities of private persons. Contrary to the Commission's claims, the processing of the information sought is limited exclusively to strengthening public confidence in the impartiality and the political neutrality of judges. Such data may not be used for other purposes, including those that could lead to discrimination against or external pressure or influence on a judge's professional career. The Commission does not provide any evidence in support of its argument and its assertions are therefore purely hypothetical.

227. The Republic of Poland also rejects the Commission's claim that the aims pursued by the national provisions can be achieved by less restrictive means. The purpose of those obligations is to enable parties to proceedings to have sufficient information to apply to a judge to recuse him or herself at an appropriate juncture. That objective cannot be attained by the means the Commission describes. The Commission's argument that the information in question may be used exclusively in the context of an internal review of potential conflicts of interest, communicated only to those responsible in order to ensure that judges comply with ethical and professional standards and to those responsible for determining the composition of panels of judges, should thus be rejected.

[181] Article 178(3) of the Constitution of the Republic of Poland lays down such a requirement.

228. The processing of data concerning judges' membership of foundations, associations or political parties therefore meets the proportionality criterion necessary for the performance of a task carried out in the public interest. Consequently, the Republic of Poland considers that, without prejudice to its position on the application of Article 2(2)(a) of the GDPR, the contested provisions also meet the criteria of Article 6(3), final sentence, read in conjunction with the first sentence of Article 6(3)(b) and Article 6(1)(c) and (e) of the GDPR. Furthermore, the data concerned do not fall within the category of specific personal data to which Article 9(1) of the GDPR refers. There is therefore no need to carry out the proportionality test advanced by the Commission. The obligations in question are not aimed at requiring a judge to file a declaration containing information relating to his or her political or religious opinions or his or her philosophical beliefs. Under the Constitution of the Republic of Poland, judges, like other citizens, have the right to freedom of speech, belief, association and assembly [182] provided that, when enjoying those rights, they act with due respect for the dignity of their function and the impartiality and independence of the judiciary.

2. Assessment

229. While the Commission's claim in respect of Article 7 and Article 8(1) of the Charter is brief and relies on the same arguments as it raises with respect to the infringement alleged in respect of the GDPR, I consider that it alleges an autonomous breach of the Charter by the Republic of Poland. [183]

230. Article 51(1) of the Charter addresses its provisions to the Member States only when they are implementing EU law. Article 6(1) TEU and Article 51(2) of the Charter specify that the provisions of the Charter do not extend in any way the competences of the European Union as defined in the Treaties. The Court thus has no jurisdiction to examine the compatibility with the Charter of national legislation that falls outside of the scope of EU law. [184]

231. In paragraph 21 of its judgment in *Åkerberg Fransson*, [185] the Court held that since the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of EU law, there are no situations covered in that way by EU law where those fundamental rights do not apply. The application of EU law thus entails the application of the fundamental rights guaranteed by the Charter. It follows that the fundamental rights guaranteed by the Charter apply in all situations governed by EU law and that they must, therefore, be complied with where national legislation falls within the scope of EU law. For the Charter to apply, it is also necessary that, in the area concerned, EU law imposes specific obligations on Member States with regard to the situation at issue. [186]

182 Articles 53, 54, 57 and 58.

183 The judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432), held that Hungary had failed to fulfil its obligations under Article 63 TFEU in conjunction with Article 17 of the Charter. Paragraph 65 of that judgment held that a Member State's reliance upon exceptions provided for by EU law in order to justify an impediment to a fundamental freedom guaranteed by the Treaty is to be regarded as 'implementing Union law' for the purposes of Article 51(1) of the Charter. See also judgments of 18 June 2020, *Commission* v *Hungary (Transparency of association)* (C-78/18, EU:C:2020:476, paragraphs 101 to 104), and of 6 October 2020, *Commission* v *Hungary (Higher education)* (C-66/18, EU:C:2020:792, paragraphs 212 to 216).

184 See, by analogy, judgment of 10 June 2021, *Land Oberösterreich (Housing assistance)* (C-94/20, EU:C:2021:477, paragraph 59 and the case-law cited).

185 Judgment of 26 February 2013 (C-617/10, EU:C:2013:105).

186 See, to that effect, judgment of 24 September 2020, *NK (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraphs 78 and 79).

