



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

5 November 2019*

(Failure of a Member State to fulfil obligations — Second subparagraph of Article 19(1) TEU — Rule of law — Effective judicial protection in the fields covered by EU law — Principles of the irremovability of judges and judicial independence — Lowering of the retirement age of judges of the ordinary Polish courts — Possibility of continuing to carry out the duties of judge beyond the newly set age, by authorisation of the Minister for Justice — Article 157 TFEU — Directive 2006/54/EC — Articles 5(a) and 9(1)(f) — Prohibition of discrimination based on sex in matters of pay, employment and occupation — Establishment of different retirement ages for men and women holding the position of judge of the ordinary Polish courts or of the Sąd Najwyższy (Supreme Court, Poland) or that of public prosecutor in Poland)

In Case C-192/18,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 15 March 2018,

European Commission, represented by A. Szmytkowska, K. Banks, C. Valero and H. Krämer, acting as Agents,

applicant,

v

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

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal (Rapporteur), M. Vilaras, E. Regan, P.G. Xuereb and L.S. Rossi, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, L. Bay Larsen, D. Šváby and K. Jürimäe, Judges,

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 8 April 2019,

after hearing the Opinion of the Advocate General at the sitting on 20 June 2019,

gives the following

* Language of the case: Polish.

Judgment

- 1 By its application, the European Commission requests the Court to declare:
 - first, that, in establishing, by Article 13(1) to (3) of the *ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw* (Law amending the Law on the system of ordinary courts and certain other laws) of 12 July 2017 (Dz. U. 2017, item 1452; ‘the Amending Law of 12 July 2017’), a different retirement age for men and women who are judges in the ordinary Polish courts and the Sąd Najwyższy (Supreme Court, Poland) or are public prosecutors in Poland, the Republic of Poland has failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), and
 - second, that, in lowering, by Article 13(1) of the Amending Law of 12 July 2017, the retirement age applicable to judges of the ordinary Polish courts and in granting the Minister for Justice (Poland) the right to decide whether to authorise extension of the period of active service as a judge, pursuant to Article 1(26)(b) and (c) of that 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 of Fundamental Rights of the European Union (‘the Charter’).

Legal context

EU law

The EU Treaty

- 2 Article 2 TEU reads as follows:

‘The [European] Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’

- 3 Article 19(1) TEU provides:

‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

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

The FEU Treaty

- 4 Article 157 TFEU provides:

‘1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

...

3. The European Parliament and the Council [of the European Union], acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’

The Charter

- 5 Title VI of the Charter, headed ‘Justice’, includes Article 47, headed ‘Right to an effective remedy and to a fair trial’, which provides:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. ...

...’

- 6 Article 51 of the Charter states:

‘1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’

Directive 2006/54

- 7 Recitals 14 and 22 of Directive 2006/54 state:

‘(14) Although the concept of pay within the meaning of Article [157 TFEU] does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, notwithstanding the fact that such scheme forms part of a general statutory scheme. According to the [judgments of 28 September 1994, *Beune* (C-7/93, EU:C:1994:350), and of 12 September 2002, *Niemi* (C-351/00, EU:C:2002:480)], that condition will be satisfied if the pension scheme

concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary. For reasons of clarity, it is therefore appropriate to make specific provision to that effect.

...

(22) In accordance with Article [157(4) TFEU], with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.'

8 As set out in Article 1 of Directive 2006/54:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

...

(c) occupational social security schemes.

...'

9 Article 2(1) of Directive 2006/54 states:

'For the purposes of this Directive, the following definitions shall apply:

(a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

...

(f) "occupational social security schemes": schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [(OJ 1979 L 6, p. 24)] whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.'

10 Headed 'Positive action', Article 3 of Directive 2006/54 provides:

'Member States may maintain or adopt measures within the meaning of Article [157(4) TFEU] with a view to ensuring full equality in practice between men and women in working life.'

11 Chapter 2, headed 'Equal treatment in occupational social security schemes', of Title II of Directive 2006/54 contains inter alia Articles 5, 7 and 9.

12 Article 5 of Directive 2006/54 states:

‘... there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

(a) the scope of such schemes and the conditions of access to them;

...’

13 Headed ‘Material scope’, Article 7 of Directive 2006/54 provides:

‘1. This chapter applies to:

(a) occupational social security schemes which provide protection against the following risks:

...
(iii) old age, including early retirement,

...

...

2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect.’

14 As set out in Article 9 of Directive 2006/54, headed ‘Examples of discrimination’:

‘1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:

...

(f) fixing different retirement ages;

...’

Polish law

The Law on the ordinary courts

15 Article 69(1) and (3) of the ustawa — Prawo o ustroju sądów powszechnych (Law on the system of ordinary courts) of 27 July 2001 (Dz. U. No 98, item 1070; ‘the Law on the ordinary courts’) was worded as follows:

1. A judge shall retire upon reaching 67 years of age ... unless, no later than 6 months before reaching that age, he submits a statement to the Minister for Justice indicating his wish to continue in his post and presents a certificate, issued in accordance with the rules specified for candidates applying for a judicial post, confirming that his health is no impediment to performing the duties of a judge.

...

3. In the event that a judge submits the statement and presents the certificate referred to in paragraph 1, that judge may continue in his post only until he reaches 70 years of age. ...'

16 Article 69(1) of the Law on the ordinary courts was amended, first of all, by the ustawa o zmianie ustawy o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych oraz niektórych innych ustaw (Law amending the Law on retirement pensions and other pensions payable from the Social Security Fund and certain other laws) of 16 November 2016 (Dz. U. 2017, item 38; 'the Law of 16 November 2016'), which lowered the retirement age of both female and male judges to 65 years. That amendment was to enter into force on 1 October 2017.

17 However, before that amendment even entered into force, Article 69(1) was further amended by Article 13(1) of the Amending Law of 12 July 2017, an enactment which entered into force on 1 October 2017. As a result of that amendment, a judge's retirement age was set at 60 years for women and 65 years for men.

18 Article 1(26)(b) and (c) of the Amending Law of 12 July 2017 also inserted a new paragraph 1b in Article 69 of the Law on the ordinary courts and amended Article 69(3) thereof.

19 As a result of the amendments referred to in the previous two paragraphs, Article 69 provided:

'1. A judge shall retire upon reaching 60 years of age, in the case of women, or upon reaching 65 years of age, in the case of men, unless, no later than 6 months and no earlier than 12 months before reaching that age, he or she submits a statement to the Minister for Justice indicating his or her wish to continue in his or her post and presents a certificate, issued in accordance with the rules specified for candidates applying for a judicial post, confirming that his or her health is no impediment to performing the duties of a judge.

