



Reports of Cases

ORDER OF THE COURT (Grand Chamber)

17 December 2018*

[Text rectified by order of 2 July 2019]

(Interim relief — Article 279 TFEU — Application for interim measures — Second subparagraph of Article 19(1) TEU — Charter of Fundamental Rights of the European Union — Article 47 — Effective judicial protection — Independence of judges)

In Case C-619/18 R,

APPLICATION for interim measures under Article 279 TFEU and Article 160(2) of the Rules of Procedure of the Court of Justice lodged on 2 October 2018,

European Commission, represented by K. Banks, H. Krämer and S.L. Kaleda, acting as Agents,

applicant,

v

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

defendant,

supported by:

Hungary, represented by M.Z. Fehér, acting as Agent,

intervener,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta (Judge-Rapporteur), Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras, T. von Danwitz, C. Toader, F. Biltgen, K. Jürimäe and C. Lycourgos, Presidents of Chambers, L. Bay Larsen, D. Šváby, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

after hearing the Advocate General, E. Tanchev,

makes the following

* Language of the case: Polish.

Order

- 1 By its application for interim relief, the European Commission requests the Court to order the Republic of Poland, pending the judgment of the Court ruling on the substance:
 - to suspend the application of the provisions of Article 37, §§ 1 to 4, and of Article 111, §§ 1 and 1a, of the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dziennik Ustaw of 2018, item 5), of Article 5 of the Ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the System of Common Courts, the Law on the Supreme Court and certain other laws) of 10 May 2018 (Dziennik Ustaw of 2018, item 1045) ('the amending Law') (collectively, 'the provisions of national legislation at issue'), and of all measures adopted pursuant to those provisions;
 - to take all necessary measures to ensure that the judges of the Sąd Najwyższy (Supreme Court, Poland) concerned by the provisions of national legislation at issue may continue to perform their duties in the positions which they held on 3 April 2018, the date on which the Law on the Supreme Court entered into force, while continuing to enjoy the same status and the same rights and working conditions as they did until 3 April 2018;
 - to refrain from adopting any measure concerning the appointment of judges to the Sąd Najwyższy (Supreme Court) to replace the Supreme Court judges concerned by the provisions of national legislation at issue, or any measure concerning the appointment of a new First President of that court or indicating the person tasked with leading that court in its First President's stead pending the appointment of a new First President; and
 - to inform the Commission, one month after being notified of the order of the Court granting the interim measures sought at the latest, and then regularly — every month — thereafter, of all the measures it has adopted or plans to adopt in order to fully comply with that order.
- 2 The Commission has also requested, pursuant to Article 160(7) of the Rules of Procedure of the Court, that the interim measures referred to in paragraph 1 above be granted before the defendant has submitted its observations, owing to the immediate risk of serious and irreparable damage to the right to effective judicial protection in the context of the application of EU law.
- 3 Those requests have been made in the context of an action for failure to fulfil obligations under Article 258 TFEU brought by the Commission on 2 October 2018 ('the action for failure to fulfil obligations') seeking a finding that by, first, lowering the retirement age for judges of the Sąd Najwyższy (Supreme Court) and applying that measure to serving judges who were appointed to that court before 3 April 2018 and, second, granting the President of the Republic of Poland the discretion to extend the period of active judicial service of judges of that court beyond the newly-set retirement age, the Republic of Poland has failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). That action was registered as Case C-619/18.
- 4 By order of 19 October 2018, *Commission v Poland* (C-619/18 R, not published, EU:C:2018:852), the Vice-President of the Court, pursuant to Article 160(7) of the Rules of Procedure, provisionally granted the application for interim measures pending the making of an order closing the present interlocutory proceedings.
- 5 Applying Article 161(1) of the Rules of Procedure, the Vice-President of the Court referred the present case to the Court, which, in the light of the importance of that case, assigned it to the Grand Chamber, in accordance with Article 60(1) of those rules.

- 6 By decision of the President of the Court of 30 October 2018, Hungary was granted leave to intervene in support of the form of order sought by the Republic of Poland for the purposes of the oral part of the procedure.
- 7 By order of the President of the Court of 15 November 2018, *Commission v Poland* (C-619/18, EU:C:2018:910), the expedited procedure laid down in Article 23a of the Statute of the Court of Justice of the European Union and in Article 133 of the Rules of Procedure was applied to Case C-619/18.
- 8 On 16 November 2018 the main parties and Hungary presented oral observations at a hearing before the Grand Chamber.

Legal context

The Polish Constitution

- 9 [Rectified by order of 2 July 2019] Article 183(3) of the Polish Constitution states that the First President of the Sąd Najwyższy (Supreme Court) is to be appointed for a term of six years.

The Law on the Supreme Court

- 10 Article 37, §§ 1 to 4, of the Law on the Supreme Court provides:

§ 1. Judges of the [Sąd Najwyższy (Supreme Court)] shall retire on the day of their 65th birthday, unless they make a statement, no earlier than twelve months and no later than six months before reaching [the age of 65], indicating their desire to continue to perform their duties, and submit a certificate, drawn up under the conditions applicable to candidates applying for a judge's post, confirming that their state of health allows them to serve, and the President of the Republic of Poland consents to their continuing to perform their duties at the [Sąd Najwyższy (Supreme Court)].

§ 1a. Before giving such consent, the President of the Republic of Poland shall consult the National Council of the Judiciary. The National Council of the Judiciary shall communicate its opinion to the President of the Republic of Poland within 30 days of the date of being requested to do so by the latter. If the National Council of the Judiciary has not communicated its opinion within the period laid down in the second sentence, the opinion shall be deemed to be favourable.

§ 1b. When providing the opinion referred to in § 1a, the National Council of the Judiciary shall take into account the interest of the judicial system or an important public interest, in particular the rational distribution of members of the [Sąd Najwyższy (Supreme Court)] or the needs arising from the workload of individual chambers of the [Sąd Najwyższy (Supreme Court)].

§ 2. The statement and certificate referred to in § 1 shall be submitted to the First President of the [Sąd Najwyższy (Supreme Court)], who shall promptly forward them, together with his opinion, to the President of the Republic of Poland. The First President of the [Sąd Najwyższy (Supreme Court)] shall communicate his statement and his certificate, together with the opinion of the College of the [Sąd Najwyższy (Supreme Court)], to the President of the Republic of Poland.

