



Reports of Cases

ORDER OF THE VICE-PRESIDENT OF THE COURT

21 April 2023 *

(Interim relief – Article 163 of the Rules of Procedure of the Court of Justice – Application to cancel or vary an order for interim measures – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Effective judicial protection – Independence of judges – Non-execution – Change in circumstances – Periodic penalty payment)

In Case C-204/21 R-RAP,

APPLICATION for cancellation or variation of an order for interim measures, pursuant to Article 163 of the Rules of Procedure of the Court of Justice, made on 10 March 2023,

Republic of Poland, represented by B. Majczyna and S. Żyrek, acting as Agents,

applicant,

v

European Commission, represented by K. Herrmann and P.J.O. Van Nuffel, acting as Agents,

defendant,

supported by:

Kingdom of Belgium, represented by M. Jacobs, C. Pochet and L. Van den Broeck, acting as Agents,

Kingdom of Denmark, represented by V. Pasternak Jørgensen and M. Søndahl Wolff, acting as Agents,

Kingdom of the Netherlands, represented by M.K. Bulterman and J. Langer, acting as Agents,

Republic of Finland, represented by H. Leppo, acting as Agent,

Kingdom of Sweden, represented initially by H. Eklinder, J. Lundberg, C. Meyer-Seitz, M. Salborn Hodgson, R. Shahsavan Eriksson, H. Shev and O. Simonsson, and subsequently by H. Eklinder, C. Meyer-Seitz, M. Salborn Hodgson, R. Shahsavan Eriksson, H. Shev and O. Simonsson, acting as Agents,

* Language of the case: Polish.

interveners,

THE VICE-PRESIDENT OF THE COURT,

after hearing the Advocate General, A.M. Collins,

makes the following

Order

- 1 By its application, the Republic of Poland requests the Court to cancel or, in the alternative, to vary the order of the Vice-President of the Court of 27 October 2021, *Commission v Poland* (C-204/21 R, ‘the order of 27 October 2021’, EU:C:2021:878).

Procedure before the Court

- 2 On 1 April 2021, the European Commission brought an action under Article 258 TFEU for failure to fulfil obligations, seeking a declaration that:
 - by adopting and maintaining in force Article 42a(1) and (2) and Article 55(4) of the ustawa – Prawo o ustroju sądów powszechnych (Law relating to the organisation of the ordinary courts) of 27 July 2001 (Dz. U. of 2001, No 98, item 1070), as amended by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws) of 20 December 2019 (Dz. U. of 2020, item 190; ‘the amending law’) (‘the amended Law relating to the ordinary courts’), Article 26(3) and Article 29(2) and (3) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5), as amended by the amending law (‘the amended Law on the Supreme Court’), Article 5(1a) and (1b) of the ustawa – Prawo o ustroju sądów administracyjnych (Law relating to the organisation of the administrative courts) of 25 July 2002 (Dz. U. of 2002, item 1269), as amended by the amending law (‘the amended Law relating to the administrative courts’), and Article 8 of the amending law, which prohibit any national court from reviewing compliance with the EU requirements relating to an independent and impartial tribunal previously established by law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’), in the light of the case-law of the European Court of Human Rights concerning Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and under Article 267 TFEU and the principle of primacy of EU law;
 - by adopting and maintaining in force Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and Article 10 of the amending law, which place the examination of complaints and questions of law concerning the lack of independence of a court or judge under the exclusive jurisdiction of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court, Poland) (‘the Extraordinary Review and Public Affairs Chamber’), the Republic of Poland has failed to fulfil its obligations under the second subparagraph of

Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU and the principle of primacy of EU law;

- by adopting and maintaining in force points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts and points 1 to 3 of Article 72(1) of the amended Law on the Supreme Court, under which the examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law may be classified as a ‘disciplinary offence’, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU;
 - by conferring on the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court) (‘the Disciplinary Chamber’), whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office, such as, first, applications for authorisation to initiate criminal proceedings against judges and trainee judges or to detain them and, second, cases relating to employment and social security law that concern judges of the Sąd Najwyższy (Supreme Court) and cases relating to the compulsory retirement of those judges, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;
 - by adopting and maintaining in force Article 88a of the amended Law relating to the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law relating to the administrative courts, the Republic of Poland has infringed the right to respect for private life and the right to protection of personal data, guaranteed by Article 7 and Article 8(1) of the Charter and by Article 6(1)(c) and (e), Article 6(3) and Article 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1).
- 3 On the same day, the Commission made an application for interim relief, namely for the Court to impose on the Republic of Poland, pending the judgment on the substance of the proceedings, a series of obligations.
- 4 By the order of 14 July 2021, *Commission v Poland* (C-204/21 R, ‘the order of 14 July 2021’, EU:C:2021:593), the Vice-President of the Court ordered the Republic of Poland, in point 1 of the operative part of that order, pending delivery of the judgment closing the proceedings in Case C-204/21:
- (a) to suspend, first, the application of point 1a of Article 27(1) of the amended Law on the Supreme Court, under which the Disciplinary Chamber has jurisdiction to adjudicate, at both first instance and second instance, on applications for authorisation to initiate criminal proceedings against judges or trainee judges, place them in provisional detention, arrest them or summon them to appear before it, and second, the effects of the decisions already adopted by the Disciplinary Chamber on the basis of that article which authorise the initiation of criminal proceedings against or the arrest of a judge, and to refrain from referring cases covered by that article to a court which does not meet the requirements of

independence defined, in particular, in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982);

