Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 24 September 2019[1]

Joined Cases C-558/18 and C-563/18

Miasto Łowicz
v
Skarb Państwa — Wojewoda Łódzki (C-558/18),
joined parties:
Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Regionalna w Łodzi),
Rzecznik Praw Obywatelskich
(Request for a preliminary ruling from the Sąd Okręgowy w Łodzi (District Court, Łódź, Poland))
and
Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Okręgowa w Płocku)
v
VX,
WW,
XV (C-563/18)

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

(Reference for a preliminary ruling — Article 267 TFEU — Admissibility of the questions — Rule of law — Article 2 TEU — Article 19(1) TEU — Principle of effective judicial protection — Principle of judicial independence — National measures establishing regime for disciplinary proceedings against judges)

1 Original language: English.

I. Introduction

1. The present cases are the fourth in a series of Opinions I have written [2] relating to the reform of the Polish justice system instituted by measures adopted in 2017 and which form part of the Commission's reasoned proposal, issued under Article 7(1) TEU, regarding the rule of law in Poland. [3] The changes to the law of this Member State impacting on the independence of the Polish judiciary have attracted considerable international criticism, [4] and are also the subject of a number of cases which have been brought before the Court. [5]

2. In the present cases, the Sąd Okręgowy w Łodzi (District Court, Łódź, Poland) and the Sąd Okręgowy w Warszawie (District Court, Warsaw, Poland) seek guidance from the Court as to whether the new regime for disciplinary proceedings against judges in Poland meets the requirements of judicial independence under the second subparagraph of Article 19(1) TEU. This is in view, inter alia, of the fact that, according to the orders for reference, the Minister for Justice has gained influence over the initiation and conduct of disciplinary proceedings against judges, and the legislative authorities have gained influence over the composition of the Krajowa Rada Sądownictwa (National Council of the Judiciary), the body responsible for selecting the group of judges who are eligible for appointment to the Disciplinary Chamber of the Supreme Court which examines disciplinary cases involving judges.

3. In addition to this, the referring courts express, in the orders for reference, fear of retribution if they do not adjudicate in favour of the State, an apprehension which stems from abuse of the disciplinary process under the new regime. It is also significant that judges of the referring courts indicated that they were called to account for their decisions to submit the present requests for a preliminary ruling by way of investigation procedures which were initiated after those requests were made, even though disciplinary proceedings against those judges were not formally commenced.

4. I have reached the conclusion that the requests for a preliminary ruling in the present cases are inadmissible because the Court cannot issue advisory opinions on general or hypothetical problems under Article 267 TFEU.

2 See Opinions of Advocate General Tanchev in *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:325) concerning the lowering of the retirement age of Supreme Court judges and granting the President of the Republic the power to extend the active mandate of Supreme Court judges; in *Commission* v *Poland (Independence of the ordinary courts)* (C-192/18, EU:C:2019:529) concerning alleged discrimination on grounds of sex due to the retirement age of ordinary court judges, Supreme Court judges and prosecutors being lowered to a different age for women than for men and granting the Minister for Justice the power to extend the active mandate of ordinary court judges; and in Joined Cases *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:2019:551) concerning the independence of the Disciplinary Chamber of the Supreme Court in view of changes to the manner in which the judicial members of the National Council of the Judiciary are appointed.

3 Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 20 December 2017. In that reasoned proposal, the Commission objected in particular to the following measures: (1) the Ustawa o zmianie ustawy o Krajowej Szkole Sądownictwa i Prokuratury, ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the National School of Judiciary and Public Prosecution, the Law on the system of the ordinary courts and certain other laws) of 11 May 2017 (Dz. U. of 2017, heading 1139, as amended); (2) the Ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of the ordinary courts and certain other laws) of 12 July 2017 (Dz. U. of 2017, heading 1452, as amended); (3) the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, heading 5, as amended); and (4) the Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, heading 3, as amended). It is primarily the latter two measures, among others, which are at issue in the present cases.

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

5 These include requests for preliminary rulings submitted by the Polish Supreme Court (C-522/18, C-537/18, C-585/18, C-624/18, C-625/18, C-668/18, C-487/19 and C-508/19), the Polish Supreme Administrative Court (C-824/18) and Polish lower courts (C-623/18), along with two infringement actions lodged by the Commission against Poland (C-619/18 and C-192/18). In its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), the Court held that measures lowering the retirement age of Supreme Court judges and granting the President of the Republic the power to extend the active mandate of Supreme Court judges are incompatible with Poland's obligations under the second subparagraph of Article 19(1) TEU, given that they are inconsistent with the principles of the irremovability and independence of judges which are protected under EU law.

5. More specifically, there is insufficient explanation in the orders for reference, which are not supplemented to the degree necessary in the case file, about the link between the Member State measures at issue and the relevant provisions of EU law, namely, the second subparagraph of Article 19(1) TEU which protects against structural breaches of judicial independence,[6] given that it obliges the Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[7]

6. In other words, the requirements concerning the content of requests for preliminary rulings set out in Article 94 of the Court's Rules of Procedure, which the Court has repeatedly held must be scrupulously observed,[8] have not been met. Those requirements also appear in the Court's Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings.[9]

II. Legal framework

A. EU law

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

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

B. Polish law

1. The 2017 Law on the Supreme Court

8. Article 3 of the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, headings 5, 650, 771, 847, 848, 1045 and 1443) ('2017 Law on the Supreme Court'), which entered into force on 3 April 2018, provides that the Supreme Court is divided into several chambers, including the Disciplinary Chamber.

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

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

(1) disciplinary proceedings;

(a) involving Supreme Court judges;

6 See points 92 and 125 of this Opinion.

7 As I noted in my Opinion in *Commission* v *Poland (Independence of the ordinary courts)* (C-192/18, EU:C:2019:529), I refer to the term 'effective legal protection' in conformity with the wording of the English version of the second subparagraph of Article 19(1) TEU, while acknowledging that the Court has held that that provision ensures 'effective judicial protection'. See, for example, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, in particular paragraphs 3, 48, 54 and the case-law cited). There seems to be similar wording in some language versions of that provision as illustrated by the judgment just cited (see, for example, Maltese: 'protezzjoni legali effettiva' and 'protezzjoni ġudizzjarja effettiva'; Polish: 'skutecznej ochrony prawnej' and 'skutecznej ochrony sądowej'), as compared to others (see, for example, Dutch: 'daadwerkelijke rechtsbescherming'; French: 'protection juridictionnelle effective'; Spanish: 'tutela judicial efectiva').

8 See, for example, judgments of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 19), and of 2 May 2019, *Asendia Spain* (C-259/18, EU:C:2019:346, paragraph 19).

9 See, for example, judgment of 13 December 2018, *Rittinger and Others* (C-492/17, EU:C:2018:1019, paragraph 38). Those recommendations are published in the *Official Journal of the European Union* (OJ 2018 C 257, p. 1) ('the Court's Recommendations').

(b) examined by the Supreme Court in connection with disciplinary proceedings under the following laws:

…

— ustawa z dnia 21 sierpnia 1997 r. — Prawo o ustroju sądów wojskowych [(Dz. U. of 2017, headings 2243 and 2265 and of 2018, headings 3 and 5) (the Law of 21 August 1997 on the system of military courts)];

…

— ustawa z dnia 27 lipca 2001 r. — Prawo o ustroju sądów powszechnych [the Law of 27 July 2001 on the system of the ordinary courts];

…

2. The Disciplinary Chamber shall consist of:

(1) the First Division;

(2) the Second Division.

3. The First Division shall examine, in particular, cases involving:

(1) Supreme Court judges;

(2) judges and public prosecutors concerning disciplinary offences having the characteristics of deliberate crimes prosecuted by public indictment and the offences set out in the application referred to in Article 97(3).

4. The Second Division shall examine, in particular:

(1) appeals against the rulings of disciplinary courts of first instance in cases involving judges and public prosecutors and the decisions and orders which preclude a judgment from being issued;

(2) appeals in cassation against disciplinary rulings;

(3) appeals against resolutions of the National Council of the Judiciary.'

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

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

2. The Law on the National Council of the Judiciary ('the NCJ')

11. According to Article 3 of the Ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. of 2018, headings 389, 848 and 1045) ('Law on the NCJ'):

'2. In addition, the Council shall carry out other tasks as laid down by law, in particular:

(4) it shall elect the disciplinary officer for ordinary court judges and assistant judges, and the disciplinary officer for military court judges.'

12. Article 7 of the Law on the NCJ states:

'The First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister for Justice shall be members of the Council for as long as they perform those functions.'

13. Article 8 of the Law on the NCJ states:

'1. A person appointed by the President of the Republic of Poland shall perform his functions within the Council for an unspecified term of office and may be dismissed at any time.

2. The mandate of the person appointed by the President shall expire at the latest 3 months after the end of the President's term of office or after his vacating the office of President of the Republic of Poland.'

14. Article 9 of the Law on the NCJ states:

'1. The Sejm [lower chamber of the Polish Parliament] shall elect from among the deputies four members of the Council for a period of 4 years.

2. The Senat [upper chamber of the Polish Parliament] shall elect from among the senators two members of the Council for a period of 4 years.

3. The members of the Council elected by the Sejm and the Senat shall perform their functions until such time as new members are elected.'

15. Article 9a of the Law on the NCJ provides:

'1. The Sejm shall elect from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts 15 members of the Council for a joint 4-year term of office.

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

3. The joint term of office of new members of the Council elected from among the judges shall begin on the day following the day of their election. The members of the Council appointed for the previous term of office shall perform their functions until the day on which the joint term of office of the new members of the Council begins.'