§ 3. The President of the Republic of Poland may consent to a judge of the [Sąd Najwyższy (Supreme Court)] continuing to perform his duties within three months of receiving the opinion of the National Council of the Judiciary referred to in § 1a or the expiry of the period within which that opinion must be submitted. Unless consent is provided within the period referred to in the first sentence, the judge

shall be deemed to have retired on the day of his 65th birthday. Where a judge of the [Sąd Najwyższy (Supreme Court)] reaches the age referred to in § 1 before the procedure for extending his term of office is completed, he shall remain in his post until that procedure is concluded.

§ 4. The consent referred to in § 1 shall be granted for a period of three years, which may be renewed once. The provisions of § 3 shall apply *mutatis mutandis*. Any judge who has been permitted to continue in active service at the [Sąd Najwyższy (Supreme Court)] may retire at any time following his 65th birthday; he shall submit a statement to that effect to the First President of the [Sąd Najwyższy (Supreme Court)], who shall forward it immediately to the President of the Republic of Poland. The First President of the [Sąd Najwyższy (Supreme Court)] shall submit his statement directly to the President of the Republic of Poland.'

11 Under Article 111, §§ 1 and 1a, of that Law:

'§ 1. Judges of the [Sąd Najwyższy (Supreme Court)] who have reached the age of 65 by the date of entry into force of the present Law or who will reach that age within three months of that entry into force, shall retire on the day following the expiry of that three-month period, unless they submit, within one month of the entry into force of the present Law, the statement and certificate referred to in Article 37, § 1, and the President of the Republic of Poland consents to their continuing to serve as a judge of the [Sąd Najwyższy (Supreme Court)]. The provisions of Article 37, §§ 2 to 4, shall apply *mutatis mutandis*.

§ 1a. Judges of the [Sąd Najwyższy (Supreme Court)] who will reach the age of 65 after a period of three months has elapsed and before a period of twelve months has elapsed following the date of entry into force of the present Law shall retire twelve months after that entry into force, unless they submit, within that period, the statement and certificate referred to in Article 37, § 1, and the President of the Republic of Poland consents to their continuing to serve as a judge of the [Sąd Najwyższy (Supreme Court)]. The provisions of Article 37, §§ 1a to 4, shall apply *mutatis mutandis*.'

12 The Law on the Supreme Court entered into force on 3 April 2018.

The amending Law

13 Article 5 of the amending Law is worded as follows:

'The President of the Republic of Poland shall immediately forward to the National Council of the Judiciary any statements referred to in Article 37, § 1, and Article 111, § 1, of the [Law on the Supreme Court] which have not been examined on the date of entry into force of the present Law for its opinion. The National Council of the Judiciary shall give its opinion within 30 days of the date of being requested to do so by the President of the Republic of Poland. The President of the Republic of Poland may consent to a judge of the [Sąd Najwyższy (Supreme Court)] continuing to perform his duties within 60 days of receiving the opinion of the National Council of the Judiciary or the expiry of the period within which that opinion must be submitted. The provisions of Article 37, §§ 2 to 4, of the [Law on the Supreme Court], as amended by the present Law, shall apply *mutatis mutandis*.'

Background to the dispute

Measures adopted in the context of implementing the provisions of national legislation at issue

14 On 3 July 2018 72 judges, 27 of whom had reached the age of 65 by that date, were serving as judges at the Sąd Najwyższy (Supreme Court).

- 15 On 4 July 2018 fifteen of those 27 judges were informed of their retirement pursuant to the provisions of national legislation at issue, eleven of them having failed to ask to continue in active judicial service and four of them having submitted out of time a statement indicating their desire to continue to perform their duties. One of the fifteen judges forced to retire is the First President of the Sąd Najwyższy (Supreme Court), whose term of office was supposed, in accordance with the Polish Constitution, to come to an end on 30 April 2020, as was confirmed by the resolution of 28 June 2018 unanimously adopted by the general assembly of judges of the Sąd Najwyższy (Supreme Court).
- 16 The twelve other judges of the Sąd Najwyższy (Supreme Court) who had reached the age of 65 by 3 July 2018 submitted statements indicating their desire to continue to perform their duties pursuant to Article 37, § 1, of the Law on the Supreme Court. On 12 July 2018 the National Council of the Judiciary gave five positive opinions and seven negative opinions, two of which concerned two Presidents of Chambers of the Sąd Najwyższy (Supreme Court), with regard to their remaining in office. Four of the seven judges concerned by negative opinions of the National Council of the Judiciary brought actions against those opinions and requested the National Council of the Judiciary to provide a statement of reasons for those opinions.
- 17 Having doubts as to the compatibility of the Law on the Supreme Court with, inter alia, the principle of the irremovability of judges and the guarantee of their independence, the Sąd Najwyższy (Supreme Court), by decision of 2 August 2018, submitted a request to the Court for a preliminary ruling under Article 267 TFEU in Case C-522/18, *Zakład Ubezpieczeń Społecznych*, currently pending before the Court, concerning the interpretation of, inter alia, the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, in the context of the lowering by the national legislature of the retirement age for judges of the Sąd Najwyższy (Supreme Court) and the application of that measure to serving judges. By that same decision, it suspended the application of the provisions of the Law on the Supreme Court pending its ruling in that case, following receipt of the Court's response to that request for a preliminary ruling.
- 18 On the same day, the Chancellery of the President of the Republic of Poland announced that the decision of the Sąd Najwyższy (Supreme Court) suspending the application of provisions of the Law on the Supreme Court 'had been taken without a suitable legal basis and was without effect with regard to the President of the Republic of Poland or any other body' and that it was, moreover, 'without legal effect'.
- 19 On 11 September 2018 the President of the Republic of Poland decided to permit five of the twelve judges referred to in paragraph 16 above to continue to perform their duties for a period of three years and announced, by means of a press release, that the seven other judges, including the two Presidents of Chambers of the Sąd Najwyższy (Supreme Court) referred to in that same paragraph, would be forced to retire on 12 September 2018. In that press release, the President of the Republic of Poland also indicated that the actions brought by certain judges of the Sąd Najwyższy (Supreme Court) against the negative opinions of the National Council of the Judiciary with regard to their remaining in office did not affect his decisions, given that such an opinion was not an essential part of the decision-making process. He also announced that he was not required to provide a statement of reasons for his decisions concerning judges of the Sąd Najwyższy (Supreme Court) remaining in office.
- 20 On 12 September 2018 the President of the Republic of Poland signed the decisions refusing to extend the period of active judicial service of the seven judges of the Sąd Najwyższy (Supreme Court) referred to in paragraph 19 above. Those decisions are based on Article 111, § 1, of the Law on the Supreme Court, the application of which has been suspended by the decision of the Sąd Najwyższy (Supreme Court) referred to in paragraph 17 above.