- (b) to suspend the application of points 2 and 3 of Article 27(1) of the amended Law on the Supreme Court, on the basis of which the Disciplinary Chamber has jurisdiction to adjudicate in cases relating to the status of judges of the Sąd Najwyższy (Supreme Court) and the performance of their office, in particular in cases relating to employment and social security law and in cases relating to the compulsory retirement of those judges, and to refrain from referring those cases to a court which does not meet the requirements of independence defined, in particular, in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982);
 - (c) to suspend the application of points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts, and of points 1 to 3 of Article 72(1) of the amended Law on the Supreme Court, which allow the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter;
 - (d) to suspend the application of Article 42a(1) and (2) and of Article 55(4) of the amended Law relating to the ordinary courts, of Article 26(3) and Article 29(2) and (3) of the amended Law on the Supreme Court, of Article 5(1a) and (1b) of the amended Law relating to the administrative courts, and of Article 8 of the amending law, in so far as they prohibit national courts from verifying compliance with the requirements of the European Union relating to an independent and impartial tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter;
 - (e) to suspend the application of Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court, and of Article 10 of the amending law, establishing the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber to examine complaints alleging lack of independence of a judge or a court; and
 - (f) to communicate to the Commission, no later than one month after notification of the order of 14 July 2021, all the measures adopted in order to comply in full with that order.
- 5 By the order of 6 October 2021, *Poland v Commission* (C-204/21 R, EU:C:2021:834), the Vice-President of the Court dismissed an application by the Republic of Poland for the order of 14 July 2021 to be cancelled.
- 6 By the order of 27 October 2021, the Vice-President of the Court ordered the Republic of Poland to pay the Commission a periodic penalty payment of EUR 1 000 000 per day, from the date on which that order is notified to that Member State and until such time as the Member State complies with the obligations arising from the order of 14 July 2021 or, if it fails to do so, until the date of delivery of the judgment closing the proceedings in Case C-204/21.
- 7 The Republic of Poland made the present application on 10 March 2023.

Forms of order sought

- 8 The Republic of Poland claims that the Court should:
- cancel the order of 27 October 2021; or
 - in the alternative, reduce the amount of the periodic penalty payment imposed by that order.
- 9 The Commission contends that the Court should:
- dismiss the application for cancellation of the order of 27 October 2021; and
 - take account, in the examination of the application for reduction of the amount of the periodic penalty payment imposed by that order, of the measures adopted by the Republic of Poland with a view to implementing the order of 14 July 2021.

The application for the order of 27 October 2021 to be cancelled or, in the alternative, varied

- 10 As a preliminary point, it should be recalled that, under Article 162(1) of the Rules of Procedure of the Court of Justice, no appeal lies from an order for interim measures.
- 11 However, in accordance with Article 163 of those rules, on application by a party, an order for interim measures may at any time be varied or cancelled on account of a change in circumstances. The concept of a ‘change in circumstances’ refers in particular to the occurrence of any factual or legal element capable of calling into question the assessments of the judge hearing the application for interim measures as to the conditions to which the grant of a suspension or of interim relief is subject (order of the Vice-President of the Court of 20 September 2021, *Czech Republic v Poland*, C-121/21 R, EU:C:2021:752, paragraph 22).
- 12 It must also be noted that the purpose of an application made under that provision is not to have the judge hearing the application for interim measures set aside retroactively an order granting an interim measure, but solely for that order to be varied or repealed, with the judge in such proceedings being capable of reconsidering, for the future only, such an order, including, where appropriate, by re-assessing, with regard to the circumstances existing on the date of his or her decision, the pleas of fact and of law which established a prima facie case for the grant of the interim measure in question (order of the Vice-President of the Court of 19 May 2022, *Czech Republic v Poland (Turów mine)*, C-121/21 R, not published, EU:C:2022:408, paragraph 22 and the case-law cited).
- 13 It follows that the purpose of an application made under Article 163 of the Rules of Procedure cannot be to call into question the past effects of an order granting an interim measure (order of the Vice-President of the Court of 19 May 2022, *Czech Republic v Poland (Turów mine)*, C-121/21 R, not published, EU:C:2022:408, paragraph 23).
- 14 In the present case, since the application made by the Republic of Poland concerns only the order of 27 October 2021, it must be understood as an application for the periodic penalty payment imposed in a manner incidental to the interim measures prescribed by the order of 14 July 2021 to be cancelled or varied.