16. According to Article 11a of the Law on the NCJ:

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

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

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

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

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

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

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

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

3. The Law on the ordinary courts

18. Article 22a of the Ustawa — Prawo o ustroju sądów powszechnych (Law on the system of the ordinary courts) of 27 July 2001 (Dz. U. of 2018, headings 23, 3, 5, 106, 138, 771, 848, 1000, 1045 and 1443) ('Law on the ordinary courts') states:

'5. A judge or assistant judge whose allocated activities have been changed in a manner resulting in a change in the scope of his duties, in particular where this involves a transfer to another court division, may appeal to the [NCJ] within 7 days of the date of being informed of the new scope of his duties. He shall not be entitled to appeal in the event of:

(1) a transfer to a division which examines cases in the same area;

(2) an entrusting of duties to that judge or assistant judge in the same division in accordance with the rules applicable to other judges, and in particular where allocation to a section or to another form of specialisation is revoked.

6. The appeal referred to in paragraph 5 shall be lodged through the president of the court who has carried out the allocation of activities which is the subject of the appeal. The president of that court shall forward the appeal to the [NCJ] within 14 days of its receipt together with a statement of his position in the case. The [NCJ] shall adopt a resolution upholding or dismissing the judge's appeal, taking into account the considerations referred to in paragraph 1. A resolution of the [NCJ] on the appeal referred to in paragraph 5 shall not require justification. The resolution of the [NCJ] cannot be appealed. Until the resolution is adopted, the judge or assistant judge shall continue to perform his existing duties.'

19. Article 82c of the Law on the ordinary courts states:

'A judge shall be obliged to carry out the activities concerned with the duties of a disciplinary court judge at an appellate court which have been entrusted to him.'

20. Article 107 of the Law on the ordinary courts states:

'1. A judge shall be liable to disciplinary action for professional misconduct, including obvious and gross violations of the law and compromising the dignity of his office (disciplinary offences).

2. A judge shall also be liable to disciplinary action for his conduct before assuming his post where this resulted in negligent performance of the State office held at the time or made him unfit for judicial office.'

21. Article 109a of the Law on the ordinary courts states:

'1. The final decision of the disciplinary court shall be made public.

2. The disciplinary court may refrain from publishing that decision where this is unnecessary for achieving the purposes of the disciplinary proceedings or where this is necessary in order to protect legitimate private interests. …'

22. Article 110 of the Law on the ordinary courts states:

'1. In disciplinary cases involving judges, the following shall adjudicate:

(1) at first instance:

   (a) disciplinary courts at appellate courts, composed of three judges;

   (b) the Supreme Court, composed of two judges from the Disciplinary Chamber and one lay Supreme Court judge, in cases of disciplinary offences having the characteristics of deliberate crimes prosecuted by public indictment or deliberate tax crimes or cases in which the Supreme Court has submitted a request for the examination of a disciplinary case together with an indication of the misconduct;

(2) at second instance — the Supreme Court composed of two judges from the Disciplinary Chamber and one lay Supreme Court judge.'

23. Article 110a of the Law on the ordinary courts states:

'1. The Minister for Justice shall, after consulting the [NCJ], entrust the duties of a disciplinary court judge at an appellate court to an ordinary court judge who has served as a judge for at least 10 years.'

24. Article 112 of the Law on the ordinary courts states:

'3. A Disciplinary Officer for Ordinary Court Judges and two Deputy Disciplinary Officers for Ordinary Court Judges shall be appointed by the Minister for Justice for four-year terms of office.'

25. Article 112b of the Law on the ordinary courts provides:

'1. The Minister for Justice may appoint a Disciplinary Officer of the Minister for Justice to conduct a specific case concerning a judge. The appointment of a Disciplinary Officer of the Minister for Justice shall preclude another disciplinary officer from acting in the case.

2. The Disciplinary Officer of the Minister for Justice shall be appointed from among the ordinary court judges or the Supreme Court judges. In the case of disciplinary offences having the characteristics of deliberate crimes prosecuted by public indictment, the Disciplinary Officer of the Minister for Justice may also be appointed from among the public prosecutors indicated by the Public Prosecutor General. In justified cases, in particular in the case of the death of the Disciplinary Officer of the Minister for Justice or long-term obstacles to his performing his functions, the Minister for Justice shall appoint in his place another judge or, in the case of a disciplinary offence having the characteristics of a deliberate crime prosecuted by public indictment, a judge or public prosecutor.

3. The Disciplinary Officer of the Minister for Justice may initiate proceedings at the request of the Minister for Justice or join ongoing proceedings.

4. The appointment of the Disciplinary Officer of the Minister for Justice is equivalent to a request to initiate investigative or disciplinary proceedings.'

26. Article 114 of the Law on the ordinary courts provides:

'1. A disciplinary officer shall carry out investigative activities at the request of the Minister for Justice, the president of an appellate court or the president of a district court, the college of an appellate court or the college of a district court, the [NCJ] or on his own initiative, after the preliminary establishment of the circumstances which is required in order to determine whether a disciplinary offence has been committed. Investigative activities should be carried out within 30 days of the first actions taken by the disciplinary officer.

…

9. If the disciplinary officer finds no grounds for initiating disciplinary proceedings when called upon to do so by the competent body, he shall issue a decision refusing to do so. A copy of the decision shall be delivered to the body which submitted the request for proceedings to be initiated, the college of the appropriate district or appellate court, and the accused. A copy of the decision shall also be delivered to the Minister for Justice, who may file an objection within 30 days. The filing of an objection is equivalent to an obligation to initiate disciplinary proceedings, and instructions from the Minister for Justice concerning the further course of proceedings shall be binding on the disciplinary officer.

10. If, in disciplinary proceedings, grounds have not been provided for the submission of an application requesting the disciplinary court to examine a disciplinary case, the disciplinary officer shall issue a decision to close the disciplinary proceedings.

11. The accused, the body which submitted the request for disciplinary proceedings to be initiated and the competent college may appeal to a disciplinary court within 7 days of the date of being served with the decision referred to in paragraph 10.'

27. Article 115a of the Law on the ordinary courts states:

'1. An unjustified failure to appear on the part of the notified accused, or his defence counsel, shall not prevent the examination of the case.

2. If it is not possible to examine the case on the ground of the justified absence of the accused and he does not have defence counsel, the disciplinary court shall designate him defence counsel of its own motion, determining the deadline for the defence counsel to familiarise himself with the case file.

3. The disciplinary court shall conduct proceedings despite the justified absence of the notified accused or his defence counsel, unless this is contrary to the interests of the disciplinary proceedings being conducted.'

28. Article 115b of the Law on the ordinary courts states:

'1. Where the disciplinary court considers, on the basis of the evidence collected by the disciplinary officer, that the circumstances of the offence and the guilt of the accused are not in doubt, and that imposing the penalties provided for in subparagraphs (1) to (3) of Article 109(1) will be sufficient, it may issue a penalty order.

2. A penalty order shall be issued by a disciplinary court consisting of a single judge.

3. A penalty referred to in subparagraph (2a) of Article 109(1) which is imposed by a penalty order shall range from 5% to 10% of the basic salary for a period of 6 months to 1 year.'

29. Article 115c of the Law on the ordinary courts states:

'Evidence obtained for the purposes of criminal proceedings as set out in Articles 168b, 237 or 237a of the Kodeks postępowania karnego [Polish Code of Criminal Procedure], or obtained as a result of the use of operational surveillance, may be used in disciplinary proceedings.'

30. Article 125 of the Law on the ordinary courts states:

'The [NCJ], the First President of the Supreme Court and the Minister for Justice may request the reopening of disciplinary proceedings.'

31. Article 126(1) of the Law on the ordinary courts states:

'The reopening of disciplinary proceedings to the detriment of the accused may take place if the discontinuation of the proceedings or the issuing of the decision took place unlawfully or if, within 5 years of the discontinuation of the proceedings or the issuing of the decision, new facts or items of evidence come to light which could justify a conviction or a harsher penalty.'

32. Article 129 of the Law on the ordinary courts states:

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

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

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

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

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

III. Facts, main proceedings and questions referred

33. Case C-558/18 concerns an action brought by the City of Łowicz, Poland ('the municipality') against the State Treasury represented by the Governor of Łódź Province, Poland ('the State Treasury') before the Sąd Okręgowy w Łodzi, Wydział I Cywilny (District Court, Łódź, First Civil Division).

34. According to the order for reference, the action involves the application of Article 49 of the Ustawa dochodach jednostek samorządu terytorialnego (Law on the income of local government units) of 13 November 2003 (Dz. U. of 2017, headings 1453, 2203, 2260, and of 2018, heading 317). The municipality claims that, for the years 2005 to 2015, it received insufficient subsidies for the performance of tasks delegated by the central government, and seeks payment of 2 357 148 Polish zlotys (PLN) to cover those costs. The referring court indicates that it is likely that the judgment in the case will be unfavourable to the State Treasury. This has caused the referring court to experience a real fear that, in the event that a particular decision is taken in the case, disciplinary proceedings will be initiated against the members of the formation ruling in that case.

35. Case C-563/18 concerns a criminal action brought by the Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Okręgowa w Płocku) (General Prosecutor represented by the National Prosecutor's Office, Poland [initially District Public Prosecutor's Office in Płock, Poland]) against VX, WW and XV ('the defendants') before the Sąd Okręgowy w Warszawie w VIII Wydziale Karnym (District Court, Warsaw, Eighth Criminal Division) chaired by Judge Igor Tuleya.

36. According to the order for reference, the main proceedings concern the inquiry of the Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Okręgowa w Płocku) (General Prosecutor represented by the National Prosecutor's Office [initially District Public Prosecutor's Office in Płock]) into the activities of members of an organised criminal group which carries out, inter alia, assassinations and kidnappings of persons with the aim of obtaining money for their release. The defendants admitted to the criminal allegations against them, and applied for cooperative witness status due to their cooperation with the law enforcement authorities. In consequence, the referring court indicates that it will have to decide whether to apply the extraordinary mitigation of a penalty pursuant to Article 60(3) to (5) of the Polish Criminal Code. The application of such a milder penalty has caused the referring court to experience a real fear that, in the event that a particular decision is taken in the case, this may result in disciplinary proceedings being initiated against the members of the formation ruling in that case and in particular Judge Igor Tuleya.