...

1b. The Minister for Justice may consent to a judge continuing in his or her post, having regard to the rational use of the staff of the ordinary courts and the needs resulting from the workload of individual courts. In a situation where the procedure connected with the judge continuing in his or her post has still not come to an end after he or she has reached the age referred to in paragraph 1, the judge shall remain in post until such time as that procedure has come to an end.

...

3. In the event that the Minister for Justice gives the consent referred to in paragraph 1b, a judge may continue in his or her post only until he reaches 70 years of age. ...'

20 As set out in Article 91 of the Law on the ordinary courts:

'1. The level of remuneration for judges occupying equivalent judicial posts shall be differentiated according to the length of service or the functions performed:

...

1c. The basic salary for a judge in a given year shall be based on the average remuneration in the second quarter of the previous year, published in the official gazette of the Republic of Poland (*Monitor Polski*) ...

...

2. The basic salary for a judge shall be expressed in grades, the level of which shall be determined through the application of multipliers to the basis for determining the basic salary referred to in paragraph 1c. The basic salary grades for individual judicial posts and the multipliers used to determine the level of the basic salary for judges in individual grades are set out in the annex to this Law. ...

...

7. In addition, remuneration for judges shall be differentiated by a seniority allowance amounting, as from the sixth year of service, to 5% of the basic salary and increasing each year by 1% until it reaches 20% of the basic salary.

...'

21 Article 91a of the Law on the ordinary courts provides:

'1. A judge assuming a position at a [sąd rejonowy (district court, Poland)] shall be entitled to the grade 1 basic salary. A judge assuming a position at a [sąd okręgowy (regional court, Poland)] shall be entitled to the grade 4 basic salary and if, while occupying a lower position, he was already receiving a grade 4 or grade 5 salary, he shall be entitled to the grade 5 or grade 6 basic salary, respectively. A judge assuming a position at a [sąd apelacyjny (court of appeal, Poland)] shall be entitled to the grade 7 basic salary and if, while occupying a lower position, he was already receiving a grade 7 or grade 8 salary, he shall be entitled to the grade 8 or grade 9 basic salary, respectively. ...

...

3. The basic salary for a judge shall be established at the next highest grade after the completion of 5 years' service in a given judicial post.

4. The length of service as a trainee judge shall be added to the length of service as a district court judge.

...'

22 Article 13(1) of the Amending Law of 12 July 2017 amended Article 100(1) of the Law on the ordinary courts and inserted Article 100(4a) and (4b). Following those amendments, Article 100 provided:

'1. A judge who has been retired in the event of changes to the system of the courts or changes to the boundaries of judicial districts shall be entitled, until reaching the age of 60 years, in the case of women, and 65 years, in the case of men, to emoluments in the amount of remuneration received in the post most recently occupied.

2. A judge who has retired or who has been retired on the grounds of age, illness or loss of strength shall be entitled to emoluments in the amount of 75% of the basic salary and length-of-service allowance received in the post most recently occupied.

3. The emoluments referred to in paragraphs 1 and 2 shall be increased in accordance with changes to the amount of the basic salary for serving judges.

...

4a. In the situation referred to in paragraph 1, a retired judge shall receive a one-off payment upon reaching the age of 60 years, in the case of women, and 65 years, in the case of men.

4b. A judge who has returned to the post he previously occupied or a post equivalent to that previously occupied, in accordance with Article 71c(4) or Article 74(1a), shall, in the event of retirement or being retired, be entitled to a one-off payment in an amount consisting in the difference between the amount of the payment calculated on the day of retirement or being retired and the amount of the payment already paid. In the situation referred to in paragraph 1, the judge shall be entitled to the payment upon reaching the age of 60 years, in the case of women, and 65 years, in the case of men.'

The Law on the Public Prosecutor's Office

23 Article 127(1) of the ustawa Prawo o prokuraturze (Law on the Public Prosecutor's Office) of 28 January 2016 (Dz. U. 2016, item 177) states:

'Unless otherwise provided for in this Law, the provisions of Articles 69 to 71, ... Articles 99 to 102 ... of the Law [on the ordinary courts] shall apply, *mutatis mutandis*, to public prosecutors. ...'

24 As set out in Article 124 of the Law on the Public Prosecutor's Office:

'1. The amount of remuneration for public prosecutors occupying equivalent public prosecutors' posts shall be differentiated according to the length of service or the functions performed. ...

2. The basic salary for public prosecutors shall be expressed in grades, the level of which shall be determined through the application of multipliers to the basis for determining the basic salary for public prosecutors.

3. A public prosecutor assuming a position in:

- a [prokuratura rejonowa (district public prosecutor's office, Poland)] shall be entitled to the grade 1 basic salary;
- a [prokuratura okręgowa (regional public prosecutor's office, Poland)] shall be entitled to the grade 4 basic salary and if, while occupying a lower position, he was already receiving a grade 4 or grade 5 salary, he shall be entitled to the grade 5 or grade 6 basic salary, respectively;
- a [prokuratura regionalna (supra-regional public prosecutor's office, Poland)] shall be entitled to the grade 7 basic salary and if, while occupying a lower position, he was already receiving a grade 7 or grade 8 salary, he shall be entitled to the grade 8 or grade 9 basic salary, respectively.

...

5. The basic salary for a public prosecutor shall be established at the next highest grade after the completion of 5 years' service in a given public prosecutor's post.

6. The length of service as a trainee public prosecutor shall be added to the length of service as a public prosecutor in a [prokuratura rejonowa (district public prosecutor's office)].

...

11. A public prosecutor shall be entitled to a seniority allowance amounting, as from the sixth year of service, to 5% of the basic salary currently received by the public prosecutor and increasing by 1% for each subsequent year of service until it reaches 20% of the basic salary. After 20 years' service the allowance shall be paid, regardless of the length of service beyond that period, in the amount of 20% of the basic salary currently received by the public prosecutor.

...'

- 25 Article 13(3) of the Amending Law of 12 July 2017 amended certain other provisions of the Law on the Public Prosecutor's Office, inserting in particular references to the new retirement ages for public prosecutors, that is to say, 60 years for women and 65 years for men.

The 2002 Law on the Supreme Court

- 26 Article 30(1) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 23 November 2002 (Dz. U. 2002, No 240, item 2052; 'the 2002 Law on the Supreme Court') set the retirement age for judges of the Sąd Najwyższy (Supreme Court) at 70 years. Article 30(2) provided, however, that judges who so requested could retire after reaching the age of 67 years.