- 15 With a view to ruling on that application, it must be recalled that Article 279 TFEU confers on the Court the power to prescribe any interim measure that it deems necessary in order to ensure that the final decision is fully effective (order of 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877, paragraph 97, and order of 27 October 2021, paragraph 19).
- 16 In particular, the judge hearing an application for interim measures must be able to ensure the effectiveness of an order directed at a party pursuant to Article 279 TFEU, by adopting any measure intended to ensure that the interim order is complied with by that party. Such a measure may entail, inter alia, provision for a periodic penalty payment to be imposed should that order not be respected by the relevant party (order of 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877, paragraph 100, and order of 27 October 2021, paragraph 20).
- 17 In that context, it follows from the order of 27 October 2021 that, since it was not apparent from the case file that the measures adopted by the Republic of Poland were sufficient to ensure the implementation of the interim measures prescribed by the order of 14 July 2021, the judge hearing the application for interim measures found that that the effectiveness of those interim measures had to be strengthened by providing for the imposition of a periodic penalty payment on that Member State, with a view to deterring it from delaying bringing its conduct into line with the latter order.
- 18 Accordingly, in order to rule on the present application, it falls to the judge hearing the application for interim measures to determine whether the arguments put forward by the Republic of Poland allow a change in circumstances to be established, meaning that, on the date on which that judge gives a ruling, the periodic penalty payment imposed on that Member State by the order of 27 October 2021 is no longer justified, either in whole or in part.
- 19 More specifically, since the purpose of the arguments raised by the Republic of Poland in support of that application is to establish that that Member State has implemented in full the interim measures prescribed by the order of 14 July 2021, it is for the judge hearing the application for interim measures to determine whether that is in fact the case, such that, in that scenario, the imposition of a periodic penalty payment of EUR 1 000 000 per day would no longer be justified for the future.
- 20 It must further be specified, since the present application seeks, in the alternative, the reduction of the amount of the periodic penalty payment imposed by the order of 27 October 2021, that the judge hearing the application for interim measures may, pursuant to Article 163 of the Rules of Procedure, not only cancel but also vary an order for interim measures. Such a variation may consist inter alia in reducing the amount of a periodic penalty payment previously imposed on a Member State where a change in circumstances justifies such a reduction.
- 21 In the light of the foregoing, it is necessary to examine the arrangements for implementation of the various interim measures prescribed by the order of 14 July 2021, in order to determine whether the Republic of Poland has demonstrated that, on account of a change in circumstances, such implementation justifies the periodic penalty payment imposed by the order of 27 October 2021 being cancelled or, failing that, reduced for the future.

The obligation to suspend the application of points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court

Arguments

- 22 The Republic of Poland claims that the ustawa o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the Supreme Court and certain other laws) of 9 June 2022 (Dz. U. item 1259; ‘the Law of 9 June 2022’) abolished the Disciplinary Chamber and repealed in its entirety Article 27 of the amended Law on the Supreme Court.
- 23 The obligation to suspend the application of points 1a, 2 and 3 of Article 27(1) of that law has therefore become redundant.
- 24 The Commission is likewise of the view that the Law of 9 June 2022 duly implemented that obligation.

Assessment

- 25 It follows from point 1(a) and (b) of the operative part of the order of 14 July 2021 that that order required the Republic of Poland, inter alia, to suspend the application of points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court, under which the Disciplinary Chamber has jurisdiction to adjudicate, at both first instance and second instance, on applications for authorisation to initiate criminal proceedings against judges or trainee judges, place them in provisional detention, arrest them or summon them to appear before it, and in cases relating to the status of judges of the Sąd Najwyższy (Supreme Court) and the performance of their office.
- 26 It follows from Article 1 of the Law of 9 June 2022 that Article 27 of the amended Law on the Supreme Court has been repealed in its entirety. In addition, it is established that the Disciplinary Chamber was abolished by that law.
- 27 While the adoption of such measures was not essential to ensure the implementation of the order of 14 July 2021 (see, to that effect, order of 27 October 2021, paragraph 53), the fact remains that they do guarantee that points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court are no longer applicable within the Polish legal order.
- 28 The Republic of Poland has therefore complied in full with the provisional measures referred to in paragraph 25 of this order.

The obligation to suspend the effects of the decisions adopted by the Disciplinary Chamber which authorise the initiation of criminal proceedings against or the arrest of a judge

Arguments

- 29 The Republic of Poland claims, first, that Article 9 of the Law of 9 June 2022 provides that, in the cases which fell within the jurisdiction of the Disciplinary Chamber before the entry into force of that law, the Izba Odpowiedzialności Zawodowej (Professional Liability Chamber) of the Sąd Najwyższy (Supreme Court) (‘the Professional Liability Chamber’) reviews of its own motion, at

the first hearing devoted to a particular case, the suspension from duty of the judge concerned ordered by the Disciplinary Chamber. That procedure allows the appropriateness of the interim measures adopted by the latter chamber to be determined expeditiously.

- 30 Second, Article 18(1) of the Law of 9 June 2022 permits the judge against whom a final disciplinary decision has been made or a final resolution authorising the initiation of criminal proceedings has been adopted, by a panel of the Sąd Najwyższy (Supreme Court) comprising at least one member of the Disciplinary Chamber, to apply for the procedure to be reopened before the Professional Liability Chamber.
- 31 The Law of 9 June 2022 thus establishes a legal framework which allows the judges concerned by decisions of the Disciplinary Chamber to call those decisions into question. Furthermore, several judges have succeeded within that framework in calling such decisions into question. Finally, cases relating to decisions of that nature are still pending.
- 32 The Commission contends that the legal remedies thus introduced by the Republic of Poland do not have the effect of suspending immediately the effects of the decisions of the Disciplinary Chamber. In addition, the examples cited by the Republic of Poland are insignificant.