- 21 On the same day, a hearing was held before a panel of judges of the Sąd Najwyższy (Supreme Court) including two judges concerned by the provisions of national legislation at issue. That panel found that those judges were entitled to continue to perform their duties, given that the application of those provisions had been suspended by the decision of the Sąd Najwyższy (Supreme Court) referred to in paragraph 17 above.

Procedures for appointing new judges to the Sąd Najwyższy (Supreme Court)

- 22 On 29 March 2018 the President of the Republic of Poland increased the total number of judges' positions at the Sąd Najwyższy (Supreme Court) from 93 to 120. On 29 June 2018 44 vacancies for judges' positions at the Sąd Najwyższy (Supreme Court) were published.
- 23 The Ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the System of Common Courts and certain other laws) of 20 July 2018 (Dziennik Ustaw of 2018, item 1443) amended the rules governing the transitional procedure for selecting the First President of the Sąd Najwyższy (Supreme Court). In particular, that Law reduced the number of judges of the Sąd Najwyższy (Supreme Court) required to agree to initiate that procedure from 110 to 80. Furthermore, it limited the suspensory effect of actions against the opinions of the National Council of the Judiciary brought by candidates applying for judges' positions at the Sąd Najwyższy (Supreme Court). That Law entered into force on 9 August 2018 and is applicable to procedures for appointing judges to the Sąd Najwyższy (Supreme Court) initiated before that date.
- 24 On 28 August 2018 the President of the Republic of Poland published new vacancies for judges' positions at the Sąd Najwyższy (Supreme Court), including the position of First President of that court.
- 25 Between 20 and 28 August 2018 the National Council of the Judiciary drew up the definitive list of candidacies to be submitted to the President of the Republic of Poland with a view to appointing judges to the Sąd Najwyższy (Supreme Court).
- 26 On 20 September 2018 the President of the Republic of Poland decided to appoint ten judges to the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court).
- 27 It is apparent from the information available to the Court that, on 10 October 2018, the President of the Republic of Poland formalised the appointment of 27 new judges to the Sąd Najwyższy (Supreme Court).

The application for interim relief

- 28 Article 160(3) of the Rules of Procedure provides that applications for interim relief must specify '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'.
- 29 Accordingly, 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 (*fumus boni juris*) 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 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877, paragraphs 29 and 30 and the case-law cited).

Fumus boni juris

- 30 According to the settled case-law of the Court, the *fumus boni juris* requirement is met 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 the pleas relied on 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 whose resolution is not immediately obvious (order of the Vice-President of the Court of 20 July 2018, *ECB v Latvia*, C-238/18 R, not published, EU:C:2018:581, paragraph 36 and the case-law cited).
- 31 In the present case, in order to establish the presence of a *prima facie* case, the Commission relies on two pleas in law, also raised in the action for failure to fulfil obligations, the first alleging that the provisions of the Law on the Supreme Court relating to the lowering of the retirement age for judges of the Sąd Najwyższy (Supreme Court) ('the provisions regarding the lowering of the retirement age'), inasmuch as they are applicable to serving judges who were appointed to that court before 3 April 2018, infringe the principle of the irremovability of judges, and the second alleging that the provisions of the Law on the Supreme Court conferring on the President of the Republic of Poland the discretion to extend the period of active judicial service of judges of that court beyond the newly-set retirement age infringe the principle of judicial independence. The Commission considers, as a result, that the provisions of national legislation at issue are at odds with the Republic of Poland's obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.
- 32 In the first plea in law, the Commission emphasises, first of all, that, before the entry into force of the Law on the Supreme Court, namely 3 April 2018, the retirement age for judges of the Sąd Najwyższy (Supreme Court) was set at 70, and that that Law lowered that age to 65, providing for the immediate application, unaccompanied by transitional measures, of that lowering of the retirement age not only to judges of that court appointed after that date but also to the 72 judges who were serving on that date.
- 33 The Commission notes, next, that the application of the provisions regarding the lowering of the retirement age has already led to the forced retirement of 22 judges of the Sąd Najwyższy (Supreme Court): fifteen, including the First President, on 4 July 2018, and a further seven, including two Presidents of Chambers, on 12 September 2018. This represents around 30% of the judges of the Sąd Najwyższy (Supreme Court) who were serving on the date of entry into force of the Law on the Supreme Court.
- 34 The Commission considers, lastly, that the lowering of the retirement age for judges of the Sąd Najwyższy (Supreme Court) and the application of that lowering of the retirement age to judges serving on the date of entry into force of the Law on the Supreme Court has led to a reduction of the length of the period of active judicial service of those judges. Thus, the forced retirement of those judges resulting from the sudden lowering of the retirement age constitutes a *de facto* removal of those judges, contrary to the principle of the irremovability of judges.
- 35 In the second plea in law, the Commission notes that, according to the Law on the Supreme Court, it is for the President of the Republic of Poland to consent to extending the period of active judicial service of judges of the Sąd Najwyższy (Supreme Court) beyond the age of 65 and such an extension may be renewed once. As regards the conditions relating to granting such consent, the Commission emphasises, first, that the President of the Republic of Poland must consult the National Council of the Judiciary, but the latter's opinion is not binding, and, second, that the decision of the President of the Republic of Poland is to be adopted at his discretion and is not amenable to judicial review.