232. The GDPR imposes specific obligations on Member States when they process personal data. The information to which Article 88a of the amended Law on the organisation of the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law on the organisation of the administrative courts refer relates to an identified or an identifiable natural person [187] pursuant to Article 4(1) of the GDPR. Its collection and subsequent publication constitutes processing for the purposes of Article 4(2) of the GDPR. [188] On the assumption that the processing of the personal data of judges at issue in the present complaint falls within the scope of the GDPR, and is thus governed by EU law, the Court has jurisdiction to assess whether the adoption by the Republic of Poland of the national legislation in question breaches Article 7 and Article 8(1) of the Charter. As for the Republic of Poland's claim that the GDPR does not apply to the organisation and/or the administration of justice in a Member State, since that activity falls outside the material scope of EU law pursuant to Article 2(2)(a) of the GDPR, the Court has held that whilst the organisation of justice in the Member States is a matter within their competence, when exercising that power they are required to comply with their EU law obligations. [189] The material scope of the GDPR is very broad. Its Article 2(1) provides that it 'applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system'. Article 2(2)(a) to (d) of the GDPR excludes data processing from the material scope of that regulation in certain instances. Amongst those exclusions is Article 2(2)(a) of the GDPR where that processing occurs in the course of an activity that falls outside of the scope of EU law. [190]

233. In its judgment in *Latvijas Republikas Saeima (Penalty points)*, [191] the Court [192] held that Article 2(2)(a) of the GDPR, read in the light of recital 16 thereof, [193] excludes from the scope of that regulation processing of personal data State authorities carry out in the course of an activity intended to safeguard national security or of an activity which can only be classified in that category. The fact that an activity is characteristic of the State or of a public authority is thus insufficient for that exception to apply automatically thereto. Contrary to the Republic of Poland's claims, Article 2(2)(a) of the GDPR does not exclude the organisation and/or the administration of justice in the Member States from the material scope of that regulation. [194]

187 It is settled case-law that the fact that information is provided as part of a professional activity does not mean that it cannot be characterised as personal data. Judgment of 9 March 2017, *Manni* (C-398/15, EU:C:2017:197, paragraph 34 and the case-law cited).

188 See, by analogy, judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraphs 33 and 34). See also judgment of 24 February 2022, *Valsts ieņēmumu dienests (Processing of personal data for tax purposes)* (C-175/20, EU:C:2022:124, paragraphs 33 to 35). The scope of Article 4(2) of the GDPR, which refers to 'any operation', is in very broad terms.

189 Judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraph 88 and the case-law cited).

190 The exceptions in Article 2(2) of the GDPR are to be interpreted strictly. Judgment of 24 February 2022, *Valsts ieņēmumu dienests (Processing of personal data for tax purposes)* (C-175/20, EU:C:2022:124, paragraph 40 and the case-law cited).

191 Judgment of 22 June 2021 (C-439/19, EU:C:2021:504, paragraph 66 and the case-law cited).

192 By reference to Article 2(2)(a) of the GDPR and Article 51(1) of the Charter, Advocate General Szpunar has considered that the logic of the Charter is different from that of the GDPR. The Charter seeks to domesticate the exercise of power by the EU institutions and the Member States when they operate within the scope of EU law and, conversely, provide a shield for individuals to assert their rights. The protection of personal data is, however, more than a fundamental right. As per Article 16 TFEU, data protection is an EU policy field in its own right. The GDPR has the purpose of being applied to any form of processing of personal data, regardless of the subject matter involved or the parties that carry it out. See Opinion of Advocate General Szpunar in *Latvijas Republikas Saeima (Penalty points)* (C-439/19, EU:C:2020:1054, points 50 to 52).

193 Which refers to activities concerning national security and in relation to the common foreign and security policy of the European Union.

194 I would add, for the sake of completeness, that Article 2(2)(b) to (c) of the GDPR does not exclude the organisation of justice or judicial activity from the scope of application of that regulation. The Republic of Poland does not rely upon the exclusion in Article 2(2)(d) of the GDPR, which concerns the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Nothing in the file indicates that the national provisions in question have any of those purposes as their object. The Republic of Poland represents that the purpose of imposing those obligations is to provide information to a party to facilitate submission of a reasoned request for the recusal of a judge.

234. Moreover, it may be observed that a number of specific derogations in the GDPR limit its application in respect of 'courts acting in their judicial capacity'.[195] The GDPR thus does not exclude the organisation of justice or judicial activity from its scope per se but rather limits the application of certain of its provisions in a number of specific instances.

