



## Reports of Cases

### ORDER OF THE VICE-PRESIDENT OF THE COURT

14 July 2021 \*

(Interim relief – Article 279 TFEU – Application for interim measures – Second subparagraph of Article 19(1) TEU – Independence of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) – Charter of Fundamental Rights of the European Union – Article 47 – Effective judicial protection – Independence of judges – Disciplinary regime for judges – Examination of questions of law concerning the lack of independence of judges – Exclusive jurisdiction of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court))

In Case C-204/21 R,

APPLICATION for interim measures under Article 279 TFEU, lodged on 1 April 2021,

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

applicant,

v

**Republic of Poland**, represented by B. Majczyna, acting as Agent,

defendant,

THE VICE-PRESIDENT OF THE COURT,

after hearing the Advocate General, G.W. Hogan,

makes the following

### Order

- 1 By its application for interim measures, the European Commission asks the Court, in particular, to order the Republic of Poland, pending the judgment of the Court on the substance, to suspend the application of a number of national provisions introduced by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw

\* Language of the case: Polish.

(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’).

2 That application was submitted in the context of an action under Article 258 TFEU for failure to fulfil obligations, brought by the Commission on 1 April 2021 (‘the main action’), 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 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 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’), and under Article 267 TFEU and the principle of primacy of EU law;
- by adopting and maintaining in force Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and Article 10 of the amending law, which place the examination of complaints and questions of law concerning the lack of independence of a court or judge under the exclusive jurisdiction of the 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 6 May 2021, the Republic of Poland submitted its written observations on the application for interim measures.

## **Legal framework**

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

- 4 The Law on the Supreme Court established, within the Sąd Najwyższy (Supreme Court), two new chambers: the Disciplinary Chamber and the Extraordinary Review and Public Affairs Chamber.
- 5 The amending law amended the Law on the Supreme Court, inter alia by inserting paragraphs 2 to 6 into Article 26 and point 1a into Article 27(1), amending Article 29 and Article 72(1), and inserting paragraphs 2 to 5 into Article 82.
- 6 As set out in Article 26(2) to (6) of the amended Law on the Supreme Court:

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

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

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

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

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

7 Article 27(1) of that law provides:

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

...

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

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

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

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

‘2. In the context of the activities of the [Sąd Najwyższy (Supreme Court)] or its organs, it shall not be permissible to call into question the legitimacy of the tribunals and courts, the constitutional organs of the State or the organs responsible for reviewing and protecting the law.

3. The [Sąd Najwyższy (Supreme Court)] or other authority cannot establish or assess the legality of the appointment of a judge or of the power to exercise judicial functions that derives from that appointment.’

9 Article 72(1) of that law is worded as follows:

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

(1) manifest and flagrant breach of legal rules;

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

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

- 10 In accordance with Article 73(1) of that law, the Disciplinary Chamber is the disciplinary court of second (and last) instance for judges of the ordinary courts and the disciplinary court of first and second instance for judges of the Sąd Najwyższy (Supreme Court).
- 11 Article 82 of the amended Law on the Supreme Court provides as follows:
- ‘1. If, when examining an appeal on a point of law or another action, the [Sąd Najwyższy (Supreme Court)] entertains serious doubts as to the interpretation of the legal provisions underlying the decision made, it may stay the proceedings and submit a question of law to a formation composed of seven of its judges.
2. When it examines a case in which a question of law relating to the independence of a judge or of a court arises, the [Sąd Najwyższy (Supreme Court)] shall stay the proceedings and refer that question to a formation composed of all the members of the Extraordinary Review and Public Affairs Chamber.
3. If, when examining an application referred to in Article 26(2), the [Sąd Najwyższy (Supreme Court)] entertains serious doubts as to the interpretation of the legal provisions that must form the basis of the decision, it may stay the proceedings and refer a question of law to a formation composed of all the members of the Extraordinary Review and Public Affairs Chamber.
4. When it adopts a decision referred to in paragraph 2 or 3, the Extraordinary Review and Public Affairs Chamber shall not be bound by the decision of a different formation of the [Sąd Najwyższy (Supreme Court)], unless that decision has acquired the force of a legal principle.
5. A decision adopted by all the members of the Extraordinary Review and Public Affairs Chamber on the basis of paragraph 2 or 3 shall be binding on all formations of the [Sąd Najwyższy (Supreme Court)]. Any departure from a decision which has acquired the force of a legal principle shall require that a new decision be adopted by the [Sąd Najwyższy (Supreme Court)] in plenary session, the adoption of that decision requiring the presence of at least two thirds of the judges of each of the chambers. Article 88 shall not apply.’

***The amended Law relating to the ordinary courts***

- 12 The amending law amended the Law relating to the ordinary courts, inter alia by inserting Article 42a and inserting paragraph 4 into Article 55, and by amending Article 107(1) and Article 110(2a).
- 13 Article 42a of the amended Law relating to the ordinary courts is worded as follows:
- ‘1. In the context of the activities of the courts or the organs of the courts, it shall not be permissible to call into question the legitimacy of the tribunals and courts, the constitutional organs of the State or the organs responsible for reviewing and protecting the law.
2. An ordinary court or other authority cannot establish or assess the legality of the appointment of a judge or of the power to exercise judicial functions that derives from that appointment.’

14 Article 55(4) of that law provides:

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

15 Article 80 of that law provides as follows:

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

...

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

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

16 Article 107(1) of that law is worded as follows:

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

...

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

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

...’

17 As set out in Article 110(2) of the amended Law relating to the ordinary courts:

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

sitting as a single judge of the Disciplinary Chamber and, at second instance, the [Sąd Najwyższy (Supreme Court)] sitting in a formation of three judges of the Disciplinary Chamber.’

18 Article 129 of that law provides:

‘1. The disciplinary court may suspend from duty a judge against whom disciplinary or incapacity proceedings have been initiated, and may also do so if it adopts a decision authorising the initiation of criminal proceedings against the judge concerned.

2. If the disciplinary court adopts a decision authorising the initiation of criminal proceedings against a judge for an intentional offence prosecuted by the Public Prosecutor, it shall automatically suspend the judge from duty.

3. When suspending a judge from duty, the disciplinary court shall reduce the amount of his or her remuneration by 25% to 50%, for the duration of that suspension; this provision shall not concern persons against whom incapacity proceedings have been brought.

4. If the disciplinary proceedings have been discontinued or have been terminated by an acquittal, all the components of the remuneration or emoluments shall be rectified up to their full amount.’

#### ***The amended Law relating to the administrative courts***

19 The amending law amended the Law relating to the administrative courts, inter alia by inserting paragraphs 1a and 1b into Article 5 and by amending Article 29(1) and Article 49(1).

20 Article 5(1a) and (1b) of the amended Law relating to the administrative courts states:

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

1b. An administrative court or other authority cannot establish or assess the legality of the appointment of a judge or of the power to exercise judicial functions that derives from that appointment.’

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

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

#### ***The amending law***

23 Articles 8 and 10 of the amending law contain transitional provisions.

24 In accordance with Article 8 of the amending law, Article 55(4) of the amended Law relating to the ordinary courts is also to apply to cases begun or terminated before the date of entry into force of the amending law, that is to say, 14 February 2020.

25 Article 10 of the amending law states:

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

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

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

### **The background to the dispute and the pre-litigation procedure**

26 In answer to three requests for a preliminary ruling submitted by the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber), Poland) (‘the Labour Chamber’), the Court, in paragraph 171 of 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; ‘the judgment in *A. K.*’), held that Article 47 of the Charter and Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of Article 47 of the Charter. In the same paragraph, the Court stated that that is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. Still in the same paragraph, the Court added that it was for the referring court to determine, in the light of all the relevant factors established before it, whether that applied to a court such as the Disciplinary Chamber, and that, if that was the case, the principle of primacy of EU law had to be interpreted as requiring the referring court to disapply the provision of national law which reserved jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases might be examined by a court which met the requirements of independence and impartiality and which, had it not been for that provision, would have jurisdiction in the relevant field.



- 27 Following the judgment in *A. K.*, the Labour Chamber, adjudicating in the dispute that had given rise to the request for a preliminary ruling in Case C-585/18, held, in its judgment of 5 December 2019, that the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS') was not an impartial body that was independent of the legislature and the executive. The Labour Chamber also held that the Disciplinary Chamber could not be regarded as a court or tribunal within the meaning of Article 47 of the Charter and Article 6 of the ECHR.
- 28 On 12 December 2019, a group of deputies submitted to the Sejm Rzeczypospolitej Polskiej (lower chamber of the Parliament of the Republic of Poland) the bill that led to the amending law. That law was adopted on 20 December 2019 and entered into force on 14 February 2020.
- 29 Since the Commission took the view that, in adopting that law, the Republic of Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU in conjunction with Article 7, Article 8(1) and Article 47 of the Charter and Article 6(1)(c) and (e), Article 6(3) and Article 9 of Regulation 2016/679, on 29 April 2020 it sent a letter of formal notice to that Member State, which responded by a letter of 29 June 2020 in which it denied that there was any infringement of EU law.
- 30 On 30 October 2020, the Commission issued a reasoned opinion in which it maintained that the regime introduced by the amending law infringed the provisions of EU law referred to in the preceding paragraph.
- 31 On 1 November 2020, in view of an increase in the number of cases pending before the Disciplinary Chamber concerning applications for authorisation to initiate criminal proceedings against judges on the basis of point 1a of Article 27(1) of the amended Law on the Supreme Court, the Commission addressed a number of questions to the Polish authorities. The Polish authorities answered those questions on 13 November 2020.
- 32 On 3 December 2020, the Commission sent a supplementary letter of formal notice to the Republic of Poland owing to the judicial activity of the Disciplinary Chamber on the basis of points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court in cases having a direct impact on the status of judges and trainee judges and the performance of their office.
- 33 By letter of 30 December 2020, the Republic of Poland responded to the Commission's reasoned opinion of 30 October 2020; it disputed the existence of the alleged infringements and claimed that the infringement procedure should be discontinued.
- 34 By letter of 4 January 2021, the Republic of Poland responded to the supplementary letter of formal notice of 3 December 2020, maintaining that the complaints raised by the Commission concerning the lack of independence of the Disciplinary Chamber were unfounded.
- 35 On 27 January 2021, the Commission sent the Republic of Poland a supplementary reasoned opinion concerning the judicial activity of the Disciplinary Chamber in the cases relating to the status of judges and trainee judges.
- 36 By letter of 26 February 2021, the Republic of Poland responded to the supplementary reasoned opinion, claiming that the complaint set out by the Commission in that opinion was unfounded and that the procedure should be discontinued.

37 Since the Commission was not convinced by the Republic of Poland's answers, on 31 March 2021 it brought an action for failure to fulfil obligations and lodged the present application for interim measures.

### **Forms of order sought**

38 The Commission claims that the Court should:

- order the Republic of Poland, pending the judgment of the Court in the main action,
  - (a) to suspend, first, the application of point 1a of Article 27(1) of the amended Law on the Supreme Court and other provisions, 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 in *A. K.*;
  - (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 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 in *A. K.*;
  - (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 EU requirements 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 of 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 the Court ordering the interim measures sought, all the measures adopted in order to comply in full with that order;
- order the Republic of Poland to pay the costs.

- 39 The Commission also requests the Court, under Article 160(7) of the Court’s Rules of Procedure, to grant the interim measures referred to in the preceding paragraph even before the Republic of Poland has submitted its observations.
- 40 The Republic of Poland contends that the Court should:
- dismiss the application for interim measures as manifestly inadmissible;
  - in the alternative, dismiss the application for interim measures as unfounded; and
  - order the Commission to pay the costs.

### **The request that the application be adjudicated upon *inaudita altera parte***

- 41 In accordance with Article 160(7) of the Rules of Procedure, the judge hearing the application for interim measures may grant the application even before the observations of the opposite party have been submitted and that decision may be varied or cancelled even without any application being made by any party.
- 42 According to the case-law of the Court, in particular where it is desirable in the interests of the proper administration of justice that the interlocutory proceedings are not deprived of their substance and their effect, Article 160(7) of the Rules of Procedure permits the judge hearing an application for interim measures to adopt such measures, as a precautionary measure, until either an order has been made terminating those interlocutory proceedings or until the main proceedings are terminated, if that should take place first. When assessing the need to make an order *inaudita altera parte*, the judge hearing the application for interim measures must examine the circumstances of the specific case at hand (order of the Vice-President of the Court of 19 October 2018, *Commission v Poland*, C-619/18 R, not published, EU:C:2018:852, paragraphs 13 and 14 and the case-law cited).
- 43 In the present case, the application for interim measures lodged by the Commission has not revealed circumstances of such a kind as to establish the need to adopt provisionally the measures sought, pending the adoption of the order terminating the interlocutory proceedings, without first hearing the Republic of Poland.
- 44 Consequently, the Vice-President of the Court has decided not to grant the Commission’s request that the present application for interim measures be adjudicated upon *inaudita altera parte*.