- 36 The Commission also notes that, on 11 September 2018, the President of the Republic of Poland consented to five judges of the Sąd Najwyższy (Supreme Court) who had reached the age of 65 by the date of entry into force of the Law on the Supreme Court continuing to perform their duties for a period of three years.
- 37 The Commission considers that the fact that no criteria are laid down as a basis for the President of the Republic of Poland deciding to extend the period of active judicial service of judges of the Sąd Najwyższy (Supreme Court) beyond the age of 65, combined with the lack of judicial review of that decision, has the effect of conferring on the President of the Republic of Poland an excessive discretion which poses a threat to the independence of judges in view of, inter alia, the influences and pressures on the judges of the Sąd Najwyższy (Supreme Court) likely to result from the power thereby vested in the President of the Republic of Poland.
- 38 Relying on the case-law of the Court concerning judicial independence, in particular the judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)* (C-216/18 PPU, EU:C:2018:586), from which it is apparent that maintaining the independence of judges is essential in order to guarantee the right to effective judicial protection in the fields covered by EU law, the Commission argues that, by adopting the provisions of national legislation at issue, the Republic of Poland has failed to fulfil its obligation under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter to guarantee observance of the right to effective judicial protection within the meaning of EU law.
- 39 It should be noted, in the first place, that the pleas in law relied on by the Commission raise the issue of the precise scope of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter in the context of the exercise, by a Member State, of its power to organise its judicial system. This is a difficult legal issue, which is the subject of discussion between the parties and to which the solution 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.
- 40 In the second place, without giving a ruling at this stage on the merits of the arguments relied on by the parties in the action for failure to fulfil obligations, which falls exclusively within the jurisdiction of the court ruling on the substance, it should be pointed out that, in view of the elements of fact put forward by the Commission and the case-law of the Court, in particular the judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)* (C-216/18 PPU, EU:C:2018:586), the arguments put forward by the Commission in its two pleas in law do not appear, prima facie, unfounded.
- 41 Indeed, according to that case-law, every Member State must 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’ as referred to in the second subparagraph of Article 19(1) TEU meet the requirements of effective judicial protection (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 52 and the case-law cited).
- 42 In order for that protection to be ensured, 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 (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 53 and the case-law cited).

- 43 In the present case, it is common ground between the parties that the Sąd Najwyższy (Supreme Court) may be called upon to rule on issues connected with the application or interpretation of EU law. It follows that, as a ‘court or tribunal’ within the meaning of EU law, it comes within the Polish judicial system in the ‘fields covered by EU law’ as referred to in the second subparagraph of Article 19(1) TEU and thus must meet the requirements of effective judicial protection.
- 44 It cannot be excluded, *prima facie*, that the provisions of national legislation at issue are at odds with the Republic of Poland’s obligation under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter to ensure effective judicial protection in the fields covered by EU law.
- 45 In particular, having regard to the arguments of the parties, difficult legal issues are raised which call for a detailed examination by the court ruling on the substance, such as, *inter alia*, the question whether, as the Commission claims, the guarantee of the irremovability of judges requires that the provisions regarding the lowering of the retirement age apply only to the judges of the Sąd Najwyższy (Supreme Court) who had already been appointed to that court before the entry into force of those provisions, or the issue of the extent to which intervention by an executive body in the decision to retain such judges or judges appointed to that court after that entry into force beyond the newly-set retirement age is liable to infringe the principle of the independence of courts.
- 46 It follows from the foregoing considerations that the pleas in law relied on by the Commission in the action for failure to fulfil obligations do not appear, *prima facie*, unfounded for the purposes of the case-law cited in paragraph 30 above.
- 47 That conclusion cannot be undermined by the arguments put forward by the Republic of Poland.
- 48 First, the argument that the Commission’s application for interim measures is, *prima facie*, unfounded because the Court would be called upon to give a ruling, for the first time, on an action for failure to fulfil obligations brought against a Member State which has adopted provisions concerning the organisation of a national supreme court cannot be accepted.
- 49 The fact that the Court is called upon to give a ruling, for the first time, on an action for failure to fulfil obligations with subject matter such as that of the action in the main proceedings is not capable of excluding the presence of a *prima facie* case. On the contrary, the unprecedented nature of the complaints put forward by the Commission tends to reinforce the finding made in paragraph 39 above.
- 50 Secondly, the argument that, first, the Commission could not repeat, in its application for interim measures, the arguments put forward in the action for failure to fulfil obligations and, second, that the assessment of the merits, even *prima facie*, of those arguments would require a very detailed analysis of the position of the parties to the dispute also cannot be accepted.
- 51 The fact that the arguments put forward by the Commission in support of its application for interim measures are similar to those raised in the action for failure to fulfil obligations does not prevent a finding that the *fumus boni juris* requirement may be regarded as met, given that, as is apparent from the case-law cited in paragraph 30 above, that requirement specifically calls for the *prima facie* assessment by the court hearing the application for interim relief of the merits of the pleas relied on in the dispute in the main proceedings, in order to establish that that action is not manifestly unlikely to succeed.

- 52 In addition, the fact referred to by the Republic of Poland that the assessment, even *prima facie*, of the merits of the arguments of the parties concerning the substance of the dispute requires a very detailed analysis of the position of those parties bears out the fact that there is a legal dispute the solution to which is not immediately obvious and, accordingly, confirms that the *fumus boni juris* requirement is met for the purposes of the case-law cited in paragraph 30 above.
- 53 Thirdly, the argument that, first, it is impossible to ascertain whether the pleas in law relied on by the Commission are, *prima facie*, well founded, because the arguments raised in those pleas are vitiated by a failure to state reasons, and, second, those arguments are based purely on assumptions, is unfounded.
- 54 Indeed, the Commission has sufficiently set out the pleas of fact and law establishing a *prima facie* case for the interim measures. Moreover, the Commission has provided detailed explanations regarding both the content of the provisions of national legislation at issue and the reasons why it considers that those provisions are at odds with the obligations imposed on the Republic of Poland under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.
- 55 As regards the Republic of Poland's argument that the pleas in law relied on by the Commission are based on mere assumptions, it should be noted, regarding the first plea, that the Commission clearly explained the nature of the link which it sought to establish between the application of the measure lowering the age of retirement for judges of the Sąd Najwyższy (Supreme Court) to serving judges appointed to that court before 3 April 2018 and a failure by the Republic of Poland to fulfil its obligation to ensure that that court meets the necessary requirements to guarantee effective judicial protection in the fields covered by EU law.
- 56 Regarding the second plea, it should be pointed out that, by that plea, the Commission does not claim that the President of the Republic of Poland will use his decision-making power with regard to extending the period of active judicial service of judges of the Sąd Najwyższy (Supreme Court) beyond the age of 65 in order to put pressure on those judges, but that, by granting the President of the Republic of Poland such power, the provisions of national legislation at issue put him in a position to exert such pressure.
- 57 Lastly, the Republic of Poland points to the existence, in other Member States, such as the United Kingdom of Great Britain and Northern Ireland or the French Republic, and at the Court itself, of rules similar to those of the Republic of Poland, pursuant to which decisions regarding the extension of the period of active judicial service of judges falls exclusively within the remit of the government of the Member State concerned. The Republic of Poland also makes reference to the various adjustments made to the retirement age for judges in Italy. According to the Republic of Poland, the fact that the Commission has not called those national rules into question shows that the *fumus boni juris* requirement is not met in the present case.
- 58 In that regard, however, it is sufficient to note that, for the purposes of the present proceedings, the Republic of Poland cannot rely on the alleged existence of rules similar to the provisions of national legislation at issue in order to establish that the *fumus boni juris* requirement is not met in the present case.
- 59 In the light of the foregoing considerations, it must be found that the *fumus boni juris* requirement has been met in the present case.