- 27 Article 30(2) of the 2002 Law on the Supreme Court was amended, initially, by the Law of 16 November 2016 which lowered the age at which such a request could be made to 65 years. However, before that amendment even entered into force, that provision was amended again, by Article 13(2) of the Amending Law of 12 July 2017. As thus amended, Article 30(2) of the 2002 Law on the Supreme Court provided:

'A judge of [the Sąd Najwyższy (Supreme Court)] who so requests shall retire:

(1) after reaching the age of 60 years, in the case of a woman, or 65 years, in the case of a man.

...'

- 28 Articles 42 and 43 of the 2002 Law on the Supreme Court stated:

'Article 42.

...

§ 4. The remuneration of a judge of [the Sąd Najwyższy (Supreme Court)] shall be set at the standard grade or the promotion grade. The promotion grade shall be 115% of the standard grade.

§ 5. A judge of [the Sąd Najwyższy (Supreme Court)], on entering the service, shall receive a standard grade basic salary. After 7 years' service, the basic salary for that judge shall increase to the promotion grade.

...

Article 43. A judge of [the Sąd Najwyższy (Supreme Court)] shall be entitled to a seniority allowance increasing the basic salary every year by 1%, but not exceeding 20% of that salary. The period of service on which the amount of the allowance depends shall also include the period of service or the employment relationship preceding his appointment to a judicial post at [the Sąd Najwyższy (Supreme Court)], as well as periods of professional practice as a lawyer, legal adviser or notary.'

- 29 Article 50 of the 2002 Law on the Supreme Court was worded as follows:

'A retired judge of [the Sąd Najwyższy (Supreme Court)] shall be entitled to emoluments in the amount of 75% of the basic salary and length-of-service allowance received in the post most recently occupied. Those emoluments shall be increased at the same time as, and in an amount corresponding to, changes in the basic salary of serving judges of [the Sąd Najwyższy (Supreme Court)].'

30 The 2002 Law on the Supreme Court was repealed and replaced by the *ustawa o Sądzie Najwyższym* (Law on the Supreme Court) of 8 December 2017 (Dz. U. 2018, item 5; ‘the Law of 8 December 2017’), which entered into force on 3 April 2018.

Pre-litigation procedure

31 Since the Commission took the view that, as a result of the adoption of Article 1(26)(b) and (c) and Article 13(1) to (3) of the Amending Law of 12 July 2017, the Republic of Poland had failed to fulfil its obligations under (i) Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54 and (ii) the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, on 28 July 2017 it sent a letter of formal notice to the Republic of Poland. The latter replied by letter dated 31 August 2017 in which it denied any infringement of EU law.

32 On 12 September 2017, the Commission issued a reasoned opinion in which it maintained that the national provisions referred to in the previous paragraph infringed those provisions of EU law. Consequently, it called on the Republic of Poland to take the measures necessary to comply with the reasoned opinion within 1 month of receipt thereof. The Republic of Poland responded to the reasoned opinion by letter dated 12 October 2017 in which it denied the alleged infringements.

33 In those circumstances, the Commission decided to bring the present action.

Procedure before the Court

34 Following the written part of the procedure, in which the Republic of Poland lodged a defence and, subsequently, a rejoinder in response to the Commission’s reply, the parties presented oral argument at a hearing on 8 April 2019. The Advocate General delivered his Opinion on 20 June 2019, on which date the oral part of the procedure was consequently closed.

35 By document lodged at the Court Registry on 16 September 2019, the Republic of Poland requested the reopening of the oral part of the procedure. In support of that request, it states, in essence, that it disagrees with the Advocate General’s Opinion, which is said to be based, in particular, as is clear ‘from the content and context’ of certain points thereof and of similar points contained in his Opinion delivered on 11 April 2019 in *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:325), on an incorrect reading of the Court’s previous case-law, in particular of 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), a reading which, moreover, was not debated between the parties.

36 In that regard, it should be noted, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court of Justice make no provision for the parties to submit observations in response to the Advocate General’s Opinion (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 26 and the case-law cited).

37 Second, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General’s involvement. The Court is not bound either by the Advocate General’s conclusion or by the reasoning which led to that conclusion. Consequently, a party’s disagreement with the Opinion of the Advocate General, irrespective of the questions that he examines in his Opinion, cannot in itself constitute grounds justifying the reopening of the oral part of the procedure (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 27 and the case-law cited).

- 38 Nevertheless, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the parties (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 28 and the case-law cited).
- 39 In the present case, the Court considers, however, after hearing the Advocate General, that it has, following the written part of the procedure and the hearing which has been held before the Court, all the information necessary in order to give judgment. Nor does the case have to be decided on the basis of an argument which has not been debated between the parties.
- 40 Accordingly, there is no need to order that the oral part of the procedure be reopened.

The action

Continued existence of the purpose of the proceedings

- 41 The Republic of Poland contended in its rejoinder and at the hearing that the present action for failure to fulfil obligations is now devoid of purpose as a result of the entry into force, on 23 May 2018, of the *ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych, ustawy o Krajowej Radzie Sądownictwa oraz ustawy o Sądzie Najwyższym* (Law amending the [Law on the ordinary courts], the Law on the National Council of the Judiciary and the [Law of 8 December 2017] of 12 April 2018 (Dz. U. 2018, item 848, ‘the Law of 12 April 2018’).
- 42 As regards the first complaint, alleging infringement of Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54, the Republic of Poland submits that Article 1(4) of the Law of 12 April 2018 amended Article 13(1) and (3) of the Amending Law of 12 July 2017 by repealing the distinctions between men and women relating to the retirement age of judges of the ordinary Polish courts and public prosecutors in Poland, which the Commission contests. The provisions relating to the retirement age of judges of the *Sąd Najwyższy* (Supreme Court) had, in the meantime, been replaced by those contained in the Law of 8 December 2017.
- 43 So far as concerns the second complaint, alleging infringement of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, the Republic of Poland submits that, as a result of the amendments made to Article 13(1) and Article 1(26)(b) and (c) of the Amending Law of 12 July 2017 by Article 1(4) of the Law of 12 April 2018, Article 69(1b) of the Law on the ordinary courts henceforth provides that it falls to the National Council of the Judiciary (Poland) and no longer to the Minister for Justice to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the age of 65 years. By virtue of those amendments, the National Council of the Judiciary is also called upon to adopt its decisions in that regard in the light of criteria that differ from those which applied hitherto as regards decisions of the Minister for Justice.
- 44 The Commission, for its part, stated at the hearing that it was maintaining its action.
- 45 Without there even being any need to examine whether or not the legislative amendments thereby relied upon by the Republic of Poland are capable of having brought the alleged failures to fulfil obligations to an end, in whole or in part, it is sufficient to note, as is clear from settled case-law, that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (judgment of 6 November 2012, *Commission v Hungary*, C-286/12, EU:C:2012:687, paragraph 41 and the case-law cited).