### **The application for interim measures**

#### ***Admissibility***

- 45 The Republic of Poland maintains that the application for interim measures is manifestly inadmissible.
- 46 In the first place, the Republic of Poland asserts that the national provisions which the Commission contests in the main action do not come within the competence of the European Union. It maintains that the European Union does not have any competence in relation to the

organisation of the justice systems of the Member States, nor, a fortiori, does it have any competence to define the political regime of those States, to determine the powers of their various organs, or to interfere with the internal organisation of those organs or suspend their activities. In particular, the question of the granting and lifting of the immunity of judges and trainee judges, the determination of both disciplinary proceedings against persons occupying those posts and the extent of their disciplinary liability, and the designation of the organs competent to conduct the proceedings in those cases are governed exclusively by national law. Thus, the Court manifestly lacks jurisdiction to adopt the interim measures sought by the Commission.

- 47 Furthermore, as regards, in particular, the interim measures concerning the provisions relating to the lifting of judges' immunity, the application for interim measures constitutes a flagrant breach of the principle of equal treatment of Member States. Although certain Member States do not grant any immunity, in their domestic law, to judges, with the consequence that their judges are subject to permanent pressure and in a permanent state of uncertainty, the Commission has never raised objections against those Member States.
- 48 In addition, the application constitutes a breach of the principle of the irremovability of judges. Both the suspension of the activity of the Disciplinary Chamber and the suspension of the application of the provisions referred to in paragraph 38(c) and (d) of the present order constitute an interference with the independence of judges in the exercise of their judicial functions.
- 49 Those arguments cannot be upheld.
- 50 First of all, while it is true, as the Republic of Poland rightly maintains, that the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 36 and the case-law cited).
- 51 Under that provision, every Member State must in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law meet the requirements of effective judicial protection (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Remedy)*, C-824/18, EU:C:2021:153; 'the judgment in *A.B.*'; paragraph 112 and the case-law cited).
- 52 In the present case, it is common ground that both the Sąd Najwyższy (Supreme Court), including the Disciplinary Chamber that forms part of it, and the ordinary courts may be called upon to rule on questions concerning the application or interpretation of EU law and that, as 'courts or tribunals', within the meaning of EU law, they come within the Polish judicial system in the fields covered by EU law, within the meaning of the second subparagraph of Article 19(1) TEU, so that those courts must meet the requirements of effective judicial protection (see, to that effect, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 56).

- 53 Furthermore, the national provisions called into question by the Commission in the context of the first four complaints in the main action ('the national provisions at issue') govern the jurisdiction of the Disciplinary Chamber, the disciplinary regime applicable to judges of the Sąd Najwyższy (Supreme Court), of the ordinary courts and of the administrative courts, and the procedure for review of the conditions for the independence of those judges.
- 54 Consequently, those provisions may be subject to review in the light of the second subparagraph of Article 19(1) TEU in the context of an action for failure to fulfil obligations, and, consequently, to interim measures aimed, in particular, at their suspension that are ordered by the Court, under Article 279 TFEU, in the same context.
- 55 In those circumstances, contrary to the Republic of Poland's contentions, the Court has jurisdiction to adopt interim measures of the kind sought by the Commission.
- 56 Next, as regards the Republic of Poland's argument that the Commission has failed to call into question the regimes concerning the immunity of judges that exist in other Member States, where the level of protection of the independence of judges is lower than that provided by the Polish regime, it is sufficient to note that both the alleged existence of rules similar to the national provisions at issue, or indeed of rules that afford less protection to the independence of judges than those provisions, and the Commission's failure to call those rules into question have no impact on the admissibility of the present application for interim measures (see, by analogy, order of 17 December 2018, *Commission v Poland*, C-619/18 R, EU:C:2018:1021, paragraph 58).
- 57 Finally, the Republic of Poland's assertion that grant of the interim measures sought by the Commission is contrary to the principle of the irremovability of judges cannot be upheld. It is sufficient to state that, if those measures were ordered, they would have the effect not of dismissing the judges of the Polish courts, in particular those of the Disciplinary Chamber and of the Extraordinary Review and Public Affairs Chamber, but of provisionally suspending the application of the national provisions at issue pending delivery of the Court's judgment on the substance ('the final judgment').
- 58 In the second place, the Republic of Poland submits that the Commission's application for interim measures is inadmissible in that the interim measures sought do not aim to ensure the full effect of the final judgment.
- 59 First, the Republic of Poland, reiterating that the European Union does not have any power to interfere with the activities of the constitutional organs of the Member States, including the activities of the national supreme courts, and, a fortiori, to suspend their operation, maintains that the interim measures sought would have the effect of undermining the sovereignty of that Member State.
- 60 Second, the Republic of Poland claims that some of the interim measures sought are intended to secure compliance with the final judgment envisaged by the Commission before it has even been delivered.
- 61 In particular, the Republic of Poland submits, first of all, that there is no risk associated with compliance with such a judgment. In that regard, it observes that, if the final judgment were to uphold the complaints in the main action, it would compel the Republic of Poland to bring its

national law into line with the requirements arising under EU law. However, the Commission has not demonstrated the link between the interim measures sought and the Republic of Poland's capacity to fulfil its obligation under Article 260(1) TFEU.

- 62 Next, the Republic of Poland observes that bringing the national provisions at issue into line would require exactly the same legislative process, irrespective of whether or not those provisions are applicable up to the date of delivery of the final judgment, so that the grant of the interim measures sought would be irrelevant for the purpose of ensuring the effectiveness of the final judgment.
- 63 Finally, the Republic of Poland claims that the interim measure seeking suspension of the effects of the decisions of the Disciplinary Chamber – adopted on the basis of point 1a of Article 27(1) of the amended Law on the Supreme Court – authorising the initiation of criminal proceedings against or the provisional detention of a judge must be considered to be manifestly contrary to the objective of an interim measure, in that it seeks to produce effects going beyond the obligations that may arise, in accordance with Article 260(1) TFEU, from the final judgment.
- 64 Those arguments cannot be upheld either.
- 65 First, it follows from the considerations set out in paragraphs 50 to 55 of the present order that the Court has jurisdiction not only to hear and determine an action for failure to fulfil obligations, such as the main action, that is intended to contest the compatibility with the second subparagraph of Article 19(1) TEU of the national provisions relating to the organisation of justice in Member States, such as those relating to the disciplinary regime applicable to judges called upon to adjudicate on issues falling within EU law and those governing the lifting of the immunity of those judges, but also, in the context of such an action, to order interim measures suspending the application of such national provisions, under Article 279 TFEU.
- 66 Contrary to the Republic of Poland's contentions, therefore, grant of the interim measures sought by the Commission cannot undermine the sovereignty of that Member State or, consequently, pursue such an aim.
- 67 Second, the arguments of the Republic of Poland set out in paragraphs 60 to 63 of the present order result from a misunderstanding of the purpose of interlocutory proceedings and, in particular, of the nature and effects of the interim measures sought by the Commission, and also from confusion between that purpose and the scope of the measures necessary to comply with a judgment finding a failure to fulfil obligations under Article 258 TFEU.
- 68 It must be emphasised that the purpose of interlocutory proceedings is to guarantee the full effectiveness of the decision that will be taken in the main proceedings to which the interlocutory proceedings are an adjunct, in order to ensure that there is no lacuna in the legal protection afforded by the Court. Thus, as regards, in particular, an interim measure suspending a national provision, such a measure is intended, in particular, to ensure that the immediate application of that national provision does not entail serious and irreparable damage in the light of the interests on which the applicant relies. Therefore, it is only by reference to the likelihood that serious and irreparable damage would result, as the case may be, from a refusal to grant such an interim measure, if the main action were subsequently to succeed, that the need for that measure must be assessed (see, to that effect, order of 17 December 2018, *Commission v Poland*, C-619/18 R, EU:C:2018:1021, paragraphs 60, 61 and 64 and the case-law cited).

- 69 Therefore, contrary to the Republic of Poland’s contentions, the fact –assuming that it is made out – that there is no risk that, should the main action eventually be upheld, the Republic of Poland will not comply with the final judgment has no bearing on the purpose of the interlocutory proceedings, in particular in the case of an interim measure suspending a national provision, such as the measures sought by the Commission, and therefore has no impact on the admissibility of the present application for interim measures.
- 70 The same applies to the fact, relied on by the Republic of Poland, that compliance with the final judgment, should the main action be upheld, would entail the same obligations for it irrespective of whether or not the interim measures sought by the Commission are granted.
- 71 Such a fact is not only unrelated to the purpose of interlocutory proceedings, as described in paragraph 68 of the present order, but follows from Article 260(1) TFEU, according to which, if the Court finds that a Member State has failed to fulfil an obligation under the Treaties, it is required to take the necessary measures to comply with the judgment of the Court.
- 72 Thus, whether or not the interim measures sought by the Commission are ordered by the Court, if the main action were to succeed, the Republic of Poland would be required, in accordance with Article 260(1) TFEU, in order to comply with the final judgment, to adapt its national law and to take the necessary measures to ensure that the national courts coming within its judicial system in the fields covered by EU law satisfy the requirements of effective judicial protection, as referred to in the second subparagraph of Article 19(1) TEU.
- 73 Finally, while it is true that, as the Republic of Poland submits in essence, the question of the measures required to comply with a judgment establishing a failure to fulfil obligations is not the subject matter of a judgment delivered under Article 258 TFEU (judgment of 8 April 2014, *Commission v Hungary*, C-288/12, EU:C:2014:237, paragraph 33 and the case-law cited), that does not however mean, contrary to its assertions, that the grant of a particular interim measure, such as that ordering suspension of point 1a of Article 27(1) of the amended Law on the Supreme Court and of the effects of the decisions adopted by the Disciplinary Chamber on the basis of that provision, would have effects going beyond the obligations arising from that judgment, as resulting from Article 260(1) TFEU, and would therefore be contrary to the objective of an interim measure.
- 74 Indeed, it is sufficient to note that, if it were to be upheld, the Republic of Poland’s line of argument would be tantamount to rendering interlocutory proceedings in the context of an action for failure to fulfil obligations under Article 258 TFEU wholly ineffective, since in the judgment making a finding of infringement the Court cannot order the Member State concerned to adopt specific measures in order to comply with that judgment (order of the Vice-President of the Court of 21 May 2021, *Czech Republic v Poland*, C-121/21 R, EU:C:2021:420, paragraph 30).
- 75 It follows from the foregoing considerations that the application for interim measures is admissible.

### ***Substance***

- 76 Article 160(3) of the Rules of Procedure provides that an application for interim measures is to state ‘the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for’.

- 77 Thus, the court hearing an application for interim relief may order an interim measure only if it is established that granting such a measure is justified, *prima facie*, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached regarding the substance. The court hearing the application for interim relief must, where appropriate, also weigh up the interests involved. Those conditions are cumulative, so that an application for interim measures must be dismissed if one of them is not met (order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 51 and the case-law cited).
- 78 It should therefore be verified whether the conditions set out in the preceding paragraph are met in the case of the interim measures sought. In that regard, it is appropriate to assess, in turn, the merits of the requests for interim measures set out in paragraph 38(a), (b), (d), (e) and (c) of the present order.

***The interim measures referred to in paragraph 38(a) and (b) of the present order***

***– A prima facie case***

- 79 The Court has consistently held that the condition relating to the establishment of a *prima facie* case is satisfied where at least one of the pleas in law relied on by the applicant for interim measures in support of the main action appears, *prima facie*, not unfounded. That is the case, *inter alia*, where one of those pleas reveals the existence of difficult legal issues the solution to which is not immediately obvious and therefore calls for a detailed examination that cannot be carried out by the court hearing the application for interim relief but must be the subject of the main proceedings, or where the discussion of issues by the parties reveals that there is a major legal disagreement the resolution of which is not immediately obvious (order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 52 and the case-law cited).
- 80 In this instance, the Commission claims that the fourth complaint in the main action, which relates to the national provisions forming the subject matter of the interim measures set out in paragraph 38(a) and (b) of the present order, appears, *prima facie*, not unfounded, that complaint alleging specifically that, by conferring on the Disciplinary Chamber, whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases relating to authorisation to initiate criminal proceedings against judges or trainee judges or place them in provisional detention, 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.
- 81 In that regard, the Commission relies, first, on the fact that cases falling within the jurisdiction of the Disciplinary Chamber under points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court have a direct impact on the status of judges and the conditions for the performance of their office, and second, on the findings set out in paragraphs 52 to 81 of the order of 8 April 2020, *Commission v Poland* (C-791/19 R, EU:C:2020:277), and on the guidance as to interpretation provided by the Court in the judgment in *A. K.*, from which it is said to be apparent that the complaint alleging that the Disciplinary Chamber lacks independence and impartiality appears, *prima facie*, not unfounded.