Urgency

- 60 According to the settled case-law of the Court, 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 (order of the Vice-President of the Court of 10 January 2018, *Commission v RW*, C-442/17 P(R), not published, EU:C:2018:6, paragraph 26 and the case-law cited). 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 to show that damage is foreseeable with a sufficient degree of probability (order of the Vice-President of the Court of 8 April 2014, *Commission v ANKO*, C-78/14 P-R, EU:C:2014:239, paragraph 23 and the case-law cited).

- 61 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 whose likely occurrence must be established is that which would result, where relevant, from a refusal to grant the interim measures sought in the event that the action in the main proceedings was subsequently successful (order of the Vice-President of the Court of 20 July 2018, *ECB v Latvia*, C-238/18 R, not published, EU:C:2018:581, paragraph 64 and the case-law cited).
- 62 Consequently, in the present case, the Court must, for the purposes of assessing urgency, postulate that the provisions of national legislation at issue and the measures for their application might jeopardise the independence of the Sąd Najwyższy (Supreme Court) and might thus be at odds with the Republic of Poland's obligation under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter to ensure effective judicial protection in the fields covered by EU law.
- 63 For the purposes of that assessment, it is also necessary to take account of the fact that the provisions of national legislation at issue have already begun to produce their effects, as is apparent from paragraphs 14 to 21 above. First, the application of the provisions regarding the lowering of the retirement age to serving judges appointed to the Sąd Najwyższy (Supreme Court) before 3 April 2018 has led to the forced retirement of 22 judges of that court, including the First President and two Presidents of Chambers, and, second, pursuant to the provisions regarding the power of the President of the Republic of Poland to extend the period of active service of judges, five judges of the Sąd Najwyższy (Supreme Court) out of the twelve who had submitted a statement indicating their desire to continue to perform their duties are currently benefiting from an extension of their period of active service by virtue of a decision of the President of the Republic of Poland, while the other seven have been informed of their forced retirement as of 12 September 2018.
- 64 Examining the urgency requirement involves examining whether, as the Commission argues, the application of the provisions of national legislation at issue pending delivery of the judgment of the Court regarding the action for failure to fulfil obligations ('the final judgment') is likely to cause serious and irreparable damage to the EU legal order.
- 65 In that regard, as has been recalled in paragraphs 41 and 42 above, maintaining the independence of bodies which, as 'courts or tribunals' within the meaning of EU law, come within the judicial system of a Member State in the fields covered by EU law is essential in order to ensure judicial protection of the rights which individuals derive from that law.
- 66 The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the settled case-law of the Court, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 54 and the case-law cited).

- 67 Maintaining the independence of courts and tribunals is also essential in the context of measures adopted by the European Union in the field of judicial cooperation in civil and criminal matters. Those measures are based on the special mutual trust of Member States in each other's judicial systems and are thus based on the premiss that the courts of other Member States meet the requirements of effective judicial protection, which include, in particular, the independence of those courts (see, by analogy, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 58).
- 68 Consequently, the fact that, because of the application of the provisions of national legislation at issue, the independence of the Sąd Najwyższy (Supreme Court) may not be guaranteed pending delivery of the final judgment is likely to cause serious damage to the EU legal order and thus 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.
- 69 Furthermore, it should be borne in mind that national supreme courts play a crucial role, within the judicial systems of the Member States of which they form part, in the implementation, at national level, of EU law, so that any threat to the independence of a national supreme court is likely to affect the entirety of the judicial system of the Member State concerned.
- 70 In addition, the serious damage referred to in paragraph 68 above is also likely to be irreparable.
- 71 First, as a court adjudicating at last instance, the Sąd Najwyższy (Supreme Court) makes decisions, including in cases giving rise to the application of EU law, which have the authority of *res judicata* and are thus likely to have an irreversible effect on the EU legal order.
- 72 The Republic of Poland's assertion that the Sąd Najwyższy (Supreme Court) does not rule on the substance of the cases brought before it in no way alters that finding, given that, as was confirmed by the Republic of Poland at the hearing before the Court, the Sąd Najwyższy (Supreme Court) ensures that case-law is lawful and consistent, including when it applies national rules adopted in implementation of EU law, so that the lower courts which must subsequently rule on cases remitted to them by the Sąd Najwyższy (Supreme Court) are bound by the interpretation of those rules given by that court.
- 73 Second, because of the authority of decisions of the Sąd Najwyższy (Supreme Court) with regard to lower national courts or tribunals, the fact that, in the event that the provisions of national legislation at issue are applied, the independence of that court may not be guaranteed pending delivery of the final judgment is likely to undermine the trust of the Member States and their courts in the Republic of Poland's judicial system and, as a result, in that Member State's observance of the rule of law.
- 74 In such circumstances, the principles of mutual trust and mutual recognition between Member States, which are justified by the premiss that the Member States share a series of common values on which the European Union is founded, such as the rule of law (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 35 and the case-law cited), could be jeopardised.
- 75 As is noted by the Commission, the undermining of those principles may have serious and irreparable effects on the proper functioning of the EU legal order, in particular in the area of judicial cooperation in civil and criminal matters, which is based on a particularly high degree of trust between the Member States in the compliance of their judicial systems with the requirements of effective judicial protection.

