JUDGMENT OF THE COURT (Grand Chamber)

5 June 2023 (*)

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(Failure of a Member State to fulfil obligations – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union - Rule of law – Effective legal protection in the fields covered by EU law – Independence of judges – Article 267 TFEU – Possibility of making a reference to the Court for a preliminary ruling – Primacy of EU law –

Jurisdiction in relation to the lifting of the immunity from criminal prosecution of judges and in the field of employment law, social security and retirement of judges of the Sąd Najwyższy (Supreme Court, Poland) conferred on the Disciplinary Chamber of that court – National courts prohibited from calling into question the legitimacy of the constitutional courts and bodies or from establishing or assessing the lawfulness of the appointment of judges or their judicial powers – Verification by a judge of compliance with certain requirements relating to the existence of an independent and impartial tribunal previously established by the law classified as a 'disciplinary offence' – Exclusive jurisdiction to examine questions relating to the lack of independence of a court or judge conferred on the Extraordinary Review and Public Affairs Chamber of the Sąd Najwyższy (Supreme Court) – Articles 7 and 8 of the Charter of Fundamental Rights – Rights to privacy and the protection of personal data – Regulation (EU) 2016/679 – Article 6(1), first subparagraph, points (c) and (e), and Article 6(3), second subparagraph – Article 9(1) – Sensitive data – National legislation requiring judges to make a declaration as to whether they belong to associations, foundations or political parties, and to the positions held within those associations, foundations or political parties, and providing for the placing online of the data contained in those declarations)

In Case C-204/21,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 1 April 2021,

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

applicant,

supported by:

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

Kingdom of Denmark, represented initially by V. Pasternak Jørgensen, M. Søndahl Wolff and L. Teilgård, and subsequently by J.F. Kronborg, V. Pasternak Jørgensen and M. Søndahl Wolff, acting as Agents,

Kingdom of the Netherlands, represented by M.K. Bulterman, J. Langer, A.M. de Ree and C.S. Schillemans, acting as Agents,

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

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

interveners,

v

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

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal (Rapporteur), E. Regan and L.S. Rossi, Presidents of Chambers, M. Ilešič, N. Piçarra, I. Jarukaitis, A. Kumin, N. Jääskinen, I. Ziemele, J. Passer, Z. Csehi and O. Spineanu-Matei, Judges,

Advocate General: A.M. Collins,

Registrar: M. Siekierzyńska, Administrator,

having regard to the written procedure and further to the hearing on 28 June 2022,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2022,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that:

– by adopting and maintaining in force Article 42a(1) and (2) and Article 55(4) of the ustawa – Prawo o ustroju sądów powszechnych (Law relating to the organisation of the ordinary courts) of 27 July 2001 (Dz. U. No 98, item 1070), as amended by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws) of 20 December 2019 (Dz. U. of 2020, item 190) ('the amending law') ('the amended Law relating to the ordinary courts'), Article 26(3) and Article 29(2) and (3) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5), as amended by the amending law ('the amended Law on the Supreme Court'), Article 5(1a) and (1b) of the ustawa – Prawo o ustroju sądów administracyjnych (Law relating to the organisation of the administrative courts) of 25 July 2002 (Dz. U. No 153, item 1269), as amended by the amending law ('the amended Law relating to the administrative courts'), and Article 8 of the amending law, which prohibit any national court from reviewing compliance with the EU requirements relating to an independent and impartial tribunal previously established by law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), in the light of the case-law of the European Court of Human Rights concerning Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), and under Article 267 TFEU and the principle of the primacy of EU law;

– by adopting and maintaining in force Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and Article 10 of the amending law, which place the examination of complaints and questions of law concerning the lack of independence of a court or judge under the exclusive jurisdiction of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court, Poland) ('the Extraordinary Review and Public Affairs Chamber'), the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU and the principle of the primacy of EU law;

– by adopting and maintaining in force points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts and points 1 to 3 of Article 72(1) of the amended Law on the

Supreme Court, under which the examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law may be classified as a 'disciplinary offence', the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU;

– by conferring on the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court) ('the Disciplinary Chamber'), whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office, such as, first, applications for authorisation to initiate criminal proceedings against judges and trainee judges or to detain them and, second, cases relating to employment and social security law that concern judges of the Sąd Najwyższy (Supreme Court) and cases relating to the compulsory retirement of those judges, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

– by adopting and maintaining in force Article 88a of the amended Law relating to the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law relating to the administrative courts, the Republic of Poland has infringed the right to respect for private life and the right to protection of personal data, guaranteed by Article 7 and Article 8(1) of the Charter and by points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1) ('the GDPR').

Legal context

European Union law

The EU Treaty

2 Article 2 TEU reads as follows:

'The 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. Those 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 4 TEU provides:

'1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

4 Article 5(1) and (2) TEU provides:

'1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

5 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 Charter

6 Article 7 of the Charter states:

'Everyone has the right to respect for his or her private and family life, home and communications.'

7 Article 8 of the Charter provides that:

'1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. …

…'

8 Article 47 of the Charter, entitled 'Right to an effective remedy and to a fair trial', 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. …

…'

9 Article 52(1) of the Charter provides:

‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

The GDPR

10 Recitals 4, 10, 16, 20, 39 and 51 of the GDPR state:

‘(4) The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.

…

(10) In order to ensure a consistent and high level of protection of natural persons and to remove the obstacles to flows of personal data within the Union, the level of protection of the rights and freedoms of natural persons with regard to the processing of such data should be equivalent in all Member States. Consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data should be ensured throughout the Union. Regarding the processing of personal data for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, Member States should be allowed to maintain or introduce national provisions to further specify the application of the rules of this Regulation. … This Regulation also provides a margin of manoeuvre for Member States to specify its rules, including for the processing of special categories of personal data (“sensitive data”). To that extent, this Regulation does not exclude Member State law that sets out the circumstances for specific processing situations, including determining more precisely the conditions under which the processing of personal data is lawful.

…

(16) This Regulation does not apply to issues of protection of fundamental rights and freedoms or the free flow of personal data related to activities which fall outside the scope of Union law, such as activities concerning national security. This Regulation does not apply to the processing of personal data by the Member States when carrying out activities in relation to the common foreign and security policy of the Union.

…

(20) While this Regulation applies, inter alia, to the activities of courts and other judicial authorities, Union or Member State law could specify the processing operations and processing procedures in relation to the processing of personal data by courts and other judicial authorities. The competence of the supervisory authorities should not cover the processing of personal data when courts are acting in their judicial capacity, in order to safeguard the independence of the judiciary in the performance of its judicial tasks, including decision-making. It should be possible to entrust

supervision of such data processing operations to specific bodies within the judicial system of the Member State, which should, in particular[,] ensure compliance with the rules of this Regulation, enhance awareness among members of the judiciary of their obligations under this Regulation and handle complaints in relation to such data processing operations.

…

(39) … the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data. The personal data should be adequate, relevant and limited to what is necessary for the purposes for which they are processed. … Personal data should be processed only if the purpose of the processing could not reasonably be fulfilled by other means. …

…

(51) Personal data which are, by their nature, particularly sensitive in relation to fundamental rights and freedoms merit specific protection as the context of their processing could create significant risks to the fundamental rights and freedoms. … Such personal data should not be processed, unless processing is allowed in specific cases set out in this Regulation, taking into account that Member States law may lay down specific provisions on data protection in order to adapt the application of the rules of this Regulation for compliance with a legal obligation or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. In addition to the specific requirements for such processing, the general principles and other rules of this Regulation should apply, in particular as regards the conditions for lawful processing. Derogations from the general prohibition for processing such special categories of personal data should be explicitly provided, inter alia, where the data subject gives his or her explicit consent or in respect of specific needs in particular where the processing is carried out in the course of legitimate activities by certain associations or foundations the purpose of which is to permit the exercise of fundamental freedoms.'

11 Article 1 of the GDPR, headed 'Subject matter and objectives', provides in paragraph 2:

'This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.'

12 Article 2 of the GDPR, entitled 'Material scope', provides:

'1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Regulation does not apply to the processing of personal data:

(a) in the course of an activity which falls outside the scope of Union law;

(b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;

…'

13 Article 4 of the GDPR, headed 'Definitions', is worded as follows:

‘For the purposes of this Regulation:

(1) “personal data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

(2) “processing” means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;

…

(7) “controller” means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;

…’

14 Article 6 of the GDPR, headed ‘Lawfulness of processing’, provides in paragraphs 1 and 3:

‘1. Processing shall be lawful only if and to the extent that at least one of the following applies:

…

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

…

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

…

3. The basis for the processing referred to in [points] (c) and (e) of paragraph 1 shall be laid down by:

(a) Union law; or

(b) Member State law to which the controller is subject.

The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. … The Union or

the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.'

15 Article 9 of the GDPR, headed 'Processing of special categories of personal data', provides in paragraphs 1 and 2:

'1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.

2. Paragraph 1 shall not apply if one of the following applies:

…

(g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;

…'

Polish law

The Constitution

16 Article 45(1) of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland) ('the Constitution') provides:

'Everyone is entitled to a fair and public hearing, without undue delay, by an independent and impartial tribunal with jurisdiction.'

17 Under Article 179 of the Constitution, the President of the Republic is to appoint judges, on a proposal from the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS'), for an indefinite period.

18 Under Article 186(1) of the Constitution:

'The [KRS] shall be the guardian of the independence of the courts and of the judges.'

19 Article 187 of the Constitution provides:

'1. The [KRS] shall be composed of:

1) the First President of the [Sąd Najwyższy (Supreme Court)], the Minister for Justice, the President of the [Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)] and a person designated by the President of the Republic,

2) Fifteen elected members from among the judges of the [Sąd Najwyższy (Supreme Court)], the ordinary courts, the administrative courts and the military courts,

3) Four members elected by [the Sejm (Lower Chamber of the Polish Parliament, Poland)] from among the members [of the Lower Chamber] and two members elected by the Senate from among the senators.

…

3. The elected members of the [KRS] shall have a mandate of four years.

4. The organisational structure, the field of activity and procedures for the work of the [KRS] and the procedure by which its members are elected shall be laid down by law.'

The amended Law on the Supreme Court

20 The Law on the Supreme Court established, within the Sąd Najwyższy (Supreme Court), two new chambers: the Disciplinary Chamber and the Extraordinary Review and Public Affairs Chamber.

21 The amending law, which entered into force on 14 February 2020, amended the Law on the Supreme Court, inter alia, by inserting new paragraphs 2 to 6 into Article 26 of the latter law, a new point 1a into Article 27(1) of that law, a new paragraph 3 into Article 45 thereof and new paragraphs 2 to 5 into Article 82 of that law, and amending Article 29 and Article 72(1) thereof.