Assessment

- 33 It follows from point 1(a) of the operative part of the order of 14 July 2021 that that order required the Republic of Poland, inter alia, to suspend the effects of the decisions adopted by the Disciplinary Chamber on the basis of point 1a of Article 27(1) of the amended Law on the Supreme Court.
- 34 The Republic of Poland submits, in essence, that it has implemented that interim measure in full by introducing two separate legal remedies, provided for, respectively, in Article 9 and Article 18(1) of the Law of 9 June 2022.
- 35 With regard, in the first place, to Article 9 of the Law of 9 June 2022, it is apparent from the very wording of that article that the decisions of the Disciplinary Chamber ordering the suspension of a judge, pending the outcome of a case that was still pending on the entry into force of that law, will necessarily have to be reviewed by the Professional Liability Chamber.
- 36 It is true that such a review may, in principle, prevent a decision of that nature adopted by the Disciplinary Chamber from continuing to produce effects by operation of law, since the continuation of those effects is subject to the approval of that decision by another body.
- 37 That said, first, it follows both from the wording of Article 9 of the Law of 9 June 2022 and from the Republic of Poland's interpretation of it that that article does not apply to all decisions adopted by the Disciplinary Chamber. In particular, the article does not allow for the restriction of the effects of decisions imposing a disciplinary penalty on a judge or authorising the initiation of criminal proceedings against him or her, even though such decisions are covered by the interim measure referred to in paragraph 33 of this order and, moreover, can have significant consequences for the life and the career of the judges concerned.
- 38 Second, it is true that Article 9 of the Law of 9 June 2022 provides for the review of a decision of the Disciplinary Chamber ordering the suspension of a judge in the course of the first hearing concerning that judge's situation held before the Professional Liability Chamber. However, it

does not follow either from the provisions of that law or from the arguments of the Republic of Poland that the effects of such a decision are suspended pending that first hearing, which it appears, furthermore, does not have to be held within a predetermined period.

- 39 As regards, in the second place, Article 18(1) of the Law of 9 June 2022, it follows from the wording of that provision that it affords the judge concerned by certain decisions adopted by the Disciplinary Chamber that have become final the possibility of applying, within six months from the entry into force of that law, for the procedure concerning him or her to be reopened.
- 40 Whilst the introduction of such a remedy is, in so far as it is effective, capable of strengthening the judicial protection available to the judges concerned by proceedings brought before the Disciplinary Chamber, the fact remains that its introduction by no means entails the suspension of the effects of a decision adopted by the Disciplinary Chamber if the judge in question has not submitted an application for review of that decision pursuant to the conditions laid down in the Law of 9 June 2022.
- 41 In addition, even if such an application for review is submitted, it is not apparent from Article 18(1) of that law that the effects of the decision of the Disciplinary Chamber to which that application relates are suspended pending the examination of the application.
- 42 It appears, therefore, that the legal remedies upon which the Republic of Poland relies are incapable of guaranteeing, in all cases and immediately, the suspension of the effects of the decisions adopted by the Disciplinary Chamber on the basis of point 1a of Article 27(1) of the amended Law on the Supreme Court.
- 43 In those circumstances, the fact that some of those decisions have in fact been called into question or could be in the near future, assuming this were established, cannot, in any event, establish that the interim measure referred to in paragraph 33 of this order has been implemented in full.
- 44 Accordingly, the Republic of Poland has complied with that interim measure only partially.

The obligation to suspend the application of the Polish provisions prohibiting national courts from verifying compliance with the requirements of the European Union relating to an independent and impartial tribunal previously established by law

Arguments

- 45 The Republic of Poland argues that Polish law allows the right to an independent and impartial tribunal established by law to be safeguarded at various stages of cases and in different procedures. That Member State considers that, relying on its judicial practice, it has implemented the interim measures imposed by the order of 8 April 2020, *Commission v Poland* (C-791/19 R, EU:C:2020:277).
- 46 Furthermore, the Law of 9 June 2022 introduced into the Polish legal order a new legal remedy which allows compliance, by a judge, with the requirements of independence and impartiality to be verified, taking into account the circumstances surrounding his or her appointment and his or her conduct, where doubts are raised in that regard by a party. The application of that mechanism can also lead to the recusal of a judge in cases in which a request to that end is not made.

47 The Commission contends that the legal remedy upon which the Republic of Poland relies is exercised on application by a party to the procedure at issue and that it was subject, initially, to a series of restrictive conditions. However, that legal remedy does not allow the examination *ex officio* of compliance with the requirements relating to an independent and impartial tribunal previously established by law. Furthermore, the Commission points to a case in which disciplinary proceedings were initiated by reason of the infringement of Article 42a(1) and (2) of the amended Law relating to the ordinary courts.

Assessment

48 It follows from point 1(d) of the operative part of the order of 14 July 2021 that that order required the Republic of Poland to suspend the application of Article 42a(1) and (2) and Article 55(4) of the amended Law relating to the ordinary courts, of Article 29(2) and (3) of the amended Law on the Supreme Court, of Article 5(1a) and (1b) of the amended Law relating to the administrative courts and of Article 8 of the amending law, in so far as those provisions prohibit national courts from verifying compliance with the requirements of the European Union relating to an independent and impartial tribunal previously established by law arising from Article 19(1) TEU and from Article 47 of the Charter.

49 In that regard, in the first place, in so far as the argument of the Republic of Poland is to be understood as seeking to establish that the interim measure referred to in the previous paragraph has been implemented by means of the practice of its courts, it is sufficient to observe that that argument does not contain any clarification as to the content of that practice and that, moreover, it is not accompanied by any evidence intended to establish the reality of the practice.

50 In the second place, the Law of 9 June 2022 did indeed introduce a new legal remedy which allows compliance with the requirements relating to an independent and impartial tribunal previously established by law to be verified, since that legal remedy is governed, inter alia, by Article 42a(3) of the amended Law relating to the ordinary courts, Article 29(5) of the amended Law on the Supreme Court and Article 5(1) of the amended Law relating to the administrative courts.