- 76 The fact that, because of the application of the provisions of national legislation at issue, the independence of the Sąd Najwyższy (Supreme Court) may not be guaranteed pending delivery of the final judgment could lead the Member States to refuse to recognise or enforce the judicial decisions handed down by the courts of the Republic of Poland, which is likely to result in serious and irreparable damage with regard to EU law.
- 77 In that regard, contrary to the Republic of Poland's assertions, the risk of a loss of confidence in the Polish judicial system is not fictional or hypothetical but very real. This is illustrated by the fact that, in the case which gave rise to the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)* (C-216/18 PPU, EU:C:2018:586), the request for a preliminary ruling submitted by the High Court (Ireland) in proceedings relating to the execution of European arrest warrants issued by Polish courts, because of that court's concern that, as a result of alleged systemic deficiencies with regard to the independence of the courts of the Republic of Poland resulting from the legislative reforms of the judicial system carried out by that Member State, in particular the adoption of the provisions of national legislation at issue, a person subject to a European arrest warrant might, if surrendered to the Polish judicial authorities, have his fundamental right to an independent tribunal and, accordingly, his right to a fair trial as guaranteed by the second paragraph of Article 47 of the Charter infringed.
- 78 It must therefore be held that the Commission has established that, in the event of a refusal to grant the interim measures sought, the application of the provisions of national legislation at issue pending delivery of the final judgment is likely to cause serious and irreparable damage to the EU legal order.
- 79 That conclusion cannot be undermined by the arguments put forward by the Republic of Poland to establish that there is no urgency.
- 80 In the first place, the Republic of Poland argues that the Commission initiated the infringement procedure more than six months after the adoption of the Law on the Supreme Court and only two days before the date on which the judges of the Sąd Najwyższy (Supreme Court) were required to retire pursuant to the provisions of national legislation at issue, which shows that the urgency requirement has not been met.
- 81 However, it is common ground that, before initiating the infringement procedure, the Commission triggered the mechanisms laid down by the Commission's communication to the European Parliament and the Council of 11 March 2014 entitled 'A new EU Framework to strengthen the Rule of Law' (COM(2014) 158 final).
- 82 In that regard, on 20 December 2017, the date on which the Law on the Supreme Court was signed by the President of the Republic of Poland, the Commission adopted Recommendation (EU) 2018/103 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 (OJ 2018 L 17, p. 50), together with a reasoned proposal in accordance with Article 7(1) [TEU] regarding the rule of law in Poland (COM(2017) 835 final), in which that institution set out, inter alia, the issues raised by the provisions of national legislation at issue with regard to the independence of judges, as reproduced in the action for failure to fulfil obligations.
- 83 Furthermore, in Recommendation 2018/103 the Commission requested the Polish authorities to resolve the issues it had found within a period of three months and to inform it of any measures taken to that end. It also announced that it was ready to pursue a constructive dialogue with the Polish Government. However, following a number of exchanges of views with that government, it decided to bring the action for failure to fulfil obligations, owing to a lack of satisfactory results concerning the issues it had raised.

- 84 Lastly, it should be noted that, in accordance with the procedure initiated by the communication referred to in paragraph 81 above, it was necessary that the adoption by the Commission of Recommendation 2018/103 be preceded by an assessment of the possible presence, in Poland, of a situation of a systemic threat to the rule of law, and by the initiation of a dialogue with the Republic of Poland enabling the Commission to communicate its concerns and that Member State to respond to those concerns. It is thus common ground that, even during the legislative procedure leading to the adoption of the Law on the Supreme Court, the Commission had already made overtures to the Republic of Poland concerning the issues forming the subject matter of the action for failure to fulfil obligations.
- 85 Moreover, it should be noted that the action for failure to fulfil obligations to which the present application for interim measures relates concerns not only the Law on the Supreme Court but also the amending Law adopted on 10 May 2018, that is, less than two months before the Commission sent the Republic of Poland a letter of formal notice concerning the compatibility of those two Laws with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.
- 86 In those circumstances, the Republic of Poland cannot rely on the fact that the Commission waited more than six months before initiating the infringement procedure.
- 87 In the second place, the alleged existence of rules applicable in other Member States similar to the provisions of national legislation at issue cannot be taken into account for the purposes of assessing the urgency of granting the interim measures sought.
- 88 In the third place, the argument, relied on by the Republic of Poland at the hearing before the Court, that the expedited procedure has been applied to Case C-619/18, so that there is no urgency justifying the grant of the interim measures sought, also cannot be accepted.
- 89 Indeed, it is sufficient to note, in that regard, that the fact that the final judgment will be delivered at the end of an expedited procedure is not such as to prevent the serious and irreparable damage referred to in paragraph 78 above from occurring before the delivery of that judgment.
- 90 In the light of all of the foregoing, it must be found that the urgency requirement has been met in the present case.

Balancing of interests

- 91 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 (order of the President of the Court of 25 June 1998, *Netherlands Antilles v Council*, C-159/98 P(R), EU:C:1998:329, paragraph 32 and the case-law cited). 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 provisions of national legislation 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 whether 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 (see, by analogy, order of the Vice-President of the Court of 10 January 2018, *Commission v RW*, C-442/17 P(R), not published, EU:C:2018:6, paragraph 60 and the case-law cited).