22 As set out in Article 26(2) to (6) of the amended Law on the Supreme Court:

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

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

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

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

6. An action for a declaration that a final judgment is unlawful, referred to in paragraph 4, may be brought before the Extraordinary Review and Public Affairs Chamber without being brought

before the court that delivered the contested judgment, even where a party has not exhausted the available remedies, including an extraordinary action before the [Sąd Najwyższy (Supreme Court)].'

23 Article 27(1) of the amended Law on the Supreme Court provides:

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

1) disciplinary cases:

a) concerning judges of the [Sąd Najwyższy (Supreme Court)],

b) examined by the [Sąd Najwyższy (Supreme Court)] in relation to disciplinary proceedings pursuant to the following laws:

…

– Law [relating to the ordinary courts] …,

…

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

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

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

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

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

3. The [Sąd Najwyższy (Supreme Court)] or other authority cannot establish or assess the lawfulness of the appointment of a judge or of the power to carry out tasks in relation to the administration of justice that derives from that appointment.'

25 Article 45(3) of that law provides:

'The declaration referred to in Article 88a of the [amended Law relating to the ordinary courts] shall be submitted by the judges of the [Sąd Najwyższy (Supreme Court)] to the First President of the [Sąd Najwyższy (Supreme Court)] and by the First President of the [Sąd Najwyższy (Supreme Court)] [to the KRS]'.

26 Article 72(1) of the amended Law on the Supreme Court states as follows:

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

1) manifest and flagrant breach of legal rules;

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

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

27 In accordance with Article 73(1) of the amended Law on the Supreme Court, the Disciplinary Chamber is the disciplinary court of first and second instance for judges of the Sąd Najwyższy (Supreme Court).

28 Article 82 of that law provides:

'1. If, when examining an appeal on a point of law or another action, the [Sąd Najwyższy (Supreme Court)] entertains serious doubts as to the interpretation of the legal provisions underlying the decision made, it may stay the proceedings and submit a question of law to a formation composed of seven of its judges.

2. When it examines a case in which a question of law relating to the independence of a judge or of a court arises, the [Sąd Najwyższy (Supreme Court)] shall stay the proceedings and refer that question to a formation composed of all the members of the Extraordinary Review and Public Affairs Chamber.

3. If, when examining an application referred to in Article 26(2), the [Sąd Najwyższy (Supreme Court)] entertains serious doubts as to the interpretation of the legal provisions that must form the basis of the decision, it may stay the proceedings and refer a question of law to a formation composed of all the members of the Extraordinary Review and Public Affairs Chamber.

4. When it adopts a decision referred to in paragraph 2 or 3, the Extraordinary Review and Public Affairs Chamber shall not be bound by the decision of a different formation of the [Sąd Najwyższy (Supreme Court)], unless that decision has acquired the force of a legal principle.

5. A decision adopted by all the members of the Extraordinary Review and Public Affairs Chamber on the basis of paragraph 2 or 3 shall be binding on all formations of the [Sąd Najwyższy (Supreme Court)]. Any departure from a decision which has acquired the force of a legal principle shall require that a new decision be adopted by the [Sąd Najwyższy (Supreme Court)] in plenary session, the adoption of that decision requiring the presence of at least two thirds of the judges of each of the chambers. Article 88 shall not apply.'

The amended Law relating to the ordinary courts

29 The amending law amended the Law relating to the organisation of the ordinary courts, inter alia, by inserting into that law new Articles 42a and 88a, and by adding a new paragraph 4 to Article 55 of that law, new points 2 and 3 to Article 107 of that law and a new paragraph 2a to Article 110 thereof.

30 Article 42a of the amended Law relating to the ordinary courts is worded as follows:

‘1. In the context of the activities of the courts or the organs of the courts, it shall not be permissible to call into question the legitimacy of [the courts], the constitutional organs of the State and the organs responsible for reviewing and protecting the law.

2. An ordinary court or other authority cannot establish or assess the lawfulness of the appointment of a judge or of the power to carry out tasks in relation to the administration of justice that derives from that appointment.’

31 Article 55 of that law provides:

‘1. A judge of an ordinary court is a person appointed to such a position by the President of the Republic and who has taken an oath before him.

2. Judges of the ordinary courts shall be appointed to the positions of:

1. judge of a [sąd rejonowy (district court)];

2. judge of a [sąd okręgowy (regional court)];

3. judge of a [sąd apelacyjny (court of appeal)];

3. When appointing a person to the position of judge, the President of the Republic shall designate the place to which he or she is posted (seat). A change of seat may be made without changing the place of posting in the cases and in accordance with the procedure laid down in Article 75.

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

32 Article 80 of the law provides:

‘1. A judge may not be detained or prosecuted without the authorisation of the disciplinary court that has jurisdiction. That does not concern detention *in flagrante delicto* if that detention is essential for the proper conduct of the proceedings. Pending the adoption of a decision authorising the initiation of criminal proceedings against a judge, only urgent measures may be carried out.

…

2c. The disciplinary court shall adopt a resolution authorising the initiation of criminal proceedings against a judge if there are sufficient legitimate reasons to believe that he or she has committed the offence. The resolution shall contain the decision on authorisation to initiate criminal proceedings against the judge and the reasons on which it is based.

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

…’

33 As set out in Article 88a of the amended Law relating to the ordinary courts:

‘1. A judge shall be required to submit a written declaration mentioning:

1) his or her membership of an association, including the name and registered office of the association, the positions held and the period of membership;

2) the position held within a body of a non-profit foundation, including the name and registered office of the foundation and the period during which the position was held;

3) his or her membership of a political party prior to his or her appointment to a judge’s post and his or her membership of a political party during his or her term of office before 29 December 1989, including the name of that party, the positions held and the period of membership.

2. The declarations referred to in paragraph 1 shall be submitted by the judges to the president of the competent [sąd apelacyjny (court of appeal)] and by the presidents of the [sądy apelacyjne (courts of appeal)] to the Minister for Justice.

3. The declarations referred to in paragraph 1 shall be submitted within 30 days of the date on which the judge takes office and within 30 days of the date of the occurrence or cessation of the circumstances referred to in paragraph 1.

4. The information contained in the declarations referred to in paragraph 1 shall be public and published in the [*Biuletyn Informacji Publicznej* (Public Information Bulletin)] referred to in the [ustawa o dostępie do informacji publicznej (Law on access to public information) of 6 September 2001 (Dz. U. No 112, item 1198)], no later than 30 days from the date on which the declaration is submitted to the authorised body.’

34 The text of Article 107(1) of the amended Law relating to the ordinary courts is as follows:

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

1) manifest and flagrant breach of legal rules;

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

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

…’

35 Under Article 110(2a) of that law:

‘… The cases referred to in Article 80 … shall be decided, at first instance, by the [Sąd Najwyższy (Supreme Court)] sitting as a single judge of the Disciplinary Chamber and, at second instance, by the [Sąd Najwyższy (Supreme Court)], sitting as a panel of three judges of the Disciplinary Chamber.’

36 Article 129(1) to (3) of that law states:

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

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

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

The amended Law relating to the administrative courts

37 The amending law amended the Law relating to the organisation of the administrative courts, inter alia, by inserting new paragraphs 1a and 1b into Article 5 of the latter law and a new paragraph 2 into Article 8 of that law, and by amending Article 29(1) and Article 49(1) thereof.

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

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

1b. An administrative court or other authority cannot establish or assess the lawfulness of the appointment of a judge or of the power to carry out tasks in relation to the administration of justice that derives from that appointment.’

39 Article 8(2) of the amended Law relating to the administrative courts provides:

‘The declaration referred to in Article 88a of the [amended Law relating to the ordinary courts] shall be submitted by the judges of a [wojewódzki sąd administracyjny (regional administrative court)] to the president of the competent regional administrative court, by the president of a regional administrative court and by the judges of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] to the President of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)], and by the President of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] [to the KRS].’

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

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

The transitional provisions in the amending law

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

43 Article 10 of the amending law states:

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

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

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

Pre-litigation procedure

44 On 29 April 2020, taking the view that, as a result of the adoption of the amending law, the Republic of Poland had failed, in various respects, to fulfil its obligations under the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, the principle of the primacy of EU law, Article 267 TFEU and Article 7 and Article 8(1) of the Charter, points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9 of the GDPR, the Commission sent a letter of formal notice to that Member State. The Republic of Poland replied by a letter dated 29 June 2020 in which it disputed all the allegations of infringement of EU law.

45 On 30 October 2020, the Commission issued a reasoned opinion in which it maintained that the regime introduced by the amending law infringed the provisions of EU law referred to in the preceding paragraph. Consequently, that institution invited the Republic of Poland to take the measures necessary to comply with that reasoned opinion within two months of its receipt.

46 In view of the increase in the number of cases pending before the Disciplinary Chamber concerning requests for authorisation to initiate criminal proceedings against judges, the Commission, by letter of 1 November 2020, sent various questions to the Polish authorities, which replied on 13 November 2020.

47 On 3 December 2020, the Commission sent the Republic of Poland a supplementary letter of formal notice, maintaining that, by conferring, pursuant to points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court, on the Disciplinary Chamber, whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office, that Member State had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

48 By letter of 30 December 2020, the Republic of Poland replied to the Commission’s reasoned opinion of 30 October 2020, disputing the existence of the alleged infringements.

49 By letter of 4 January 2021, that Member State replied to the supplementary letter of formal notice of 3 December 2020, contending that the complaints raised by the Commission in that letter were also unfounded.

50 On 27 January 2021, the Commission sent the Republic of Poland a supplementary reasoned opinion, maintaining the complaints which it had set out in its supplementary letter of formal notice. Consequently, that institution invited the Republic of Poland to take the measures necessary to comply with that reasoned opinion within one month of its receipt.

51 By letter of 26 February 2021, the Republic of Poland replied to that supplementary reasoned opinion, disputing the complaints set out therein by the Commission.

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

Procedure before the Court

53 By separate document lodged at the Registry of the Court of Justice on 1 April 2021, the Commission brought an application for interim measures pursuant to Article 279 TFEU.

54 By order of 14 July 2021, *Commission* v *Poland* (C-204/21 R, EU:C:2021:593), the Vice-President of the Court granted that application pending delivery of the present judgment, ordering, in essence, the Republic of Poland to suspend both the application of the national provisions referred to in the first to fourth indents of the form of order sought by the Commission, as reproduced in paragraph 1 of the present judgment, and the effects of the decisions of the Disciplinary Chamber which authorised the initiation of criminal proceedings against a judge or his or her arrest.

55 By document lodged at the Court Registry on 16 August 2021, the Republic of Poland requested that that order be cancelled. That application was dismissed by order of the Vice-President of the Court of 6 October 2021, *Poland* v *Commission* (C-204/21 R, EU:C:2021:834).