37. The referring courts harbour doubts whether the new regime for disciplinary proceedings against judges in Poland is consistent with the second subparagraph of Article 19(1) TEU.[10] They indicate that on account of changes to the system of disciplinary proceedings in relation to judges brought about by the 2017 Law on the Supreme Court, read in conjunction with the Law on the NCJ and the Law on the ordinary courts, the Minister for Justice, who is also the Public Prosecutor General, has gained decisive influence over the initiation and conduct of disciplinary proceedings against judges. The referring courts consider that, as a result of the adopted model for disciplinary proceedings, disciplinary courts may become a tool for removing persons who issue decisions of which the authorities disapprove and there may be a paralysing effect on judges through the threat of initiating disciplinary proceedings for judicial decisions issued, thereby constituting a direct threat to judicial independence and giving rise to the risk that the judiciary will be used for political ends. In that regard, the referring courts make, inter alia, the following observations.

38. First, the judges sitting in the newly created Disciplinary Chamber of the Supreme Court ('the Disciplinary Chamber'), which examines disciplinary cases involving judges, are recommended by the NCJ for appointment by the President of the Republic. Yet, the NCJ's members are now elected primarily by the legislative authorities and thus its membership reflects the political choices of the governing political party in Poland. This is borne out by the NCJ's selection of judicial candidates for the Disciplinary Chamber which raises concerns about the fairness and impartiality of disciplinary proceedings against judges. The NCJ has also become a quasi-disciplinary body examining appeals against decisions of court presidents concerning the transfer of a judge to another court division.

39. Moreover, the Minister for Justice directly appoints disciplinary court judges at the appellate courts, and the provisions in force oblige judges to perform the functions of a disciplinary court judge, since a judge's refusal to do so entails the possibility that disciplinary proceedings may be initiated against that judge. The Minister for Justice also appoints the Disciplinary Officer and two Deputy Disciplinary Officers for Ordinary Court Judges which gives him influence over the initiation of disciplinary proceedings against judges. There is a new body called the Disciplinary Officer of the Minister for Justice who is appointed by the Minister for Justice to conduct specific cases concerning judges, and has a privileged position since his appointment precludes other disciplinary officers from acting in a given case. The Minister for Justice can object to a disciplinary officer's decision not to initiate proceedings, and this may cause such proceedings to continue without a determined time frame.

40. There are also concerns that the procedural guarantees afforded to judges in disciplinary proceedings are restricted. In particular, a disciplinary court may conduct proceedings despite the justified absence of the accused judge or his representative; there is the possibility of issuing a penalty order and of using evidence obtained by means of a criminal act against a judge; the definition of offences for which a judge can be held liable is unclear; and the Minister for Justice may request the reopening of disciplinary proceedings in certain cases which means that a judgment of the disciplinary court does not prevent the accused judge from later being held liable for the same act.

41. The referring courts indicate that the new disciplinary regime involving judges and the provisions of the 2017 Law on the Supreme Court, the Law on the NCJ and the Law on the ordinary courts listed in the orders for reference are of fundamental importance for the decisions to be given in the main proceedings, since those decisions may entail for the judges ruling in the cases politically motivated disciplinary penalties applied on the basis of those Polish laws. In their view, this infringes the second subparagraph of Article 19(1) TEU and therefore the interpretation of that provision is essential to enable the referring courts to give judgment. The referring courts also consider that the interpretation of the second subparagraph of Article 19(1) TEU is relevant to the main proceedings,

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

since Article 267 TFEU gives them certain discretion to determine the EU provisions whose interpretation is required to decide on the main actions, and the provisions of Polish law relating to disciplinary proceedings against judges are of real, and not purely hypothetical, relevance to the decisions in those cases.

42. The referring courts further indicate that they are European courts because cases in fields covered by EU law, as referred to in the second subparagraph of Article 19(1) TEU, fall within their jurisdiction.

43. It was in these circumstances that the Sąd Okręgowy w Łodzi (District Court, Łódź), in Case C-558/18, decided to stay the proceedings, and to refer the following question to the Court for a preliminary ruling:

'On a proper construction of the second subparagraph of Article 19(1) of the Treaty on European Union, does the resulting obligation for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law preclude provisions which materially increase the risk of undermining the guarantee of independent disciplinary proceedings against judges in Poland through:

(1) political influence on the conduct of disciplinary proceedings;

(2) the emerging risk that the system of disciplinary measures will be used to politically control the content of judicial decisions; and

(3) the possibility of evidence obtained by [means of a criminal act] being used in disciplinary proceedings against judges?'

44. The Sąd Okręgowy w Warszawie (District Court, Warsaw), in Case C-563/18, also decided to stay the proceedings, and to refer the following question to the Court for a preliminary ruling:

'On a proper construction of the second subparagraph of Article 19(1) of the Treaty on European Union, does the resulting obligation for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law preclude provisions which remove the guarantee of independent disciplinary proceedings against judges in Poland by permitting disciplinary proceedings to be conducted under political influence, giving rise to a risk that the system of disciplinary measures will be used to politically control the content of judicial decisions?'

IV. Events following the requests for a preliminary ruling

45. On the basis of paragraph 24 of the Court's Recommendations,[11] the referring courts filed letters supplementing their requests for a preliminary ruling, so as to inform the Court of events which took place following those requests.

46. In respect of Case C-558/18, according to the first letter of 7 December 2018, the referring court indicated, inter alia, that the Deputy Disciplinary Officer for Ordinary Court Judges summoned Judge Ewa Maciejewska, who submitted the reference for a preliminary ruling in Case C-558/18, to appear as a witness at a hearing on 20 September 2018 'regarding the restriction of the independence of the ruling given by the judge chairing the formation' in the main action. That disciplinary officer also

11 Paragraph 24 of the Court's Recommendations states in relevant part: 'Since the preliminary ruling procedure is predicated on there being proceedings actually pending before the referring court or tribunal, it is incumbent on that court or tribunal to inform the Court of any procedural step that may affect the referral and, in particular, of any discontinuance or withdrawal, amicable settlement or other event leading to the termination of the proceedings.'

asked the President of the Sąd Okręgowy w Łodzi (District Court, Łódź) for information concerning the number of claims for payment made against the State Treasury registered with the First Civil Division of the Sąd Okręgowy w Łodzi (District Court, Łódź) between January 2015 and 31 August 2018, the list of cases of that type assigned to Judge Maciejewska's Chamber, together with an indication of the content of the rulings issued, including the reference numbers of the cases in which the grounds of the judgments were set out.

47. According to the second letter of 11 December 2018, the referring court in Case C-558/18 indicated that Judge Ewa Maciejewska received a request from the Deputy Disciplinary Officer for Ordinary Court Judges to submit a 'written statement … concerning a possible exceeding of jurisdiction by the [referring court] consisting in a request for a preliminary ruling made by that court contrary to the conditions of Article 267 [TFEU]'.

48. In respect of Case C-563/18, according to the first letter of 30 October 2018, the referring court indicated that Judge Igor Tuleya is participating in six sets of proceedings conducted by the Disciplinary Officer for Ordinary Court Judges, one of which concerns the reasons for the referring courts' submission of the requests for a preliminary ruling in Cases C-558/18 and C-563/18.

49. According to the second letter of 12 December 2018, the referring court in Case C-563/18 indicated in particular that Judge Igor Tuleya is participating in seven sets of proceedings conducted by the Disciplinary Officer for Ordinary Court Judges, and that he received a request from the Deputy Disciplinary Officer for Ordinary Court Judges to submit a 'written statement concerning a possible exceeding of jurisdiction by the [referring court] consisting in a request for a preliminary ruling made by that court contrary to the conditions of Article 267 [TFEU]'.

V. Procedure before the Court

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

51. By order of 1 October 2018,[12] the President of the Court rejected the referring courts' requests to deal with the present cases under the accelerated procedure pursuant to Article 105(1) of the Court's Rules of Procedure.

52. By decision of 12 November 2018, the President of the Court gave the present cases priority pursuant to Article 53(3) of the Court's Rules of Procedure.

53. Written observations on the questions referred in the present cases were submitted by the Skarb Państwa — Wojewoda Łódzki (State Treasury — Governor of Łódź Province), the Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Regionalna w Łodzi) (General Prosecutor represented by the National Prosecutor's Office, Poland [initially Regional Public Prosecutor's Office in Łódź, Poland]) and Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Okręgowa w Płocku) (General Prosecutor represented by the National Prosecutor's Office [initially District Public Prosecutor's Office in Płock]) ('the General Prosecutor'), the Netherlands Government, the Republic of Latvia, the Republic of Poland and the European Commission.

12 *Miasto Łowicz and Prokuratura Okręgowa w Płocku* (C-558/18 and C-563/18, not published, EU:C:2018:923).