- 82 In order to ascertain whether the condition relating to a prima facie case is met as regards grant of the interim measures set out in paragraph 38(a) and (b) of the present order, it must be pointed out that, as recalled in paragraph 51 of the present order, under the second subparagraph of Article 19(1) TEU, every Member State must in particular ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law meet the requirements of effective judicial protection (the judgment in *A.B.*, paragraph 112 and the case-law cited).
- 83 In order that that protection may be guaranteed, maintaining the independence of those bodies is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy (see, to that effect, judgment of 18 May 2021, *Asociația ‘Forumul Judecătorilor Din România’ and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 194 and the case-law cited).
- 84 That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the rule of law, will be safeguarded. In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive (judgment of 18 May 2021, *Asociația ‘Forumul Judecătorilor Din România’ and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 195 and the case-law cited).
- 85 It has consistently been held that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body concerned and the appointment and length of service of its members and as regards grounds for withdrawal by, objection to and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 53 and the case-law cited).
- 86 In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules applicable to the status of judges and the performance of their duties as judges must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (judgment of 18 May 2021, *Asociația ‘Forumul Judecătorilor Din România’ and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 197 and the case-law cited).
- 87 In that context, the Court has held that the requirement of judicial independence means that the rules governing the disciplinary regime of those entrusted with adjudication must provide the necessary guarantees in order to prevent any risk of that regime being used as a system of political control of the content of judicial decisions. In that regard, rules which define, in

particular, both conduct amounting to disciplinary offences and the penalties actually applicable, provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor Din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 198 and the case-law cited).

- 88 Likewise, where a Member State lays down specific rules governing criminal proceedings against judges, in particular concerning the lifting of their immunity for the purpose of initiating criminal proceedings, those rules must – in accordance with the requirement of judicial independence, and in order to dispel any reasonable doubt in the minds of individuals such as that referred to in paragraphs 85 and 86 of the present order – be justified by objective and verifiable requirements relating to the sound administration of justice and must, like the rules on the disciplinary liability of those judges, provide the necessary guarantees ensuring that both the actual procedure for the lifting of judges' immunity and the criminal proceedings cannot be used as a system of political control over the activity of those judges and fully safeguard the rights enshrined in Article 47 and 48 of the Charter (see, to that effect, judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor Din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 213 and the case-law cited). That must apply all the more where decisions authorising the lifting of judges' immunity, for the purpose of initiating criminal proceedings against them, themselves entail consequences as regards the status of the judges concerned or the conditions for the performance of their judicial office.
- 89 It follows from the foregoing that, in order to guarantee that the national courts coming within their judicial system in the fields covered by EU law meet the requirements inherent in effective judicial protection, including the requirement of independence, and in order thus to fulfil their obligations under the second subparagraph of Article 19(1) TEU, the Member States must ensure that the regime governing the status of the judges of those courts and the conditions for the performance of their office, in particular that governing the lifting of the immunity applicable to those judges, complies with the principle of judicial independence, by ensuring, in particular, that the decisions delivered in the context of that regime are taken or reviewed by a judicial authority which itself satisfies the guarantees inherent in effective judicial protection (see, by analogy, order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 35).
- 90 In the present case, it must be stated, first, that cases relating to employment and social security law that concern the judges of the Sąd Najwyższy (Supreme Court) and cases relating to the compulsory retirement of those judges, which come within the jurisdiction of the Disciplinary Chamber pursuant to points 2 and 3 of Article 27(1) of the amended Law on the Supreme Court, not only may entail the application of EU law but also concern, as the Commission has observed, the status of those judges and the conditions for the performance of their office.
- 91 Second, as the Commission has submitted without being contradicted by the Republic of Poland, decisions concerning the lifting of the immunity of judges of the Sąd Najwyższy (Supreme Court) and of the ordinary courts for the purpose of initiating criminal proceedings against them have the effect of suspending them from duty for what may be an indeterminate period and of reducing their remuneration by 25% to 50% for the same period. Therefore cases relating to authorisation to initiate criminal proceedings against judges and trainee judges or to place them in provisional detention, which come within the jurisdiction of the Disciplinary Chamber under point 1a of

Article 27(1) of the amended Law on the Supreme Court, concern the status of judges of the Sąd Najwyższy (Supreme Court) and of the ordinary courts and the conditions for the performance of their office.

- 92 Therefore, in accordance with the case-law referred to in paragraph 89 of the present order, in order to fulfil its obligations under the second subparagraph of Article 19(1) TEU, the Republic of Poland must ensure that jurisdiction to hear and determine the cases referred to in points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court is conferred on a body that meets the requirements inherent in effective judicial protection, including the requirement of independence.
- 93 Thus, the fourth complaint in the main action raises the question whether the Disciplinary Chamber meets those requirements.
- 94 In that regard, it should be recalled that, in the judgment in *A. K.*, the Court determined the scope of the requirements of independence and impartiality specifically in the context of a body such as the Disciplinary Chamber.
- 95 As regards, first, the conditions under which the appointment of judges sitting in the Disciplinary Chamber takes place, the Court, after observing that those judges are appointed by the President of the Republic of Poland on a proposal by the KRS, held in paragraphs 137 and 138 of the judgment in *A. K.*, relying in particular on paragraphs 115 and 116 of the judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), that, while the participation of the KRS in the process for their appointment may be such as to contribute to making that process more objective, by circumscribing the discretion which the President of the Republic of Poland enjoys when exercising the power conferred on him, that is the case only provided, inter alia, that the KRS is itself sufficiently independent of the legislature and the executive and of the President of the Republic of Poland. In that regard, the Court, in paragraphs 142 to 145 of the judgment in *A. K.*, identified, on the basis of the information provided by the referring court, factors which, taken together, may lead to the independence of a body such as the KRS being called into question (see, also, order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraphs 68 and 69).
- 96 Second, and irrespective of the conditions for the appointment of the judges of the Disciplinary Chamber and of the role played in that respect by the KRS, the Court identified, in paragraphs 147 to 151 of the judgment in *A. K.*, other factors that more directly characterise the Disciplinary Chamber and found, in paragraph 152 of that judgment, that, although any one of those factors was not capable, per se and taken in isolation, of calling into question the independence of that body, that might, by contrast, not be true once they were taken together, particularly if the assessment concerning the KRS were to find that that body lacked independence in relation to the legislature and the executive (see, also, order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 71).
- 97 In the light of the guidance as to interpretation provided by the Court in the judgment in *A. K.* and of the judgment of 5 December 2019 delivered by the Labour Chamber following that judgment, it cannot, prima facie, be ruled out that the Disciplinary Chamber does not meet the requirement of independence of the judges that follows from the second subparagraph of Article 19(1) TEU (see, to that effect, order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 77).

- 98 Consequently, without ruling at this stage on the merits of the arguments put forward by the parties in the context of the fourth complaint in the main action, which is solely a matter for the court hearing that action, it must be concluded that, having regard to the factors relied on by the Commission, to the case-law referred to in paragraphs 82 to 89 of the present order and to the guidance as to interpretation provided, in particular, by the judgment in *A. K.*, the arguments put forward by the Commission in the context of that complaint appear, prima facie, not unfounded, within the meaning of the case-law cited in paragraph 79 of the present order.
- 99 That conclusion cannot be undermined by the arguments put forward by the Republic of Poland.
- 100 In the first place, the Republic of Poland maintains that, in the light of the most recent case-law of the Court concerning the requirements relating to the right to effective judicial protection for the purposes of the second subparagraph of Article 19(1) TEU, case-law which results, in particular, from the judgments of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535), and of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311), from the order of the Vice-President of the Court of 10 September 2020, *Council v Sharpston* (C-424/20 P(R), not published, EU:C:2020:705), and from the order of the General Court of the European Union of 6 October 2020, *Sharpston v Council and Conference of the Representatives of the Governments of the Member States* (T-180/20, not published, EU:T:2020:473), the fourth complaint in the main action should be rejected. In its submission, it follows from that case-law that the obligation placed on Member States to guarantee the independence of the judiciary, which flows from that provision of the FEU Treaty, does not preclude procedures for the appointment of judges by politicians, in which the representatives of the judges are not involved and which are not subject to judicial oversight.
- 101 Contrary to the Republic of Poland's contentions, the judgments of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535), and of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311), did no more than apply the Court's previous case-law, in particular the legal principles identified in the judgment in *A. K.* Furthermore, the order of the Vice-President of the Court of 10 September 2020, *Council v Sharpston* (C-424/20 P(R), not published, EU:C:2020:705), merely found that the action brought against a decision adopted by the Representatives of the Governments of the Member States was, prima facie, manifestly inadmissible since such a decision, in that it is not taken by an institution, body, office or agency of the European Union, is not subject to the judicial review carried out by the Court of Justice on the basis of Article 263 TFEU, a finding that was upheld by the order of 16 June 2021, *Sharpston v Council and Conference of the Representatives of the Governments of the Member States* (C-684/20 P, not published, EU:C:2021:486), made on appeal against the order of the General Court of 6 October 2020, *Sharpston v Council and Conference of the Representatives of the Governments of the Member States* (T-180/20, not published, EU:T:2020:473).
- 102 The case-law referred to in paragraph 100 of the present order cannot therefore call into question the existence of a prima facie case so far as the fourth complaint in the main action is concerned.
- 103 In the second place, the Republic of Poland claims that the judgment in *A. K.* has no bearing on the question whether the fourth complaint in the main action appears, prima facie, not unfounded, on the ground that that judgment was delivered in a specific factual context.
- 104 In that regard, while it is true that the Court did not find, in the judgment in *A. K.*, that the Polish legislation at issue was not compatible with the second subparagraph of Article 19(1) TEU and left it to the referring court to make the findings in that regard, it must be borne in mind that the

preliminary ruling procedure laid down in Article 267 TFEU is a procedure for direct cooperation between the Court and the courts of the Member States. In that procedure, which is based on a clear separation of functions between the national courts and the Court, any assessment of the facts of the case is a matter for the national court, which must 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, while the Court is empowered only to give rulings on the interpretation or the validity of an EU provision on the basis of the facts which the national court puts before it (judgments of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 27; of 30 May 2018, *Dell’Acqua*, C-370/16, EU:C:2018:344, paragraph 31; and of 20 April 2021, *Repubblica*, C-896/19, EU:C:2021:311, paragraph 28).

- 105 In that context, the Court’s task must be distinguished according to whether it is requested to give a preliminary ruling or to rule on an action for failure to fulfil obligations. Whereas, in an action for failure to fulfil obligations, the Court must ascertain whether the national measure or practice challenged by the Commission or a Member State other than the State concerned contravenes EU law in general, without there being any need for there to be a relevant dispute before the national courts, the Court’s function in preliminary ruling proceedings is, by contrast, to help the referring court to resolve the specific dispute pending before it (judgments of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 47, and of 20 April 2021, *Repubblica*, C-896/19, EU:C:2021:311, paragraph 29 and the case-law cited).
- 106 It must also be recalled that, although it is not the Court’s task, in preliminary ruling proceedings, to rule on the compatibility of provisions of national law with the legal rules of the European Union, it has, on the other hand, jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility for the purposes of the case before it (judgments of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 23, and of 20 April 2021, *Repubblica*, C-896/19, EU:C:2021:311, paragraph 30).
- 107 In application of that case-law, the Court stated, in paragraph 132 of the judgment in *A. K.*, that it had restricted its analysis to the provisions of EU law, providing an interpretation of EU law that would be useful for the referring court, whose task it was, in the light of the guidance as to interpretation provided by the Court, to determine the compatibility of the Polish legislation at issue with EU law, for the purpose of resolving the disputes before it (see, also, order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 75).
- 108 As regards, specifically, that guidance, in so far as it relates essentially to the powers of the Disciplinary Chamber, its composition, the conditions and the process for the appointment of its members and the degree of its autonomy within the Sąd Najwyższy (Supreme Court), the relevance of the guidance cannot be limited to the factual circumstances specific to the judgment of the Sąd Najwyższy (Supreme Court) of 5 December 2019 (order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 76).
- 109 Thus, the Republic of Poland’s argument that the judgment in *A. K.* is wholly irrelevant for the purpose of assessing whether the fourth complaint in the main action is, *prima facie*, not unfounded cannot succeed.