56 By document lodged at the Court Registry on 7 September 2021, the Commission made a further application for interim measures seeking an order that the Republic of Poland pay a daily penalty payment. Granting that application by order of 27 October 2021, *Commission* v *Poland* (C-204/21 R, not published, EU:C:2021:878), the Vice-President of the Court ordered the Republic of Poland to pay the Commission a periodic penalty payment of EUR 1 000 000 per day from the date of notification of that order until such time as that Member State complied with its obligations arising from the order of the Vice-President of the Court referred to in paragraph 54 of the present judgment or, if it failed to do so, until the date of delivery of the present judgment. By order of the Vice-President of the Court of 21 April 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21 R-RAP, EU:C:2023:334), the amount of that periodic penalty payment was reduced to EUR 500 000 per day, from the date on which that order was signed.

57 By decision of 30 September 2021, the President of the Court granted the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden leave to intervene in the present case in support of the form of order sought by the Commission.

The action

58 The Commission's action consists of five complaints. The first to third complaints allege infringements of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and Article 267 TFEU, while the first and second complaints also seek a declaration that there has been an infringement of the principle of the primacy of EU law. The fourth complaint alleges infringement of the second subparagraph of Article 19(1) TEU. The fifth complaint alleges infringement of Article 7 and Article 8(1) of the Charter and of points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR.

59 The Republic of Poland disputes all the infringements thus alleged and contends that the Commission's action should be dismissed.

The jurisdiction of the Court of Justice, the rule of law and the independence of the judiciary, and the primacy of EU law

60 In its rejoinder, the Republic of Poland relies on the judgment of 14 July 2021 (Case P 7/20), delivered by the Trybunał Konstytucyjny (Constitutional Court, Poland), in which the latter held, first, relying on the provisions of Article 4(1) and (2) and Article 5(1) TEU and, in particular, on the principle of conferral of powers of the European Union and on the European Union's obligation to respect the national identity of the Member States, that the second sentence of Article 4(3) TEU, read in conjunction with Article 279 TFEU, as interpreted by the Court in the order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277), is incompatible with several provisions of the Constitution. Secondly, according to the Trybunał Konstytucyjny (Constitutional Court), by adopting, in that order, interim measures concerning the organisation and jurisdiction of the Polish courts, as well as the procedure before them, and thereby imposing obligations on the Republic of Poland, the Court ruled *ultra vires*. Consequently, such measures are not covered by the principles of the primacy and direct applicability of EU law set out in Article 91(1) to (3) of the Constitution. In that judgment of 14 July 2021, the Trybunał Konstytucyjny (Constitutional Court) also stated that, in the event of a conflict between its decisions and those of the Court of Justice, the Trybunał Konstytucyjny (Constitutional Court) had to have the 'last word' in cases of principle governed by the Polish constitutional order.

61 In so doing, the Republic of Poland seeks, in essence, as is apparent from its rejoinder, to challenge both the existence of the infringements alleged by the Commission in its action, in particular those relating to infringements of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and of the principle of the primacy of EU law, and the jurisdiction of the Court to rule on that action. According to that Member State, it is apparent from the case-law arising from the judgment of the Trybunał Konstytucyjny (Constitutional Court) of 14 July 2021 that upholding the complaints made by the Commission would amount, for the Court, to exceeding its own powers and those of the European Union. Such upholding would undermine, first, the exclusive competence of the Republic of Poland to organise justice, in breach of the principle of conferral of powers of the European Union, and, second, the national identity inherent in the fundamental political and constitutional structures of that Member State, in breach of Article 4(2) TEU.

62 In that regard, it must, however, be recalled at the outset that the review of Member States' compliance with the requirements arising from Article 2 and the second subparagraph of Article 19(1) TEU falls fully within the jurisdiction of the Court, in particular where, as in the present case, an action for failure to fulfil obligations is brought before it by the Commission under Article 258 TFEU (see, to that effect, judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 161 and the case-law cited).

63 As regards the scope of those provisions, it is apparent from the settled case-law of the Court that, although the organisation of justice in the Member States, in particular, the establishment, composition, powers and functioning of the national courts, and the rules governing the process for appointing judges or those applicable to the status of judges and the performance of their duties, falls within the competence of those 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 Articles 2 and 19 TEU (see, to that effect, judgments of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraphs 56, 60 to 62 and 95 and the case-law cited, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 38 and the case-law cited).

64 Under Article 2 TEU, the European Union is founded on values which are common to the Member States and, in accordance with Article 49 TEU, respect for those values is a prerequisite for the accession to the European Union of any European State applying to become a member of the European Union (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 124 and the case-law cited).

65 Moreover, it should be noted that, in order to be able to accede to the European Union, the Republic of Poland had to satisfy criteria to be fulfilled by the States which are candidates for accession, such as those established by the European Council in Copenhagen on 21 and 22 June 1993. Those criteria require inter alia that the State which is candidate must ensure the ‘stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities’ (judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 104).

66 As the Court has repeatedly held, the European Union is thus composed of States which have freely and voluntarily committed themselves to the values set out in Article 2 TEU, which respect those values and which undertake to promote them. Furthermore, mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that the Member States share those common values (see, to that effect, judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 50 and the case-law cited).

67 Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 232).

68 It follows, inter alia, from the foregoing that compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State. Compliance with those values cannot be reduced to an obligation which a candidate State is required to comply with in order to accede to the European Union and which it may disregard after its accession (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 126 and the case-law cited).

69 For its part, Article 19 TEU gives concrete expression to the value of the rule of law stated in Article 2 TEU (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 32). As regards, more specifically, the second subparagraph of Article 19(1) TEU, it should be recalled that, as that provision provides, it is for the Member States

to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The principle of the effective judicial protection of individuals' rights under EU law, thus referred to in that provision, 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 ECHR and which is now reaffirmed by Article 47 of the Charter (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 52 and the case-law cited).

70 To ensure that bodies which may be called upon to rule on questions concerning the application or interpretation of EU law are in a position to ensure such effective judicial protection, maintaining their independence is essential, as confirmed by the second paragraph of Article 47 of the Charter (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 57 and the case-law cited).

71 The Court has, likewise, stressed, in its case-law, that the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 126 and the case-law cited).

72 In those circumstances, there is no ground for maintaining that the requirements arising, as conditions for both accession to and participation in the European Union, from respect for values and principles such as the rule of law, effective judicial protection and judicial independence, enshrined in Article 2 and the second subparagraph of Article 19(1) TEU, are capable of affecting the national identity of a Member State, within the meaning of Article 4(2) TEU. Therefore, the latter provision, which must be read taking into account the provisions, of the same rank, enshrined in Article 2 and the second subparagraph of Article 19(1) TEU, cannot exempt Member States from the obligation to comply with the requirements arising from those provisions.

73 Thus the Court has held that, even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another. Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of 'the rule of law' which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraphs 233 and 234).

74 It follows that, in choosing their respective constitutional model, the Member States are required to comply, inter alia, with the requirement that the courts be independent stemming from Article 2 and the second subparagraph of Article 19(1) TEU (see, to that effect, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 43 and the case-law cited). They are thus required, in particular, to ensure that, in the light of the value of the rule of law, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of judges (see, to that effect, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 162).

75 Thus, in the judgment of 15 July 1964, *Costa* (6/64, EU:C:1964:66, pp. 593 to 594), the Court found that the establishment by the EEC Treaty of the Community's own legal system, accepted by the Member States on a basis of reciprocity, means, as a corollary, that they cannot accord precedence to a unilateral and subsequent measure over that legal system or rely on rules of national law of any kind against the law stemming from the EEC Treaty, without depriving the latter law of its character as Community law and without the legal basis of the Community itself being called into question. In addition, the Court emphasised that the executive force of Community law cannot vary from one Member State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the EEC Treaty or giving rise to discrimination on grounds of nationality prohibited by that treaty (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 48 and the case-law cited).

76 Those essential characteristics of the EU legal order and the importance of complying with that legal order, as required, were, moreover, confirmed by the ratification, without reservation, of the Treaties amending the EEC Treaty and, in particular, the Treaty of Lisbon, as evidenced, in particular, by Declaration No 17 concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 (OJ 2012 C 326, p. 346). The same is true of the Court's case-law subsequent to the entry into force of the latter Treaty (see, to that effect, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraphs 49 and 50 and the case-law cited).

77 It follows from that settled case-law that, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law, including constitutional provisions, being able to prevent that (judgments of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 3, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 51 and the case-law cited). Compliance with that obligation is necessary in particular in order to ensure respect for the equality of Member States before the Treaties and constitutes an expression of the principle of sincere cooperation set out in Article 4(3) TEU (see, to that effect, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 55 and the case-law cited).

78 The Court has ruled that the second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, which imposes on the Member States a clear and precise obligation as to the result to be achieved and which is not subject to any conditions, in particular as regards the independence and impartiality of the courts called upon to interpret and apply EU law and the requirement that those courts must be previously established by law, has direct effect which means that any provision, case-law or national practice contrary to those provisions of EU law, as interpreted by the Court, must be disapplied (see, to that effect, judgments of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraphs 158 and 159 and the case-law cited; of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 162 and the case-law cited; and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraphs 58 and 59 and the case-law cited).

79 In that regard, it must, finally, be borne in mind that, given that the Court has exclusive jurisdiction to give a definitive interpretation of EU law, it is for the Court, in the exercise of that jurisdiction, to clarify the scope of the principle of the primacy of EU law in the light of the relevant

provisions of EU law, with the result that that scope cannot turn on the interpretation of provisions of national law or on the interpretation of provisions of EU law by a national court which is at odds with that of the Court (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 52 and the case-law cited). Accordingly, it is, where appropriate, for the national court concerned to alter its own case-law which is incompatible with EU law, as interpreted by the Court of Justice (see, to that effect, judgments of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraphs 33 and 34, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 60).

80 In the light of all the foregoing, it must be held that, contrary to what the Republic of Poland claims, neither the principles set out in Article 4(1) and (2) and Article 5(1) TEU, nor the case-law of a national constitutional court such as that referred to in paragraph 60 of the present judgment, are such as to prevent the national provisions called into question by the Commission in its action from being subject to review by the Court, in particular in the light of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, and of the principle of the primacy of EU law.

Whether the proceedings have become devoid of purpose

81 At the hearing, the Republic of Poland referred to the recent adoption of the ustawa o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the Supreme Court and certain other laws) of 9 June 2022 (Dz. U., item 1259), which entered into force on 15 July 2022 and is intended, inter alia, to dissolve the Disciplinary Chamber referred to in the Commission's fourth complaint. Similarly, that law amended, by clarifying them, the terms in which the national provisions which are the subject of the first and third complaints were previously worded. In those circumstances, the Republic of Poland submits that the continuation of the procedure is not justified as regards the first, third and fourth complaints.