54. The General Prosecutor, the Rzecznik Praw Obywatelskich (Commissioner for Human Rights, Poland), the Republic of Poland, the EFTA Surveillance Authority and the European Commission presented oral argument at the hearing held on 18 June 2019. [13]

VI. Summary of the observations of the parties

A. Procedural objections

55. The State Treasury and Poland submit that the main proceedings constitute purely internal situations and do not fall within the scope of EU law. The State Treasury emphasises that Article 19(1) TEU has no link to the main proceedings, and none of the exceptions involving internal situations in the case-law justify the Court's jurisdiction in the present cases. [14]

56. Poland, joined by the General Prosecutor, submits, inter alia, that rules on disciplinary proceedings against judges fall within the competences of the Member States, and for this reason, EU law does not apply to their assessment. In Poland's view, specific standards relating to disciplinary proceedings cannot be deduced from Article 19(1) TEU. Poland stressed at the hearing that, following from the Court's case-law, [15] Member State measures must actually, and not potentially, fall within the fields covered by EU law under the second subparagraph of Article 19(1) TEU. The General Prosecutor further argued that Member States' competence over the organisation of justice was not changed by the Lisbon Treaty, as reflected in the Lisbon judgment of the German Federal Constitutional Court. [16]

57. The Commission, although not raising a formal objection, submits for the sake of completeness that the main proceedings do not fall within the fields covered by EU law under the second subparagraph of Article 19(1) TEU. It points out that, in respect of Case C-558/18, the exercise of tasks in the field of public administration is not covered by EU law and in particular does not constitute State aid under Article 107(1) TFEU. Likewise, in respect of Case C-563/18, the Commission submits that the main proceedings concern Polish criminal law and in particular do not fall within the scope of Article 4(b) of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ 2008 L 300, p. 42) or Article 7(4) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

58. The State Treasury, the General Prosecutor, Poland and the Commission submit that the questions referred are inadmissible because they are hypothetical and have no link to the main proceedings. [17]

13 Although the Disciplinary Chamber is not among the parties to the main proceedings and thus cannot participate in the present cases in accordance with the Court's Rules of Procedure, the President of the Court, by decision of 14 June 2019, accepted a document lodged by Poland from the Disciplinary Chamber, namely, Resolution No 8 of the Assembly of the Judges of the Disciplinary Chamber of the Supreme Court of 4 June 2019 containing the position of that chamber on the present cases (see footnotes 17 and 30 of this Opinion).

14 The State Treasury refers in particular to the judgments of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360); of 5 December 2006, *Cipolla and Others* (C-94/04 and C-202/04, EU:C:2006:758); and of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874).

15 Poland referred in particular to the judgments of 29 May 1997, *Kremzow* (C-299/95, EU:C:1997:254, paragraph 16), and of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 39 and 40).

16 BVerfG, Urteil vom 30. Juni 2009 (2 BvE 2/08), BVerfE 123, 267.

17 I note that in the resolution setting out its position in the present cases (see footnote 13 of this Opinion), the Disciplinary Chamber asserts, inter alia, that the questions referred are inadmissible and without object because they arise in cases with no link to EU law and they are abstract and hypothetical, since they do not concern the disputes in the main proceedings but rather the judicial organisation of a Member State which falls within the exclusive competence of that Member State.

59. The State Treasury, the General Prosecutor and Poland assert that the referring courts do not set out, inter alia, the reasons for examining the question of the interpretation of Article 19(1) TEU or the link between that provision of EU law and the national legislation applicable to the main proceedings, as required by the case-law, Article 94 of the Court's Rules of Procedure and its Recommendations.

60. The State Treasury, the General Prosecutor and Poland further contend that the Court's reply is not necessary to resolve the disputes in the main proceedings, as those disputes have nothing to do with the disciplinary regime in Poland and the judges concerned are not currently subject to any disciplinary proceedings. In their view, the references relate to the judges' subjective fears as to potential disciplinary proceedings being brought which are hypothetical events, and the Court has dealt with similar situations in *Falciola*[18] and *Nour*[19] which led to its rejection of the questions referred. They also claim that if national courts could submit questions unrelated to the disputes in the main proceedings, this would undermine the purpose of the preliminary ruling procedure. The State Treasury stresses that the Court's case-law[20] relaxing the condition of the relevance of the questions referred for resolving the main action is inapplicable to the present cases.

61. Poland and the Commission emphasise that the fact that the referring courts may rule on questions concerning the application or interpretation of EU law is not sufficient to establish the admissibility of the questions referred, as they must be relevant and necessary for the resolution of the disputes pending before the referring courts. The General Prosecutor and the Commission further assert that the present cases differ from *Associação Sindical dos Juízes Portugueses*,[21] since in that case the interpretation of Article 19(1) TEU was relevant to the resolution of the dispute in the main proceedings.

62. The Commission argues that Article 19(1) TEU is not relevant to the subject matter of the disputes in the main proceedings or any preliminary question (*quaestio in limine litis*) relating to those disputes. In its view, the Court's reply would amount to giving an advisory opinion on general or hypothetical questions and exceed the limits of the preliminary ruling mechanism under Article 267 TFEU, as defined in the case-law.[22] It acknowledges that the referring courts' concerns about the possibility of being subject to disciplinary proceedings cannot be ruled out, but considers that circumstance does not change the fact that the questions referred are inadmissible. The Commission stressed at the hearing that the referring courts have not indicated any element which would lead them to take a decision in consequence of a reply given by the Court on the interpretation of Article 19(1) TEU.

63. The Polish Commissioner for Human Rights and the EFTA Surveillance Authority submit that the questions referred are admissible.

64. The Polish Commissioner for Human Rights argues that *Falciola*[23] is not applicable to the present cases, as it was decided before Article 19(1) TEU was introduced into the Treaties. He contends that there is an EU law element in the present cases due primarily to the need to guarantee the effectiveness of Article 19(1) TEU and the preliminary ruling procedure laid down in Article 267 TFEU. Following from *Associação Sindical dos Juízes Portugueses*,[24] the protection of judicial independence under Article 19(1) TEU is triggered once the national legislature entrusts matters of EU law to a court, and extends to all the judicial activity of the national court so as not to

18 Order of 26 January 1990 (C-286/88, EU:C:1990:33).

19 Order of 25 May 1998 (C-361/97, EU:C:1998:250).

20 The State Treasury refers to the judgments of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723), and of 17 February 2011, *Weryński* (C-283/09, EU:C:2011:85).

21 Judgment of 27 February 2018 (C-64/16, EU:C:2018:117).

22 The Commission refers in particular to the judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236).

23 Order of 26 January 1990 (C-286/88, EU:C:1990:33).

24 Judgment of 27 February 2018 (C-64/16, EU:C:2018:117, paragraph 40).

deprive that provision of useful effect. Also, in his view, judges protected by Article 19(1) TEU must be able to initiate the preliminary ruling procedure without incurring any risks, and the absence of those guarantees constitutes in itself an EU law element in the present cases, regardless of the fact that investigations were initiated against the referring judges.

65. The Polish Commissioner for Human Rights further contends that the questions referred are not hypothetical, and the Court's answer is necessary for the referring courts to issue a decision under the protection of judicial independence afforded by the second subparagraph of Article 19(1) TEU. He emphasises that if judges could only raise the issue of judicial independence in disciplinary procedures brought against them, that would be incompatible with *Unibet*,[25] in which the Court ruled that raising the incompatibility of national law with EU law when the individual risks certain sanctions is not sufficient to ensure effective judicial protection.

66. The EFTA Surveillance Authority argues that it follows from *Associação Sindical dos Juízes Portugueses*[26] that judicial independence is indivisible. In its view, national courts act as EU Courts at all times and not only when deciding on cases specifically relating to EU law. Thus, it contends that the present cases are admissible, as there is clearly a question of EU law to be addressed in respect of the requirements of judicial independence imposed on national courts.

B. Substance

67. The Polish Commissioner for Human Rights submits that the questions referred should be answered in the affirmative. He argues that, in light of the Court's case-law,[27] Polish measures on disciplinary proceedings do not ensure that judges are protected from excessive control by the executive authorities. He contends, inter alia, that the Minister for Justice appoints disciplinary court judges at the appellate courts for a defined term of office, but that term of office expires when the judge is subject to disciplinary sanctions, and there have been situations where judges have refused to initiate disciplinary proceedings against another judge and, in turn, have been the subject of disciplinary proceedings. He also points out that the Minister for Justice appoints the Disciplinary Officer for Ordinary Court Judges and the two Deputies, and may oppose the decision of a disciplinary officer not to open disciplinary proceedings, which results in the need to initiate disciplinary proceedings and the Minister for Justice's instructions as to the conduct of such proceedings are binding on that disciplinary officer.

68. In addition, according to the Polish Commissioner for Human Rights, the Minister for Justice can appoint the Disciplinary Officer of the Minister for Justice which excludes other disciplinary officers from acting and is tantamount to the need to initiate the disciplinary procedure. He asserts that disciplinary proceedings can be initiated without a defined time frame which infringes the requirement that cases must be decided in a reasonable time, and that the Minister for Justice may request the reopening of disciplinary proceedings which makes it possible to censure a judge for the same breaches in the event of new circumstances or evidence.

69. The Polish Commissioner for Human Rights further argues that there is an absence of the necessary guarantees of the rights of defence of judges in disciplinary proceedings. In particular, he asserts that the disciplinary court can adjudicate in the justified absence of the accused judge and his representative, and in reference to Article 115c of the Law on the ordinary courts, that the use of evidence from criminal proceedings is not justified in disciplinary proceedings relating to professional misconduct of judges. In his view, institutional aspects of the disciplinary regime are also problematic,

25 Judgment of 13 March 2007 (C-432/05, EU:C:2007:163, paragraphs 62 and 64).

26 Judgment of 27 February 2018 (C-64/16, EU:C:2018:117, paragraphs 37 and 40).

27 The Polish Commissioner for Human Rights referred to the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 67).

including the use of lay judges in the Disciplinary Chamber since legal knowledge is needed to decide disciplinary cases, and the fact that the President of the Disciplinary Chamber designates the disciplinary court of first instance which raises doubts whether such court is a tribunal established by law.

70. The General Prosecutor argues that the Polish disciplinary regime in relation to judges meets the guarantees of judicial independence set out in the Court's case-law,[28] along with the standards resulting from the European Court of Human Rights case-law.[29] In particular, it points out that the Minister for Justice may initiate disciplinary proceedings and object to a decision refusing to open such proceedings, but he cannot determine the outcome of the procedure nor can he sanction a judge. In its view, Poland's reforms of the disciplinary regime aim to improve the accountability of judges. It stressed at the hearing that there is no disciplinary liability of judges for the content of their decisions, and no one has been the subject of disciplinary proceedings for having submitted requests for preliminary rulings; the investigation procedure involving the judges in the present cases was different, and sought to clarify why the references were identical.