46 In the present case, it is common ground that, on the date on which the period laid down by the Commission in its reasoned opinion expired, the national provisions which the Commission is challenging by the present action were still in force. It follows that the Court should adjudicate on the action.

The first complaint

Arguments of the parties

47 By its first complaint, the Commission contends that the distinctions made by Article 13(1) to (3) of the Amending Law of 12 July 2017 between women and men so far as concerns (i) the retirement age for judges of the ordinary Polish courts and public prosecutors in Poland and (ii) the age from which early retirement is possible in the case of judges of the Sąd Najwyższy (Supreme Court), namely, in both cases, 60 years for women and 65 years for men, constitute discrimination based on sex prohibited by Article 157 TFEU and by Articles 5(a) and 9(1)(f) of Directive 2006/54.

48 In the Commission's submission, the pension schemes applicable to those three categories of judge or public prosecutor are covered by the concept of 'pay' within the meaning of Article 157 TFEU and fall within the scope of Directive 2006/54, since they satisfy the three criteria established by the Court's case-law, namely that the retirement pension provided for by those schemes concerns only a particular category of workers, it is directly related to the period of service completed and its amount is calculated by reference to the final salary.

49 First, each of those schemes concerns a particular category of workers. Second, the amount of the retirement pension of the persons concerned is calculated on the basis of the pay received in respect of the last post occupied since it is set at 75% of that pay. Third, the pension is directly related to the period of service completed since it is apparent from the applicable national provisions that the number of years of service is a decisive factor when calculating both of the components of that pay, namely the basic salary and the seniority allowance.

50 Both Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54 preclude age conditions that differ according to sex from being set for the grant of such pensions.

51 Furthermore, the Commission takes the view that the distinctions at issue do not amount to positive action authorised under Article 157(4) TFEU and Article 3 of Directive 2006/54.

52 The Republic of Poland's primary submission is that the pension schemes at issue are not covered by either Article 157 TFEU or Directive 2006/54, but by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24), Article 7(1)(a) of which provides for the right of Member States to exclude from the directive's scope the question of determination of pensionable age with grant of a pension. Indeed, those schemes do not satisfy one of the three criteria referred to in paragraph 48 of the present judgment, namely that the pension at issue must be directly related to the period of service completed.

53 The fact that the seniority allowance is limited to a maximum 20% of basic salary and that ceiling is reached after 20 years of service means, in fact, that the period of service is of only secondary importance when calculating the amount of the pension.

54 As for the basic salary, in view of the fact that, on taking up duties at a sąd rejonowy (district court) or at a prokuratura rejonowa (district public prosecutor's office), a judge or public prosecutor receives remuneration set at the basic rate and that he is entitled to a basic salary at the next highest rate after

5 years in such a post, each judge or public prosecutor is entitled to the fifth increased rate, that is to say, the highest rate, after 20 years of service. The acquiring of higher rates as a result of rising to a post of a higher level depends on individual promotions of the judge or public prosecutor concerned and is not therefore directly related to the period of service completed.

- 55 Thus, under the applicable national provisions, all judges and public prosecutors, whether men or women, including those who have previously carried out other qualifying professional activities for service as a judge or public prosecutor, are entitled to the maximum seniority allowance and the maximum increased basic salary well before reaching retirement age. This means that the difference in retirement age for men and women introduced by the Amending Law of 12 July 2017 has no effect on the amount of the retirement pension received by those judges and public prosecutors, including in the event of early retirement, as a professional career of at least 25 years must be shown for early retirement.
- 56 Finally, the Republic of Poland states that, at the time when the provisions challenged by the Commission were still in force, transitional provisions existed, namely those laid down in Article 26(1) and (2) of the Law of 16 November 2016, pursuant to which all judges and public prosecutors, both female and male, covered by the Amending Law of 12 July 2017 and having reached the age of 60 years for women or 65 years for men no later than 30 April 2018 qualified for the retirement age as previously set, which was identical for men and women, by merely lodging a declaration within the prescribed statutory period and without any authorisation from any authority being required.
- 57 In the alternative, the Republic of Poland submits that the contested national provisions are ‘authorised positive action’ under Article 157(4) TFEU and Article 3 of Directive 2006/54. On account of their particular social role connected with motherhood and child raising, women have greater difficulties in maintaining continuous involvement in a professional career and are therefore promoted less often than men. The public interest dictates that the requirements laid down for such promotions must remain high and uniform, which makes it impossible to adopt specific relaxation measures in order to respond to the difficulties thus encountered by women in developing their career. The possibility of early retirement therefore constitutes indirect compensation for the difficulties that they thus suffer generally.

Findings of the Court

- 58 In the first place, it should be recalled that, under Article 157(1) TFEU, each Member State is to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. In accordance with the first subparagraph of Article 157(2) TFEU, pay is defined as being the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
- 59 For the purpose of determining whether a retirement pension falls within the scope of Article 157 TFEU, the only criterion which may be regarded as decisive is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment, based on the wording of that article (judgment of 15 January 2019, *E.B.*, C-258/17, EU:C:2019:17, paragraph 45 and the case-law cited). Benefits granted under a pension scheme which essentially relates to the employment of the person concerned form part of the pay received by that person and come within the scope of that provision (judgment of 26 March 2009, *Commission v Greece*, C-559/07, not published, EU:C:2009:198, paragraph 42 and the case-law cited).