82 In that regard, it suffices, however, to note that it is settled case-law that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State at issue found itself at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 30 and the case-law cited).

83 In the present case, it is common ground that, on the dates on which the time limits prescribed by the Commission in the reasoned opinion and in the supplementary reasoned opinion expired, all the national provisions which the Commission disputes by its action remained in force. Consequently, it is appropriate for the Court to rule on all the complaints raised in the context of this action.

The fourth complaint

Arguments of the parties

84 By its fourth complaint, which it is appropriate to examine first, the Commission claims that there has been an infringement of the second subparagraph of Article 19(1) TEU, inasmuch as the Republic of Poland failed to fulfil its obligation to guarantee the independence and impartiality of the Disciplinary Chamber, even though that chamber, as a 'court or tribunal', forms part of the Polish judicial system in the 'fields covered by Union law', within the meaning of that provision,

and has been accorded exclusive jurisdiction to rule in certain cases concerning the status and performance of judges' duties, which is liable to affect their independence.

85 In its application, the Commission relies, in that regard, on the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, 'the judgment in *A. K. and Others*', EU:C:2019:982), and the judgment of 5 December 2019 (III PO 7/18) and the orders of 15 January 2020 (III PO 8/18 et III PO 9/18) of the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber), Poland), which was the referring court in the cases in the main proceedings giving rise to the judgment in *A. K. and Others*. It follows from those judicial decisions that an overall assessment relating, in particular, to the context and conditions in which the Disciplinary Chamber was established, its composition, the method of appointment of its members and the intervention, in that context, of the newly formed KRS, and certain of the characteristics of that chamber and the specific powers conferred on it, is such as to give rise to legitimate doubts, on the part of individuals, concerning the independence and impartiality of that chamber.

86 The Commission maintains that, by conferring on the Disciplinary Chamber jurisdiction, on the one hand, to authorise the initiation of criminal proceedings against judges and trainee judges, as well as their possible arrest and detention, and to decide, in such circumstances, whether to suspend and reduce their remuneration, and, on the other hand, to hear and determine cases relating to employment and social security law or retirement concerning judges of the Sąd Najwyższy (Supreme Court), points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court does not guarantee the independence and impartiality of those judges, in particular against unjustified external pressure, or, therefore, the right of individuals to an effective remedy in the fields covered by EU law.

87 In its reply, the Commission adds that, in the meantime, the merits of the fourth complaint have been confirmed by the guidance provided in the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596). Furthermore, the European Court of Human Rights held, in its judgment of 22 July 2021, *Reczkowicz v. Poland* (CE:ECHR:2021:0722JUD004344719), that the Disciplinary Chamber did not constitute a tribunal established by law within the meaning of Article 6 ECHR.

88 In its defence, the Republic of Poland submits that both the procedure for appointing the members of the Disciplinary Chamber and the other safeguards enjoyed by them once appointed are such as to guarantee the independence of that chamber.

89 First, according to the Republic of Poland, the conditions which candidates for the duties of judge of the Sąd Najwyższy (Supreme Court) must satisfy are defined exhaustively in national law and the procedure for their appointment entails, after publication of a public call for applications, a selection made by the KRS on the basis of which the KRS makes a proposal for the appointment of successful candidates. That procedure leads to the adoption of an act of appointment, by the President of the Republic, who is not required to follow the proposal of the KRS. The new composition of the KRS, the constitutionality of which was confirmed by the Trybunał Konstytucyjny (Constitutional Court), is hardly different from that of the national councils of the judiciary established in other Member States. The intervention of the legislature in the appointment of members of the KRS also contributes to strengthening the democratic legitimacy of the KRS, while that new composition has made it possible to ensure improved representativeness of the Polish judiciary.

90 Secondly, the Republic of Poland maintains that, once appointed, the members of the Disciplinary Chamber enjoy safeguards relating in particular to the indefinite duration of their term of office, their irremovability, their immunity and their obligation to remain apolitical, as well as various occupational incompatibilities and a particularly high level of remuneration.

Findings of the Court

91 As recalled in paragraphs 69 to 71 of the present judgment, the second subparagraph of Article 19(1) TEU requires Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law, in particular by ensuring that bodies which are called upon, as courts or tribunals, to rule on questions relating to the application or interpretation of EU law, meet the requirements which ensure such compliance, including that relating to the independence and impartiality of those bodies.

92 It is common ground that both the Sąd Najwyższy (Supreme Court) – and the Disciplinary Chamber which is part of that court – and the Polish ordinary or administrative courts may be called upon to rule on questions relating to the application or interpretation of EU law as 'courts or tribunals' falling within the scope of the second subparagraph of Article 19(1) TEU, so that those courts must meet the requirements of effective judicial protection (see, to that effect, judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 55 and the case-law cited).

93 Furthermore, it is settled case-law of the Court that the guarantees of independence and impartiality thus required under EU law presuppose rules, particularly as regards the composition of the body concerned and the appointment, length of service and as regards grounds for withdrawal by, objection to, and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 59 and the case-law cited).

94 In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules applicable to the status of judges and the performance of their duties must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 60 and the case-law cited).

95 As regards specifically the rules governing the disciplinary regime applicable to judges, it thus follows from the settled case-law of the Court that the requirement of independence derived from EU law, and, in particular, from the second subparagraph of Article 19(1) TEU, means that that regime must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. In that regard, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, rules 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, especially the rights of the defence, and rules 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 (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 61 and the case-law cited).

96 The same must, in principle, apply, *mutatis mutandis*, to other rules relating to the status of judges and the performance of their duties, such as those governing the waiver of their criminal immunity where such immunity is, as in the present case, provided for in the national law concerned (see, to that effect, judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 213).

97 As the Advocate General observed, in essence, in point 206 of his Opinion, the application of such rules is likely to have major consequences both for the career progress of judges and on their living conditions. That is certainly the case with rules such as those in respect of which points 1a, 2 and 3 of Article 27(1) of the amended Law on the Supreme Court entrusts the application or review to the Disciplinary Chamber, in so far as such application may lead to authorisation to initiate criminal proceedings against the judges concerned, to arrest them and to place them in provisional detention, as well as to the suspension of those judges and a reduction in their remuneration.

98 The same applies to decisions concerning essential aspects of the employment law or social security rules applicable to those judges, such as their rights in respect of emoluments, leave or social protection, or their possible early retirement, particularly on medical grounds.

99 In those circumstances, the legal order of the Member State concerned must include guarantees capable of preventing any risk of such rules or decisions being used as a system of political control of the content of judicial decisions or as an instrument of pressure and intimidation against judges which could, inter alia, lead to an appearance of a lack of independence or impartiality on their part capable of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in individuals (see, to that effect, judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 216).

100 To that end, it is therefore important, as has been recalled in paragraph 95 of the present judgment in relation to the rules applicable to the disciplinary regime for judges, that decisions authorising the initiation of criminal proceedings against the judges concerned, their arrest and detention, and the suspension or reduction of their remuneration, or decisions relating to essential aspects of the employment, social security or retirement law schemes applicable to those judges, be adopted or reviewed by a body which itself satisfies the guarantees inherent in effective judicial protection, including that of independence (see, by analogy, judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 80 and the case-law cited).

101 In that regard, it should be noted in particular that the mere prospect, for judges, of running the risk that authorisation to prosecute them might be sought and obtained from a body whose independence is not guaranteed is liable to affect their own independence (see, by analogy, judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 82 and the case-law cited). The same is true of risks that such a body may decide whether to suspend their duties and reduce their remuneration or whether they should be retired early, or even to rule on other essential aspects of their employment and social security law regime.

102 In the present case, it should be recalled that, in the light of all the factors noted and considerations set out in paragraphs 89 to 110 of the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), to which reference must be made, the Court held, in paragraph 112 of that judgment, that, taken together, the particular context and objective circumstances in which the Disciplinary Chamber was created, the characteristics of that chamber and the way in which its members were appointed are such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular the direct or indirect influence of the Polish legislature and executive, and its neutrality with respect to the interests before it and, thus, are likely to lead to that body's not being seen to be independent or impartial, which is likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals.

103 In those circumstances, the fourth complaint must be upheld.

The third complaint

Arguments of the parties

104 The third complaint, which it is appropriate to examine in the second place, comprises two parts.

105 By the first part of this complaint, the Commission disputes the compatibility with EU law of the provisions of points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court and points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts, which categorise as disciplinary offences on the part of judges of the Sąd Najwyższy (Supreme Court) and judges of the ordinary courts, on the one hand, acts or omissions of such a kind as to prevent or seriously undermine the functioning of a judicial authority and, on the other hand, acts calling into question the existence of the employment relationship of a judge, the effectiveness of the appointment of a judge or the legitimacy of a constitutional organ of the Republic of Poland. The Commission submits, in that regard, that, as is apparent from Article 29(1) and Article 49(1) of the amended Law relating to the administrative courts, the provisions of points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts are also applicable to judges of the administrative courts.

106 According to the Commission, those national provisions infringe, in the first place, the provisions of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, in so far as they seek to prevent all the judges concerned, on pain of disciplinary penalties which may go as far as dismissal, from making assessments, as they are required to do under the case-law of the Court, as to whether, in cases concerning individual rights derived from EU law, the right of individuals to a hearing by an independent and impartial tribunal previously established by law may be guaranteed or has not been infringed.

107 The Commission maintains that, while a disciplinary offence should always be worded in clear and precise terms, the words 'of such a kind as to prevent' or 'seriously undermine' the functioning of a judicial authority in point 2 of Article 72(1) of the amended Law on the Supreme Court and point 2 of Article 107(1) of the amended Law relating to the ordinary courts do not satisfy such a requirement.

108 According to the Commission, that wording thus makes it possible, for example, to conclude that there is an infringement referred to in those national provisions where, instead of referring the examination of an application for recusal to the Extraordinary Review and Public Affairs Chamber,

as required by Article 26(2) of the amended Law on the Supreme Court, a judicial body itself examines whether the judge concerned is independent and concludes that that is not the case, relying on the case-law of the Court of Justice.

109 It asserts that the same would apply where, in compliance with its obligations arising from the judgment in *A. K. and Others*, a national court applies, in respect of another court called upon to rule on a case, the criteria established by the Court in paragraphs 132 to 154 of that judgment, and decides, in the light of those criteria, on the one hand, to disapply the national provision conferring jurisdiction on that court on account of its lack of independence and, on the other hand, to refer the case concerned to a third court offering such guarantees of independence. Such a judicial step could be regarded as constituting an act or omission of such a kind as to prevent or seriously undermine the functioning of a judicial authority, within the meaning of the contested national provisions.