71. Poland argues that the Polish legal system does not contain provisions which infringe the guarantees of independent disciplinary proceedings against judges or which increase the risk of infringements of those guarantees. In its view, the requests refer to measures which do not exist in Poland, and are hypothetical, since they do not indicate which concrete guarantees have been infringed and how they have been infringed. Moreover, Poland asserts that it is difficult to respond to the allegations in the requests, as they consist of a selective statement of certain provisions of Polish law relating to disciplinary proceedings, mixed with subjective assessments, the aim of which is to formulate a general criticism of the reform of the justice system in Poland.

72. Poland submits, inter alia, that neither the Minister for Justice nor another organ of the executive branch rules on disciplinary proceedings or applies disciplinary sanctions with respect to judges. It points out that, according to Articles 110 and 110a of the Law on the ordinary courts, disciplinary courts at the appellate courts rule on disciplinary proceedings in relation to ordinary court judges, and in certain cases, the Disciplinary Chamber adjudicates such proceedings. According to Poland, judges of the Disciplinary Chamber are appointed, in accordance with Article 179 of the Polish Constitution, by the President of the Republic, and the Minister for Justice, after consulting the NCJ, appoints disciplinary court judges at the appellate courts for a 6-year term from among judges of the ordinary courts with at least 10 years' seniority and, as such, from among judges appointed to that office in accordance with the Polish Constitution. In its view, judges who adjudicate in disciplinary proceedings against judges enjoy the formal guarantees of independence,[30] including appointment for an unlimited time, irremovability, immunity, remuneration and the obligation to remain apolitical.[31]

73. Poland emphasises that neither the Minister for Justice nor any other politician exercises influence on the disciplinary courts and the judges sitting in such courts in particular because: (1) they do not determine the composition of the disciplinary courts which under Article 111 of the Law on the ordinary courts is determined by drawing lots from a list of the judges of a given court; (2) they cannot address guidelines to judges sitting in disciplinary courts; (3) they cannot remove judges of disciplinary courts; (4) they cannot dismiss a judge of a disciplinary court from a case he is dealing with; and (5) they have no right to control the activity of disciplinary courts.

28 The General Prosecutor referred to the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 67).

29 The General Prosecutor referred to ECtHR, 25 September 2018, *Denisov v. Ukraine* (CE:ECHR:2018:0925JUD007663911), and ECtHR, 9 January 2013, *Oleksandr Volkov v. Ukraine* (CE:ECHR:2013:0109JUD002172211).

30 I note that in the resolution setting out its position in the present cases (see footnote 13 of this Opinion), the Disciplinary Chamber contends, inter alia, that the judges of the Disciplinary Chamber enjoy all the guarantees of independence under the same rules as other chambers of the Supreme Court, and that that chamber meets all of the requirements under EU law for ensuring effective judicial protection for litigants, including in disciplinary cases involving judges.

31 Poland refers to Articles 178(2) and (3), 179, 180 and 181 of the Polish Constitution.

74. Poland acknowledges that the Minister for Justice has certain powers to initiate disciplinary proceedings, since he may require a disciplinary officer to initiate an investigation, object to that disciplinary officer's decision refusing to open disciplinary proceedings, or designate a Disciplinary Officer of the Minister for Justice to handle a specific case. Even so, Poland stresses, the Minister for Justice exercises indirect influence, mainly by opposing the decision refusing to open disciplinary proceedings, and has no influence on the outcome of proceedings initiated by disciplinary officers or the disciplinary court's decision. Poland stated at the hearing that the Disciplinary Officer of the Minister for Justice is appointed in situations where it is necessary to focus on one procedure, and this body was created to facilitate the workload of disciplinary officers and handle cases involving complex legal and factual circumstances.

75. Poland submits that judges enjoy the procedural guarantees of the right to a fair trial in disciplinary proceedings. It asserts that cases are decided by a court acting on the basis of the Law on the ordinary courts, the judges ruling in those cases are subject to the guarantees of impartiality and independence, and disciplinary proceedings are public under Article 116(1) of the Law on the ordinary courts. Poland points out that the disciplinary procedure respects the principles of equality of arms and *ne bis in idem*, and the accused judge may appoint defence counsel from among judges, prosecutors, lawyers or legal advisers and, in the event of illness, is entitled to a court-appointed defence counsel pursuant to Article 113(1) and (2) of the Law on the ordinary courts; that judge also benefits from the presumption of innocence, and may lodge an appeal against the decision of the disciplinary court at first instance which must be examined within 2 months of its filing under Article 121 of the Law on the ordinary courts. According to Poland, the definition of disciplinary offences set out in Article 107 of the Law on the ordinary courts has remained unchanged for many years, and ensures flexibility and predictability. Poland stressed at the hearing that there is no disciplinary liability for the content of judicial decisions.

76. In respect of the referring courts' letters supplementing their requests for a preliminary ruling, Poland states that the Disciplinary Officer for Ordinary Court Judges replied to the information contained in those letters in a Communication 'on the investigation procedures with the participation of Judges Ewa Maciejewska and Igor Tuleya, in connection with the submission of preliminary questions to the Court of Justice of the European Union'.[32] Poland asserts that, according to that Communication, the purpose of the investigation was to determine whether any judge had attempted to exert influence on the referring judges in order to interfere with the content of the judgments in the cases in which those questions were asked. Poland states that the suspicion of disciplinary misconduct was raised because the orders for reference were virtually identical. Poland further states that the Deputy Disciplinary Officer for Ordinary Court Judges closed the investigation given the absence of disciplinary misconduct committed, and that in those proceedings the judges concerned had the status of witnesses and not as accused judges. Moreover, Poland points out that those judges are not currently the subject of disciplinary proceedings and have only been heard as witnesses in cases concerning other judges.

77. Latvia proposes that the Court should reply to the questions referred that the second subparagraph of Article 19(1) TEU should be interpreted as meaning that a Member State has an obligation to ensure that the disciplinary regime for judges respects the guarantees of judicial independence. It stresses that such a regime must comply with those guarantees set out in the Court's case-law,[33] as

32 NR RDSP 713-53/18, 17 December 2018, available at http://rzecznik.gov.pl/wp-content/uploads/2018/12/Komunikat-Rzecznika-Dysc-z-1712.pdf.

33 Latvia refers to the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 67).

illustrated by the Latvian disciplinary system. It observes that judicial decisions do not in principle engage the disciplinary liability of judges, and only flagrant and inexcusable misconduct may be subject to that liability.[34] It underlines the linkage of judicial independence to the separation of powers and the rule of law as recognised in, inter alia, Latvian and EU law.[35]

78. The Netherlands proposes that the questions referred should be answered in the affirmative.[36] It takes the view that, following from the Court's case-law,[37] national measures which, as explained by the referring courts, involve or allow political influence on disciplinary proceedings against judges and which may be used to exercise political control over the content of judicial decisions, infringe the principle of judicial independence under the second subparagraph of Article 19(1) TEU, along with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

79. The EFTA Surveillance Authority emphasises the importance of judicial independence for observance of the rule of law, as recognised in the EEA and EU legal orders.[38] It expresses concerns that, on the basis of the Court's case-law,[39] a number of elements of the Polish disciplinary regime against judges are inconsistent with the requirements of judicial independence. These elements include: (1) the disciplinary offence of professional misconduct is not clearly defined; (2) there seems to be a link between the party responsible for disciplinary proceedings and the executive branch with respect to the Disciplinary Chamber's composition and the executive branch's appointment of disciplinary officers for the examination of cases and in the outcome of the investigations; (3) the use of evidence obtained from criminal proceedings or operational surveillance in disciplinary proceedings; (4) concerns about the independence of the Disciplinary Chamber; and (5) disciplinary sanctions are severe and proceedings can be reopened to the detriment of accused judges.

80. The EFTA Surveillance Authority contends that the whole picture of the changes in the law relating to the justice system in Poland should be taken into account, and that if each change were considered separately, without considering the cumulative effects, there is a risk that insufficient attention would be given to the full impact of what appears to be a set of coordinated measures. It also stresses that there is a chilling effect resulting from the fact that the referring courts were called upon to submit written statements in respect of the questions referred.

34 Latvia refers in particular to the Venice Commission, Directorate of Human Rights and OSCE Office for Democratic Institutions and Human Rights, Joint Opinion No 755/2014 of 24 March 2014 on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova, CDL-AD(2014)006, and Venice Commission Opinion No 825/2015 of 21 December 2015 on the Laws on the Disciplinary Liability and Evaluation of Judges of 'the Former Yugoslav Republic of Macedonia', CDL-AD(2015)042.

35 Latvia refers in particular to the judgment of 18 January 2010 by the Satversmes tiesa (Constitutional Court, Latvia), No 2009-11-01; and to the judgments of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587); of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158); and of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117).

36 The Netherlands notes in its written observations that it does not take a position on point 3 of the question referred in Case C-558/18 concerning the possibility of using evidence obtained by means of a criminal act in disciplinary proceedings against judges, as there is not sufficient material for it to answer.

37 The Netherlands refers to the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraphs 48 to 54, 63 to 67).

38 The EFTA Surveillance Authority refers in particular to the decision of the EFTA Court of 14 February 2017, *Pascal Nobile v DAS Rechtsschutz-Versicherungs*, E-21/16; and to the judgments of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587); and of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117).