- 110 In the third place, the Republic of Poland points to the existence, in other Member States, of rules similar to those of the Republic of Poland as regards the procedure for the appointment of judges to the national supreme courts. In that context, the Republic of Poland refers, first, to the regimes that exist in the Czech Republic, Germany, Ireland, Lithuania, Malta and Austria, under which the selection of those judges is exclusively or predominantly entrusted to persons within the executive or the legislature, and second, to the regimes that exist in Belgium, Denmark and France, under which representatives of the judiciary participate in the procedure for the appointment of the judges of the highest courts, but do not have decisive influence on the selection of those judges. Furthermore, as regards, in particular, the procedure for the appointment of the members of the KRS, the Republic of Poland also mentions the Spanish regime, making reference to the conditions for the appointment of members of the Consejo General del Poder Judicial (National Council of the Judiciary, Spain). In the Republic of Poland's submission, the fact that the Commission has failed to call those national regimes into question shows that its complaint relating to the lack of independence of the Disciplinary Chamber is unfounded.
- 111 In that regard, however, it is sufficient to point out, for the purposes of the present proceedings, that the Republic of Poland cannot profitably rely on the alleged existence of rules similar to the national provisions to which the fourth complaint in the main action relates in order to establish that the condition relating to a prima facie case has not been met in the case of that complaint (order of 17 December 2018, *Commission v Poland*, C-619/18 R, EU:C:2018:1021, paragraph 58).
- 112 In the fourth and last place, the Republic of Poland refers to the characteristics of the regime for the appointment of judges of the Sąd Najwyższy (Supreme Court) and also to the characteristics of the procedure for the appointment of members of the KRS, the body that participates in the nomination of those judges, in order to demonstrate that that regime satisfies the requirement of the independence of the judges.
- 113 However, in the light, in particular, of the guidance as to interpretation provided by the Court in the judgment in *A. K.*, that line of argument cannot justify a finding that the fourth complaint in the main action is, prima facie, not unfounded.
- 114 Having regard to the foregoing considerations, it must be concluded that the condition relating to a prima facie case is met as regards the grant of the interim measures set out in paragraph 38(a) and (b) of the present order.

– *Urgency*

- 115 As recalled in paragraph 68 of the present order, the Court has consistently held that the purpose of interlocutory proceedings is to guarantee the full effectiveness of the future final decision, in order to ensure that there is no lacuna in the legal protection afforded by the Court. For the purpose of attaining that objective, urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim protection. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that nature. In order to establish the existence of serious and irreparable damage, it is not necessary for the occurrence of the damage to be demonstrated with absolute certainty. It is sufficient that the damage be foreseeable with a sufficient degree of probability (order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 82 and the case-law cited).

- 116 In addition, the court hearing an application for interim relief must postulate – solely for the purposes of assessing urgency, without this involving it taking any position as regards the merits of the complaints put forward in the main action by the applicant for interim relief – that those complaints might be upheld. The serious and irreparable damage the likely occurrence of which must be established is that which would result, where relevant, from a refusal to grant the interim measures sought should the action in the main proceedings subsequently be successful (order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 83 and the case-law cited).
- 117 In the present case, therefore, the Court, in order to assess urgency, must postulate that the national provisions to which the fourth complaint in the main action relates are liable to confer jurisdiction to adjudicate in cases relating to employment and social security law that concern the judges of the Sąd Najwyższy (Supreme Court), in cases relating to the compulsory retirement of those judges and in cases relating to authorisation to initiate criminal proceedings against judges or trainee judges or to place them in provisional detention, on a body whose independence might not be guaranteed, and thus to be contrary to the obligation owed by the Republic of Poland, under the second subparagraph of Article 19(1) TEU, to ensure that the national courts coming within its judicial system in the fields covered by EU law satisfy the requirements of effective judicial protection.
- 118 For the purposes of that assessment, it is also necessary to take into account the fact that the Disciplinary Chamber has already commenced its activities in the context of the cases referred to in points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court.
- 119 In addition, as regards in particular the cases concerning applications for authorisation to initiate criminal proceedings against judges or trainee judges or to place them in provisional detention, it is also necessary to take into account the fact that, as the Commission has submitted without being contradicted by the Republic of Poland, first, during the period from 14 February 2020, the date of entry into force of the amending law, until 15 March 2021, the Disciplinary Chamber received more than 40 applications, including one relating to the President of the Labour Chamber, and that, since 5 November 2020, more than 20 applications have already been examined. Second, the number of applications relating to judges of the Sąd Najwyższy (Supreme Court) increased during the weeks preceding the initiation of the main action; in particular, on 16 March 2021 the Prokuratura Krajowa (National Public Prosecutor’s Office, Poland) submitted applications for authorisation to initiate criminal proceedings against three judges of the Criminal Chamber of that court. Third, more than 12 decisions authorising the initiation of criminal proceedings against judges as well as their suspension from duty and a reduction of their remuneration by 25% to 50% during the period of suspension were issued by the Disciplinary Chamber.
- 120 In that context, it must be examined whether, as the Commission claims, the application of the national provisions to which the fourth complaint in the main action relates and the maintenance of the effects of the decisions issued by the Disciplinary Chamber on the basis of point 1a of Article 27(1) of the amended Law on the Supreme Court are liable to cause serious and irreparable damage in the light of the EU legal order.
- 121 In that regard, as is clear from the case-law referred to in paragraphs 88 and 89 of the present order, the fact that, owing to the application of the national provisions to which the fourth complaint in the main action relates, examination of cases relating to employment and social security law that concern the judges of the Sąd Najwyższy (Supreme Court), those relating to the

compulsory retirement of those judges and those relating to authorisation to initiate criminal proceedings against judges or trainee judges or to place them in provisional detention is, pending delivery of the final judgment, within the jurisdiction of a body whose independence might not be guaranteed, namely the Disciplinary Chamber, is liable to undermine, during that period, the independence of the Sąd Najwyższy (Supreme Court) and the ordinary courts.

- 122 Indeed, as the Commission has observed and as is apparent, moreover, from the Court's case-law, the mere prospect, for judges of the Sąd Najwyższy (Supreme Court) and the ordinary courts, of being exposed to the risk that applications relating to the lifting of their immunity for the purpose of initiating criminal proceedings against them will be examined by a body whose independence might not be guaranteed is liable to affect their own independence, in view of the consequences for the judges concerned – namely suspension from office for an indeterminate period and the reduction of their remuneration by 25% to 50%, also for an indeterminate period – which the lifting of their immunity may entail (see, by analogy, order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 90).
- 123 Likewise, the mere fact that examination of cases having an impact on the status and employment conditions of judges of the Sąd Najwyższy (Supreme Court), such as the conditions relating to employment and social security law and those relating to compulsory retirement, is entrusted to a body whose independence might not be guaranteed is liable to give rise to doubts in the minds of individuals as to the independence of those judges.
- 124 It is apparent from the Court's case-law that the fact that, owing to the application of a national provision forming the subject matter of an action for failure to fulfil obligations, the independence of the Sąd Najwyższy (Supreme Court) may not be guaranteed pending delivery of the judgment ruling on that action is liable to cause serious and irreparable damage to the EU legal order and thus to the rights which individuals derive from EU law and the values, set out in Article 2 TEU, on which the European Union is founded, in particular the rule of law (see, to that effect, order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 92 and the case-law cited).
- 125 It follows from the foregoing that, as the Commission has claimed, the application of the national provisions to which the fourth complaint in the main action relates, in that they grant the Disciplinary Chamber, whose independence might not be guaranteed, jurisdiction to adjudicate in cases relating to employment and social security law that concern judges of the Sąd Najwyższy (Supreme Court), in those relating to the compulsory retirement of those judges and in those relating to authorisation to initiate criminal proceedings against judges or trainee judges in the Polish judicial system or to place them in provisional detention, is liable to cause serious and irreparable damage to the EU legal order.
- 126 Finally, if the mere prospect for the judges of the Sąd Najwyższy (Supreme Court) and of the ordinary courts of being exposed to the risk that applications concerning the lifting of their immunity for the purpose of initiating criminal proceedings against them will be examined by a body whose independence might not be guaranteed, such as the Disciplinary Chamber, is liable to undermine the independence of those judges, a fortiori the adoption by that body of decisions concerning the lifting of the judges' immunity, with the consequence that the judges concerned will be suspended from duty and the amount of their remuneration will be reduced, is liable to increase the doubts as to the imperviousness of the judges of the Sąd Najwyższy (Supreme Court) and the ordinary courts who have not been subject to such decisions to any influence or any



external factor capable of affecting their decisions and to lead to a lack of appearance of independence or impartiality on the part of those judges that would be likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

- 127 Therefore, the fact that, because the effects of the decisions of the Disciplinary Chamber authorising the initiation of criminal proceedings against a judge are maintained, the independence of the judges of the Sąd Najwyższy (Supreme Court) and of the ordinary courts who are not subject to those decisions may not be guaranteed pending delivery of the final judgment is liable to entail serious and irreparable damage in the light of EU law, especially since the exercise of judicial functions during that period will be solely in the hands of those judges.
- 128 As the Commission has observed, such a risk can be avoided only by guaranteeing, in the case of the judges affected by those decisions, the restoration of their status, and of the situation as regards their rights and the conditions for the exercise of their duties, that applied before those decisions were adopted.
- 129 Accordingly, it must be considered that the Commission has established that, if the interim measures referred to in paragraph 38(a) and (b) of the present order were not granted, first, the application of the national provisions forming the subject matter of the fourth complaint in the main action and, second, the maintenance of the effects of the decisions authorising the initiation of criminal proceedings against judges in the Polish judicial system would be liable to cause serious and irreparable damage in the light of the EU legal order.
- 130 The arguments by which the Republic of Poland seeks to establish the lack of urgency cannot call that assessment into question.
- 131 In the first place, the Republic of Poland claims that the Commission delayed taking the successive steps designed to bring the infringement alleged in the fourth complaint in the action to an end, as it is since the adoption of the Law on the Supreme Court, and not since the adoption of the amending law, that the Disciplinary Chamber has had jurisdiction to adjudicate in cases of the kind referred to in points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court.
- 132 Points 2 and 3 of Article 27(1) of the amended Law on the Supreme Court were already to be found in the Law on the Supreme Court. As for point 1a, the Republic of Poland submits that it merely extended the Disciplinary Chamber's jurisdiction to adjudicate in cases relating to authorisation to initiate criminal proceedings against judges or trainee judges or place them in provisional detention – which resulted from other provisions of the Law on the Supreme Court – to proceedings at first instance concerning judges of the ordinary courts and trainee judges.
- 133 In addition, as regards the jurisdiction of the Disciplinary Chamber in relation to the cases referred to in points 2 and 3 of Article 27(1) of the amended Law on the Supreme Court, the Republic of Poland submits that the guidance as to interpretation provided by the Court in the judgment in *A. K.* allows any risk of serious and irreparable damage as a result of the application of that provision to be eliminated. If it were to be concluded, in the light of that guidance as to interpretation, that examination by the Disciplinary Chamber of one of those cases did not allow the right to an independent tribunal to be guaranteed, the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter would make it possible to disregard the provisions that confer jurisdiction to adjudicate in that case on the Disciplinary Chamber and to refer the case to another tribunal that would have jurisdiction in the absence of the latter provisions.

- 134 In that regard, it should first of all be observed that, as is apparent from paragraphs 29 to 37 of the present order, the Commission sent the Republic of Poland a first letter of formal notice concerning the amending law on 29 April 2020, that is to say, four months after that law had been adopted following a legislative process lasting only eight days. In view of the fact that the amending law amended not only the Law on the Supreme Court but also other laws, such as the Law relating to the ordinary courts and the Law relating to the administrative courts, the taking of such a period of four months to examine all the amendments introduced by the amending law and their compatibility with EU law and to evaluate their effects cannot be considered unreasonable. Furthermore, the chronological sequence of the written exchanges between the Commission and the Republic of Poland that took place between that letter of formal notice and the bringing of the main action does not reveal any particular inactivity on the part of the Commission as regards the steps to obtain a declaration of the alleged failure to fulfil obligations.
- 135 Next, as regards the jurisdiction conferred on the Disciplinary Chamber by point 1a of Article 27(1) of the amended Law on the Supreme Court, apart from the fact that it is not disputed that that provision was newly introduced by the amending law, the Republic of Poland has confirmed in its written observations the data supplied by the Commission concerning both the number of applications to lift judicial immunity which the Disciplinary Chamber received during the period from 14 February 2020 until 15 March 2021 and the number of applications examined by that chamber since 5 November 2020, as given in paragraph 119 of the present order.
- 136 It is true that the Republic of Poland disputes the conclusion which the Commission drew from those data, namely that the activities of the Disciplinary Chamber on the basis of point 1a of Article 27(1) of the amended Law on the Supreme Court intensified during the final months before the main action and the present application for interim measures were brought, an intensification which, according to the Commission, demonstrates the existence of urgency. The Republic of Poland observes that, when a law confers on a particular court jurisdiction to hear and determine a new category of cases, that court must first of all investigate those cases, so that the number of decisions delivered in that respect is initially necessarily low. The Republic of Poland concludes that it cannot reasonably be maintained that the Disciplinary Chamber intensified its activities on the sole ground that, following the adoption of the amending law, that chamber delivered more decisions during the period from 5 November 2020 to 15 March 2021 than during the period from 14 February 2020 to 5 November 2020.
- 137 However, by that claim, the Republic of Poland not only contradicts its assertion that the Disciplinary Chamber has been adjudicating in cases of the type referred to in point 1a of Article 27(1) of the amended Law on the Supreme Court for more than three years, but also demonstrates that the activity of the Disciplinary Chamber, so far as concerns the adoption of decisions on the basis of that provision, was, during the period before the action for failure to fulfil obligations, greater than in the period immediately after the amending law entered into force.
- 138 Finally, the Republic of Poland cannot, in order to establish the lack of urgency, validly rely on the fact that points 2 and 3 of Article 27(1) of the amended Law on the Supreme Court could already be found in the Law on the Supreme Court, or on the fact that the judgment in *A. K.* enables the risk that serious and irreparable damage will occur as a result of the application of that provision to be reduced. The amending law introduced certain provisions which the Commission is challenging in the main action on the ground, in particular, that they would prevent the national courts from applying the principles resulting from that judgment and thus undermine, from the entry into force of the amending law, the effectiveness of that judgment for the purposes stated.