110 According to the Commission, as regards the acts referred to in point 3 of Article 72(1) of the amended Law on the Supreme Court and point 3 of Article 107(1) of the amended Law relating to the ordinary courts, they could include, inter alia, not only the calling into question of the very validity of the act of appointment of a judge, but, more generally, any negative assessment of the lawfulness of the procedure for the appointment of that judge for the purposes of verifying compliance with the requirement of EU law relating to a tribunal previously established by law. Thus, the offence concerned could, for example, be regarded as having been committed where a court, ruling on appeal, finds that the court of first instance did not constitute a court previously established by law because of the rules governing the appointment of judges sitting within that court and, on that ground, annuls the decision of that court.

111 In that regard, it submits that it is apparent in particular from paragraphs 133 and 134 of the judgment in *A. K. and Others* that, in the context of the examination to be carried out by any national court described in paragraph 109 of the present judgment, it is necessary, inter alia, for that court to be able to ensure that the substantive conditions and procedural rules governing the adoption of the appointments of the judges making up the court whose independence is called into question 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 their neutrality with respect to the interests before them once they have been appointed. The very fact of carrying out such a review would also be open to disciplinary sanctions on the basis of the contested national provisions.

112 The Commission maintains that it is apparent, moreover, from the explanatory memorandum to the draft law which led to the adoption of the amending law that the primary objective of the new disciplinary offences thus established was to protect the judiciary and the constitutional organs of the State against challenges from their own bodies.

113 Moreover, according to the Commission those new infringements concern the content of judicial decisions, even though the requirement of judicial independence precludes the disciplinary regime applicable to those judges from being used for the purposes of political control of such content.

114 In the second place, it submits that the national provisions referred to in paragraph 105 of the present judgment also infringe Article 267 TFEU. The very fact that a national court is staying ongoing proceedings and referring questions to the Court of Justice for a preliminary ruling concerning the interpretation of the requirements relating to the right to effective judicial protection under EU law, owing, for example, to doubts that that court has as to whether those requirements are consistent with the jurisdiction conferred on a national court or constitutional body such as the

KRS, or the circumstances in which a judge was appointed, could be classified as a disciplinary offence in view of the wording of those national provisions.

115 By the second part of the third complaint, the Commission maintains that the introduction, in point 1 of Article 72(1) of the amended Law on the Supreme Court, of a disciplinary offence characterised by a 'manifest and flagrant' breach of legal rules calls for the same criticisms as those which it made in the context of the action for failure to fulfil obligations which it brought in the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), concerning the provision, worded in identical terms, contained in point 1 of Article 107(1) of the Law relating to organisation of the ordinary courts. An infringement formulated in such vague terms, moreover in the context, described by the Commission in that action for failure to fulfil obligations, of intensification of disciplinary actions against judges and increasing pressure from the executive on the activity of disciplinary bodies, would give rise to the risk that point 1 of Article 72(1) could be used for the purposes of political control and paralysis of the judicial activity of judges of the Sąd Najwyższy (Supreme Court).

116 In its reply, the institution asserts that the guidance provided in the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), has, in the meantime, fully confirmed the merits of the third complaint.

117 Lastly, at the hearing, the Commission stated that the context in which the amending law had been adopted, in urgent fashion and barely one month after the delivery of the judgment in *A. K. and Others*, in which the assessment of the independence of the Disciplinary Chamber and that of the KRS was at issue, confirmed that the actual function of the national provisions at issue in the context of the third complaint, like that of the national provisions which that institution contests in the context of the first complaint, was to prevent Polish judges from applying the findings in the judgment in *A. K. and Others*, as well as those stemming from the judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798), delivered in the intervening period.

118 According to the Commission, it is apparent, in particular, from those judgments that the review of the procedure for the appointment of judges, and the examination aimed at ensuring, in that context, that the KRS is an independent body, may prove necessary for the purposes of ensuring that the judges concerned or the court to which they belong are independent and previously established by law. Such review and examination would be prevented by the contested national provisions in so far as they make it possible to impose a disciplinary penalty for any challenge to the effectiveness of the appointment of a judge or the legitimacy of a constitutional body.

119 In its defence, the Republic of Poland submits that the Commission has not discharged the burden of proof and that it sets out mere presumptions with regard to the contested national provisions by adopting interpretations of those provisions that are incompatible with their wording and purpose, while failing to refer to any practice on the part of the Polish administration or courts capable of supporting those interpretations.

120 First, in its view, the correct application of EU law by a national court, in particular as regards the independence of judges or the status of a tribunal previously established by law, or the fact of making a reference to the Court for a preliminary ruling cannot constitute an act or omission of such a kind as to prevent or seriously undermine the functioning of justice, since the purpose of the disciplinary offence at issue is, on the contrary, precisely to ensure that judges do not disregard their duties or behave in a manner incompatible with the dignity of their duties.

121 Secondly, it maintains that the disciplinary offences connected with calling into question a judge's mandate or employment relationship cannot result either from the fact that a judge examines whether an individual enjoys the right to effective judicial protection or, in the event of a possible infringement of such a right, from the fact that such a judge thus infers the consequences provided for by law, such as the recusal of a judge, the referral of a case to another court offering all guarantees of independence or the annulment of a judicial decision. Nor can such infringements result from the fact that questions relating to the independence of the judiciary are referred to the Court of Justice for a preliminary ruling, as is shown, moreover, by various references concerning such a subject matter recently made by Polish courts, without disciplinary proceedings having been brought as a result.

122 The Republic of Poland asserts that the disciplinary offences referred to in the contested national provisions consist, in reality, solely of calling into question the act of appointment of a judge or the effects of that appointment in the context of procedures not provided for by the Constitution, which, moreover, is consistent with the requirements of the irremovability of judges and the stability of their employment relationship.

123 Thirdly, it submits that the disciplinary offence relating to a 'manifest and flagrant' breach of legal rules was introduced in point 1 of Article 72(1) of the amended Law on the Supreme Court, with the sole aim of aligning the cases in which disciplinary liability of judges of the Sąd Najwyższy (Supreme Court) is incurred with those applicable to judges of the ordinary courts provided for in point 1 of Article 107(1) of the Law relating to the organisation of the ordinary courts, with the result that those two provisions should be accorded the same scope. Point 1 of Article 107(1) of the Law relating to the organisation of ordinary courts is the subject of a well-established and very restrictive interpretation by the Sąd Najwyższy (Supreme Court), precluding such an offence from arising from the content of judicial decisions interpreting the law. In particular, the fact that a national court discharges its obligations under EU law, including that of guaranteeing a party the right to effective judicial protection, within the meaning of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, or the fact that such a court asks the Court about the interpretation of provisions of EU law cannot, by definition, constitute a manifest and flagrant breach of legal rules, within the meaning of the abovementioned point 1 of Article 72(1).

124 Lastly, the Republic of Poland asserts that the third complaint and the second complaint are contradictory, in so far as it is not possible to maintain that national law prohibits judges of national courts from reviewing the possible existence of infringements of the right to effective judicial protection on pain of a disciplinary penalty, while at the same time claiming that the Extraordinary Review and Public Affairs Chamber has exclusive jurisdiction to rule on pleas alleging such infringements.

Findings of the Court

– *Preliminary observations*

125 As a preliminary point, it is important, on the one hand, to recall that, although the establishment of the disciplinary regime applicable to judges falls within the competence of the Member States, the fact remains that, when exercising that power, each Member State is required to comply with EU law. The Republic of Poland is thus required to ensure that the disciplinary regime which it has put in place in respect of national judges is appropriate for safeguarding the independence of courts which, like the ordinary courts, the administrative courts and the Sąd Najwyższy (Supreme Court), are called upon to rule on questions relating to the application or

interpretation of EU law, in order to guarantee individuals the effective judicial protection required by the second subparagraph of Article 19(1) TEU (see, to that effect, judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 136 and the case-law cited). In accordance with the principle of the separation of powers which characterises the operation of the rule of law, such independence must be ensured in relation to the legislature and the executive (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 42 and the case-law cited).

126 As regards conduct capable of being classified as disciplinary offences on the part of judges, it is true that the Court has held that the safeguarding of that independence cannot have the effect of totally excluding the possibility that the disciplinary liability of a judge may, in certain very exceptional cases, be triggered as a result of judicial decisions adopted by that judge. Such a requirement of independence is clearly not intended to support any serious and totally inexcusable forms of conduct on the part of judges, which would consist, for example, in violating deliberately and in bad faith, or as a result of particularly serious and gross negligence, the national and EU law with which they are supposed to ensure compliance, or acting arbitrarily or denying justice when they are called upon, as guardians of the duty of adjudicating, to rule in disputes which are brought before them by individuals (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 137).

127 The Court nevertheless held that it remained essential, in order to preserve that independence and to prevent the disciplinary regime from being diverted from its legitimate purposes and being used to exert political control over judicial decisions, that the putting in issue of the disciplinary liability of a judge as a result of such a decision should be limited to entirely exceptional cases such as those referred to in the preceding paragraph and be governed, in that regard, by objective and verifiable criteria, arising from requirements relating to the sound administration of justice, and also by guarantees designed to avoid any risk of external pressure on the content of judicial decisions. To that end, it is important in particular that rules be laid down that define, in a sufficiently clear and precise manner, the forms of conduct which may trigger the disciplinary liability of the judges concerned (see, to that effect, judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraphs 138 to 140 and the case-law cited).

128 On the other hand, it should also be borne in mind that, as is apparent from the case-law of the Court, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. In that context, Article 19 TEU, which, as recalled in paragraph 69 above, 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 (see, to that effect, judgments of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraphs 39 and 40 and the case-law cited, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 108 and the case-law cited).

129 As the Commission asserts, the Court has thus held that the fundamental right to a fair trial and, in particular, the guarantees of access to an independent and impartial tribunal previously established by law which characterise that fundamental right, mean in particular that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point, such a check being necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction (see, to that effect, judgment of 26 March

2020, *Review Simpson* v *Council* and *HG* v *Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 57).

130 More generally, it is apparent, in that regard, from the case-law of the Court that national courts, in certain circumstances, may be obliged to review compliance with the requirements arising from the fundamental right to effective judicial protection, for the purposes of Article 19(1) TEU and Article 47 of the Charter, and, in particular, those relating to access to an independent and impartial tribunal previously established by law (see, by way of example, judgments in *A. K. and Others*, paragraphs 153, 154, 164 and 166; of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 139, 149, 165 and 166; and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraphs 74 and 87).

131 Thus, in particular, it is established that a national court must be able, in certain circumstances, to ascertain whether an irregularity vitiating the procedure for the appointment of a judge could have led to an infringement of that fundamental right (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraphs 130 and 131, 152 to 154 and 159).

132 In those circumstances, the fact that a national court performs the tasks entrusted to it by the Treaties and, in so doing, complies with its obligations under those Treaties, by giving effect to provisions such as the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, cannot, by definition, be regarded as a disciplinary offence on the part of judges sitting in such a court without those provisions of EU law being infringed *ipso facto*.