39 The EFTA Surveillance Authority refers to the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 67).

81. The Commission submitted in the alternative at the hearing that, under the Court's case-law,[40] the disciplinary system in Poland breaches the principle of judicial independence because it does not offer the necessary guarantees to avoid the risk of using that system as an instrument for political control of the content of judicial decisions. For this reason, the Commission stated that it launched an infringement procedure under Article 258 TFEU against Poland, alleging that the new disciplinary regime for judges is incompatible with the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 of the Charter.[41]

82. Summarising its allegations in the context of that procedure, the Commission contends in particular that: (1) Polish law makes it possible to hold judges of ordinary courts liable for disciplinary action because of the content of their judicial decisions, including requests for preliminary rulings; (2) the Disciplinary Chamber does not meet the requirements of judicial independence under EU law, as covered by pending Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*; (3) the Polish disciplinary regime does not guarantee that a tribunal established by law will rule at first instance in disciplinary proceedings against an ordinary court judge, since the President of the Disciplinary Chamber determines, on an ad hoc and discretionary basis, the disciplinary court to hear the case; and (4) the procedural rights of judges in disciplinary proceedings are restricted, since this regime no longer guarantees that cases are dealt with within a reasonable time, and the rights of defence of the accused judges are affected.

VII. Analysis

83. I have reached the conclusion that the requests for a preliminary ruling in the present cases are inadmissible because the Court is not in possession of sufficient factual and legal material to determine whether there has been a breach of the obligation on Member States to guarantee judicial independence under the second subparagraph of Article 19(1) TEU.

84. More specifically, the absence of explanation in the orders for reference about the link between the Member State measures in question and the second subparagraph of Article 19(1) TEU, which is inconsistent with the requirements set out in Article 94(c) of the Court's Rules of Procedure, has led the referring courts to submit generalised questions. A reply by the Court to those questions would thus constitute an advisory opinion which is precluded under Article 267 TFEU.

85. My analysis is divided into two parts. First, in Section A, I will examine whether the situation in the main proceedings falls within the material scope of EU law and in particular the second subparagraph of Article 19(1) TEU. Second, in Section B, I will conduct an assessment of the admissibility of the requests for a preliminary ruling. In the course of the discussion in Section B, it will become evident why there is insufficient information in the case file to conduct a substantive assessment of whether a structural breach of judicial independence under the second subparagraph of Article 19(1) TEU has occurred. For this reason, I will not express a view on whether the guarantees inherent in the second subparagraph of Article 19(1) TEU have been breached.

A. The situation in the main proceedings falls within the material scope of the second subparagraph of Article 19(1) TEU

86. In my view, the situation in the main proceedings falls within the material scope of EU law, and more specifically the second subparagraph of Article 19(1) TEU.

40 The Commission refers to the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 67).

41 Press release — Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control, 3 April 2019, available at http://europa.eu/rapid/press-release_IP-19-1957_en.htm.

87. In its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18),[42] the Court affirmed that, as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter. In paragraph 51 of that judgment, the Court held as follows:

'Contrary to what has been claimed by the Republic of Poland and Hungary in this respect, the fact that the national salary reduction measures at issue in the case which gave rise to the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117) were adopted due to requirements linked to the elimination of the excessive budget deficit of the Member State concerned and in the context of an EU financial assistance programme for that Member State *did not*, as is apparent from paragraphs 29 to 40 of that judgment, play *any* role in the interpretation which led the Court to conclude that the second subparagraph of Article 19(1) TEU was applicable in the case in question. That conclusion was reached on the basis of the fact that the national body which that case concerned, namely the Tribunal de Contas (Court of Auditors, Portugal), *could*, subject to verification to be carried out by the referring court in that case, rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fell within the fields covered by EU law (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 40).'[43]

88. What is noteworthy in the judgment just mentioned is the Court's rejection of arguments put forward by Poland and Hungary that the second subparagraph of Article 19(1) TEU was applicable in *Associação Sindical dos Juízes Portugueses* because the national salary reduction measures at issue which gave rise to the Court's judgment in that case were adopted due to requirements to limit the excessive budget deficit in the Member State concerned in the context of an EU financial assistance programme. Rather, the Court confirmed that what was essential in *Associação Sindical dos Juízes Portugueses* was that the national body in question in that case 'could' rule, as a court or tribunal, which I take to mean under Article 267 TFEU, on questions concerning the application or interpretation of EU law and which therefore fell within the fields covered by EU law.

89. The same is true of the referring courts in the present cases (see point 42 of this Opinion). It is not disputed that they are bodies which 'could' rule, as courts or tribunals under Article 267 TFEU, on questions concerning the application or interpretation of EU law. Therefore, in principle the referring courts fall within the material scope of the second subparagraph of Article 19(1) TEU and that provision is applicable in the present cases.

90. That said, I take the view that the Court did not rule in its judgments in *Associação Sindical dos Juízes Portugueses* or *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18) that the broad material scope of the second subparagraph of Article 19(1) TEU displaced, or even attenuated, the rules of the Court on the admissibility of requests for preliminary rulings. It is this aspect — which was not present in the proceedings giving rise to my Opinion in Joined Cases *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*,[44] another reference for preliminary ruling from a Polish court on the compliance of Polish measures with the requirements of judicial independence under the second subparagraph of Article 19(1) TEU — which precludes the Court from ruling on whether the second subparagraph of Article 19(1) TEU has been breached in these proceedings. This will be discussed below in Section B of this Opinion.

42 EU:C:2019:531, paragraph 50 and the case-law cited.

43 My emphasis.

44 C-585/18, C-624/18 and C-625/18, EU:C:2019:551. In those cases, the admissibility of the questions referred was not at issue because there was a clear link between EU law, namely 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), and the disputes requiring resolution in the main proceedings. That being so, I maintain the view that the Court is able to rule in those cases, in addition to alleged breach of Article 47 of the Charter, on whether there has been a structural breach of judicial independence under the second subparagraph of Article 19(1) TEU. See further point 125 of this Opinion.

91. The broad material scope of the second subparagraph of Article 19(1) TEU also means that, contrary to arguments of the State Treasury, the Court's line of case-law on so-called internal situations and in particular its judgment in *Ullens de Schooten*[45] does not apply to the situation in the main proceedings. That line of case-law is concerned with the Court's ability to reply to requests for preliminary rulings in circumstances which may be considered to derogate from the general rule that internal situations, in which all the elements of a particular case are confined within a single Member State, fall outside the scope of EU law. This case-law is largely situated in the context of requests for preliminary rulings relating to the EU free movement rules and other areas of EU law where in principle a cross-border element is required.[46] The present cases are concerned with the scope of application of the second subparagraph of Article 19(1) TEU. This cannot, by definition, be classified as a matter which is purely internal.

92. This is so because 'the fields covered by Union law' under the second subparagraph of Article 19(1) TEU include an authority vested in the Court to rule on structural breaches of the guarantees of judicial independence, given that Article 19 TEU is a concrete manifestation of the rule of law, one of the fundamental values on which the European Union is founded under Article 2 TEU, and Member States are bound under the second subparagraph of Article 19(1) TEU to 'provide remedies sufficient to ensure effective legal protection'.[47] Structural breaches of judicial independence inevitably impact on the preliminary ruling mechanism under Article 267 TFEU and therefore on the capacity of Member State courts to act as EU Courts.

93. In this regard, I accept the arguments of the Polish Commissioner for Human Rights in point 64 of this Opinion on the meaning of 'the fields covered by Union law' under the second subparagraph of Article 19(1) TEU,[48] and reject those of the General Prosecutor and Poland in point 56 of this Opinion that a ruling to the effect that the main proceedings fall within the material scope of the second subparagraph of Article 19(1) TEU would interfere with the division of competences between the European Union and the Member States. This is because EU law impacts on the competences of the Member States to organise their systems for the administration of justice in the narrow circumstances here described.

94. I am therefore unconcerned that the disputes in the main proceedings pertain to the application of provisions of Polish law in the field of public administration in Case C-558/18 and of Polish criminal law in Case C-563/18. As made clear by the Court in paragraph 51 of *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18) and reproduced in point 87 of this Opinion, the material scope of the second subparagraph of Article 19(1) TEU is not linked in any way to whether the substantive dispute in which judicial independence is being challenged concerns EU law. As pointed out above in points 88 and 89 of this Opinion, the material scope of the second subparagraph of Article 19(1) TEU is broad. Whether or not the breach of judicial independence is structural in nature and therefore in violation of the second subparagraph of Article 19(1) TEU is a separate exercise (see point 125 of this Opinion).

45 Judgment of 15 November 2016 (C-268/15, EU:C:2016:874, paragraphs 49 to 55); see also judgment of 20 September 2018, *Fremoluc* (C-343/17, EU:C:2018:754).

46 See Iglesias Sánchez, S., 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?', *European Constitutional Law Review*, Vol. 14, 2018, pp. 7 to 36, in particular pp. 14 to 28. For further discussion, see, for example, Dubout, E., 'Voyage en eaux troubles: vers une épuration des situations « purement » internes?: CJUE, gde ch., 15 novembre 2016, *Ullens de Schooten*, aff. C-268/15, ECLI:EU:C:2016:874', *Revue des affaires européennes*, N° 4, 2016, pp. 679 to 693; Krommendijk, J., 'Wide Open and Unguarded Stand our Gates : The CJEU and References for a Preliminary Ruling in Purely Internal Situations', *German Law Journal*, Vol. 18, 2017, pp. 1359 to 1394; Potvin-Solis, L., 'Qualification des situations purement internes', in Neframi, E., ed., *Renvoi préjudiciel et marge d'appréciation du juge national*, Larcier, 2015, pp. 39 to 99.

47 See, in that regard, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, in particular paragraphs 42 to 48, 54, 55, 57, 58 and the case-law cited).

48 This is to the exclusion of his arguments concerning the *Falciola* case at least in the circumstances of the present cases.

95. Thus, the similarities of the present cases with the Court's rulings in *Falciola*[49] and *Nour*[50] are not directly pertinent to the situation in the main proceedings, given that those rulings were issued prior to the Court's judgments in *Associação Sindical dos Juízes Portugueses* and *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18).