235. Consequently, the organisation and/or the administration of justice in a Member State is not an activity that falls outside the material scope of EU law pursuant to Article 2(2)(a) of the GDPR.[196] National provisions which provide for the processing of personal data that falls within the scope of the GDPR must comply therewith and, by implication, respect the fundamental rights enshrined in the Charter. In the light of the objective set out in Article 1(2) of the GDPR to protect fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data, for as long as the conditions governing the legal processing of personal data under that regulation are fulfilled such processing meets the requirements of Articles 7 and 8 of the Charter.[197]

236. As is apparent from recital 10 thereof, one of the purposes of the GDPR is to ensure a high level of protection of natural persons within the European Union. To that end, it seeks to ensure the consistent and homogeneous application of the rules for the protection of the fundamental rights and freedoms of such individuals with regard to the processing of their personal data throughout the European Union. As recital 4 to the GDPR indicates, the right to protection of personal data is not absolute but must be considered in relation to its function in society and balanced against other fundamental rights in accordance with the principle of proportionality.

237. Subject to the derogations permitted by Article 23 of the GDPR, any processing of personal data must observe the principles that govern it and the rights of the person concerned as set out, respectively, in Chapters II and III thereof. In particular, any processing of personal data must, first, comply with the principles set out in Article 5 of the GDPR and, second, satisfy the conditions laid down in Article 6 thereof.[198]

238. Personal data must, under Article 5(1)(a), (b), (c) and (d) of the GDPR, be processed lawfully, fairly and in a transparent manner in relation to the data subject; be collected for specified, explicit and legitimate purposes; be adequate, relevant and not excessive in relation to those purposes; and be accurate and, where necessary, kept up to date.

239. The Commission does not claim that the Republic of Poland has breached any of the principles relating to the processing of personal data laid down in Article 5 of the GDPR.[199] As regards Article 6 of the GDPR, the judgment in *Latvijas Republikas Saeima (Penalty points)*

195 See Article 9(2)(f), Article 37(1)(a) and Article 55(3) of the GDPR. See also the derogation in Article 23(1)(f) of the GDPR in respect of the protection of judicial independence and judicial proceedings.

196 As the Republic of Finland observed at the hearing.

197 See, by analogy, judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 102).

198 Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 208 and the case-law cited). In accordance with Article 23 of the GDPR, the European Union and the Member States may adopt 'legislative measures' that limit the scope of the obligations and rights provided for, inter alia, in its Article 5 as long as they correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society. Article 23(1)(f) of the GDPR provides that restrictions may be adopted to safeguard 'protection of judicial independence and judicial proceedings'. The Republic of Poland does not rely on that provision and specifically indicates that the objectives of the provisions of national law in question do not concern judicial independence.

199 A clear distinction is not made between the principles laid down in Article 5 of the GDPR and the lawfulness of processing in Article 6 thereof and the two provisions overlap to some extent. The Commission has not claimed that the national measures in question fail to comply with Article 5(1)(c) of the GDPR on data minimisation as it considers the processing of the personal data in question in the manner specified in the national provisions is unlawful in its entirety.

[200] states that that provision contains an exhaustive and restrictive list of the cases where the processing of personal data can be considered lawful. Lawful data processing must therefore fall within one of the cases provided for in that provision. [201]

240. The processing of data is lawful under Article 6(1)(c) of the GDPR only if it is necessary to comply with a legal obligation to which the controller is subject. [202] Such processing is lawful under Article 6(1)(e) thereof only if it is necessary to perform a task carried out in the public interest or in the exercise of official authority vested in the controller. [203] Given that the data processing in the present proceedings is provided for by law, its lawfulness falls to be examined in the light of Article 6(1)(c) of the GDPR. In accordance with Article 6(3) of the GDPR, the legal basis for the processing to which Article 6(1)(c) thereof refers must be laid down in EU law or in the law of the Member State to which the controller is subject, [204] which legal basis determines the purpose of such processing. In addition, Article 6(3) of the GDPR provides that EU or national law must meet an objective of public interest and be proportionate to the legitimate aim pursued thereby. Recital 39 of the GDPR states that personal data should be processed only if the purpose of that processing could not reasonably be fulfilled by other means.