– *The first part of the third complaint*

133 By the first part of the third complaint, the Commission asks the Court to declare that, by adopting and maintaining the provisions set out in points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court and points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts, the Republic of Poland has failed to fulfil its obligations under, on the one hand, the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and, on the other hand, Article 267 TFEU.

134 As is apparent from their wording, those national provisions classify as disciplinary offences, on the part of judges of the ordinary courts and of the Sąd Najwyższy (Supreme Court), ‘acts or omissions of such a kind as to prevent or seriously undermine the functioning of a judicial authority’ and ‘acts calling into question the existence of the employment relationship of a judge, the effectiveness of the appointment of a judge or the legitimacy of a constitutional organ of the Republic of Poland’. Furthermore, it is apparent from Article 29(1) and Article 49(1) of the amended Law relating to the administrative courts that those disciplinary offences also apply to judges of the administrative courts.

135 As regards, on the one hand, the alleged infringement of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, it should be noted, in the first place, that, contrary to what the Republic of Poland maintains, the wording of the contested national provisions does not permit the inference that those disciplinary offences relate exclusively to judicial acts the purpose of which is to rule on the actual validity of the act of appointment of a judge.

136 The references in those national provisions to ‘acts or omissions’ likely to ‘prevent or seriously undermine’ the ‘functioning’ of a ‘judicial authority’ or to ‘acts’ ‘calling into question’ the existence of the ‘employment relationship of a judge’, the ‘effectiveness’ of the appointment of a judge or the ‘legitimacy of a constitutional organ’ are such as to lead to a fairly wide range of acts or omissions, in particular of a judicial nature, being capable, having regard to their content or effects, of being classified as ‘disciplinary offences’ on the part of the judges concerned, and the abovementioned restrictive interpretation which the Republic of Poland gives those national provisions cannot therefore be supported by the terms used by the Polish legislature.

137 As the Advocate General observed, in essence, in points 181 and 183 of his Opinion, such references are so broad and imprecise that they are, in particular, liable to lead to the application of the contested national provisions and to the initiation of disciplinary proceedings against the judges concerned in situations in which those judges examine and rule on whether they themselves or the court in which they sit or other judges or courts to which they belong satisfy the requirements arising from the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

138 Furthermore, in view of their insufficiently clear and precise wording, those national provisions also do not ensure that the liability of the judges concerned for the judicial decisions which they are called upon to give is strictly limited to completely exceptional cases, such as those referred to in paragraph 126 of the present judgment.

139 In the second place, it is also necessary, as the Commission submits, to take account of the particular circumstances and context in which those national provisions were adopted, which help to clarify their scope.

140 In that regard, it cannot be ignored, inter alia, that the words thus favoured by the Polish legislature at the time of the adoption, as a matter of urgency and on the basis of a draft law submitted to the Sejm on 12 December 2019, of the amending law of 20 December 2019 which introduced the contested national provisions into the Law on the Supreme Court, the Law relating to the organisation of the ordinary courts and the Law relating to the organisation of the administrative courts, clearly and specifically echo a series of questions raised by various Polish courts as regards compliance with EU law and, more specifically, with the requirements arising from the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, of various recent legislative amendments affecting the organisation of justice in Poland.

141 Thus, first, it was clear from the judgment in *A. K. and Others*, delivered shortly before the amending law was adopted, in particular paragraphs 134, 139 and 149 and the operative part of that judgment, that the referring court in the joined cases giving rise to that judgment and, having regard to the *erga omnes* effect attaching to the interpretative judgments delivered by the Court on the basis of Article 267 TFEU (see, to that effect, judgments of 11 June 1987, *X*, 14/86, EU:C:1987:275, paragraph 12 and the case-law cited; of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, EU:C:2020:953, paragraph 73 and the case-law cited; and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraph 36 and the case-law cited), any other national courts subsequently called upon to rule on similar cases could be required, on the basis of EU law, on the one hand, to rule on the ability of a body such as the Disciplinary Chamber to rule on cases falling within the scope of EU law, taking into consideration, inter alia, the conditions in which the members of that chamber were appointed and, on the other hand, to rule on the independence of the KRS as a body called upon to intervene in the process of appointing judges.

142 In so doing, the national courts responsible for applying, in the context of their jurisdiction, the provisions of EU law may be called upon to adopt acts which may prove 'of such a kind as to prevent or seriously undermine the functioning of a judicial authority', such as the Disciplinary Chamber, and to 'call into question' the 'effectiveness of the appointment' of the judges sitting in that chamber, as well as acts capable of 'calling into question … the legitimacy of a constitutional organ', such as the KRS, and which are therefore liable to be caught by the national provisions which the Commission disputes in the first part of the third complaint.

143 Moreover, it is also necessary to take account, in that regard, of the fact that, in its judgment of 5 December 2019 (III PO 7/18), the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber)) had itself held, on the basis of the guidance provided in the judgment in *A.K. and Others*, that the newly formed KRS did not constitute a body independent of the Polish legislature and executive and that the Disciplinary Chamber was not a court or tribunal, within the meaning of Article 47 of the Charter, Article 6 ECHR and Article 45(1) of the Constitution.

144 Secondly, it should be noted that, on the date of adoption of the contested national provisions, the Court was also asked to give a preliminary ruling on various questions relating to the interpretation of the provisions of the second subparagraph of Article 19(1) TEU which had been referred to it by Polish courts and relating, in particular, to whether that provision must be interpreted as meaning that:

– a court composed of a single person who has been appointed to the position of judge in flagrant breach of the laws of a Member State applicable to judicial appointments is not an independent and impartial tribunal previously established by law (Case C-487/19, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court)*);

– in proceedings seeking a declaration that a judge's service relationship is non-existent, a national court may find that the person appointed in a manner incompatible with the principle of effective judicial protection is not a judge (Case C-508/19, *Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court – Appointment)*);

– the requirements of effective judicial protection, including the independence of the judiciary, are infringed where criminal proceedings are organised in such a way that a judge belonging to a court situated one level below in the court hierarchy may be seconded by the Minister for Justice to sit on a panel of judges hearing a given case, without the criteria applied for the purposes of such a secondment being known or the decision to second him or her being amenable to judicial review and while the Minister is entitled to terminate that secondment at any time (Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*).

145 It must be stated that, depending on their content, the answers then expected to be given to those various questions were clearly such as to lead the referring courts which brought the matter before the Court of Justice in the cases concerned and, moreover, all other national courts called upon, in the future, to rule on similar cases, to be required, where appropriate, to adopt acts that could be held to have 'call[ed] into question' either 'the effectiveness of the appointment of a judge' or 'the existence of the employment relationship of a judge', or to have 'seriously undermine[d] the functioning of a judicial authority', within the meaning of the contested national provisions, which are therefore liable to fall within their scope.

146 Thirdly, it must be stressed that, in one of the judgments pending on the date of the adoption of those national provisions, that is to say, the judgment of 6 October 2021, *W.Ż. (Chamber of*

Extraordinary Control and Public Affairs of the Supreme Court – Appointment) (C-487/19, EU:C:2021:798), the Court held that the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law must be interpreted as meaning that a national court seised of an application for recusal as an adjunct to an action by which a judge holding office in a court that may be called upon to interpret and apply that law challenges a decision to transfer him or her without his or her consent must – where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of that law – declare to be null and void an order by which a court, ruling at last instance and comprising a single judge, has dismissed that action, if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that (i) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU.

147 It appears that, by carrying out the examination thus required and by setting aside, where appropriate, on the abovementioned grounds, an order such as that at issue in the main proceedings in Case C-487/19, the judges making up the referring court in that case, like all the judges who would, in the future, be required to carry out such an examination and to adopt such a decision, may be criticised for having, in so doing, 'call[ed] into question' the 'effectiveness of the appointment of [the] judge' who made such an order or of having adopted an act 'of such a kind as to prevent or seriously undermine the functioning of a judicial authority', within the meaning of the contested national provisions.

148 Furthermore, in another judgment thus pending on the date of adoption of those national provisions, that is to say, the judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931), the Court held, as is apparent from the operative part of that judgment, that the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Article 6(1) and (2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1), must be interpreted as precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

149 It appears, once again, that, by being called upon to give due effect to the judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931), the judges making up the referring court in the cases in the main proceedings which gave rise to that judgment, or all those who would, in the future, be required to adjudicate in similar situations, could also be criticised for having adopted acts 'of such a kind as to prevent or seriously undermine the functioning of a judicial authority', within the meaning of the contested national provisions, and, consequently, face disciplinary proceedings on that basis.

150 In the third place, as regards the fact that, according to the Republic of Poland, the disciplinary offences referred to in those national provisions relate only to conduct which is otherwise prohibited under national constitutional provisions as interpreted by the Trybunał Konstytucyjny (Constitutional Court), it is sufficient to note that, as is apparent from the case-law

referred to in paragraphs 75 to 79 of the present judgment, such a circumstance, even if it were established, is irrelevant for the purposes of assessing the requirements arising, for the Member States, from the second subparagraph of Article 19(1) TEU.

151 Furthermore, it should be recalled that, in the event that, following judgments delivered by the Court, a national court finds that the case-law of a constitutional court is contrary to EU law, the fact that such a national court disapplies that case-law, in accordance with the principle of the primacy of EU law, cannot additionally trigger its disciplinary liability (see, to that effect, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 260).

152 It follows from all of the foregoing that the risk that the national provisions referred to in paragraph 133 of the present judgment may be interpreted in such a way that the disciplinary regime applicable to judges, and, in particular, the penalties that that regime entails, may be used in order to prevent the national courts concerned from making certain findings or assessments, which, however, are required by the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, and, accordingly, to influence the judicial decisions expected from those courts, thus undermining the independence of the judges of which those courts are composed, is established in the present case and that those provisions of EU law are therefore infringed in those two respects.

153 As regards, moreover, the alleged infringement of Article 267 TFEU, the considerations set out in paragraphs 135 to 149 above also lead to the finding that judges of the ordinary courts, the administrative courts or the Sąd Najwyższy (Supreme Court) who refer questions to the Court for a preliminary ruling concerning the interpretation of the requirements relating to the independence and impartiality of the courts and the concept of 'tribunal previously established by law' stemming from the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, such as those which were referred to the Court in the context of the preliminary ruling cases referred to in paragraphs 141 and 144 of that judgment, may, by reason of the very fact that they formulated such questions and expressed their doubts underlying those questions, be criticised, in so doing, for having committed the offences laid down in the contested national provisions.