96. In the order of 26 January 1990 of the Full Court in *Falciola*,[51] the dispute before the referring court concerned the application of EU rules on public procurement, yet it was clear from the order for reference that the aim of the questions referred was to determine whether the national judges could carry out their duties as EU judges in an independent and impartial manner despite the adoption of Italian legislation on the liability of the judiciary. The Court found that the questions referred bore no relation to the main action, since they did not concern the interpretation of the EU rules on public procurement in question, and the referring court was 'in doubt only as to the possible psychological reactions of certain Italian judges' as a result of that legislation. Consequently, the Court held that the questions referred did not involve an interpretation of EU law objectively required to settle the dispute, and it had no jurisdiction to rule on those questions.

97. Likewise, in its order of 25 May 1998 in *Nour*,[52] the Court held that the questions referred had no relation to the main action, and it had no jurisdiction to answer them. Those questions were submitted by an Austrian appeals board in the context of a dispute between a doctor and an insurance fund about his medical fees, and concerned the general principles forming part of EU law in relation to certain aspects of that board's functioning. The Court's reasoning rested on three grounds. First, the questions referred fell outside the scope of the dispute, and thus did not involve an interpretation of EU law objectively required to resolve that dispute. Second, it was not permissible under the procedure of Article 267 TFEU to permit a national judge to refer questions connected with a dispute in which he was involved on a private basis via the tribunal he presides over and in the context of different proceedings, as the president of that appeals board had done. Third, EU law was not shown to be applicable to the situation in the main proceedings.

98. Yet, neither of those cases concerned the second subparagraph of Article 19(1) TEU. In view of the foregoing considerations, the objection alleging that the situation in the main proceedings does not fall within the material scope of the second subparagraph of Article 19(1) TEU should be rejected.

B. Why the questions referred are inadmissible

99. I take the view that the objection concerning the admissibility of the questions referred should be accepted, but for reasons which are slightly different from those put forward in the observations of the parties. The heart of the admissibility problem in the present cases lies in the absence of sufficient bases, both in terms of law and fact, for the Court to determine whether breach of judicial independence protected under the second subparagraph of Article 19(1) TEU has occurred. For this reason, it is impossible for me to advise the Court on whether that provision has been breached. I will therefore refrain from expressing a view in the alternative, should the Court disagree with my analysis of the admissibility of the questions referred.

49 Order of 26 January 1990 (C-286/88, EU:C:1990:33).

50 Order of 25 May 1998 (C-361/97, EU:C:1998:250).

51 C-286/88, EU:C:1990:33, in particular paragraphs 1 to 5, 8 to 10. For further discussion of this case and its role in the development of the Court's case-law on the admissibility of references, see, for example, Opinions of Advocate General Lenz in *Bosman and Others* (C-415/93, EU:C:1995:293, points 76 to 80); of Advocate General Fennelly in *Corsica Ferries France* (C-266/96, EU:C:1998:19, point 19, footnote 30); and of Advocate General Jacobs in *Centrosteel* (C-456/98, EU:C:2000:137, point 24).

52 C-361/97, EU:C:1998:250, in particular paragraphs 1 to 9, 12 to 20. This order was issued by a three-Judge chamber.

1. Pertinent rules on the admissibility of requests for preliminary rulings

100. It is useful to recall that, under established case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to answer.[53]

101. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[54]

102. Under the case-law interpreting Article 94(a) and (b) of the Court's Rules of Procedure,[55] the need to provide an interpretation of EU law which will be of use to the national court requires that court to define the factual and legislative context of the questions referred or at least to explain the factual circumstances on which those questions are based.[56] Moreover, pursuant to Article 94(c) of the Court's Rules of Procedure, it is essential that the referring court provides some explanation of the reasons for the choice of the provisions of EU law which it seeks to have interpreted and of the link which it establishes between those provisions and the national legislation applicable to the main proceedings.[57] As noted in point 6 of this Opinion, those requirements also appear in the Court's Recommendations.[58]

103. It is also settled case-law that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute.[59] Thus, where the Court's reply to a question referred would lead it to deliver an advisory opinion on a problem which is general[60] or hypothetical[61] in nature, the Court finds such questions inadmissible.

53 See, for example, judgments of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 26), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraphs 43 and 44).

54 See, for example, judgments of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 27), and of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 48).

55 Article 94 of the Court's Rules of Procedure states: 'In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain: (a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based; (b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law; (c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of [EU] law, and the relationship between those provisions and the national legislation applicable to the main proceedings.'

56 See, for example, judgments of 10 March 2016, *Safe Interenvios* (C-235/14, EU:C:2016:154, paragraph 114), and of 20 December 2017, *Asociación Profesional Élite Taxi* (C-434/15, EU:C:2017:981, paragraph 24).

57 See, for example, judgments of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraph 54), and of 2 May 2019, *Asendia Spain* (C-259/18, EU:C:2019:346, paragraph 18).

58 See, for example, judgments of 13 July 2017, *INGSTEEL and Metrostav* (C-76/16, EU:C:2017:549, paragraph 51), and of 2 May 2019, *Asendia Spain* (C-259/18, EU:C:2019:346, paragraph 20).

59 See, for example, judgments of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 28), and of 13 December 2018, *Rittinger and Others* (C-492/17, EU:C:2018:1019, paragraph 50).

60 See, for example, judgments of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraphs 44 to 46), and of 7 November 2013, *Romeo* (C-313/12, EU:C:2013:718, paragraphs 39 to 41).

61 See, for example, judgments of 25 July 2018, *Aviabaltika* (C-107/17, EU:C:2018:600, paragraphs 40 to 43), and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraphs 165 and 166).

104. This corresponds to the purpose of the preliminary ruling procedure under Article 267 TFEU. By setting up a dialogue between the Court and the courts and tribunals of the Member States, that procedure has the object of securing the consistency and uniformity in the interpretation of EU law, thereby serving to ensure its full effect and its autonomy, as well as, ultimately, the particular nature of the law established by the Treaties.[62]

105. An analysis of the case-law on the requirements of the content of requests for preliminary rulings laid down in Article 94 of the Court's Rules of Procedure shows why the requests for a preliminary ruling in the present cases are problematic in terms of admissibility.

106. The Court's judgment of 27 September 2017 in *Puškár*[63] concerned the interpretation of several provisions of EU law in the context of an action brought against the Slovakian authorities to remove the applicant's name from a list of persons considered to act as 'fronts' in company director roles. The applicant claimed that his inclusion in that list infringed his personality rights.

107. The fourth question in *Puškár*[64] concerned whether precedence should be given to the case-law of the Court when it differs from that of the European Court of Human Rights. The Court held that that question was inadmissible, as it 'was raised by the referring court in general terms, without the latter clarifying in a clear and concrete manner what those differences are'. The Court added that, with respect to the requirements laid down in Article 94 of its Rules of Procedure, 'the referring court must set out the precise reasons that led it to raise the question of the interpretation of certain provisions of EU law' and that 'it is essential that the national court should give at the very least some explanation of the reasons for the choice of the EU law provisions which it seeks to have interpreted and of the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it'.

108. Insufficient explanation of Member State law to enable the establishment of this critical link, and therefore a finding of inadmissibility, occurred in particular in the judgments of 9 March 2017 in *Milkova*[65] and of 13 December 2018 in *Rittinger and Others*,[66] along with the order of 7 June 2018 in *Filippi and Others*.[67]

109. In *Milkova*,[68] involving a challenge to a dismissal of employment before the Bulgarian courts which allegedly breached the prohibition against discrimination on the grounds of disability, the Court held that the referring court merely referred generally to Article 4 of Directive 2000/78, along with other provisions of that directive, without establishing a link between those provisions and the national legislation at issue in those proceedings.

110. *Rittinger and Others*[69] involved a dispute by reference, inter alia, to EU State aid law in respect of German legislation under which all adults possessing a dwelling in the national territory were required to pay a contribution to public broadcasters. The Court concluded that it was fatal to the admissibility of the order for reference that 'while the referring court states that the broadcasting contribution enabled that system to be financed for the sole benefit of broadcasters in Germany, it does not explain the conditions of financing that system or the reasons why other broadcasters are excluded from using the system'.

62 See, for example, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 45).

63 C-73/16, EU:C:2017:725, in particular paragraphs 1, 2, 25 and 26.

64 Judgment of 27 September 2017 (C-73/16, EU:C:2017:725, paragraphs 118 to 124).

65 C-406/15, EU:C:2017:198.

66 C-492/17, EU:C:2018:1019.

67 C-589/16, EU:C:2018:417.

68 Judgment of 9 March 2017 (C-406/15, EU:C:2017:198, in particular paragraphs 73 to 77).

69 Judgment of 13 December 2018 (C-492/17, EU:C:2018:1019, in particular paragraphs 45 to 47).

111. In *Filippi and Others*,[70] concerning seizure by the Austrian authorities and other sanctions with respect to gaming machines requiring authorisation, the Court held that the request for a preliminary ruling was manifestly inadmissible. This was due in particular to the failure to satisfy the requirements referred to in Article 94(c) of the Court's Rules of Procedure because there was nothing in the order for reference which set out with the necessary precision and clarity the reasons which led the referring court to inquire into the interpretation of the relevant provisions of EU law, and the link between EU law and the national legislation applicable to the disputes in the main proceedings was not explained. Moreover, in respect to those requirements, the requisite information on that national legislation was lacking. While the request for a preliminary ruling set out the content of certain provisions of national law, it did not 'indicate in a sufficiently clear manner how such provisions could apply in the disputes before the referring court and which are the subject of the request'.

112. Finally, I note that in the recent judgment of the Full Court in *Wightman and Others*,[71] rejecting arguments concerning the admissibility of a reference relating to the United Kingdom's notification of its intention to withdraw from the European Union, the requirements of Article 94 of the Court's Rules of Procedure, including the link required by Article 94(c) of those rules between the relevant provisions of EU law and the Member State law applicable to the main proceedings, was not in dispute.