- 60 In accordance with settled case-law, a pension which concerns only a particular category of workers, which is directly related to the period of service completed and whose amount is calculated by reference to the final salary comes within the scope of Article 157 TFEU (judgment of 15 January 2019, *E.B.*, C-258/17, EU:C:2019:17, paragraph 46 and the case-law cited).
- 61 In the present case, the judges of the ordinary Polish courts, judges of the Sąd Najwyższy (Supreme Court) and public prosecutors in Poland to whom the three pension schemes at issue apply must be considered to be three particular categories of workers for the purposes of the case-law recalled in the previous paragraph. It follows from settled case-law that civil servants who benefit under a pension scheme are distinguished from employees grouped within an undertaking or group of undertakings, in a particular sector of the economy, or in a trade or inter-trade sector, only by reason of the specific features governing their employment relationship with the State, or with other public employers or bodies (judgments of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 31 and the case-law cited, and of 26 March 2009, *Commission v Greece*, C-559/07, not published, EU:C:2009:198, paragraph 52 and the case-law cited).
- 62 Nor is it in dispute that in the present case the amount of the retirement pension paid to each of those three categories of judge or public prosecutor is calculated on the basis of the final salary of the person concerned. It is clear from Article 100(2) of the Law on the ordinary courts, Article 127(1) of the Law on the Public Prosecutor's Office, which refers to Article 100 of the Law on the ordinary courts, and Article 50 of the 2002 Law on the Supreme Court that the amount of the pension paid to those judges and public prosecutors is set at 75% of the basic salary and seniority allowance received by them in respect of the last post occupied.
- 63 As regards the question whether such pensions are directly related to the period of service completed by the persons concerned, it must be stated, first, that it is apparent from Articles 91(1) and 91a(3) of the Law on the ordinary courts, Article 124(1) and (5) of the Law on the Public Prosecutor's Office and Article 42(4) and (5) of the 2002 Law on the Supreme Court that the amount of the basic salary, which constitutes one of the two components of the final pay to which a percentage of 75% is applied for the purpose of calculating the amount of the pension payable to those various categories of judge or public prosecutor, changes, in particular, according to the length of service of the judge or public prosecutor concerned.
- 64 Second, as regards the other component of that final pay, namely the seniority allowance, it is clear from Article 91(7) of the Law on the ordinary courts, Article 124(11) of the Law on the Public Prosecutor's Office and Article 43 of the 2002 Law on the Supreme Court that the number of years of service plays a part in the calculation of that allowance, as the allowance amounts to 5% of basic salary after 5 years of service and then increases by one percentage point per year of service for 15 years.
- 65 Furthermore, as the Commission has observed, since the seniority allowance is itself a percentage of the amount of that basic salary, which changes according to the length of service of the judge or public prosecutor concerned, it is determined also in this respect by reference to the period of service completed by the persons concerned.
- 66 Accordingly, the various circumstances relied upon by the Republic of Poland that are referred to in paragraphs 53 to 55 of the present judgment are entirely irrelevant for the purpose of determining whether the pensions paid under the pension schemes at issue are 'pay' within the meaning of Article 157 TFEU.
- 67 Such circumstances affect neither the fact that, as is clear from the findings made in paragraphs 63 to 65 of the present judgment, the period of service completed by the persons concerned plays, in the present case, a decisive role in the calculation of the amount of their pension nor the fact that the pensions paid under the pension schemes at issue essentially relate to the employment of the persons concerned, a factor which, under the settled case-law recalled in paragraph 59 of the present judgment,

constitutes the decisive criterion for the purposes of classification as ‘pay’ within the meaning of Article 157 TFEU (see, to that effect, judgments of 28 September 1994, *Beune*, C-7/93, EU:C:1994:350, paragraphs 5 and 46; of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraphs 33 to 35; and of 12 September 2002, *Niemi*, C-351/00, EU:C:2002:480, paragraphs 45 and 55).

- 68 In this connection, it should be added that, as the Commission has submitted, that link between the pension and the employment of the persons concerned is further strengthened by the fact that it is apparent from Article 100(3) of the Law on the ordinary courts, Article 127(1) of the Law on the Public Prosecutor’s Office, which refers to Article 100(3) of the Law on the ordinary courts, and Article 50 of the 2002 Law on the Supreme Court that the pensions concerned are subject to increases which themselves depend on changes in the pay of serving judges and public prosecutors.
- 69 It follows from all the foregoing that pensions paid under schemes such as those established by the Law on the ordinary courts, the Law on the Public Prosecutor’s Office and the 2002 Law on the Supreme Court are ‘pay’ within the meaning of Article 157 TFEU.
- 70 So far as concerns Directive 2006/54, in particular Articles 5(a) and 9(1)(f), which in the Commission’s submission have also been infringed, both of those provisions are in Chapter 2 of Title II of the directive, a chapter which, as is apparent from its heading, contains provisions devoted to equal treatment in occupational social security schemes.
- 71 Article 7 of Directive 2006/54, which defines the material scope of Chapter 2, states in paragraph 2 that that chapter applies inter alia to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer.
- 72 In that regard, it is apparent from recital 14 of Directive 2006/54 that the EU legislature sought to take formal notice of the fact that, in accordance with the Court’s case-law recalled in paragraph 60 of the present judgment, a pension scheme for public servants falls within the scope of the principle of equal pay set out in Article 157 TFEU if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, that condition being satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant’s final salary.
- 73 It is clear from paragraphs 61 to 69 of the present judgment that the three pension schemes that the present action concerns satisfy those conditions, with the result that they fall within the material scope of Chapter 2 of Title II of Directive 2006/54 and, therefore, within that of Articles 5 and 9 of the directive.
- 74 In the second place, it should be noted that, as is clear from settled case-law, Article 157 TFEU prohibits any discrimination with regard to pay as between men and women, whatever the mechanism by which that inequality arises. According to that case-law, it is contrary to Article 157 TFEU to impose an age condition which differs according to sex for the grant of a pension that constitutes pay within the meaning of that provision (see, to that effect, judgments of 17 May 1990, *Barber*, C-262/88, EU:C:1990:209, paragraph 32; of 12 September 2002, *Niemi*, C-351/00, EU:C:2002:480, paragraph 53; and of 13 November 2008, *Commission v Italy*, C-46/07, not published, EU:C:2008:618, paragraph 55).
- 75 Article 5(a) of Directive 2006/54 provides that there is to be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards the scope of such schemes and the conditions of access to them.
- 76 Article 9(1) of Directive 2006/54 identifies a number of provisions which, when they are based on sex, either directly or indirectly, are to be included among the provisions contrary to the principle of equal treatment. That is so, as is clear from Article 9(1)(f), inter alia in the case of provisions based on sex

for fixing different retirement ages. The EU legislature thus decided that the rules to which Article 9(1) refers in the field of occupational social security schemes are contrary to the principle of equal treatment laid down by Directive 2006/54 (judgment of 3 September 2014, X, C-318/13, EU:C:2014:2133, paragraph 48).