154 Those national provisions are, as noted in paragraphs 135 to 138 of the present judgment, worded in such broad and imprecise terms that they do not make it possible to rule out the possibility that such doubts and questions may be perceived as 'calling into question the existence of the employment relationship of a judge, the effectiveness of the appointment of a judge or the legitimacy of a constitutional organ of the Republic of Poland' or as having contributed to 'seriously undermin[ing] the functioning of a judicial authority' within the meaning of those provisions.

155 It must be borne in mind that, according to settled case-law of the Court, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law which are necessary for the resolution of the case before them (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 223 and the case-law cited).

156 Moreover, in the case of courts or tribunals such as the Sąd Najwyższy (Supreme Court) or the Naczelny Sąd Administracyjny (Supreme Administrative Court), against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 267 TFEU, that discretion is even replaced, subject to certain exceptions recognised by the Court's case-

law, by an obligation to make a reference to the Court for a preliminary ruling (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 224 and the case-law cited).

157 It is also settled case-law that a rule of national law cannot prevent a national court from exercising that discretion, or complying with that obligation, which are an inherent part of the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU and of the functions of the court responsible for the application of EU law entrusted by that provision to the national courts (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 225 and the case-law cited).

158 Furthermore, a national rule the effect of which may inter alia be that a national court will choose to refrain from referring questions for a preliminary ruling to the Court is detrimental to the prerogatives thus granted to national courts and tribunals by Article 267 TFEU and, consequently, to the effectiveness of that system of cooperation (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 226 and the case-law cited).

159 Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the Court of Justice cannot therefore be permitted. Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in paragraph 157 of the present judgment (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 227 and the case-law cited).

160 In that context, it should also be noted that the Court has found, in several judgments, that investigations prior to the initiation of any disciplinary proceedings relating to decisions by which ordinary Polish courts had sent requests for a preliminary ruling to the Court concerning, inter alia, the interpretation of the second subparagraph of Article 19(1) TEU, have in fact already been carried out (see judgments of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 101 and the case-law cited, and of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 231).

161 It thus follows from all of the foregoing that the risk that the national provisions which the Commission disputes in the first part of the third complaint could be interpreted in such a way that the disciplinary regime concerned may be used for the purpose of penalising national judges on account of having made references to the Court for a preliminary ruling or maintaining such references is also established and that those national provisions consequently infringe Article 267 TFEU.

162 Lastly, the argument of the Republic of Poland set out in paragraph 124 of the present judgment which alleges that there is a contradiction between the third complaint and the second complaint must be rejected. In that regard, it is sufficient to note that, while the second complaint seeks to criticise the fact that the examination of certain legal questions falls within the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber, the third complaint concerns, for its part, the compliance with EU law of provisions establishing certain types of conduct as disciplinary offences on the part of judges of the ordinary courts, the administrative courts and the Sąd Najwyższy (Supreme Court), including, moreover, the judges of the Extraordinary Review and Public Affairs Chamber.

163 In the light of all the foregoing, it must be held that the provisions of points 2 and 3 of Article 72(1) of the amended Law on the Supreme Court and points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts infringe both the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and those of Article 267 TFEU, with the result that the first part of the Commission's third complaint must be upheld.

– *The second part of the third complaint*

164 It should be noted, at the outset, that, as the Commission points out, point 1 of Article 72(1) of the amended Law on the Supreme Court classifying as a disciplinary offence, on the part of judges of the Sąd Najwyższy (Supreme Court), the 'manifest and flagrant breach of legal rules', reproduces, in that regard, a wording identical to that already contained in point 1 of Article 107(1) of the amended Law relating to the organisation of the ordinary courts before its amendment by the amending law, which also made such an infringement a disciplinary offence on the part of judges of those courts.

165 As is apparent from paragraph 157 and from the second indent of point 1 of the operative part of the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), delivered while the present proceedings were ongoing, the Court held, with regard to the rule set out in point 1 of Article 107(1) of the Law relating to the organisation of the ordinary courts, that, in the light of all the considerations set out in paragraphs 134 to 156 of that judgment, it was established that, in the specific context resulting from the recent reforms affecting the judiciary and the disciplinary regime applicable to judges of the ordinary courts in Poland, the definition of the concept of 'disciplinary offence' contained in that provision did not help to avoid that disciplinary regime from being used in order to create pressure and a deterrent effect with regard to those judges, who are called upon to interpret and apply EU law, which are likely to influence the content of their decisions. In paragraph 157, the Court thus concluded that point 1 of Article 107(1) therefore undermined the independence of the judges of the ordinary courts in breach of the second subparagraph of Article 19(1) TEU.

166 In those circumstances, it is necessary for reasons essentially identical to those set out in paragraphs 134 to 156 of the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), to which reference must be made, to find that point 1 of Article 72(1) of the amended Law on the Supreme Court also infringes the second subparagraph of Article 19(1) TEU. That national provision undermines the independence of the judges of the Sąd Najwyższy (Supreme Court) who, as noted in paragraph 92 of the present judgment, are also called upon to interpret and apply EU law, since that national provision does not help to avoid the disciplinary regime applicable to those judges from being used to create pressure and a deterrent effect likely to influence the content of their decisions, in particular those concerning the requirements stemming from the right to effective judicial protection relating to the existence of independent and impartial tribunals previously established by law.

167 Moreover, it should be noted that, in the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), the Court also held, as is clear from paragraph 234 and point 2 of the operative part of that judgment, that, on account of the existence of the disciplinary offence set out in point 1 of Article 107(1) of the Law relating to the organisation of the ordinary courts and for the reasons set out in paragraphs 222 to 233 of that judgment, the Republic of Poland had failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU, by allowing the right of the national courts and tribunals concerned to submit requests for a preliminary ruling to the Court of Justice to be restricted by the possibility of triggering disciplinary proceedings.

168 In those circumstances, it is necessary for reasons essentially identical to those set out in paragraphs 222 to 233 of the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), to which reference must be made, to find that, by adopting and maintaining the provision set out in point 1 of Article 72(1) of the amended Law on the Supreme Court, and thus enabling the obligation of the Sąd Najwyższy (Supreme Court) to refer questions to the Court of Justice for a preliminary ruling to be restricted by the possibility of triggering a disciplinary procedure against judges of that national court, the Republic of Poland failed to fulfil its obligations under Article 267 TFEU.

169 It follows that the second part of the third complaint is also well founded and that that complaint must therefore be upheld in its entirety.

The first complaint

Arguments of the parties

170 By its first complaint, which it is appropriate to examine in the third place, the Commission maintains that the provisions of Article 42a(1) and (2) of the amended Law relating to the ordinary courts, Article 26(3) and Article 29(2) and (3) of the amended Law on the Supreme Court and Article 5(1a) and (1b) of the amended Law relating to the administrative courts, as well as the provisions of Article 55(4) of the amended Law relating to the ordinary courts and those of Article 8 of the amending law infringe the provisions of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, the principle of the primacy of EU law and Article 267 TFEU.

171 According to the Commission, the purpose of those national provisions is to prevent the national courts to which they apply from determining, as those courts are obliged to do, of their own motion or at the request of a party, whether the right of individuals to have their case heard by an independent and impartial tribunal previously established by law in cases relating to the individual rights which they derive from EU law may be guaranteed or has not been infringed, by reviewing whether their own composition or that of another court, for example a lower court panel, meets the requirements capable of providing such a guarantee. Such a review should, in particular, be capable of concerning the regularity of the process of appointing the members of the courts concerned or enable the legitimacy of those courts and their members to be assessed, which the contested national provisions are intended to prevent.

172 By invoking the principle of the irremovability of judges and the constitutional impossibility of invalidating the act of their appointment, the Republic of Poland confuses the obligation to allow such judicial review under EU law with the consequences of finding, following that judicial review, that there has been a failure to comply with the requirements arising from the right of access to an independent and impartial tribunal previously established by law. Such consequences, which should be determined by the national court called upon to give a ruling, on the basis of the applicable national law and taking due account of the full effectiveness of EU law and of the need to balance the requirements relating to the application of the principle of legal certainty against those relating to compliance with the applicable law, should not necessarily consist of the annulment of the act of appointment at issue or of the dismissal of the judge concerned. In general, those consequences are determined in the context of a judicial review carried out at second instance, the subject matter of which is a judgment or an act other than an act of appointment to a position of judge.

173 In the event that an infringement of the fundamental right of individuals to an effective judicial remedy is established, the principle of the primacy and the effectiveness of EU law also

require that, where the outcome of the abovementioned balancing exercise so requires, the national rules concerned are not to be applied.

174 In its defence, the Republic of Poland submits that the Commission has not discharged the burden of proof on it by failing to substantiate its claims relating to possible infringements of Article 267 TFEU and the principle of the primacy of EU law. In any event, the national provisions at issue do not deal with the submission by the national courts of questions for a preliminary ruling or concern issues of conflict between rules in the context of which that principle may have to be applied. Nor has the Commission explained how one of the national provisions at issue, namely Article 26(3) of the amended Law on the Supreme Court, could infringe the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter.

175 As regards the other alleged infringements of the latter two provisions of EU law, the Republic of Poland submits that the obligation for a national court to examine compliance with the safeguards required under those provisions in order to satisfy itself that irregularities in the procedure for the appointment of a judge have not adversely affected a party's right to a tribunal established by law in a particular case does not mean that every individual has the right to request that a judge be deprived of his or her mandate and that any national court has jurisdiction to call into question, in any procedure, the act of appointment of a judge and the continuation of its effects without any legal basis. According to that Member State, moreover, any other interpretation would lead to an infringement of the principles of the irremovability of judges and judicial independence.

176 The Republic of Poland asserts that, as is apparent from their literal, contextual, purposive and systemic interpretation, and contrary to the incorrect meaning attributed to them by the Commission, Article 42a(1) and (2) of the amended Law relating to the ordinary courts, Article 26(3) and Article 29(2) and (3) of the amended Law on the Supreme Court and Article 5(1a) and (1b) of the amended Law relating to the administrative courts do not prevent compliance with the guarantees required under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

177 It maintains that, in the first place, those national provisions were introduced only on account of serious threats to the security of legal relations and justice linked to a recent increase in the attempts to call into question the very existence of the terms of office of judges. In so doing, the Polish legislature sought, moreover, only to ensure compliance with pre-existing national law. The Constitution and settled case-law of both constitutional and administrative courts have, at all times, precluded the validity or effectiveness of the act of appointment of a judge from being subject to judicial review.

178 In the second place, those national provisions should be interpreted in the light of and in accordance with higher-ranking provisions in the hierarchy of norms, namely Article 45 of the Constitution, Article 6 ECHR and the corresponding provisions of EU law.