51 However, first, it is not in dispute that the Polish provisions referred to in paragraph 48 of this order have not been repealed and that their application has not been formally suspended, and therefore the restrictions which they introduce vis-à-vis the possibility of verifying compliance with the requirements relating to an independent and impartial tribunal previously established by law remain, in principle, wholly applicable within the Polish legal order.

52 Second, it follows both from the wording of the provisions governing the new legal remedy introduced by the Polish legislature upon which the Republic of Poland relies and from that Member State's arguments that that legal remedy can be exercised only on application by a party to the procedure concerned.

53 It follows that that legal remedy must be understood as introducing a derogation from the restrictions arising from the Polish provisions referred to in paragraph 48 of this order only in the event that such an application has been made. It is therefore not established that those restrictions are removed in other cases, in particular where a judge verifies *ex officio* compliance with the requirements relating to an independent and impartial tribunal previously established by law.

- 54 Accordingly, without it being necessary to determine whether EU law necessarily requires that a judge must be able to carry out such verification of his or her own motion, it appears that the adoption of the Law of 9 June 2022 cannot ensure, in all cases, the suspension of all of the effects of the Polish provisions referred to in paragraph 48 of this order.
- 55 In those circumstances, the view must be taken that, while the adoption of the Law of 9 June 2022 can limit the effects of those provisions, it is not sufficient to ensure the implementation in full of the interim measure referred to in paragraph 48 of this order.
- 56 The Republic of Poland has therefore complied with that interim measure only partially.

The obligation to suspend the application of the Polish provisions which allow the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law

Arguments

- 57 The Republic of Poland submits that the applicable Polish provisions have never allowed the disciplinary liability of judges to be incurred because they guaranteed individuals the right of access to a tribunal established by law, and that the disciplinary courts have always interpreted those provisions to that effect.
- 58 In addition, the Law of 9 June 2022 clarified the definitions of the disciplinary offences for which judges can be held liable. Thus, first, it follows from that law that the content of a judicial decision cannot constitute a disciplinary offence, including where that content relates to the right of access to a tribunal established by law. Second, that law confirmed that the examination of compliance with the requirements of independence and impartiality, in the scenario identified in a series of provisions listed by that law, does not constitute a disciplinary offence.
- 59 According to the Commission, the provisions upon which the Republic of Poland relies preclude disciplinary proceedings from being initiated against judges who give decisions vitiated by a misinterpretation of the requirements of Article 19(1) TEU or who examine, on application by a party, a judge's compliance with the requirements of independence and impartiality.
- 60 However, the Commission maintains that those provisions do not preclude the examination *ex officio* of compliance, by a member of a court hearing a case, with those requirements from being deemed a disciplinary offence. Moreover, it has been informed of the initiation of disciplinary proceedings and of investigative measures in two cases in that category.

Assessment

- 61 It follows from point 1(c) of the operative part of the order of 14 July 2021 that that order required the Republic of Poland to suspend the application of points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts and of points 1 to 3 of Article 72(1) of the amended Law on the Supreme Court which allow the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law arising from Article 19(1) TEU and from Article 47 of the Charter.

- 62 In that regard, in the first place, it must be observed that the argument alleging that the fact that the applicable Polish provisions have never allowed the disciplinary liability of judges to be incurred because they guaranteed individuals the right of access to a tribunal established by law is a repetition of an argument raised by the Republic of Poland in its written observations on the application for interim measures made by the Commission on 1 April 2021. Such an argument cannot therefore establish the existence of a ‘change in circumstances’ within the meaning of Article 163 of the Rules of Procedure and must therefore be rejected (see, by analogy, order of the Vice-President of the Court of 20 September 2021, *Czech Republic v Poland*, C-121/21 R, EU:C:2021:752, paragraph 24).
- 63 In the second place, as the Republic of Poland points out, the Law of 9 June 2022 supplemented Article 107 of the amended Law relating to the ordinary courts and Article 72 of the amended Law on the Supreme Court.
- 64 Thus supplemented, those articles now provide, in particular, that neither the commission of an error in the interpretation and the application of provisions of EU law nor the verification of compliance with the requirements relating to an independent and impartial tribunal previously established by law constitutes a disciplinary offence in the cases referred to in Article 42a(3) of the amended Law relating to the ordinary courts, Article 29(5) of the amended Law on the Supreme Court and Article 5(1) of the amended Law relating to the administrative courts.
- 65 However, first of all, it is not disputed that the Polish provisions referred to in paragraph 61 of this order have not been repealed or that their application has not been formally suspended, and therefore those provisions continue to allow, in principle, the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law arising from Article 19(1) TEU and from Article 47 of the Charter.
- 66 Next, it must be observed that the clarification introduced by the Law of 9 June 2022, to the effect that the commission of an error in the interpretation and the application of provisions of EU law does not constitute a disciplinary offence, by no means precludes, prima facie, such a classification from being applied where the interpretation and application – correct or erroneous – of such provisions lead to certain applicable rules within the Polish legal order being called into question.
- 67 In particular, since Article 107(1) of the amended Law relating to the ordinary courts and Article 72(1) of the amended Law on the Supreme Court still provide that a judge is to be held accountable, in disciplinary terms, for professional misconduct, including in the case of acts of such a kind as to prevent or seriously undermine the functioning of a judicial authority or acts calling into question the existence of a judge’s working relationship, the effectiveness of a judge’s appointment or the legitimacy of a constitutional body of the Republic of Poland, the view cannot be taken that precluding the initiation of disciplinary proceedings on account of the commission of an error in the interpretation and the application of provisions of EU law necessarily prevents such proceedings from being initiated where a judge has found, correctly or incorrectly, that EU law required him or her to adopt a measure having such effects.
- 68 Lastly, it follows both from the wording of the Law of 9 June 2022 and from the Republic of Poland’s interpretation of it that the clarification introduced by that law, namely that the verification of compliance with the requirements relating to an independent and impartial tribunal previously established by law does not constitute a disciplinary offence, does not apply

where that verification is undertaken in the cases referred to in Article 42a(3) of the amended Law relating to the ordinary courts, Article 29(5) of the amended Law on the Supreme Court and Article 5(1) of the amended Law relating to the administrative courts.