- 77 In the present case, it is not in dispute that, inasmuch as Article 13(1) to (3) of the Amending Law of 12 July 2017 sets the retirement age of judges of the ordinary courts and of public prosecutors, respectively, at 60 years for women and 65 years for men, and permits any early retirement of judges of the Sąd Najwyższy (Supreme Court) from the age of 65 years for men and 60 years for women, it fixes different retirement ages on the basis of sex.
- 78 In so doing, those provisions introduce directly discriminatory conditions based on sex into the pension schemes in question, in particular as regards the time when the persons concerned may have actual access to the advantages provided for by those schemes, and they therefore fail to comply both with Article 157 TFEU and with Article 5(1) of Directive 2006/54, in particular Article 5(1)(a), read in conjunction with Article 9(1)(f) of the directive.
- 79 In the third place, as regards the Republic of Poland's argument that the setting, for retirement, of such age conditions that differ according to sex is justified by the objective of eliminating discrimination against women, it is clear from settled case-law that that argument cannot succeed.
- 80 Even though Article 157(4) TFEU authorises the Member States to maintain or adopt measures providing for specific advantages in order to prevent or compensate for disadvantages in professional careers, with a view to ensuring full equality between men and women in working life, it cannot be inferred that that provision permits the setting of such age conditions that differ according to sex. The national measures covered by that provision must, in any event, contribute to helping women to conduct their professional life on an equal footing with men (see, to that effect, judgments of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 64, and of 13 November 2008, *Commission v Italy*, C-46/07, not published, EU:C:2008:618, paragraph 57).
- 81 The setting, for retirement, of an age condition that differs according to sex does not offset the disadvantages to which the careers of female public servants are exposed by helping those women in their professional life and by providing a remedy for the problems which they may encounter in the course of their professional career (judgment of 13 November 2008, *Commission v Italy*, C-46/07, not published, EU:C:2008:618, paragraph 58).
- 82 For the reasons set out in the previous two paragraphs, nor can such a measure be authorised on the basis of Article 3 of Directive 2006/54. As is apparent from the very wording of that provision and recital 22 of the directive, the measures to which that provision refers are solely those that Article 157(4) TFEU itself authorises.
- 83 In the fourth place, as regards the transitional measures relied on by the Republic of Poland in its rejoinder and at the hearing, it is sufficient to note that those measures in any event, as the Republic of Poland itself acknowledges, were capable of benefiting only female judges and public prosecutors who reached the age of 60 years before 30 April 2018. It thus follows from the foregoing that, on the relevant date for determining whether the present action is well founded, namely, as pointed out in paragraphs 45 and 46 of the present judgment, the date on which the period laid down in the reasoned opinion expired, the discrimination based on sex that the Commission criticises remained intact.
- 84 In the light of the foregoing considerations, the Commission's first complaint, alleging infringement of Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54, must be upheld.

The second complaint

Scope of the complaint

- 85 At the hearing, the Commission explained that, by its second complaint, it seeks, in essence, a declaration that the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, has been infringed. According to the Commission, the concept of ‘effective legal protection’ in the second subparagraph of Article 19(1) TEU must in fact be interpreted while having regard to the content of Article 47 of the Charter and, in particular, to the guarantees inherent in the right, laid down in the latter provision, to an effective remedy, so that the first of those provisions entails that preservation of the independence of bodies such as the ordinary Polish courts, which are entrusted, inter alia, with the task of interpreting and applying EU law, must be guaranteed.
- 86 For the purpose of ruling on the present complaint, it is therefore necessary to examine whether the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

Arguments of the parties

- 87 Relying, in particular, on the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), the Commission contends that, in order for the Republic of Poland to comply with the obligation imposed on it by the second subparagraph of Article 19(1) TEU to establish a system of legal remedies ensuring effective judicial review in the fields covered by EU law, it is required, inter alia, to ensure that the national bodies which, like the ordinary Polish courts, may rule on questions relating to the application or interpretation of EU law meet the requirement of judicial independence, that requirement forming part of the essence of the fundamental right to a fair trial as resulting in particular from the second paragraph of Article 47 of the Charter.
- 88 According to the Commission, in lowering, by Article 13(1) of the Amending Law of 12 July 2017, the retirement age applicable to judges of the ordinary Polish courts to 65 years for men and 60 years for women while granting the Minister for Justice the right to decide whether to authorise extension of the period of active service as a judge to the age of 70 years, pursuant to Article 1(26)(b) and (c) of that law, the Republic of Poland has infringed the obligation referred to in the previous paragraph.
- 89 In that regard, the Commission submits that the criteria on the basis of which the Minister for Justice is called upon to adopt his decision are too vague and that the provisions at issue, furthermore, oblige him neither to grant authorisation, on the basis of those criteria, for the judge concerned to continue to carry out his duties nor to state reasons for his decision in the light of those criteria — a decision which, moreover, is not amenable to judicial review. Nor do those provisions specify the period within which or for how long the Minister for Justice’s decision must be taken or whether, in certain circumstances, it may or must be renewed.
- 90 According to the Commission, in view of the discretion thus vested in the Minister for Justice, the prospect of having to apply to him for authorisation to continue to carry out duties as a judge and, once such an application has been made, the wait for the minister’s decision for an unspecified period are liable to place the judge concerned under pressure of such a kind as to lead him to submit to any wishes of the executive so far as concerns the cases before him, including where he finds it necessary to interpret and apply provisions of EU law. The provisions at issue thus undermine the personal and operational independence of serving judges.
- 91 In the Commission’s submission, those provisions also undermine the irremovability of the judges concerned. The Commission emphasises, in this regard, that its complaint concerns not the measure lowering the judges’ retirement age in itself, but the fact that that reduction was accompanied here by

the grant of such discretion to the Minister for Justice. According to the Commission, the judges must be protected against any decision arbitrarily denying them the right to continue to carry out their judicial duties, not only in the case of formal loss of their status resulting, for example, from dismissal, but also when the issue is whether to extend the carrying out of such duties beyond their retirement age, where they themselves wish to continue to act as a judge and their state of health so permits.