- 139 In the second place, the Republic of Poland maintains that the administration of justice cannot suffer any damage because the immunity of a judge in respect of whom there is evidence of the commission of an offence has been lifted and criminal proceedings can be brought against him or her. In its submission, the risk that such damage will occur exists all the less because the criminal proceedings that follow a decision to lift immunity take place not before the Disciplinary Chamber but before the Criminal Chamber.
- 140 In that regard, it is sufficient to observe, however, that, as is clear from the findings set out in paragraphs 121 to 125 of the present order, the risk that serious and irreparable damage will occur is the result not of the fact that the judges in the Polish judicial system may be the subject of a decision lifting their immunity for the purposes of the initiation of criminal proceedings against them but of the fact that such decisions are taken by a body whose independence cannot be guaranteed. The fact that the criminal proceedings that follow a decision to lift immunity do not take place before the Disciplinary Chamber does not therefore mean that such a risk can be eliminated.
- 141 In the light of the foregoing considerations, it must be concluded that the condition relating to urgency has been met as regards the grant of the interim measures referred to paragraph 38(a) and (b) of the present order.

– *The balance of interests*

- 142 It is clear that, in most interlocutory proceedings, the decision to grant or to refuse the suspension of application sought is likely to produce, to a certain extent, certain definitive effects and it is for the court hearing the application for interim relief to weigh up the risks attaching to each of the possible solutions. In practical terms, this involves, in particular, examining whether or not the interest of the applicant for interim measures in obtaining suspension of the application of national provisions outweighs the interest in their immediate implementation. In that examination, it must be determined whether the possible repeal of those provisions after the Court has upheld the action in the main proceedings would make it possible to reverse the situation that would have been brought about by their immediate implementation and, conversely, to what extent the suspension of their application would be such as to impede the objectives pursued by those provisions in the event of the action in the main proceedings being dismissed (order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 104 and the case-law cited).
- 143 In this case, the Commission maintains that, if the Court were to uphold the fourth complaint in the main action after having refused to grant the interim measures referred to in paragraph 38(a) and (b) of the present order, the proper functioning of the EU legal order would be systemically affected and irreparable harm would be caused to the rights which individuals derive from EU law and to the values of the rule of law set out in Article 2 TEU, whereas, if the Court were to order the interim measures sought and subsequently to reject that complaint, the only consequence would be, first, the temporary suspension of the activities falling within the jurisdiction of the Disciplinary Chamber pursuant to points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court and, second, the non-implementation of the decisions of the Disciplinary Chamber concerning the immunity of judges.
- 144 The Republic of Poland, as regards, in the first place, the grant of the interim measures referred to in paragraph 38(a) of the present order, claims, first, that suspension of the application of point 1a of Article 27(1) of the amended Law on the Supreme Court would breach not only the principle of

subsidiarity and the fundamental principles of the EU legal order but also the fundamental principles – protected by the Constitution of the Republic of Poland – of the democratic system of a State governed by the rule of law, which would cause serious and irreparable damage to that Member State and its population.

- 145 In that regard, however, it is sufficient to observe that, as recalled in paragraph 50 of the present order, while the organisation of justice of the Member States falls within their competence, they are required, when exercising that competence, to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU.
- 146 Second, the Republic of Poland contends that suspension of the effects of all the decisions authorising the initiation of criminal proceedings against judges would have the effect that some of the offences committed would become time-barred. Furthermore, proceedings which have not yet been terminated would have to be recommenced *ab initio* by the filing of a new indictment, which would also have the consequence that some offenders, owing to the passage of time, could avoid liability. Finally, suspension of the effects of all the decisions taken by the Disciplinary Chamber would entail the lapse of any measures which the courts may have ordered to protect the victims of offences such as rape or domestic violence. Thus, the grant of the interim measure sought by the Commission would be detrimental to the interests of the victims of the offences committed by the judges concerned by those decisions.
- 147 However, without prejudging the merits of the Republic of Poland's contention that suspension of the effects of the decisions of the Disciplinary Chamber concerning the lifting of the immunity of judges would be liable to lead to the offences committed by them becoming time-barred, it must be stated that the Republic of Poland provides no information about the number of decisions the suspension of which might, in the light of the particular circumstances pertaining to them, have such a consequence. Nor does it adduce any specific evidence capable of establishing the existence of decisions that have lifted the immunity of a judge for the purpose of initiating criminal proceedings against him for rape or domestic violence and have led to the adoption of measures for the protection of the victims of those offences. Thus, the Republic of Poland has not demonstrated the existence of a risk that the damage on which it relies may occur.
- 148 Third, the Republic of Poland claims that the resumption of judicial activities by judges facing criminal charges would give rise to a genuine risk for the security of the administration of justice, in that those judges might take advantage of their reinstatement in office in order, inter alia, to favour their particular interests, and, furthermore, would entail a lack of appearance of independence of those judges, causing irreparable damage to Polish justice and to the way in which it is perceived by individuals. In its submission, it is difficult to invoke the appearance of independence of a judge when that judge is facing charges of corruption.
- 149 In that regard, first, it should be observed that a judge taking advantage of the resumption of judicial activities in order to favour his or her particular interests in the exercise of his or her duties could be subject to the measures provided for in national law to bring such conduct to an end, including, where appropriate, criminal measures, provided, in the latter case, that the decision to lift that judge's immunity is taken by an independent judicial body that meets the requirements set out in the judgment in *A. K.*
- 150 Second, while it is true that, having regard to the duties which judges are required to perform, the fact that a judge who is accused of offences that by their nature imply permeability to outside influences, such as the offence of corruption, resumes his or her judicial activities could give rise

to doubts as to the independence of that judge, the fact nonetheless remains that the Republic of Poland has provided no information about the proportion of the decisions lifting immunity adopted by the Disciplinary Chamber between the entry into force of the amending law, on 14 February 2020, and the bringing of the action for failure to fulfil obligations, on 31 March 2021, that were taken against judges accused of having committed offences of that type, although such information would have made it possible to assess the existence and the gravity of the damage claimed.

- 151 As regards, in the second place, the grant of the interim measures referred to paragraph 38(b) of the present order, the Republic of Poland emphasises that the application of points 2 and 3 of Article 27(1) of the amended Law on the Supreme Court would entail no damage, since, in accordance with the judgment in *A. K.*, it would be possible, in the event of a genuine risk of a breach of a party's right, to refer cases coming under that provision to a tribunal that would guarantee the right to an independent tribunal. On the other hand, if the application of that provision were suspended, the Disciplinary Chamber would be deprived of the possibility of hearing and determining cases in which no objection concerning the guarantee by that chamber of the right to an independent tribunal is raised.
- 152 However, for the reasons set out in paragraph 138 of the present order, the effectiveness of the judgment in *A. K.* as a factor that would enable the risk of serious and irreparable damage to the EU legal order as a result of the application of points 2 and 3 of Article 27(1) of the amended Law on the Supreme Court to be eliminated cannot be established.
- 153 Accordingly, it must be concluded that the weighing of the interests involved favours granting the interim measures referred to in paragraph 38(a) and (b) of the present order.

***The interim measures referred to in paragraph 38(d) of the present order***

***– A prima facie case***

- 154 The Commission maintains that the first complaint in the main action, which relates to the national provisions forming the subject matter of the interim measures set out in paragraph 38(d) of the present order, appears, prima facie, not unfounded, that complaint alleging specifically that, by prohibiting any national court from verifying 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 in conjunction with Article 47 of the Charter, in the light of the case-law of the European Court of Human Rights concerning Article 6(1) of the ECHR, and under Article 267 TFEU and the principle of primacy of EU law.
- 155 In that regard, the Commission, relying, in particular, on the legal principles resulting from the judgment of 26 March 2020, *Review Simpson v Council* and *HG v Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232), in particular from paragraphs 55 to 57 and 73 to 75 of that judgment, which, in its submission, show that judicial review of the legality of the appointment of judges and of the legitimacy of judicial bodies, in particular with respect to irregularities in the judicial appointments procedure, is necessary in order to guarantee the fundamental right of individuals to an effective remedy in the fields covered by EU law, contends that the provisions to

which the first complaint in the main action relates, in that they prohibit the Polish courts from carrying out such review, infringe Article 19(1) TEU, read in conjunction with Article 47 of the Charter.

- 156 Furthermore, the prohibition on carrying out such a review prevents the national courts from referring to the Court, under Article 267 TFEU, questions for a preliminary ruling on the interpretation of the EU requirements relating to an independent and impartial tribunal previously established by law.
- 157 Finally, the Commission maintains that the fact that the act of appointment to the post of judge in Poland may be systemic in nature and, in accordance with the Constitution of the Republic of Poland, is not open to challenge cannot justify the exclusion of judicial review aimed at verifying compliance with the requirement of EU law relating to an independent and impartial tribunal previously established by law in order to guarantee the fundamental right to effective judicial protection in the fields covered by EU law. The Commission adds that, where it is established that there has been a breach of that fundamental right, the principle of effectiveness and the principle of primacy resulting from the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter require, where the weighing up of the principle of legal certainty against compliance with the applicable law and the particular role to be played by the judiciary in a democratic society so demands, that the national rules, including constitutional rules, be disapplied, as is apparent from paragraph 151 of the judgment in *A.B.*
- 158 The Republic of Poland claims that the national provisions to which the Commission takes exception in the context of the first complaint in the main action, under which it is prohibited to call into question the existence of an employment relationship or the mandate of judges, in breach of the constitutional provisions, do not in any way prevent the national courts from verifying compliance with the requirements laid down by EU law with regard 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, since a legal prohibition relating to acts which are impossible would be wholly without normative merit.
- 159 According to the Republic of Poland, the right to an independent and impartial tribunal previously established by law, guaranteed in Article 47 of the Charter, does not include the right for an individual to seek to challenge the mandate of a judge who has or would have examined the case concerning that individual.
- 160 In that regard, in order to ascertain whether the condition relating to a prima facie case is met so far as concerns the grant of the interim measures set out in paragraph 38(d) of the present order, it must, in the first place, be stated, in the light of the Republic of Poland's observations, that the national provisions to which the first complaint in the main action relates prohibit the Sąd Najwyższy (Supreme Court), the ordinary courts and the administrative courts from verifying the regularity of the process for the appointment of judges sitting in the formations of courts and from finding, as the case may be, that such a process is irregular.
- 161 It is apparent from the Republic of Poland's assertions, as set out in paragraphs 158 and 159 of the present order, that that Member State is disputing not the fact that those national provisions prohibit the national courts from carrying out such verification but the fact that such a prohibition, which is consistent with the Polish constitutional provisions, may be regarded as a breach of its obligations under the second subparagraph of Article 19(1) TEU to guarantee the right to an independent and impartial tribunal established by law.