- 69 In addition, it is apparent from paragraphs 52 and 53 of this order that those provisions allow such verification only on application by a party to the procedure concerned. It follows from that fact that it is not established that the amendments introduced by the Law of 9 June 2022 allow the initiation of disciplinary proceedings against a judge to be precluded, in all circumstances, merely because he or she has carried out that verification.
- 70 In those circumstances, whilst those amendments may indeed ensure compliance with the interim measure referred to in paragraph 61 of this order where compliance with the requirements of independence and impartiality of a tribunal previously established by law arising from EU law is verified in the context of the new legal remedy introduced by the provisions referred to in paragraph 68 of this order, those amendments cannot guarantee the implementation in full of that interim measure.
- 71 It follows that the Republic of Poland has complied with the interim measure only partially.

The obligation to suspend the application of the Polish provisions establishing the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber to examine complaints alleging lack of independence of a judge or of a court

Arguments

- 72 The Republic of Poland claims, first, that the President of the Sąd Najwyższy (Supreme Court), who also presides over the Extraordinary Review and Public Affairs Chamber, adopted, on 29 July 2021, an order finding that no case in which a plea alleging the unlawful appointment of a judge was pending before that chamber and ordering the suspension of the registration of cases relating to the recusal of a judge or determination of the court having jurisdiction, concerning the lack of independence of a judge or of a court ('the order of 29 July 2021').
- 73 Second, following the entry into force of the Law of 9 June 2022, the Vice-President of Section I of the Extraordinary Review and Public Affairs Chamber referred back all applications for recusal forwarded pursuant to Article 26(2) of the amended Law on the Supreme Court. He took the view that the new legal remedy introduced by that law had to be applied as a matter of priority and thus left it to the ordinary courts to examine the complaints relating to the lack of independence of a judge.
- 74 It follows from those facts that the Polish courts no longer apply, in practice, the provisions referred to in point 1(e) of the operative part of the order of 14 July 2021.
- 75 The Commission does not contest the materiality of the points raised by the Republic of Poland and states that it has not been informed of the application, following the entry into force of the Law of 9 June 2022, of the provisions conferring on the Extraordinary Review and Public Affairs Chamber exclusive jurisdiction to examine complaints alleging lack of independence of a judge or of a court.

76 However, it is apparent from the website of the Sąd Najwyższy (Supreme Court) and from that court's electronic register that some cases relating to such complaints which had been forwarded to the Extraordinary Review and Public Affairs Chamber, prior to the entry into force of the Law of 9 June 2022, pursuant to Article 26(2) of the amended Law on the Supreme Court, are still pending before that chamber. It cannot therefore be excluded that that chamber may continue to exercise its exclusive jurisdiction in such matters.

Assessment

77 It follows from point 1(e) of the operative part of the order of 14 July 2021 that that order required the Republic of Poland to suspend the application of Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and of Article 10 of the amending law, which establish the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber to examine complaints alleging lack of independence of a judge or of a court.

78 It is established that the provisions referred to in the preceding paragraph have not been repealed and that their application has not been formally suspended, and therefore the Extraordinary Review and Public Affairs Chamber retains, in principle, exclusive jurisdiction to adjudicate on the cases referred to in those provisions.

79 It is therefore necessary to examine whether the orders adopted by judges of the Sąd Najwyższy (Supreme Court) upon which the Republic of Poland relies are capable, in practice, of rendering those provisions ineffective.

80 In that regard, in the first place, it was found in paragraph 51 of the order of 27 October 2021 that it could not be established on the basis of the measures adopted by the President of the Sąd Najwyższy (Supreme Court), which include the order of 29 July 2021, that the Extraordinary Review and Public Affairs Chamber can no longer examine cases pending before it, or that the cases falling within that chamber's jurisdiction must no longer be referred to it by the ordinary courts.

81 It follows that the order of 29 July 2021 cannot be regarded as constituting a 'change in circumstances' within the meaning of Article 163 of the Rules of Procedure on the basis of which it may be established that the interim measure referred to in paragraph 77 of this order has been implemented in full by the Republic of Poland.

82 Moreover, the examples, cited by the Commission, of cases which were notified to the Extraordinary Review and Public Affairs Chamber before the entry into force of the Law of 9 June 2022 and which are still pending before that chamber confirm that the order of 29 July 2021 has not, in practice, entirely excluded the application of the rules to which that interim measure refers.

83 In the second place, an order of the Vice-President of Section I of the Extraordinary Review and Public Affairs Chamber produced by the Republic of Poland does appear to confirm the existence of a practice of referring back to the ordinary courts the cases notified to that chamber pursuant to the provisions referred to in paragraph 77 of this order; the Commission does not contest the materiality of that practice.