- 92 In that context, the Commission maintains that the argument put forward by the Republic of Poland that the provisions at issue had the aim of bringing the retirement age of judges of the ordinary Polish courts into line with the general retirement age applicable to workers is unfounded, as an infringement of the principle of judicial independence brooks no justification. In any event, the general pension scheme, unlike the contested scheme applicable to judges of the ordinary Polish courts, entails not the automatic retirement of workers, but only the right, and not the obligation, for them to stop working. Furthermore, it is apparent from the white paper of 8 March 2018 published by the Polish Government, which was devoted to reform of the Polish courts, that the aim of lowering the retirement age of judges was in particular to remove certain categories of judges.
- 93 The Republic of Poland submits, first, that national rules such as those contested by the Commission in its action relate to the organisation and proper operation of the national system of justice, which do not fall within EU law or the competence of the European Union, but within the exclusive competence and the procedural autonomy of the Member States. Such national rules cannot therefore be reviewed in the light of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter without extending excessively the scope of those provisions of EU law, which are intended to apply only in situations governed by EU law.
- 94 In the present instance, there is, in particular, no situation in which EU law is being implemented, within the meaning of Article 51(1) of the Charter. It follows, moreover, from Article 6(1) TEU and Article 51(2) of the Charter that the Charter does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union. The second subparagraph of Article 19(1) TEU lays down only a general obligation to adopt the necessary measures to ensure effective legal protection in the fields covered by EU law, and does not confer on the European Union competence so far as concerns adoption of the institutional rules relating to the judiciary, in particular those relating to the retirement age of judges, which do not display any real links with EU law.
- 95 Second, the Republic of Poland disputes that the irremovability of judges has been undermined in any way as irremovability concerns only serving judges and the national legislation at issue relates to judges who have already reached the statutory retirement age. Once retired, judges retain their status as a judge and acquire the right to a retirement pension which is markedly higher than the retirement benefits provided for by the general social security scheme. In the present instance, bringing the retirement age of judges into line with the retirement age under the general pension scheme applicable to workers cannot, moreover, be regarded as arbitrary or unjustified.
- 96 Third, it follows from the statutory criteria on the basis of which the Minister for Justice has to adopt his decision on any extension of the period for which a judge carries out his duties beyond the normal retirement age that a refusal to extend is acceptable only where refusal is justified by a small workload of the judge concerned in the court where he holds a post and the need to reassign that post to another court with a higher workload. Such a measure is legitimate in the light, in particular, of the fact that it is impossible, save in exceptional circumstances, to transfer judges to another court without their consent.
- 97 In any event, the fear that serving judges may, over a period of 6 to 12 months, be tempted to give rulings favourable to the executive, on account of uncertainty as to the decision which will be adopted regarding the possible extension of the period for which they carry out their duties, is unfounded. It is

mistaken to believe that a judge may, after having acted as a judge for so many years, feel pressure linked to the fact that his duties may not be extended for a further few years. Nor does the guarantee of judicial independence necessarily entail a complete absence of relations between the executive and the judiciary. Thus, the renewal of the term of office of a judge of the Court of Justice of the European Union also itself depends upon the assessment of the government of the Member State of the judge concerned.

Findings of the Court

– Applicability and scope of the second subparagraph of Article 19(1) TEU

- 98 First of all, it should be pointed out that Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and the judicial protection that individuals derive from EU law to national courts and tribunals and to the Court of Justice (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 50 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 47).
- 99 In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure for individuals compliance with their right to effective judicial protection in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 34 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 48).
- 100 The principle of the effective judicial protection of individuals' rights under EU law, thus referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 35 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 49).
- 101 As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 29, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 50).
- 102 Furthermore, although, as the Republic of Poland points out, 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 (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 40, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 52 and the case-law cited).
- 103 In that regard, every Member State must, under the second subparagraph of Article 19(1) TEU, 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 (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 55 and the case-law cited).

- 104 In the present case, it is not in dispute that the ordinary Polish courts may, in that capacity, be called upon to rule on questions relating to 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 Union 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.
- 105 To ensure that such ordinary courts are in a position to offer such protection, maintaining their independence 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, judgments 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, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 57).
- 106 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 value of the rule of law, will be safeguarded (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 48 and 63, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 58).
- 107 In the light of the foregoing, the national rules which are the subject of the second complaint set out by the Commission in its action may be reviewed in the light of the second subparagraph of Article 19(1) TEU and it should accordingly be examined whether, as the Commission contends, the Republic of Poland has infringed that provision.

– *The complaint*

- 108 The requirement that courts be independent, a requirement which the Member States must — under the second subparagraph of Article 19(1) TEU — ensure is observed in respect of national courts which, like the ordinary Polish courts, are called upon to rule on issues relating to the interpretation and application of EU law, has two aspects to it (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 71).
- 109 The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 44 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 72).
- 110 The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law

(judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 65 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 73).

- 111 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 66 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 74).
- 112 As is also clear from settled case-law, the necessary freedom of judges from all external intervention or pressure requires certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 64 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 75).
- 113 The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 76).
- 114 In that latter respect, it is apparent, more specifically, from the Court's case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 67, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 77).
- 115 Having regard to the cardinal importance of the principle of irremovability, an exception thereto is thus acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the courts concerned to external factors and their neutrality with respect to the interests before them (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 79).
- 116 In the present case, as explained both at the hearing and in its written pleadings, by its second complaint the Commission does not seek to criticise the measure lowering the retirement age of judges of the ordinary Polish courts in itself. This complaint is essentially directed at the mechanism with which that measure was coupled, under which the Minister for Justice has the right to authorise

judges of those courts to continue actively to carry out judicial duties beyond the retirement age, as lowered. In the Commission's submission, in the light of its characteristics that mechanism undermines the independence of the judges concerned in that it does not enable it to be guaranteed that they will carry out their duties wholly autonomously and be protected against external intervention or pressure. Furthermore, the combination of the measure and the mechanism undermines their irremovability.

- 117 In that regard, it should be noted, as a preliminary point, that the mechanism thus criticised by the Commission deals not with the process for the appointment of candidates to carry out judicial duties, but with the possibility, for serving judges who thus enjoy the guarantees inherent in carrying out those duties, to continue to carry them out beyond the normal retirement age, and that that mechanism accordingly concerns the conditions under which their careers progress and end (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 109).
- 118 Furthermore, although it is for the Member States alone to decide whether or not they will authorise such an extension to the period of judicial activity beyond the normal retirement age, the fact remains that, where those Member States choose to adopt such a mechanism, they are required to ensure that the conditions and the procedure to which such an extension is subject are not such as to undermine the principle of judicial independence (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 110).
- 119 As regards the need, noted in paragraphs 109 to 111 of the present judgment, to ensure that courts can exercise their functions wholly autonomously, objectively and without any interest in the outcome of the proceedings, while being protected against external intervention or pressure liable to impair the independent judgement of their members and to influence their decisions, it is true that the fact that an organ, such as the Minister for Justice, is entrusted with the power to decide whether or not to grant any extension to the period of judicial activity beyond the normal retirement age is not sufficient in itself to conclude that the principle of judicial independence has been undermined. However, it is necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 111).
- 120 To that end, it is necessary, in particular, that those conditions and procedural rules are designed in such a way that those judges are protected from potential temptations to give in to external intervention or pressure that is liable to jeopardise their independence. Such procedural rules must thus, 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 (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 112 and the case-law cited).
- 121 In the present case, the conditions and the detailed procedural rules which the contested national provisions impose in relation to the possibility that judges of the ordinary Polish courts continue to carry out their duties beyond the new retirement age do not satisfy those requirements.
- 122 First of all, Article 69(1b) of the Law on the ordinary courts provides that the Minister for Justice may decide whether or not to authorise such continuation on the basis of certain criteria. However, those criteria are too vague and unverifiable and, moreover, as the Republic of Poland conceded at the hearing, the minister's decision is not required to state reasons, inter alia by reference to those

criteria. Nor can such a decision be challenged in court proceedings (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 114).