241. The rights enshrined in Articles 7 and 8 of the Charter and in the GDPR are also not absolute and apply in relation to their function in society. [205] In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised thereby, such as the right to respect for private and family life and the right to protection of personal data, must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations are justified only where they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. The Court has also stated that legislation which entails an interference with the fundamental rights to respect for private life and to the protection of personal data must lay down clear and precise rules governing its scope and application. [206]

200 Judgment of 22 June 2021 (C-439/19, EU:C:2021:504, paragraph 99).

201 The Member States can neither add new principles relating to the lawfulness of the processing of personal data to those in Article 6 of the GDPR nor impose additional requirements that amend the scope of one of the six principles set out therein. For the processing of personal data to be lawful, it must therefore come within one of the six cases in Article 6(1) of the GDPR. See, by analogy, judgment of 11 December 2019, *Asociația de Proprietari bloc M5A-ScaraA* (C-708/18, EU:C:2019:1064, paragraphs 37 and 38).

202 The Republic of Poland confirmed at the hearing that the declarations of all judges, save those of the Presidents of ordinary appeal courts, are sent to the President of the relevant ordinary appeal court and are publicly available on the website of those courts. Presidents of ordinary appeal courts submit their declarations to the Minister for Justice: Article 88a(4) of the amended Law on the organisation of the ordinary courts. Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law on the organisation of the administrative courts provide, inter alia, that judges of the Supreme Court and of the Supreme Administrative Court submit their declarations to the First President of the Supreme Court and the First President of the Supreme Administrative Court respectively and the latter submit their declarations to the KRS. According to the Republic of Poland, the personal data of the Presidents of appeal courts is published by the Minister for Justice, who thus acts as a controller pursuant to Article 4(7) of the GDPR since he or she determines the 'means of the processing of personal data'. The Presidents of ordinary appeal courts act as controllers in respect of the personal data of ordinary judges. The First President of the Supreme Court and the First President of the Supreme Administrative Court act as controllers in respect of the personal data of judges of their respective courts. The KRS acts as controller in respect of the personal data of the First Presidents of the Supreme Court and of the Supreme Administrative Court. The processing in question is necessary for the Minister for Justice, the Presidents of appeal courts, the First Presidents of the Supreme Court and Supreme Administrative Court and the KRS to comply with their obligations pursuant to Article 88a of the amended Law on the organisation of the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law on the organisation of the administrative courts. See Article 6(1)(c) of the GDPR.

203 I refer to these provisions because the Commission has relied on them.

204 See also Article 52(1) of the Charter.

205 Judgment of 16 July 2020, *Facebook Ireland and Schrems* (C-311/18, EU:C:2020:559, paragraph 172 and the case-law cited).

206 Judgment of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)* (C-439/19, EU:C:2021:504, paragraph 105).

242. The Commission's fifth complaint centres on the proportionality of the national provisions in question. The Commission does not claim that the objective of ensuring access to an impartial tribunal is not in the public interest [207] and that the processing does not comply with Article 6(1)(c) and Article 6(3) of the GDPR and Article 52(1) of the Charter on that basis. [208] Suffice it to state that, in fields covered by EU law, Member States must guarantee access to an independent and impartial tribunal previously established by law pursuant to the second subparagraph of Article 19(1) TEU. [209] The Commission claims, in essence, that the national provisions are unlawful as they are neither appropriate nor necessary to achieve the stated objective of the Republic of Poland, which is to ensure judicial impartiality.

243. Article 9(1) of the GDPR explicitly prohibits processing certain specified personal data deemed as particularly sensitive. [210] Article 88a of the amended Law on the organisation of the ordinary courts [211] seeks information concerning judges' (i) membership of an association [212] including the positions held by them and their period of membership, (ii) position within a body of a non-profit foundation and the duration thereof and (iii) membership of a political party prior to their appointment to the office of judge or during the exercise of that office prior to 29 December 1989. Membership of an association or a position held in the body of a non-profit foundation could refer to membership of or a position held in the body of a trade union, a sporting organisation, a philosophical community or a social club. The terms 'membership' or 'position held' are undefined and could refer to formal or informal membership or position. The terminology used in the national provisions under examination is so broad and imprecise as to potentially encompass almost any form of association between people. In addition, save for Article 88a(3) of the amended Law on the organisation of the ordinary courts, the national provisions in question do not impose any temporal limits on the data required. A judge could potentially have to declare membership of an amateur sporting association dating back to his or her early childhood.

244. The reach of the impugned provisions is thus very broad. The requirement to provide a written declaration concerning membership of a political party, an association or a position held in the body of a non-profit foundation over an unlimited period of time, and the publication of those data is capable of constituting the processing of personal data revealing a judge's political opinions, philosophical beliefs or trade union membership.