- 84 That said, that order of the Vice-President of Section I of the Extraordinary Review and Public Affairs Chamber provides for the referral to the ordinary courts only of the cases falling within the scope of the new legal remedy introduced by the Law of 9 June 2022, to which reference is made in paragraph 50 of this order. Accordingly, it is not established that the application of the provisions referred to in paragraph 77 of this order is likewise excluded in cases falling outside the scope of that new legal remedy but in those in which complaints alleging lack of independence of a judge or of a court have been raised.
- 85 It follows that, while the measures upon which the Republic of Poland relies are capable of significantly restricting the application of the rules conferring exclusive jurisdiction on the Extraordinary Review and Public Affairs Chamber, it is not apparent from the case file that the application of those rules is, in practice, completely suspended.
- 86 The Republic of Poland has therefore only partially complied with the interim measure referred to in paragraph 77 of this order.

The obligation to refrain from referring cases covered by points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court to a court which does not meet the requirements of independence

Arguments

- 87 The Republic of Poland submits that the cases covered by points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court have been assigned, by the Law of 9 June 2022, to two separate benches of the Sąd Najwyższy (Supreme Court): the Professional Liability Chamber and the Extraordinary Review and Public Affairs Chamber.
- 88 First of all, it has not been established in any judgment of the Court that those chambers do not satisfy the guarantees laid down in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982). Next, the members of those chambers enjoy the same guarantees of independence as the other judges of the Sąd Najwyższy (Supreme Court). Furthermore, the correlation of factors which led the court to uphold an action for failure to fulfil obligations brought by the Commission relating to the Disciplinary Chamber in the judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), does not form part of the characteristics of the Professional Liability Chamber or the Extraordinary Review and Public Affairs Chamber. Finally, the mere fact that a judge was appointed by a Head of State on a proposal from a body composed, predominantly, of members representing the legislature and the executive cannot suffice to establish an infringement of Article 19(1) TEU.
- 89 The Commission is of the view that the Professional Liability Chamber and the Extraordinary Review and Public Affairs Chamber do not satisfy the guarantees laid down in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982).

- 90 It observes, in that regard, that 14 of the 17 members of the Extraordinary Review and Public Affairs Chamber and 4 of the 11 members of the Professional Liability Chamber were appointed members of the Sąd Najwyższy (Supreme Court) in circumstances regarded by the European Court of Human Rights as entailing infringement of the right of access to a tribunal previously established by law.
- 91 In the Commission's view, the fact that those judges were appointed on a proposal from a body no longer offering sufficient guarantees of independence vis-à-vis the legislature or the executive combined with the fact that those appointments were made despite the suspension, by an administrative court, of the proposal adopted by that body gives rise to genuine doubts that the two chambers in question satisfy the requirements of independence under Article 19(1) TEU.

Assessment

- 92 It follows from point 1(a) and (b) of the operative part of the order of 14 July 2021 that that order required the Republic of Poland, inter alia, to refrain from referring cases covered by points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court to a court which does not meet the requirements of independence defined, in particular, in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982).
- 93 It is established that, further to the repeal of Article 27 of the amended Law on the Supreme Court and the abolition of the Disciplinary Chamber, the Polish legislature assigned the jurisdiction formerly conferred on that chamber in part to the Professional Liability Chamber and in part to the Extraordinary Review and Public Affairs Chamber.
- 94 While the Republic of Poland did thus refer the cases covered by points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court to bodies other than the Disciplinary Chamber, the Commission is nevertheless of the view that such a referral cannot ensure the implementation of the interim measures referred to in paragraph 92 of this order, because the Professional Liability Chamber and the Extraordinary Review and Public Affairs Chamber do not satisfy, having regard to the arrangements for appointment of their members, the requirements of independence defined, in particular, in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982).
- 95 In that regard, it must be observed that the view thus expressed by the Commission does not stem directly from a finding made by the Court, pursuant to Article 258 TFEU, that the Republic of Poland has failed to fulfil the obligations arising from Article 19(1) TEU as regards the organisation and the functioning of the Professional Liability Chamber and the Extraordinary Review and Public Affairs Chamber, since the Court has not thus far taken a view on that point when examining an action for failure to fulfil obligations.
- 96 Nor can that stance adopted by the Commission be substantiated on the basis of a judgment given by the Court under Article 267 TFEU.
- 97 It is true that, in paragraph 152 of the judgment of 6 October 2021, *W.Ż.(Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798), the Court did consider that a series of circumstances surrounding the appointment of a judge within the Extraordinary Review and Public Affairs Chamber was such as

to lead to the conclusion that that appointment had taken place in clear disregard of the fundamental procedural rules for the appointment of judges to the Sąd Najwyższy (Supreme Court) forming an integral part of the establishment and functioning of the Polish judicial system and, therefore, in breach of Article 19(1) TEU.