- 162 Thus, the first complaint in the main action raises the question whether, in order to comply with their obligation under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, to guarantee that the national courts coming within their judicial system in the fields covered by EU law meet the requirements inherent in effective judicial protection, including the requirements of independence, the Member States must ensure that those courts can verify the regularity of the process for the appointment of judges sitting in a formation of a court.
- 163 In that regard, it should be pointed out that, as the Court has already held, it follows from the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law, guaranteed by Article 47 of the Charter, that everyone must, in principle, have the possibility of invoking an infringement of that right. Accordingly, the Courts of the European Union must be able to check whether an irregularity vitiating the appointment procedure at issue could lead to an infringement of that fundamental right (judgment of 26 March 2020, *Review Simpson v Council* and *HG v Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 55).
- 164 The guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. That right means that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. That check is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the court's own motion (judgment of 26 March 2020, *Review Simpson v Council* and *HG v Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 57 and the case-law cited).
- 165 Furthermore, according to the settled case-law of the European Court of Human Rights, the reason for the introduction of the term 'established by law' in the first sentence of Article 6(1) of the ECHR, to which the first sentence of the second paragraph of Article 47 of the Charter corresponds, is to ensure that the organisation of the judicial system does not depend on the discretion of the executive, but that it is regulated by law emanating from the legislature in compliance with the rules governing its jurisdiction. The Court of Justice has explained that that phrase reflects, in particular, the principle of the rule of law and covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned (judgment of 26 March 2020, *Review Simpson v Council* and *HG v Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 73 and the case-law cited).
- 166 Likewise, the European Court of Human Rights has observed that the right to be judged by a tribunal 'established by law' within the meaning of Article 6(1) of the ECHR encompasses, by its very nature, the process of appointing judges (judgment of 26 March 2020, *Review Simpson v Council* and *HG v Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 74 and the case-law cited).
- 167 Thus, an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to create a real

risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus giving rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system (judgment of 26 March 2020, *Revue Simpson v Council* and *HG v Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 75).

- 168 Finally, in paragraph 171 of the judgment in *A. K.*, the Court held that EU law precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of Article 47 of the Charter. The Court inferred therefrom that it was for the referring court to determine, in the light of the guidance as to interpretation provided, whether that applied to the body with jurisdiction to adjudicate in the cases in the main proceedings, namely the Disciplinary Chamber, and that, if that was the case, the principle of primacy of EU law required the referring court to disapply the national provisions that conferred jurisdiction on such a body.
- 169 As stated in paragraph 108 of the present order, the guidance as to interpretation provided by the Court to the referring court for the purpose of assessing whether the Disciplinary Chamber is an independent and impartial tribunal, within the meaning of EU law, relates, in particular, to the conditions and the process for the appointment of the members of that court.
- 170 Thus, it is apparent that, in order to comply with their obligations under the second subparagraph of Article 19(1) TEU, the Member States must guarantee the possibility of judicial review of compliance by the national courts coming within the judicial system in the fields covered by EU law and by the judges of those courts with the requirements inherent in effective judicial protection, that review including, inter alia, review of the regularity of the process for the appointment of the judges of those courts.
- 171 It cannot therefore, *prima facie*, be ruled out that the national provisions to which the first complaint in the action for failure to fulfil obligations relates, in that they prohibit the national courts from verifying the regularity of the process for the appointment of a judge or the legitimacy of a court, breach the Republic of Poland's obligation, under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, in the light of the case-law of the European Court of Human Rights concerning Article 6(1) of the ECHR, to guarantee that the national courts coming within its judicial system in the fields covered by EU law meet the requirements inherent in effective judicial protection.
- 172 In the second place, the Court has consistently held that any national court hearing a case within its jurisdiction has, as an organ of a Member State, the obligation, pursuant to the principle of cooperation set out in Article 4(3) TEU, to apply in full the directly applicable EU law and to protect the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary, whether the latter is prior to or subsequent to the EU legal rule (judgments of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 55 and the case-law cited, and of 21 January 2021, *Whiteland Import Export*, C-308/19, EU:C:2021:47, paragraph 31).
- 173 It follows that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the



moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law (judgments of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 56 and the case-law cited, and of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 36).

- 174 Therefore, a national provision that prevents a national court which is hearing a case within its jurisdiction from applying the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, and from disapplying any national provision contrary to those provisions, is in breach of the principle of primacy of EU law.
- 175 In those circumstances, it cannot, *prima facie*, be ruled out that the national provisions to which the first complaint in the main action relates also breach the obligations owed by the Member State concerned under the principle of primacy resulting from the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter.
- 176 Accordingly, without ruling at this stage on the merits of the arguments put forward by the parties in the context of the first complaint in the main action, which is solely a matter for the court hearing that action, it must be concluded that, having regard to the factors relied on by the Commission and the case-law referred to in paragraphs 163 to 168 and 172 and 173 of the present order, the arguments put forward by the Commission in the context of that complaint appear, *prima facie*, not unfounded, within the meaning of the case-law cited in paragraph 79 of the present order.
- 177 Consequently, it must be held that the condition relating to a *prima facie* case is met as regards the grant of the interim measures set out in paragraph 38(d) of the present order, without there being any need to assess, *prima facie*, the merits of the argument relating to the alleged infringement of Article 267 TFEU by the national provisions to which the first complaint in the main action relates, as is apparent from the case-law referred to in paragraph 79 of the present order.

– ***Urgency***

- 178 In accordance with the case-law referred to in paragraph 116 of the present order, the Court must, for the purpose of assessing urgency, postulate that the national provisions to which the first complaint in the main action relates, in that they prohibit the judges of the Sąd Najwyższy (Supreme Court), the ordinary courts and the administrative courts from verifying the regularity of the process for appointing judges and, as the case may be, from declaring that such a process is irregular, are liable to infringe the Republic of Poland's obligation, under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, to guarantee that the national courts coming within its judicial system in the fields covered by EU law satisfy the guarantees inherent in effective judicial protection. It is also necessary to postulate that those national provisions are liable to prevent national courts that are hearing a case within their jurisdiction from applying the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, and from disapplying the national provisions contrary to those provisions of EU law, and are therefore liable to infringe the principle of primacy of EU law.
- 179 The fact that, owing to the application of the national provisions to which the first complaint in the main action relates, the Polish courts may, pending delivery of the final judgment, be prevented from verifying observance by a judge or a court of the guarantees inherent in effective

judicial protection is liable to undermine, during that period, the independence of those Polish courts and, consequently, in accordance with the case-law referred to in paragraph 124 of the present order, to cause serious and irreparable damage to the EU legal order and, therefore, to the rights which individuals derive from EU law and to the values set out in Article 2 TEU, on which the European Union is founded, in particular the rule of law.

- 180 In addition, the specific characteristics of the legal context of which those provisions form part make the risk that such serious and irreversible damage will occur all the more likely.
- 181 Indeed, it must be borne in mind that the amending law is the final instalment in a series of legislative reforms relating to the organisation of the Polish judiciary, introduced by the Republic of Poland since late 2015. The reform introduced in 2017 was strongly contested owing, specifically, to the systemic shortcomings entailed by it with respect to the independence of the Polish courts, in particular with respect to the conditions for the appointment of the judges of the Sąd Najwyższy (Supreme Court), and that reform, moreover, gave rise to a number of actions for failure to fulfil obligations, numerous requests to the Court for a preliminary ruling and the adoption by the Commission, on 20 December 2017, in accordance with Article 7(1) TEU, of the 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).
- 182 In a context in which serious doubts are raised as to the independence of the Polish courts because of the legislative reforms referred to in the preceding paragraph, the application of national provisions that would prevent the national courts from verifying compliance by a judge or a court with the requirements relating to the independence of judges would clearly only increase the existing doubts as to the independence of those courts, reinforce the lack of appearance of independence of the Polish judiciary and aggravate the loss of confidence of individuals and the other Member States in the judicial system of the Republic of Poland.
- 183 The Republic of Poland claims that the national courts' obligation to observe the principle of primacy of EU law has the effect of eliminating any risk that serious and irreparable damage would arise as a result of the application of the national provisions to which the first complaint in the main action relates.
- 184 That argument cannot be upheld, however, since, as stated in paragraph 178 of the present order, for the purpose of assessing urgency, it is necessary to postulate that those provisions are liable to prevent the national courts from applying the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, and from disapplying the national provisions contrary to those provisions of EU law, with the consequence that those courts would breach the principle of primacy of EU law.
- 185 In addition, it is necessary to take account of the fact that compliance by a national court with the obligations owed by it pursuant to the principle of primacy of EU law would entail that court infringing the national provisions in question, which might constitute a disciplinary offence. In that regard, it should be noted that, in its observations concerning the interim measures referred to in paragraph 38(c) of the present order, the Republic of Poland has acknowledged that examination by a judge of the regularity of the appointment of a judge might constitute the offence laid down in point 3 of Article 107(1) of the amended Law relating to the ordinary courts and in point 3 of Article 72(1) of the amended Law on the Supreme Court.

- 186 As the Commission has pointed out, the mere prospect for national judges that they might be subject to disciplinary proceedings if they were to comply with their obligations under the principle of primacy of EU law is such as to deter them from observing that principle.
- 187 Finally, the Republic of Poland cannot properly rely, in order to establish the lack of urgency, on the existence of a system of remedies against decisions taken by the national courts when it adduces no evidence from which it might be established that that system is configured in such a way as to enable, in a context such as that described in paragraphs 181 and 182 of the present order, elimination of the risk that serious and irreparable damage for the EU legal order might arise as a result of the application of the national provisions at issue.
- 188 In the light of the foregoing considerations, it must be concluded that the condition relating to urgency has been met as regards the grant of the interim measures referred to paragraph 38(d) of the present order.

– *The balance of interests*

- 189 The Commission observes that, if the Court were to uphold the first complaint in the main action after having refused to grant the interim measure referred to in paragraph 38(d) of the present order, serious and irreparable damage would be caused to the EU legal order and to the rights that individuals derive from EU law, whereas, if the Court were to order that measure and subsequently to reject that complaint, the consequence would be merely the temporary suspension of the application of the provisions to which that complaint relates.
- 190 The Republic of Poland claims that suspension of the national provisions at issue would be contrary to the fundamental principles resulting, in particular, from the Constitution of the Republic of Poland, so that such suspension would not mean that the courts will be able to dismiss judges in conditions other than those laid down in Article 180 of that constitution. Finally, the effects of such suspension would clearly be harmful to the interests of justice.
- 191 In that regard, it should be pointed out that, having regard to the effects associated with the principle of primacy of EU law, the Republic of Poland cannot validly rely on the conflict between the provisions of domestic law, including constitutional provisions, and the effects that the application of an interim measure ordered by the Court, such as the suspension of the national provisions to which the first complaint in the main action relates, would entail, or on the harm to the interests of that Member State which, because of that conflict, would result from the implementation of such a measure. In any event, such harm, even on the assumption that it were established, cannot prevail over the general interest of the European Union in the proper functioning of its legal order.
- 192 Accordingly, it must be concluded that the weighing of the interests involved favours granting the interim measures referred to in paragraph 38(d) of the present order.

***The interim measures referred to in paragraph 38(e) of the present order***

***– A prima facie case***

- 193 The Commission maintains that the second complaint in the main action, which relates to the national provisions forming the subject matter of the interim measures set out in paragraph 38(e) of the present order, appears, prima facie, not unfounded, that complaint alleging, in particular, that, by conferring on the Extraordinary Review and Public Affairs Chamber, in accordance with those provisions, exclusive jurisdiction to examine complaints and questions of law concerning the lack of independence of a court or a judge, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, and under Article 267 TFEU and the principle of primacy of EU law.
- 194 The Commission maintains that, under those national provisions, no national court other than the Extraordinary Review and Public Affairs Chamber can assess the independence of a judge or a court, as referred to in the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, or refer a question in that regard to the Court for a preliminary ruling pursuant to Article 267 TFEU.
- 195 The Commission observes, in particular, that it follows from the judgment in *A. K.* that any national court in a situation comparable to that of the referring court in the joined cases that gave rise to that judgment is required to verify whether the court in question is independent on the basis of the factors set out in paragraph 171 of that judgment and, if it follows from that verification that that is not the case, to disapply, under the principle of primacy of EU law, the national provisions that are contrary to Article 19(1) TEU and Article 47 of the Charter.
- 196 The Republic of Poland disputes that the allocation to a particular organ, namely the Extraordinary Review and Public Affairs Chamber, of questions relating to the independence of a judge or a court may constitute an infringement of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. In that regard, it explains that the reason for such allocation is the need to ensure specialisation in those fundamental questions of a constitutional nature and to eliminate the risks of divergence in the case-law in matters relating to the independence of justice.
- 197 In order to verify whether the condition relating to a prima facie case is met with respect to the grant of the interim measures set out in paragraph 38(e) of the present order, it should, in the first place, be observed that, as is apparent from the parties' arguments, the second complaint raises, in particular, the question whether under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, questions relating to the independence of judges may be examined only by a specialised court and, if so, what conditions must be met in order to guarantee the right of individuals to effective judicial protection. That is a complex legal question the answer to which is not immediately obvious and which therefore merits a thorough examination, which cannot be carried out by the judge hearing the application for interim relief.
- 198 In the second place, it must be stated that, as the Commission has submitted without being contradicted by the Republic of Poland, under the national provisions to which the second complaint in the main action relates, first, only the Extraordinary Review and Public Affairs Chamber has jurisdiction to adjudicate on questions of law concerning the independence of a judge or a court, so that the national courts are required to refer to that chamber any question of that nature that is raised in the cases before them. Second, that chamber's findings concerning the independence of a judge or a court are binding on the national courts. Third, that chamber alone

has jurisdiction to hear and determine actions seeking a declaration that final judgments of the Sąd Najwyższy (Supreme Court), the ordinary courts or the administrative courts are unlawful where the alleged unlawfulness relates to the status as judge of the person who delivered the judgment.