2. Application to the present cases

113. The Court has held that in order to ascertain whether the information supplied in the order for reference satisfies the requirements concerning the content of requests for preliminary rulings, the nature and scope of the question referred are taken into account.[72] It is also established in the case-law that those requirements as set out in Article 94 of the Court's Rules of Procedure are of particular importance in areas, such as competition law, where the factual and legal situations are often complex.[73]

114. These considerations, combined with the fact that it is established more broadly in the case-law that the requirements laid down in Article 94 of the Court's Rules of Procedure entail scrupulous adherence,[74] leads me to conclude that the complexities of determining whether a structural breach of judicial independence under the second subparagraph of Article 19(1) TEU has occurred means that, in this context, Article 94(c) of the Court's Rules of Procedure requires sufficient explanation of the Member State measures challenged and why they are inconsistent with the guarantees of judicial independence afforded by the second subparagraph of Article 19(1) TEU.

115. In the present cases, the orders for reference do not provide sufficient explanation of the relationship between the second subparagraph of Article 19(1) TEU and the Polish measures in question. In the context of the referring courts' concerns with respect to judicial independence, the relevant Polish measures are generally reproduced in points 8 to 32 of this Opinion. However, in contrast with other cases in which the Court has been asked to assess the compatibility of national measures relating to the reform of the justice system in Poland with the guarantees of judicial independence under the second subparagraph of Article 19(1) TEU,[75] there is a dearth of information in the case file concerning which provisions of Polish law are incompatible with those guarantees and why.

70 Order of 7 June 2018 (C-589/16, EU:C:2018:417, in particular paragraphs 25, 28, 31 to 33).

71 Judgment of 10 December 2018 (C-621/18, EU:C:2018:999, in particular paragraphs 29 to 34).

72 See, for example, judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio* (C-217/05, EU:C:2006:784, paragraph 29).

73 See, for example, judgments of 13 December 2018, *Rittinger and Others* (C-492/17, EU:C:2018:1019, paragraph 39); and of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 49); see also Opinion of Advocate General Bot in *Danqua* (C-429/15, EU:C:2016:485, point 32).

74 See, for example, judgments of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 19), and of 2 May 2019, *Asendia Spain* (C-259/18, EU:C:2019:346, paragraph 19).

75 See footnote 2 of this Opinion.

116. In this regard, I agree with the arguments made in substance by Poland and reproduced above in point 71 of this Opinion that the allegations set out in the orders for reference are generalised in nature. In particular, while the orders for reference set out the content of several provisions of Polish law, they do not explain the operation of those provisions or indicate how those provisions allegedly breach the requirements of judicial independence under second subparagraph of Article 19(1) TEU. The orders for reference also do not explain how the specified provisions of Polish law have been modified by the laws adopted in the context of the reform of the Polish justice system or how those provisions apply within the framework of the new regime for disciplinary proceedings against judges. Consequently, the factual and legal material necessary to assess the allegations set out in the orders for reference and to ascertain their scope is lacking.

117. In addition, the orders for reference are concerned with an element of subjective bias with respect to the impact of the new disciplinary regime on the referring judges' capacities to adjudicate independently. This has been described in both orders for reference as a 'fear' (see points 34 and 36 of this Opinion). In the absence of a dispute between interested parties with respect to this issue, it is difficult to determine whether judicial independence has been tainted by subjective bias, which as I have pointed out in my previous Opinions concerning the independence of the judiciary in Poland[76] is a separate exercise from assessing objective independence.

118. In the present cases, the orders for reference indicate that the interpretation of the second subparagraph of Article 19(1) TEU is necessary for the decisions to be given in the main proceedings on the grounds that the referring courts fear that, in the event of a particular decision being taken in those proceedings, disciplinary proceedings will be initiated against the judges of those courts. It follows that the initiation of disciplinary proceedings has not yet occurred. On the basis of the orders for reference, the referring courts have merely a subjective fear which has not crystallised into disciplinary proceedings and remains hypothetical.

119. Thus, the question whether there is a structural breach of judicial independence under the second subparagraph of Article 19(1) TEU remains hypothetical in the circumstances of the main proceedings, due to the absence of sufficient information as to how this breach has occurred and why, both of which are compounded by the lack of crystallisation of a dispute between interested parties with respect to judicial independence.

120. I note in particular that none of the parties making submissions in the present cases refuted at the hearing the detailed arguments in the written observations of Poland on why specified provisions of Polish law are consistent with Member States' obligations with respect to judicial independence (see points 72 to 75 of this Opinion). Nor were any submissions made as to why the subjective fear of the judges concerned remained justified, even though the General Prosecutor and Poland asserted that the reason for the investigations of those judges was because the references were identical, and not because references had been made, and that no disciplinary action has been taken against those judges (see points 70 and 76 of this Opinion). In the light of all this, it is difficult to see how any dispute in respect of those judges has crystallised in the present cases.

121. As indicated by the General Prosecutor and the Commission, the circumstances of the present cases differ from those leading to the Court's judgment in *Associação Sindical dos Juízes Portugueses*.[77] That case involved an action brought before a Portuguese court by the Trade Union of Portuguese Judges against the Portuguese Court of Auditors, seeking, inter alia, the annulment of national salary reduction measures which reduced their pay. In support of its action, that trade union

76 See Opinion of Advocate General Tanchev in Joined Cases *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:2019:551, point 120).

77 Judgment of 27 February 2018 (C-64/16, EU:C:2018:117).

argued that those measures infringed the principle of judicial independence enshrined in Portuguese and EU law.[78] It is clear that the judges in that case suffered a reduction in salary. It is not clear in the circumstances of the present cases that the action taken by Poland led to a justified apprehension of bias that requires substantive investigation.

122. Moreover, as indicated by the State Treasury, the examples in the Court's case-law which give a broad interpretation of the relevance of questions referred for the purposes of resolving the disputes in the main proceedings do not invalidate this analysis. For instance, the Court has replied to questions relating to the national court's right or obligation to refer under Article 267 TFEU,[79] which strictly speaking may not determine the outcome of the decision to be given in the main proceedings. Additionally, in a line of case-law situated in the field of judicial cooperation in civil matters,[80] the Court has given a broad interpretation of the terms 'give judgment' for the purposes of the second paragraph of Article 267 TFEU as covering the whole of the procedure leading to the referring court's judgment.

123. Yet, that is a different matter from sufficiently setting out the link between the Member State measures at issue and the relevant provisions of EU law, which is here the second subparagraph of Article 19(1) TEU. Further, as pointed out above in point 114 of this Opinion, the complexities of determining whether Member State measures are inconsistent with the guarantees of judicial independence under the second subparagraph of Article 19(1) TEU require rigorous adherence to the requirements set out in Article 94 of the Court's Rules of Procedure.

124. To this, I would add that, in light of arguments put forward by the Polish Commissioner for Human Rights on the relevance of the Court's judgment in *Unibet*[81] to the present cases (see point 65 of this Opinion), that judgment does not excuse a national court from complying with the Court's rules on the admissibility of requests for preliminary rulings. I do not view the present cases as instances in which it is the absence of a Member State remedy which is thwarting the application of EU law. The present cases are simply instances in which the Court has insufficient information to determine if EU law has been breached.

125. Finally, I note that while the second subparagraph of Article 19(1) TEU has a broad material scope and extends to all national courts which 'could' make references under Article 267 TFEU (see points 87 to 89 of this Opinion), substantively speaking and in terms of EU competence, I take the position that, in the context of judicial independence, the second subparagraph of Article 19(1) TEU is confined to structural breaches which compromise the essence of judicial independence. I have expressed the view in previous Opinions that such a structural breach occurs when it impacts on an entire tier of the judiciary, and I reached the same conclusion with respect to the Disciplinary Chamber in a context in which it is the forum provided under Polish law to decide on cases involving judges affected by measures lowering the retirement age of Supreme Court judges,[82] which were held by the Court in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18) to infringe the guarantees of judicial independence under the second subparagraph of Article 19(1) TEU.[83] Compliance with Article 94 of the Court's Rules of Procedure also requires

78 See judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, in particular paragraphs 11 to 13).

79 See, for example, judgments of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraphs 23 to 26); of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraphs 68 to 74); and of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraphs 31 to 36). I note that no objection as to the admissibility of the request for a preliminary ruling was made in the latter case.

80 See judgments of 17 February 2011, *Weryński* (C-283/09, EU:C:2011:85, paragraphs 34 to 42); of 11 June 2015, *Fahnenbrock and Others* (C-226/13, C-245/13, C-247/13 and C-578/13, EU:C:2015:383, paragraph 30); and of 16 June 2016, *Pebros Servizi* (C-511/14, EU:C:2016:448, paragraph 28).

81 Judgment of 13 March 2007 (C-432/05, EU:C:2007:163, paragraphs 62 and 64).

82 See Opinions of Advocate General Tanchev in *Commission* v *Poland (Independence of the ordinary courts)* (C-192/18, EU:C:2019:529, points 114 to 116), and in Joined Cases *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:2019:551, points 145 to 152).

83 EU:C:2019:531. See footnote 5 of this Opinion.

sufficient explanation as to why the breach of judicial independence at issue is structural in nature for the purposes of the second subparagraph of Article 19(1) TEU, rather than one to be dealt with under Article 47 of the Charter, but only when Member States are implementing EU law under Article 51(1) of the Charter.

126. In view of the foregoing considerations, the objection alleging that the questions referred in the present cases are inadmissible should be upheld.

VIII. Conclusion

127. I propose that the Court should declare that the requests for a preliminary ruling submitted by the Sąd Okręgowy w Łodzi (District Court, Łódź, Poland) in Case C-558/18 and by the Sąd Okręgowy w Warszawie (District Court, Warsaw, Poland) in Case C-563/18 are inadmissible.