- 98 However, that finding was made subject to the final assessments to be carried out by the referring court, which alone has jurisdiction, in preliminary ruling proceedings, to find and assess the facts in the case before it and to interpret and apply national law (see, to that effect, judgment of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 36 and the case-law cited).
- 99 In that context, the judge hearing the application for interim measures could not therefore uphold the Commission's argument without having assessed beforehand the compatibility with Article 19(1) TEU of the appointment process for members of the Professional Liability Chamber and of the Extraordinary Review and Public Affairs Chamber.
- 100 That argument thus differs from those examined in paragraphs 22 to 86 of this order. The assessment of the latter arguments involved simply determining whether the new measures adopted by the Republic of Poland were capable of entailing the suspension of the effects of the Polish provisions criticised by the Commission in the context of the action for failure to fulfil obligations forming the subject of Case C-204/21, on the basis of complaints deemed in the order of 14 July 2021 not to be lacking a genuine basis. With that in mind, there was no need for the judge hearing the application for interim measures to assess the compatibility with EU law of those new measures or of other aspects of Polish legislation.
- 101 However, within the system established by Articles 258 and 260 TFEU, the Court enjoys exclusive jurisdiction which is directly and expressly conferred on it by the FEU Treaty to adjudicate on the compatibility of Member States' conduct with EU law (see, to that effect, judgment of 15 January 2014, *Commission v Portugal*, C-292/11 P, EU:C:2014:3, paragraphs 49 and 50).
- 102 The judge hearing an application for interim measures does indeed have jurisdiction, before a judgment of the Court is handed down ruling on an action for failure to fulfil obligations, to make a preliminary assessment concerning the complaints raised in support of that action, with a view to ruling on the condition relating to the establishment of a *prima facie* case, without prejudice to the final assessment of those complaints by the Court.
- 103 That jurisdiction cannot, however, without encroaching upon the exclusive jurisdiction of the Court arising from Articles 258 and 260 TFEU, allow the judge hearing an application for interim measures to assess the compatibility with EU law of a national practice or national legislation which is not the subject of complaints raised in support of an action for failure to fulfil obligations and which has not been examined beforehand by the Court (see, by analogy, judgment of 15 January 2014, *Commission v Portugal*, C-292/11 P, EU:C:2014:3, paragraph 51).
- 104 A solution to the contrary could, moreover, infringe the procedural rights of the Member State concerned by depriving it of the possibility of clarifying, at the pre-litigation stage of the infringement proceedings, its position vis-à-vis the arguments put forward by the Commission; that stage gives the Member State the opportunity to comply with its obligations under EU law or to present its case properly against those arguments (see, by analogy, judgment of 15 January 2014, *Commission v Portugal*, C-292/11 P, EU:C:2014:3, paragraphs 55 and 56).

- 105 Furthermore, it must be stated that an examination, by the judge hearing an application for interim measures, of an argument alleging the incompatibility with EU law of a national practice or national legislation which is not the subject of complaints raised in support of an action for failure to fulfil obligations cannot be allowed, even though that examination is confined to determining whether that argument appears, *prima facie*, not to lack a genuine basis.
- 106 Such a standard of review is justified, when an application for interim measures is examined, only because the argument at issue is to be the subject of a final assessment by the court ruling on the substance of the matter, which is not the case with an argument relating to such a national practice or such national legislation.
- 107 Accordingly, where, in the context of verification by the judge hearing an application for interim measures of the implementation of interim measures, a difference of opinion exists between the Commission and the Member State concerned regarding the compatibility with EU law of a national practice or national legislation, which is not the subject of complaints raised in support of an action for failure to fulfil obligations and which has not been examined by the Court beforehand, it is for the Commission, if it considers it to be appropriate, to bring a new action for failure to fulfil obligations concerning that national practice or national legislation (see, by analogy, judgment of 15 January 2014, *Commission v Portugal*, C-292/11 P, EU:C:2014:3, paragraph 52).
- 108 In those circumstances, since the compatibility with EU law of the appointment process for members of the Professional Liability Chamber and of the Extraordinary Review and Public Affairs Chamber is not the subject of the complaints set out in the application lodged in Case C-204/21, which are reproduced in paragraph 2 of this order, and that compatibility has not been examined beforehand by the Court, the judge hearing an application for interim measures cannot uphold the argument by the Commission referred to in paragraph 94 of this order.
- 109 It follows that the view must be taken, without prejudice to the question of whether that appointment process is compatible with EU law, that the Republic of Poland has complied with the interim measures referred to in paragraph 92 of this order.
- 110 In the light of all of the foregoing, it must be found that it is not apparent from the case file that the measures adopted by the Republic of Poland are sufficient to ensure the implementation of all of the interim measures set out in the order of 14 July 2021 and that, therefore, it is no longer necessary to strengthen the effectiveness of those interim measures by imposing a periodic penalty payment.
- 111 Accordingly, the application for cancellation of the order of 27 October 2021 must be rejected.
- 112 However, it is apparent from paragraphs 25 to 109 of this order that the measures put in place by the Republic of Poland further to the signature of the order of 27 October 2021 are capable of ensuring, to a significant degree, the implementation of the interim measures set out in the order of 14 July 2021.
- 113 Therefore, in the light of the circumstances of the case and the ability of the Republic of Poland to pay it, the amount of the periodic penalty payment imposed by the order of 27 October 2021 must be reduced to EUR 500 000 per day, from the date on which the present order is signed.

On those grounds, the Vice-President of the Court hereby orders:

- 1. The application for the order of the Vice-President of the Court of 27 October 2021, *Commission v Poland* (C-204/21 R, EU:C:2021:878), to be cancelled is dismissed.**
- 2. The amount of the periodic penalty payment which the Republic of Poland was ordered to pay to the European Commission by the order of the Vice-President of the Court of 27 October 2021, *Commission v Poland* (C-204/21 R, EU:C:2021:878), is reduced to EUR 500 000 per day, from the date on which the present order is signed.**
- 3. The costs are reserved.**

[Signatures]