- 123 Next, under Article 69(1) of the Law on the ordinary courts, the request for extension of the period for which judicial duties are carried out must be made by the judges concerned no earlier than 12 months and no later than 6 months before reaching the normal retirement age. Furthermore, as maintained by the Commission in its written pleadings and at the hearing without its being disputed by the Republic of Poland, that provision does not lay down a period within which the Minister for Justice must adopt his decision in that regard. That provision, in conjunction with Article 69(1b) of the Law on the ordinary courts which provides that, where a judge reaches the normal retirement age before the procedure for extending the period of judicial duties has ended, the person concerned is to remain in post until that procedure has come to an end, is such as to prolong the period of uncertainty for the judge concerned. It follows from the foregoing that the length of the period for which the judges are thus liable to continue to wait for the decision of the Minister for Justice once the extension has been requested, likewise, ultimately falls within the minister's discretion.
- 124 Having regard to the foregoing, it must be found that the power held in the present instance by the Minister for Justice for the purpose of deciding whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties, from the age of 60 to 70 years in the case of women and the age of 65 to 70 years in the case of men, is such as to give rise to reasonable doubts, inter alia in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests that may be the subject of argument before them (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 118).
- 125 Furthermore, that power fails to comply with the principle of irremovability, which is inherent in judicial independence (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 96).
- 126 In that regard, it is to be noted that that power was conferred on the Minister for Justice in the more general context of a reform that resulted in the lowering of the normal retirement age of, amongst others, judges of the ordinary Polish courts.
- 127 First, having regard, in particular, to certain preparatory documents relating to the reform at issue, the combination of the two measures referred to in the previous paragraph is such as to create, in the minds of individuals, reasonable doubts regarding the fact that the new system might actually have been intended to enable the Minister for Justice, acting in his discretion, to remove, once the newly set normal retirement age was reached, certain groups of judges serving in the ordinary Polish courts while retaining others of those judges in post (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 85).
- 128 Second, it should be pointed out that the period for which judges of the ordinary Polish courts carry out judicial duties that thus falls within the pure discretion of the Minister for Justice is considerable since it amounts to the final 10 years of performance of such duties in a female judge's career and the final 5 years of their performance in a male judge's career.
- 129 Third, it is to be recalled that, under Article 69(1b) of the Law on the ordinary courts, where a judge reaches the normal retirement age before the procedure for extending the period of judicial duties has ended, he or she is to remain in post until that procedure has come to an end. In such a situation, any decision of the Minister for Justice in the negative — which moreover, as already noted in paragraph 123 of the present judgment, is not subject to any time limit — is thus adopted after the judge concerned has been retained in post, as the case may be for a relatively long period of uncertainty, beyond the normal retirement age.

- 130 In the light of the considerations set out in paragraphs 126 to 129 of the present judgment, it must be found that, as the requirements noted in paragraphs 113 to 115 of the present judgment are not complied with, the combination of the measure lowering the normal retirement age to 60 years for women and 65 years for men and of the discretion vested in the present instance in the Minister for Justice for the purpose of granting or refusing authorisation for judges of the ordinary Polish courts to continue to carry out their duties, from the age of 60 to 70 years in the case of women and 65 to 70 years in the case of men, fails to comply with the principle of irremovability.
- 131 The finding made in the previous paragraph is affected neither by the fact, relied on by the Republic of Poland, that the judges who are not authorised to continue to carry out their duties retain the title of judge or that they continue to enjoy immunity and high emoluments once they have been retired nor by its formal argument that the judges concerned can no longer benefit from the guarantee that they cannot be removed, on the ground that they have already reached the new statutory retirement age. In the latter regard, it has, moreover, already been pointed out, in paragraph 129 of the present judgment, that, as is apparent from Article 69(1b) of the Law on the ordinary courts, the Minister for Justice's decision on whether to extend the period for which the persons concerned carry out their judicial duties may be adopted at a time when they have been retained in post beyond that new normal retirement age.
- 132 Finally, the Republic of Poland's argument concerning a similarity between the national provisions thus challenged and the procedure applicable at the time of any renewal of the term of office of a judge of the Court of Justice of the European Union cannot succeed.
- 133 Unlike national judges who are appointed until they reach the statutory retirement age, the appointment of judges within the Court of Justice occurs, as provided for in Article 253 TFEU, for a six-year fixed term. Moreover, under that article, a new appointment to such a post held by a judge whose term of office is coming to an end requires, as was the case in respect of the initial appointment of that judge, the common accord of the Governments of the Member States, after consultation of the panel provided for in Article 255 TFEU (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 121).
- 134 The conditions thus set by the Treaties cannot modify the scope of the obligations imposed on the Member States pursuant to the second subparagraph of Article 19(1) TEU (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 122).
- 135 In the light of all the foregoing, the Commission's second complaint, alleging infringement of the second subparagraph of Article 19(1) TEU, must be upheld.
- 136 The Commission's action must therefore be upheld in its entirety, with the result that it should be declared:
- first, that, in establishing, by Article 13(1) to (3) of the Amending Law of 12 July 2017, a different retirement age for men and women who are judges in the ordinary Polish courts and the Sąd Najwyższy (Supreme Court) or are public prosecutors in Poland, the Republic of Poland has failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54, and
 - second, that, in granting, pursuant to Article 1(26)(b) and (c) of the Amending Law of 12 July 2017, the Minister for Justice the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges, as lowered by Article 13(1) of that law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

Costs

¹³⁷ Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Poland has been unsuccessful, the latter must be ordered to pay the costs.

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

- 1. Declares that, in establishing, by Article 13(1) to (3) of the ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of ordinary courts and certain other laws) of 12 July 2017, a different retirement age for men and women who are judges in the ordinary Polish courts and the Sąd Najwyższy (Supreme Court, Poland) or are public prosecutors in Poland, the Republic of Poland has failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation;**
- 2. Declares that, in granting, pursuant to Article 1(26)(b) and (c) of the Law amending the Law on the system of ordinary courts and certain other laws of 12 July 2017, the Minister for Justice (Poland) the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges, as lowered by Article 13(1) of that law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;**
- 3. Orders the Republic of Poland to pay the costs.**

[Signatures]