- 199 In the light of the case-law referred to in paragraphs 163 to 168 of the present order, it cannot, *prima facie*, be ruled out that the national provisions to which the first complaint in the main action relates, in that they prevent the chambers of the Sąd Najwyższy (Supreme Court) other than the Extraordinary Review and Public Affairs Chamber, the ordinary courts and the administrative courts from verifying compliance by a judge or a court with the requirements relating to the independence of judges, infringe the Republic of Poland's obligation, under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, to guarantee that the national courts coming within its judicial system in the fields covered by EU law meet the requirements inherent in effective judicial protection.
- 200 In the third place, as already pointed out in paragraph 173 of the present order, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law (judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 56 and the case-law cited).
- 201 The Court has stated that that would be the case if, in the event of a conflict between a provision of EU law and a subsequent national law, the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary (judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 57 and the case-law cited).
- 202 Finally, the Court has also stated that, if it is apparent that the assessments made by a national court are not in conformity with EU law, EU law requires that a different national court which in domestic law is unconditionally bound by the interpretation of EU law made by the first court must, of its own motion, refuse to apply the rule of domestic law which requires it to comply with the interpretation of EU law adopted by that first court, and that that would be the case, in particular, where, as a result of having to follow such a rule of domestic law, a national court, in dealing with the cases pending before it, would be prevented from taking due account of the fact that it follows from a judgment of the Court of Justice that a provision of national law must be held to be contrary to EU law and from ensuring that the primacy of EU law is duly guaranteed, by taking all measures required to that end (order of 7 June 2018, *Filippi and Others*, C-589/16, EU:C:2018:417, paragraphs 35 and 36 and the case-law cited).
- 203 Nor, therefore, in the light of the case-law referred to in paragraphs 200 to 202 of the present order, can it, *prima facie*, be ruled out that the national provisions to which the second complaint in the main action relates infringe the obligations owed by the Republic of Poland under the principle of primacy resulting from the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter.

- 204 Accordingly, without ruling at this stage on the merits of the arguments put forward by the parties in the context of the second complaint in the main action, which is solely a matter for the court hearing that action, it must be concluded that, having regard to the factors relied on by the Commission and the case-law referred to in paragraphs 163 to 168 and 200 to 202 of the present order, the arguments put forward by the Commission in the context of that complaint appear, *prima facie*, not unfounded, within the meaning of the case-law cited in paragraph 79 of the present order.
- 205 Consequently, it must be held that the condition relating to a *prima facie* case is met as regards the grant of the interim measures set out in paragraph 38(e) of the present order, without there being any need to assess, *prima facie*, the merits of the argument relating to the alleged infringement of Article 267 TFEU by the national provisions to which the second complaint in the main action relates, as is apparent from the case-law referred to in paragraph 79 of the present order.

– *Urgency*

- 206 In accordance with the case-law set out in paragraph 116 of the present order, the Court must, for the purpose of assessing urgency, postulate that the national provisions to which the second complaint in the main action relates, in that they confer on the Extraordinary Review and Public Affairs Chamber exclusive jurisdiction to adjudicate on questions relating to the independence of a judge or a court and, consequently, prevent the judges of the Sąd Najwyższy (Supreme Court), the ordinary courts and the administrative courts from verifying compliance by a judge or a court with the requirement of independence of judges, are liable to infringe the obligations owed by the Republic of Poland, under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, to guarantee that the courts meet the requirements inherent in effective judicial protection. It must also be postulated that those provisions are liable to prevent national courts that are hearing a case within their jurisdiction from applying the second subparagraph of Article 19(1) TFEU, read in conjunction with Article 47 of the Charter, and from disapplying the national provisions which are contrary to those provisions of EU law, and thus to infringe the principle of primacy of EU law.
- 207 The fact that, owing to the application of the national provisions to which the second complaint in the main action relates, the national courts, with the exception of the Extraordinary Review and Public Affairs Chamber, are prevented, pending delivery of the final judgment, from adjudicating on questions relating to the independence of a judge or a court and thus from verifying compliance by that judge or that court with the requirements inherent in effective judicial protection is liable to undermine, during that period, the independence of the Polish courts and, therefore, in accordance with the case-law referred to in paragraph 124 of the present order, to cause serious and irreparable damage to the EU legal order and, consequently, to the rights which individuals derive from EU law and the values, set out in Article 2 TEU, on which the European Union is founded, in particular the rule of law.
- 208 In addition, the specific characteristics of the legal context of which those provisions form part, as described in paragraphs 181 and 182 of the present order, make the risk that such serious and irreversible damage will occur all the more likely.
- 209 The Republic of Poland disputes that there is a risk that such damage will occur since, pending delivery of the final judgment, complaints relating to the independence of a judge or a court will be examined by the Extraordinary Review and Public Affairs Chamber, whose independence is said not to give rise to any doubt.

- 210 However, it is necessary to take account of the fact that, first, like the Disciplinary Chamber, the Extraordinary Review and Public Affairs Chamber was created by the Law on the Supreme Court and that, as is apparent from the observations of the Republic of Poland, the members of that chamber are appointed following a procedure in which – as is also the case for members of the Disciplinary Chamber – the KRS is involved. Having regard to the guidance as to interpretation provided in the judgment in *A. K.*, it cannot be asserted, as the Republic of Poland claims, that the independence of the Extraordinary Review and Public Affairs Chamber does not give rise to any doubt.
- 211 Second, it must be observed that, in accordance with Article 26(3) of the amended Law on the Supreme Court, applications concerning the establishment or the assessment of the legality of the appointment of a judge or of his or her authority to carry out judicial functions are not examined by the Extraordinary Review and Public Affairs Chamber.
- 212 It follows that the application of the national provisions to which the second complaint in the main action relates would mean that, pending delivery of the final judgment, no national court would be able to examine those questions, which, as stated when the interim measures referred to in paragraph 38(d) of the present order were being examined, would be liable to cause serious and irreparable damage to the EU legal order and to the rights of individuals to an effective remedy.
- 213 In the light of the foregoing considerations, it must be concluded that the condition relating to urgency has been met as regards the grant of the interim measures referred to in paragraph 38(e) of the present order.

– *The balance of interests*

- 214 The Commission observes that, if the Court were to uphold the second complaint in the main action after having refused to grant the interim measure referred to in paragraph 38(e) of the present order, serious and irreparable damage would be caused to the EU legal order and to the rights that individuals derive from EU law, whereas, if the Court were to order that measure and subsequently reject that complaint, the consequence would be merely the temporary suspension of the application of Article 26(2) and (4) to (6) and of Article 82(2) to (5) of the amended Law on the Supreme Court.
- 215 The Republic of Poland claims, first, that the suspension of the national provisions to which the second complaint in the main action relates would not mean that the national courts will be able to examine the questions which those provisions reserve for the Extraordinary Review and Public Affairs Chamber, so that the suspension of those provisions would be unable to contribute to the objective which it pursues. Second, that suspension would undermine the right to a tribunal previously established by law and the principle of legal certainty, since no national provision would govern actual jurisdiction to adjudicate on the questions of law which those provisions reserve for the Extraordinary Review and Public Affairs Chamber.
- 216 In that regard, it should be borne in mind that the implementation of an interim measure suspending the application of a national provision entails the obligation for the Member State concerned to ensure that the legal situation that prevailed before the entry into force of that provision is restored, that Member State thus being required to apply, pending the final

judgment, the provisions that were repealed, replaced or amended by the provision the application of which must be suspended (see, to that effect, order of 17 December 2018, *Commission v Poland*, C-619/18 R, EU:C:2018:1021, paragraphs 95 and 107).

- 217 Thus, the breach of the right to a tribunal previously established by law and of the principle of legal certainty which, according to the Republic of Poland, would result from the suspension, pending delivery of the final judgment, of the national provisions to which the second complaint in the main action relates cannot be established.
- 218 Accordingly, it must be concluded that the weighing of the interests involved favours granting the interim measures referred to in paragraph 38(e) of the present order.

***The interim measures referred to in paragraph 38(c) of the present order***

***– A prima facie case***

- 219 The Commission maintains that the third complaint in the main action, which relates to the national provisions forming the subject matter of the interim measures set out in paragraph 38(c) of the present order, appears, prima facie, not unfounded, that complaint alleging specifically that, 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 tribunal previously established by law may be classified as a disciplinary offence, the Republic of Poland has failed to fulfil its obligation under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and Article 267 TFEU to guarantee the independence of the judiciary and the right to judicial protection.
- 220 In the first place, the Commission submits that the constituent elements of the disciplinary offences referred to in points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts and in points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court, namely ‘acts or omissions of such a kind as to prevent or seriously undermine the functioning of a judicial authority’ or ‘acts calling into question the existence of the employment relationship of a judge [or] the effectiveness of the appointment of a judge’, are so imprecise that those offences may cover the situation in which a national judge reviews compliance, by a court, with the requirements of independence of judges, for the purposes of Article 19(1) TEU, read in conjunction with Article 47 of the Charter. In particular, a finding, by a judge, that the formation of the court in which he or she sits or a different formation does not comply with the requirement of an independent and impartial tribunal previously established by law, within the meaning of those provisions of EU law, owing to an irregularity in the appointment of a judge sitting in that formation, might be classified as an ‘act calling into question the existence of the employment relationship of a judge or the effectiveness of the appointment of a judge’. In the Commission’s submission, that assertion is borne out by the fact that disciplinary proceedings were initiated on 5 August 2020, on that ground, against a judge of the Sąd Apelacyjny Szczecin (Court of Appeal, Szczecin, Poland), pursuant to point 3 of Article 107(1) of the amended Law relating to the ordinary courts.
- 221 Thus, relying, in particular, on the legal principles set out in paragraph 32 of the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), and in paragraphs 55, 57, 70 and 71 of the judgment of 26 March 2020, *Review Simpson v Council* and



*HG v Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232), the Commission claims that the national provisions to which the third complaint in the main action relates are contrary to the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.

- 222 Furthermore, the disciplinary offences referred to in those provisions are associated with the content of judicial decisions, which is contrary to paragraph 67 of 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).
- 223 In the second place, the Commission maintains that the disciplinary offence referred to in point 1 of Article 72(1) of the amended Law on the Supreme Court is based on an imprecise concept, namely ‘manifest and flagrant breach of legal rules’, a concept that may refer both to the content of judicial decisions and to breach of national provisions prohibiting judicial review of compliance, by a court, with the requirements relating to the independence of judges, within the meaning of EU law.
- 224 The Republic of Poland asserts that the disciplinary liability imposed on judges pursuant to 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 does not include liability in respect of the content of judicial decisions, so that it cannot be regarded as a factor that would bring pressure to bear on judges or interfere with their judicial activities.
- 225 In particular, as regards, in the first place, the offence consisting in making the administration of justice appreciably more difficult, or even impossible, referred to in point 2 of Article 107(1) of the amended Law relating to the ordinary courts and in point 2 of Article 72(1) of the amended Law on the Supreme Court, the Republic of Poland disputes that the performance by a court of the obligations described in the judgment in *A. K.* might be covered by such an offence, since, first, it is clear that a judgment of the Court of Justice cannot include provisions the implementation of which would render the administration of justice appreciably more difficult and, second, that judgment is not a decision which, having regard to its content, would threaten the functioning of justice. Furthermore, the Republic of Poland notes that such an offence plays a very important role in national legal orders and is provided for in the constitutional rules of other Member States relating to the judiciary. In particular, the provisions contested by the Commission are inspired by French law, which the Commission has not called into question.
- 226 As regards, in the second place, the offence consisting in calling into question the existence of the employment relationship of a judge and the effectiveness of the appointment of a judge, referred to in point 3 of Article 107(1) of the amended Law relating to the ordinary courts and point 3 of Article 72(1) of the amended Law on the Supreme Court, the Republic of Poland reiterates the arguments set out in paragraphs 158 and 159 of the present order in the context of the examination of the interim measures referred to in paragraph 38(d) hereof. In particular, the Republic of Poland, which does not dispute the Commission’s assertion that disciplinary proceedings have been initiated against a judge of the Sąd Apelacyjny Szczecin (Court of Appeal, Szczecin), nonetheless emphasises that the prohibition on assessing the legality of the appointment of a judge constitutes, in the light of the constitutional model for the appointment of judges in Poland, a detail added to the content of the legal rule that defines the disciplinary offence, and is wholly justified and appropriate.