245. Article 9(1) of the GDPR prohibits the collection and publication of sensitive personal data that reveal, inter alia, political opinions, religious or philosophical beliefs, or trade union membership. Article 9(2) of the GDPR provides certain exceptions to, and derogations from, that prohibition. These include Article 9(2)(g) of the GDPR, which states that such personal data may

207 The objective of strengthening the impartiality and political neutrality of judges and confidence in their impartiality is capable of coming within the concept of ensuring access to an impartial court.

208 The Commission does not, moreover, claim that the national provisions in question are insufficiently precise and clear or do not refer to the objective they pursue, as Article 6(3) of the GDPR requires. Thus whilst the purpose of the national provisions in question is not evident from their terms, that is not the basis upon which the Commission asserts that the Republic of Poland has failed to comply with Article 6(3) of the GDPR.

209 See also Article 45(1) of the Constitution of the Republic of Poland.

210 Recital 51 of the GDPR states that personal data which are, by their nature, particularly sensitive in relation to fundamental rights and freedoms, merit specific protection as the context of their processing could create significant risks to fundamental rights and freedoms.

211 Which is, for most practical purposes, identical to Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law on the organisation of the administrative courts.

212 Article 88a of the amended Law on the organisation of the ordinary courts uses the terms 'zrzeszenie' and 'stowarzyszenie' both of which may be translated in English by the word 'association'. While the term 'stowarzyszenie' is defined in the Polish law of 7 April 1989 on associations, there is no definition of the term 'zrzeszenie', which is broader than and includes the term 'stowarzyszenie'. 'Zrzeszenie' refers to all groupings of persons for the purposes of a common aim.

be processed where it 'is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject'. [213]

246. It may also be observed that the Republic of Poland has not indicated any measures it has taken to protect the fundamental rights of judges, pursuant to Article 7 and Article 8(1) of the Charter, or under the GDPR, in particular Articles 6 and 9 thereof, as Article 9(2)(g) of that regulation requires, in order to temper the impact of the provisions it has adopted.

247. On that basis alone the Republic of Poland appears to have infringed the fundamental right of judges to respect for their private life and their right to protection of personal data, guaranteed by Article 7 and Article 8(1) of the Charter and by Article 6(1)(c) and (e), Article 6(3) and Article 9(1) of the GDPR.

248. For the sake of completeness, I shall examine whether the national provisions in question are appropriate or necessary to achieve the Republic of Poland's stated objective to ensure judicial impartiality. Securing access to an independent and impartial tribunal is a reason of substantial public interest [214] for the purposes of Article 9(2)(g) of the GDPR. Increased transparency as regards judges' prior membership of foundations, associations, and so forth is, in principle, capable of enhancing public confidence in the independence and impartiality of the judiciary.

249. It has not been established that the adoption of the national provisions at issue was necessary to pursue the aim that they purport to pursue. First, those provisions do not indicate the reasons for their adoption. Second, the Republic of Poland has not demonstrated any such necessity in the course of these proceedings. It has not indicated that, prior to the adoption of those provisions, the existing national provisions on judicial impartiality and the recusal of judges were inadequate or that there was any lack of public confidence in the impartiality of the judiciary in Poland. The national provisions at issue appear to be grounded upon an assumption that the public perceive the judiciary as biased. This is particularly evident as regards the requirement in Article 88a(3) of the amended Law on the organisation of the ordinary courts in respect of membership of judge of a political party during the exercise of his or her functions prior to 29 December 1989. In its judgment in *Getin Noble Bank*, [215] the Court held that the appointment of a judge when the Polish People's Republic was a communist State cannot per se give rise to legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge in the exercise of judicial functions some 30 years later.

[213] The prohibition in Article 9(1) of the GDPR, subject to the exceptions provided for therein, applies to every kind of processing of the special categories of data to which that provision refers and to all controllers carrying out such processing: Judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)* (C-136/17, EU:C:2019:773, paragraph 42). Moreover, the protection of the fundamental right to privacy guaranteed by Article 7 and Article 8(1) of the Charter requires that derogations and limitations in relation to the protection of personal data apply only in so far as is strictly necessary. See, by analogy, judgments of 11 December 2014, *Ryneš* (C-212/13, EU:C:2014:2428, paragraph 28), and of 5 April 2022, *Commissioner of An Garda Síochána and Others* (C-140/20, EU:C:2022:258, paragraph 52). See also judgment of 3 October 2019, *A and Others* (C-70/18, EU:C:2019:823, paragraph 29), on Article 8(1) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), which corresponds to Article 9(1) of the GDPR.