- 92 The Commission considers that, in the present case, the most pressing threat is the threat to the general interest of the European Union. It submits in that regard that, if the Court did not grant the interim measures sought and subsequently upheld the action for failure to fulfil obligations, the proper functioning of the EU legal order would be systemically affected, whereas, if the Court were to grant those measures and subsequently dismiss that action, the effect of the provisions of national legislation at issue would be merely postponed.
- 93 In order to establish its interest in the immediate application of the provisions of national legislation at issue, the Republic of Poland disputes, firstly, that the interim measures requested by the Commission are capable of achieving the objective sought, namely guaranteeing that the final judgment can be enforced, in the event that the action for failure to fulfil obligations is ultimately upheld, so that the grant of the requested interim measures would not be justified by the general interest of the European Union relied on by the Commission.
- 94 In particular, concerning, in the first place, the interim measure suspending the application of the provisions of national legislation at issue, the Republic of Poland asserts, first of all, that the sole effect of suspending Article 37 of the Law on the Supreme Court, which mainly defines the new retirement age for judges of the Sąd Najwyższy (Supreme Court), would be the creation of a legal lacuna as regards the definition of the retirement age for judges of the Sąd Najwyższy (Supreme Court). Next, it maintains that the suspension of the provisions of Article 37 of the Law on the Supreme Court governing the procedure for extending the period of active judicial service of judges of the Sąd Najwyższy (Supreme Court) beyond the age of 65 would have no impact on the possibility of enforcing the final judgment, given that the next judges due to retire from that court will not reach the age of 65 for approximately another two years. Moreover, in so far as Article 111, § 1, of the Law on the Supreme Court, which concerns judges who reached the age of 65 between 3 April 2018 and 3 July 2018, has already exhausted its effects, the suspension of the application of that provision and of any measure adopted in implementation thereof would be impossible to enforce, given that an interim measure may not have retroactive effect. Lastly, the effect of suspending the application of Article 111, § 1a, of the Law on the Supreme Court, which concerns judges who will reach the age of 65 between 4 July 2018 and 3 April 2019, would be that the only judge concerned by that provision would retire on the basis of Article 37, § 1, of the Law on the Supreme Court, that is to say, without being able to take advantage of a transitional period in order to express his desire to continue in active service.
- 95 The Republic of Poland's arguments are, however, based on a misunderstanding of the nature and effects of the interim measures sought by the Commission in the present interlocutory proceedings. Indeed, granting such interim measures entails an obligation for that Member State immediately to suspend the application of the provisions of national legislation at issue, including those whose effect is to repeal or replace the previous provisions governing the retirement age for judges of the Sąd Najwyższy (Supreme Court), so that those previous provisions become applicable again pending delivery of the final judgment. Thus, the implementation of an interim measure suspending the application of a provision entails an obligation to ensure that the rule of law preceding the entry into force of that provision — in the present case, the legal regime laid down by the provisions of national legislation repealed or replaced by the provisions of national legislation at issue — is restored.
- 96 Concerning, in the second place, the interim measure reinstating the judges of the Sąd Najwyższy (Supreme Court) forced to retire pursuant to the provisions of national legislation at issue, the Republic of Poland contends that the implementation of that measure will not have the effect of ensuring that the final judgment is fully effective. Indeed, given that that measure would apply only pending delivery of the final judgment, the judges of the Sąd Najwyższy (Supreme Court) temporarily reinstated in their positions would be required to retire again from the date of delivery of that judgment, pursuant to the provisions of national legislation at issue. Furthermore, the temporary

reinstatement of the judges concerned by the provisions of national legislation at issue would involve the adoption of measures having retroactive effect, even though an interim measure may not have such an effect.

- 97 In that regard, concerning, first, the alleged retroactive effect of the measures that would have to be adopted in order to temporarily reinstate the judges of the Sąd Najwyższy (Supreme Court) forced to retire pursuant to the provisions of national legislation at issue in their positions, it is sufficient to note that, as is apparent from paragraph 95 above, the Republic of Poland's obligation to ensure such reinstatement will be an immediate effect of the interim measures ordered, which entail an obligation to suspend the application of those provisions and the measures implementing them — in the present case, the measures forcing the judges concerned to retire — and to ensure that the situation preceding the entry into force of those provisions is restored.
- 98 Second, the judges of the Sąd Najwyższy (Supreme Court) temporarily reinstated in implementation of the interim measures sought would not be required, where appropriate, to retire, pursuant to the provisions of national legislation at issue, until the date of delivery of the final judgment, assuming that that judgment dismisses the action for failure to fulfil obligations.
- 99 Concerning, in the third place, the interim measure requiring the Republic of Poland to refrain from adopting any measure concerning the appointment of judges to the Sąd Najwyższy (Supreme Court) to positions vacated by the judges forced to retire, the Republic of Poland argues that that interim measure is not necessary to ensure the effectiveness of the final judgment, in so far as the mechanisms provided for by Polish law would ensure, in any event, the reinstatement of the judges concerned by the provisions of national legislation at issue in the positions which they held before being forced to retire. Given that judges' positions at the Sąd Najwyższy (Supreme Court) are not non-transferable positions, it argues that the judges forced to retire pursuant to the provisions of national legislation at issue could be reinstated either in vacant judges' positions or, in the event that all judges' positions at the Sąd Najwyższy (Supreme Court) are filled on the date of delivery of the final judgment, in new judges' positions which the President of the Republic of Poland has the discretion to create by way of decree.
- 100 However, contrary to the Republic of Poland's assertions, the mechanisms referred to by that Member State are not such as to remove the risk referred to by the Commission.
- 101 First, contrary to the Republic of Poland's assertions, the fact that judges' positions at the Sąd Najwyższy (Supreme Court) are not non-transferable positions increases the risk that the judges forced to retire may not be reinstated in the positions which they held before being forced to retire, in the event that the procedures for appointing new judges to that court are relaunched. As all the judges' positions to be filled at the Sąd Najwyższy (Supreme Court) are included in a general reserve and subsequently filled following appointment procedures, it cannot be guaranteed that the judges concerned by the provisions of national legislation at issue will be able, on the date of delivery of the final judgment, to resume the duties they were performing before they were forced to retire.
- 102 Second, assuming that the increase in the number of judges' positions at the Sąd Najwyższy (Supreme Court) by way of a decree of the President of the Republic of Poland has the effect of creating judges' positions in the chambers in which the judges forced to retire pursuant to the provisions of national legislation at issue were serving at that time, nevertheless it cannot be inferred from that creation of new positions that the First President of the Sąd Najwyższy (Supreme Court) and the two Presidents of Chambers referred to in paragraph 16 above are guaranteed to be reinstated in the positions which they held before being forced to retire. Indeed, because of the swiftness of the procedures for appointing judges to that court, as evidenced by the sequence of events referred to in paragraphs 22 to 26 above, those positions might have been filled by the date of delivery of the final judgment.