- 227 As regards, in the third and last place, the offence consisting in the manifest and flagrant breach of legal rules, referred to in point 1 of Article 72(1) of the amended Law on the Supreme Court, the Republic of Poland claims that that offence cannot be equated in the slightest with disciplinary liability because of the content of a judgment or on the basis of ordinary errors which the judge may make in the course of adjudication. As the case-law of the Sąd Najwyższy (Supreme Court) shows, that offence covers exceptional cases of breach of the legal rules, namely cases in which the breach is manifest and flagrant, and justifies liability of the person responsible.
- 228 In order to ascertain whether the condition relating to a prima facie case is met with respect to the grant of the interim measures set out in paragraph 38(c) of the present order, it must, in the first place, be borne in mind that, as is apparent from paragraphs 171 and 199 of the present order, national provisions which have the effect of preventing the national courts whose task it is to interpret and apply EU law from verifying compliance by a judge or a court with the requirements inherent in effective judicial protection and, in particular, the regularity of the process for appointing a judge or a court are, prima facie, contrary to the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.
- 229 It must therefore be found that national provisions from which it follows that the national judges may be subject to disciplinary proceedings because they have carried out such a verification are also, prima facie, contrary to the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.
- 230 In the second place, it should be borne in mind that, as is apparent from the case-law referred to in paragraph 87 of the present order, the requirement of independence and impartiality arising, in particular, from the second subparagraph of Article 19(1) TEU makes it necessary to avoid any risk that the disciplinary regime will be used against those whose task it is to adjudicate, as a system of political control of the content of judicial decisions.
- 231 To that end, it is essential in particular that rules should be laid down which define sufficiently clearly and precisely the conduct which may give rise to the disciplinary liability of judges, in order to guarantee the independence inherent in their task and to avoid exposing them to the risk that their disciplinary liability may be incurred solely because of their decision (see, by analogy, judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor Din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 234).
- 232 In the present case, it is apparent from the outset that, as the Commission has submitted, the wording of points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts and of points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court is so abstract and imprecise that it cannot, prima facie, be ruled out that the disciplinary liability of a judge may be incurred for the sole reason that he or she has verified compliance by a judge or a formation of a court with the requirements of independence of judges and, in particular, found that the process for appointing a judge was irregular.
- 233 The same applies with respect to point 1 of Article 72(1) of the amended Law on the Supreme Court. Owing to the abstract and imprecise nature of the words 'manifest and flagrant breach of legal rules', it cannot, prima facie, be ruled out that the liability of a judge may be incurred because of what is alleged to be the 'incorrect' content of his or her decisions or because he or she has failed to comply with the national provisions that prevent the national courts from verifying compliance by a judge or a formation of a court with the requirements of independence of judges.

- 234 Thus, having regard to the wording of the national provisions to which the third complaint in the main action relates, it cannot, *prima facie*, be ruled out that those provisions not only prevent the national courts from verifying compliance by a judge or a court with the requirements inherent in effective judicial protection, but also enable the disciplinary regime to be used as a system of political control of the content of judicial decisions and that, accordingly, they are contrary to the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.
- 235 There are even more pressing reasons to make that assessment in the case of point 3 of Article 107(1) of the amended Law relating to the ordinary courts and point 3 of Article 72(1) of the amended Law on the Supreme Court, because, as is apparent from the parties' arguments set out in paragraphs 220 and 226 of the present order, a finding that the appointment of a judge was irregular could constitute the offence referred to in those provisions.
- 236 Furthermore, the fact that decisions adopted in the context of disciplinary proceedings initiated against judges are reviewed by a body, namely the Disciplinary Chamber, whose lack of independence cannot, *prima facie*, be ruled out, as established in paragraph 97 of the present order, helps to reinforce the finding set out in paragraph 234 hereof. The same applies to the fact, highlighted by the Commission, that the amending law which introduced the disciplinary offences laid down in the national provisions in question was adopted one month after the Court delivered its judgment in *A. K.* and provided the referring court with guidance as to the assessment of the independence of that chamber, on the basis of which the national courts were able to assess the independence of the judge or of the court with jurisdiction to take decisions in the cases brought before those national courts.
- 237 In addition, as regards the case-law of the Sąd Najwyższy (Supreme Court) to which the Republic of Poland refers, concerning the components of the offence consisting in a 'manifest and flagrant breach of legal rules' which is laid down in Article 72(1) of the amended Law on the Supreme Court, it is sufficient to state that that case-law preceded the establishment, in 2017, of the Disciplinary Chamber and, *a fortiori*, the adoption, in 2019, by the amending law, of the national provisions to which, in particular, the first two complaints in the main action relate. Consequently, that case-law cannot call into question the finding set out in paragraph 234 of the present order.
- 238 Finally, as stated in paragraph 111 of the present order, the Republic of Poland cannot profitably rely on the alleged existence in other Member State of rules similar to those provisions in order to establish that the condition relating to a *prima facie* case is not met in the present case.
- 239 Accordingly, without ruling at this stage on the merits of the arguments put forward by the parties in the context of the third complaint in the main action, which is solely a matter for the court hearing that action, it must be concluded that, having regard to the factors relied on by the Commission and the case-law referred to in paragraphs 163 to 168 and 230 and 231 of the present order, the arguments put forward by the Commission in the context of that complaint appear, *prima facie*, not unfounded, within the meaning of the case-law cited in paragraph 79 of the present order.
- 240 Consequently, it must be held that the condition relating to a *prima facie* case is met as regards the grant of the interim measures set out in paragraph 38(c) of the present order.

– *Urgency*

- 241 In accordance with the case-law set out in paragraph 116 of the present order, the Court must, for the purpose of assessing urgency, postulate that the national provisions to which the third complaint in the main action relates are liable, first, to prevent the national courts from verifying compliance by a judge or a court with the requirements inherent in effective judicial protection and, second, to enable the disciplinary regime to be used as a system of political control of the content of judicial decisions and thus to be contrary to the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.
- 242 As the Commission has submitted, the fact that, owing to the application of the national provisions to which the third complaint in the main action relates, first, the national courts may be prevented, pending delivery of the final judgment, from verifying compliance by a judge or a court with the requirements inherent in effective judicial protection and, second, the disciplinary regime may, pending delivery of that judgment, be used as a system of political control of the content of judicial decisions is liable to undermine, during that period, the independence of the Polish courts and, consequently, in accordance with the case-law referred to in paragraph 124 of the present order, to cause serious and irreparable damage to the EU legal order and, therefore, to the rights which individuals derive from EU law and the values, set out in Article 2 TEU, on which the European Union is founded, in particular the rule of law.
- 243 The Republic of Poland disputes the existence of urgency and refers to the suspension, following the order of 8 April 2020, *Commission v Poland* (C-791/19 R, EU:C:2020:277), of the activities of the Disciplinary Chamber so far as concerns disciplinary matters relating to judges. According to the Republic of Poland, because of that suspension, which will be maintained pending delivery of the judgment on the substance in Case C-791/19, the Disciplinary Chamber does not apply, generally, the provisions contested by the Commission, so that the suspension of those provisions is not urgent as it would not have the effect of preventing any damage whatsoever.
- 244 In that regard, while it is true that the suspension of the activities of the Disciplinary Chamber is likely to reduce the risk that serious and irreparable damage will occur as a result of the application of the national provisions at issue, such suspension does not however enable such a risk to be eliminated.
- 245 As the Commission has observed, the mere prospect, for Polish judges, that they may, in some circumstances, be subject to disciplinary proceedings on the ground that they have verified compliance by a judge or a court with the requirements inherent in effective judicial protection is liable to affect their independence, irrespective of the judicial body before which the disciplinary proceedings take place.
- 246 Furthermore, the mere existence of national provisions which would enable the disciplinary regime to be used as a system of political control of the content of judicial decisions is such as to give rise to doubts in the minds of individuals and the other Member States as to the independence of the national courts, which might well cause serious and irreparable damage.
- 247 Finally, as regards, in particular, point 1 of Article 72(1) of the amended Law on the Supreme Court, the Republic of Poland claims that the application for suspension of that provision is out of time and wholly incomprehensible. In that context, the Republic of Poland contends, first, that the Commission has put forward no justification for the suspension of application of a provision which forms part of a very long constitutional tradition in Poland and, second, that the fact that

the Commission, in the action for failure to fulfil obligations in Case C-791/19, contested an analogous provision in Article 107 of the Law relating to the ordinary courts yet did not request suspension of the application of that provision shows that in reality the Commission sees no risk of damage resulting from the application of point 1 of Article 72(1) of the amended Law on the Supreme Court.

- 248 However, first, contrary to the Republic of Poland's assertions, the Commission has explained the reasons why it considers that the application of all the provisions to which the third complaint in the main action relates must be suspended. Second, as observed in paragraphs 138 and 237 of the present order, the amending law introduced a number of provisions, such as those to which the first two complaints in the main action relate, that are liable to have an impact as regards the scope of the offence referred to in point 1 of Article 72(1) of the amended Law on the Supreme Court and that therefore constitute, for the purpose of assessing the existence of urgency, new matters by comparison with those existing before that amending law was adopted.
- 249 In the light of the foregoing considerations, it must be concluded that the condition relating to urgency has been met as regards the grant of the interim measures referred to in paragraph 38(c) of the present order.

– *The balance of interests*

- 250 The Commission observes that, if the Court were to uphold the third complaint in the main action after having refused to grant the interim measure referred to in paragraph 38(c) of the present order, serious and irreparable damage would be caused to the EU legal order and to the rights which individuals derive from EU law, in particular their fundamental right to an effective remedy before an independent and impartial tribunal previously established by law.
- 251 If, on the other hand, the Court were to order that measure and subsequently to reject that complaint, the consequence would be merely that 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 would be temporarily suspended and, therefore, that the review by a judge, in the course of his or her judicial activities, of compliance with the requirements of EU law relating to the independence and impartiality of a tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, would, temporarily, not be classifiable as an offence under those national provisions.
- 252 The Republic of Poland claims, in particular, that the consequence of not applying, pending delivery of the final judgment, the national provisions to which the third complaint in the main action relates would be that, throughout that period, reprehensible conduct, which should undoubtedly give rise to disciplinary liability of those responsible, would, on the contrary, be permissible. Thus, the judges of the Sąd Najwyższy (Supreme Court) might, in particular, backdate judicial acts, conceal documents of importance for the settlement of cases, order penalties that are not provided for by law or alter decisions using methods not provided for by the procedural rules, or indeed deliver decisions not provided for by procedural rules. The suspension of the application of the national provisions at issue would therefore entail damage for the interests of the Republic of Poland.

- 253 In that regard, it is sufficient to point out, however, that, as is apparent from paragraph 216 of the present order, the suspension of the application of the national provisions to which the third complaint in the main action relates would entail the obligation for the Republic of Poland to apply, pending delivery of the final judgment, the provisions repealed, replaced or amended by the national provisions to which that complaint relates. Thus, the grant of the interim measure set out in paragraph 38(c) of the present order could not cause the damage on which the Republic of Poland relies.
- 254 Accordingly, it must be concluded that the weighing of the interests involved favours granting the interim measures referred to in paragraph 38(c) of the present order.
- 255 Having regard to the foregoing considerations, the Commission's application for interim measures referred to in paragraph 1 of the present order must be granted.

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

1. **The Republic of Poland is required, immediately and 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 ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017, 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 and other provisions, under which the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) 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 Law on the Supreme Court, as amended, on the basis of which the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court) 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 ustawa – Prawo o ustroju sądów powszechnych (Law relating to the organisation of the ordinary courts) of 27 July 2001, as amended by the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, and of points 1 to 3 of Article 72(1) of the Law on the Supreme Court, as amended, 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 of Fundamental Rights of the European Union;**

- (d) to suspend the application of Article 42a(1) and (2) and of Article 55(4) of the Law relating to the organisation of the ordinary courts, as amended, of Article 26(3) and Article 29(2) and (3) of the Law on the Supreme Court, as amended, of 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, as amended by the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, and of Article 8 of the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, 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 of Fundamental Rights;**
- (e) to suspend the application of Article 26(2) and (4) to (6) and Article 82(2) to (5) of the Law on the Supreme Court, as amended, and of Article 10 of the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, establishing the exclusive jurisdiction of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court) to examine complaints alleging lack of independence of a judge or a court; and**
- (f) to communicate to the European Commission, no later than one month after notification of the order of the Court ordering the interim measures sought, all the measures adopted in order to comply in full with that order.**

**2. The costs are reserved.**

[Signatures]