[214] See, to that effect, judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235, paragraph 95). The guarantees of independence and impartiality require the adoption of rules in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of the judiciary to external factors and its neutrality with respect to the interests before it (paragraph 119). Given that access to an impartial judiciary is fundamental to the rule of law, the objective in question is not merely in the general or public interest but meets, in my view, the higher standard laid down in Article 9(2)(g) of the GDPR of constituting a reason of 'substantial public interest'.

[215] Judgment of 29 March 2022 (C-132/20, EU:C:2022:235, paragraph 107).

250. As to whether the purpose of the processing could not reasonably be fulfilled by other means, while the national provisions in question make it possible, as the Republic of Poland claims, to verify *ad casum* that a judge who examines a case has not been involved in activities which might give the impression that he or she is not entirely objective, they allow the public at large access to sensitive personal data.[216] The stated purpose of the national provisions could have been achieved by far less invasive means by allowing, for example, the lawyers of parties to a case access to the data in question and limiting any subsequent public disclosure of data unrelated to the specific and circumscribed purpose of ensuring judicial impartiality.

251. The processing of the sensitive personal data in question constitutes a serious limitation of judges' right to respect for private life and their right to protection of personal data pursuant to Article 7 and Article 8(1) of the Charter and the GDPR that goes beyond what is necessary for attaining the objective pursued thereby.

252. I therefore advise the Court that Article 88a of the amended Law on the organisation of the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law on the organisation of the administrative courts, infringe Article 7 and Article 8(1) of the Charter and Article 6(1)(c) and (e), Article 6(3) and Article 9(1) of the GDPR.

VII. Costs

253. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

254. In the present case, the Commission and the Republic of Poland applied, respectively, for the other party to the proceedings to be ordered to pay the costs.

255. Since the Commission has applied for costs and the Republic of Poland has been unsuccessful, save in respect of the second complaint, the latter must be ordered to pay four fifths of the costs, including four fifths of the costs relating to the proceedings for interim relief.

256. Under Article 140(1) of the Rules of Procedure, the Member States that intervened in the proceedings shall bear their own costs. The Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden should thus be ordered to pay their own costs.

VIII. Conclusion

257. In the light of the foregoing considerations, I propose that the Court should:

– declare that by adopting and maintaining in force Article 42a(1) and (2) and Article 55(4) 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), as amended by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the organisation of the ordinary courts, the Law on

[216] Such persons may have access to sensitive personal data for reasons totally unrelated to the objective of general interest invoked by the Republic of Poland. See, to that effect, judgment of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)* (C-439/19, EU:C:2021:504, paragraph 118).

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 organisation of the ordinary courts'), Article 26(3) and Article 29(2) and (3) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5), as amended by the Amending Law ('the amended Law on the Supreme Court'), Article 5(1a) and (1b) of the ustawa – Prawo o ustroju sądów administracyjnych (Law on the organisation of the administrative courts) of 25 July 2002 (Dz. U. of 2002, item 1269), as amended by the Amending Law ('the amended Law on the organisation of the administrative courts'), and Article 8 of the Amending Law, which prohibit any national court from reviewing compliance with the EU requirements relating to an independent and impartial tribunal previously established by law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), in the light of the case-law of the European Court of Human Rights concerning Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950;

– declare that by adopting and maintaining in force points 2 and 3 of Article 107(1) of the amended Law on the organisation of the ordinary courts and points 1 to 3 of Article 72(1) of the amended Law on the Supreme Court, under which the examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law may be classified as a 'disciplinary offence', the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU;

– declare that by conferring on the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland), whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office, such as, first, applications for authorisation to initiate criminal proceedings against judges and trainee judges or to detain them and, second, cases relating to employment and social security law that concern judges of the Sąd Najwyższy (Supreme Court) and cases relating to the compulsory retirement of those judges, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

– declare that by adopting and maintaining in force Article 88a of the amended Law on the organisation of the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law on the organisation of the administrative courts, the Republic of Poland has infringed the right to respect for private life and the right to protection of personal data, guaranteed by Article 7 and Article 8(1) of the Charter and by Article 6(1)(c) and (e), Article 6(3) and Article 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation);

– order the Republic of Poland to pay four fifths of the costs, including four fifths of the costs relating to the proceedings for interim relief;

– order the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden to pay their own costs.