- 103 Lastly, the fact that, following the 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), procedures for appointing judges to the Sąd Najwyższy (Supreme Court) are currently suspended does not remove the risk referred to by the Commission. Indeed, it should be emphasised that the measures required by that order suspending the application of the provisions of national legislation at issue, reinstating the judges concerned by those provisions in the positions which they held before being forced to retire, and freezing the procedures for appointing new judges to replace those judges and a new First President of the Sąd Najwyższy (Supreme Court) are valid, according to the wording of the operative part of that order, ‘until such time as an order is made closing the present interlocutory proceedings’. Accordingly, if the interim measures sought by the Commission were not granted by the present order closing those proceedings, there would be no guarantee that the appointment procedures in question would not be relaunched.
- 104 In those circumstances, it must be held that the Republic of Poland’s arguments do not establish that the requested interim measures are not justified by the general interest of the European Union relied on by the Commission.
- 105 Secondly, the Republic of Poland makes a series of arguments to show that it has a prevailing interest in the proper functioning of the Sąd Najwyższy (Supreme Court) which justifies a refusal to grant the interim measures sought by the Commission.
- 106 In the first place, the Republic of Poland invokes the existence of circumstances which would make it excessively difficult to reinstate the judges of the Sąd Najwyższy (Supreme Court) who have been forced to retire. The Republic of Poland argues, inter alia, that that reinstatement requires legislative intervention and the adoption of general provisions of an incidental nature on the part of the Polish authorities, which would not be compatible with the Polish Constitution.
- 107 That argument must be rejected. As has been explained in paragraphs 95 and 97 above, the implementation of the interim measures sought by the Commission entails an obligation for the Republic of Poland to immediately suspend the application of the provisions of national legislation at issue and of any measures implementing those provisions, resulting in an obligation to apply, pending the final judgment, the previous provisions regarding the retirement age for judges of the Sąd Najwyższy (Supreme Court) and to restore the situation prevailing before the entry into force of the provisions of national legislation at issue.
- 108 In that regard, it should be borne in mind that, according to settled case-law, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under EU law (judgment of 4 July 2018, *Commission v Slovakia*, C-626/16, EU:C:2018:525, paragraph 60 and the case-law cited).
- 109 In the second place, the Republic of Poland contends that the temporary restoration of judges of the Sąd Najwyższy (Supreme Court) who have been forced to retire to active judicial service would present a systemic risk significantly higher than the risk presented by their continued retirement. In particular, the situation of a judge reinstated in his position for a period not defined beforehand would entail, according to the Republic of Poland, a risk that the independence of that judge, pending delivery of the final judgment, would not be guaranteed.
- 110 However, it must be pointed out that the Republic of Poland has not provided any evidence to establish that such a risk exists.
- 111 In the third place, the Republic of Poland maintains that the temporary reinstatement of the judges concerned by the provisions of national legislation at issue would significantly complicate the organisation of the work of the Sąd Najwyższy (Supreme Court). It remarks, in particular, that the

average time taken by that court to process a case is seven months, so that, during the period preceding the date of delivery of the final judgment, the temporarily reinstated judges would not be able to process any case in its entirety.

- 112 It should, however, be pointed out that that fact, which relates to the proper organisation of the work of the Sąd Najwyższy (Supreme Court), although important, cannot outweigh the general interest of the European Union in that court functioning under conditions ensuring that its independence is respected.
- 113 In the fourth place, the Republic of Poland argues that it is impossible to implement the interim measure requiring it to refrain from adopting any measure concerning the appointment of judges to the Sąd Najwyższy (Supreme Court) to the positions vacated by the judges concerned by the provisions of national legislation at issue, given that judges' positions at the Sąd Najwyższy (Supreme Court) are not non-transferable. Furthermore, the Republic of Poland remarks that the freezing of appointments to vacant judges' positions in the chambers of the Sąd Najwyższy (Supreme Court) would infringe the rights of persons who have applied for a judge's position within that court.
- 114 In that regard, account should be taken of, in addition to the case-law recalled in paragraph 108 above, the fact that the organisational difficulties and inconveniences encountered by applicants for a judge's position at the Sąd Najwyższy (Supreme Court) which would be connected with the grant of such an interim measure cannot outweigh the general interest of the European Union in the proper functioning of its legal order.
- 115 Thus, it is apparent from the examination carried out in accordance with the case-law cited in paragraph 91 above that there would be a risk that the general interest of the European Union in the proper functioning of its legal order would be seriously and irreparably affected, pending the final judgment, if the interim measures sought by the Commission were not ordered but the action for failure to fulfil obligations were to be upheld.
- 116 By contrast, the Republic of Poland's interest in the proper functioning of the Sąd Najwyższy (Supreme Court) is not likely to be thus affected in the event that the interim measures sought by the Commission are granted but the action for failure to fulfil obligations is dismissed, given that that grant would merely have the effect of maintaining, for a limited period, the application of the legal system which existed prior to the adoption of the Law on the Supreme Court.
- 117 In those circumstances, it must be concluded that weighing up the interests involved supports granting the interim measures requested by the Commission.
- 118 Having regard to all of the foregoing, it is appropriate to grant the Commission's request for interim measures as referred to in paragraph 1 above.

On those grounds, the Court (Grand Chamber) hereby orders:

- 1. The Republic of Poland is required, immediately and pending delivery of the judgment closing the proceedings in Case C-619/18:**
 - **to suspend the application of the provisions of Article 37, §§ 1 to 4, and of Article 111, §§ 1 and 1a, of the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017, of Article 5 of the Ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the System of Common Courts, the Law on the Supreme Court and certain other laws) of 10 May 2018, and of all measures adopted pursuant to those provisions;**

- to take all necessary measures to ensure that the judges of the Sąd Najwyższy (Supreme Court, Poland) concerned by those provisions may continue to perform their duties in the positions which they held on 3 April 2018, the date on which the Law on the Supreme Court entered into force, while continuing to enjoy the same status and the same rights and working conditions as they did until 3 April 2018;
- to refrain from adopting any measure concerning the appointment of judges to the Sąd Najwyższy (Supreme Court) to replace the Supreme Court judges concerned by those provisions, or any measure concerning the appointment of a new First President of that court or indicating the person tasked with leading that court in its First President's stead pending the appointment of a new First President; and
- to inform the European Commission, one month after being notified of the present order at the latest, and then regularly — every month — thereafter, of all the measures it has adopted or plans to adopt in order to fully comply with that order.

2. The costs are reserved.

[Signatures]