179 In the third place, the effective review of the safeguards relating to access to an independent and impartial tribunal previously established by law under EU law is fully ensured by the application of various other national provisions. The same thus applies, first, to Articles 48 to 54 of the ustawa – Kodeks postępowania cywilnego (Law on the Code of Civil Procedure) ('the Code of Civil Procedure'), Articles 40 to 44 of the ustawa – Kodeks postępowania karnego (Law on the Code of Criminal Procedure) and Articles 18 to 24 of the ustawa – Prawo o postępowaniu przed sądami administracyjnymi (Law on the procedure before the administrative courts), provisions which make it possible to request the recusal of judges in the event of doubt as to their impartiality and their independence. Secondly, the possibility, for an individual who has doubts as to a court's

ability to guarantee his or her right to such a tribunal, to request that the case concerned be transferred to another court, in accordance with the guidance provided in the judgment in *A. K. and Others*, is guaranteed in Article 200(1^4) of the Code of Civil Procedure, under which national courts must examine of their own motion whether they have jurisdiction and, in the absence of such jurisdiction, refer the case back to the court having jurisdiction. Thirdly, where the composition of the court that has given a ruling is contrary to the law, the higher court before which an appeal has been brought is required, of its own motion, to declare the proceedings concerned invalid and set aside the judgment in question, in accordance with Article 379(4) of the Code of Civil Procedure, point 1 of Article 439(1) of the Law on the Code of Criminal Procedure and point 4 of Article 183(2) of the Law on the Code of Administrative Procedure.

180 Furthermore, the Republic of Poland maintains that the Commission is mistaken about the scope of Article 55(4) of the amended Law relating to the ordinary courts and, therefore, of the scope of Article 8 of the amending law, which provides for the application of Article 55(4) to pending cases. Article 55(4) in no way prohibits the assessment of whether a court is properly composed, in particular by means of an application for recusal or for the purpose of verifying whether that composition has had a negative impact on the outcome of the dispute concerned. The same Article 55(4) in fact simply codifies the settled case-law of the Sąd Najwyższy (Supreme Court), according to which the fact that a case has been examined by a panel of judges in breach of the 'regulatory' provisions relating to the allocation of cases to judges and the designation of panels hearing the case does not constitute a ground of public policy such as automatically to invalidate the proceedings concerned, or a case where an extraordinary appeal is initiated.

181 Lastly, the Republic of Poland submits, in terms similar to those referred to in paragraph 124 of the present judgment, that the first and second complaints are contradictory, in so far as it is not possible to argue both that national law prohibits national courts from reviewing the possible existence of infringements of the right to effective judicial protection and, at the same time, that the Extraordinary Review and Public Affairs Chamber has exclusive jurisdiction to rule on the pleas in law alleging such infringements.

182 In its reply, the Commission submits, in particular, as regards the alleged infringement of Article 267 TFEU, that it stated in the reasoned opinion and that it is, moreover, clear that, by prohibiting national courts from assessing whether a court or a judge meets certain requirements relating to effective judicial protection under EU law, the national provisions at issue automatically prevent those national courts from engaging in a preliminary ruling dialogue with the Court in that regard. The alleged infringement of Article 267 TFEU was, moreover, substantiated in detail in the application in so far as concerns the second complaint. As regards Article 26(3) of the amended Law on the Supreme Court, it has the same legislative content as Article 29(3) of that law and Article 42a of the amended Law relating to the ordinary courts, with the result that the same legal reasoning applies to all of those provisions, without the need to specify it in the grounds of the application.

183 As regards the alleged infringement of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and of the principle of the primacy of EU law, according to the Commission, the national provisions referred to in paragraph 176 of the present judgment prohibit not only 'establish[ing]', but also 'assess[ing]' the lawfulness of the appointment and the 'power to carry out tasks in relation to the administration of justice that derives from that appointment', without reference to the act of appointment concerned, with the result that, on the basis of such wording, the assessment of the power of a judge to rule in a given case is prohibited. That interpretation is also apparent from Article 26(3) of the amended Law on the Supreme Court,

according to which a request referred to in paragraph 2 of that article cannot concern assessment of the legality of the appointment of a judge or his or her authority to carry out judicial functions.

184 As regards Article 55(4) of the amended Law relating to the ordinary courts, the Commission submits that that national provision does not cover cases of infringement of the provisions relating to the allocation of cases and to the designation and modification of formations of the court, with the result that the arguments put forward by the Republic of Poland alleging such an infringement are irrelevant.

185 In its rejoinder, the Republic of Poland submits that, as regards the alleged infringements of Article 267 TFEU and of the principle of the primacy of EU law, the Commission is not entitled to rely on either alleged 'evidence', any presumption being ruled out in that regard, or on the fact that an argument not relied on in the application appears in the reasoned opinion. As regards Article 26(3) of the amended Law on the Supreme Court, it was for the Commission to substantiate its complaints without the defendant being expected to have to guess that the arguments put forward in the application concerning other national provisions could also serve as a basis for those complaints.

186 As regards Article 55(4) of the amended Law relating to the ordinary courts, according to the Republic of Poland, it is not apparent from the second sentence of that provision and, in particular, from the use of the words 'cannot be a basis for determining' contained therein, that compliance with the regulatory provisions relating to the allocation of cases or the appointment or modification of the formations of the court is such as to rectify any other defects which may have vitiated the procedure concerned and which are capable of resulting in a decision that infringes the individual's right to an independent and impartial tribunal previously established by law.

187 At the hearing, apart from the considerations set out in paragraphs 117 and 118 of the present judgment, the Commission claimed that, as regards Article 55(4) of the amended Law relating to the ordinary courts, that national provision was, for example, such as to hinder compliance, by the national courts, with the guidance deriving, on the one hand, from paragraph 176 of the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), and, on the other hand, from the operative part of the judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931).

Findings of the Court

– *Admissibility*

188 As regards, in the first place, the alleged infringement of Article 267 TFEU, it should be recalled that, in accordance with Article 120(c) of the Rules of Procedure of the Court of Justice and the case-law relating to that provision, an application initiating proceedings must state the subject matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law. Such a statement must be sufficiently clear and precise to enable the defendant to prepare his or her defence and the Court to rule on the application. It is therefore necessary for the essential points of fact and of law on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a complaint (judgment of 19 September 2017, *Commission* v *Ireland (Registration tax)*, C-552/15, EU:C:2017:698, paragraph 38 and the case-law cited).

189 The Court has also held that, where an action is brought under Article 258 TFEU, the application must set out the complaints coherently and precisely, so that the Member State and the Court can know exactly the scope of the alleged infringement of EU law, a condition that must be satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged (judgment of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)*, C-213/19, EU:C:2022:167, paragraph 133 and the case-law cited).

190 In particular, the Commission's action must contain a coherent and detailed statement of the reasons which have led it to conclude that the Member State in question has failed to fulfil one of its obligations under the Treaties (judgment of 31 October 2019, *Commission* v *Netherlands*, C-395/17, EU:C:2019:918, paragraph 54 and the case-law cited).

191 In the present case, it should be noted that, although Article 267 TFEU is referred to, inter alia, in the form of order sought in the application relating to the first complaint, the arguments set out in that application in the summary of that complaint and the related arguments of the Commission do not, by contrast, contain the slightest reference to that article and its possible infringement, nor, a fortiori, does it contain the slightest detail as regards the reasons why the national provisions contested in the context of that complaint are capable of infringing that article.

192 In those circumstances, it must be held, as the Advocate General observed in point 128 of his Opinion, that, as regards the alleged infringement of Article 267 TFEU in the context of the first complaint, the application does not satisfy the requirements set out in paragraphs 188 to 190 of the present judgment. In that regard, neither the fact that that alleged infringement, as regards that first complaint, was substantiated by the Commission, in the reasoned opinion, nor the fact that a similar infringement of Article 267 TFEU was the subject of arguments concerning other complaints set out in the application in relation to provisions of national law other than those covered by the first complaint are capable of remedying the irregularity vitiating the application initiating proceedings. The latter does not make it possible, as regards the first complaint, to crystallise, in a coherent, clear and precise manner, the dispute relating to Article 267 TFEU which was submitted to the Court in the present case at the end of the pre-litigation procedure.

193 In the second place, as regards the alleged infringement of the principle of the primacy of EU law, it should, by contrast, be noted that, in the arguments relating to the first complaint that it set out in the application, the Commission refers to that principle, stating, in particular, in paragraph 75 of that application, that, by preventing the Polish courts from ruling on whether the requirements arising from the second subparagraph of Article 19(1) of the TEU in conjunction with Article 47 of the Charter are satisfied, in the situations referred to by the contested national provisions, those provisions were, for that very reason, also capable of preventing those courts from adopting, in accordance with that principle, acts which might prove necessary in order to ensure effective compliance with those requirements in such situations.

194 As regards, in the third place, Article 26(3) of the amended Law on the Supreme Court, it is true, as the Republic of Poland observes, that, although that national provision appears in the form of order sought in the application relating to the first complaint, the arguments set out in support of that complaint in that application do not contain any arguments specifically relating to that provision.

195 However, as the Commission submits, by stating that the Extraordinary Review and Public Affairs Chamber cannot examine an application concerning the establishment and assessment of the legality of the appointment of a judge or of his or her authority to carry out judicial functions,

Article 26(3) merely reiterates, in essence, what is already apparent from Article 29(3) of the amended Law on the Supreme Court, namely that the Sąd Najwyższy (Supreme Court), in particular the Extraordinary Review and Public Affairs Chamber, is prohibited from establishing or assessing the lawfulness of the appointment of a judge or of the power to carry out tasks in relation to the administration of justice resulting from that appointment.

196 In those circumstances, it must be held that the Commission's criticisms of Article 29(3) of the amended Law on the Supreme Court relate, ipso facto, also to Article 26(3) of that law and thus encompass the latter provision. It follows that it was not necessary for the Commission to provide a particular explanation as regards the latter national provision and, therefore, that the absence of such an explanation was not such as to affect the Republic of Poland's rights of defence.

197 It follows from all the foregoing that the Commission's first complaint is inadmissible in so far as it relates to the alleged infringement of Article 267 TFEU and is admissible as to the remainder.

– *Substance*

198 As regards, first of all, Article 42a(1) and (2) of the amended Law relating to the ordinary courts, Article 29(2) and (3) of the amended Law on the Supreme Court and Article 5(1a) and (1b) of the amended Law relating to the administrative courts, it is apparent from the wording of the first two national provisions mentioned, on the one hand, that 'in the context of the activities' of the various courts concerned 'or [their] bodies', it is 'not … permissible to call into question the legitimacy of the [courts], the constitutional organs of the State and the organs responsible for reviewing and protecting the law' and, secondly, that those courts 'cannot establish or assess the lawfulness of the appointment of a judge or of the power to carry out tasks in relation to the administration of justice that derives from that appointment'. As regards Article 26(3) of the amended Law on the Supreme Court, that provision precludes the Extraordinary Review and Public Affairs Chamber from being able, following the transmission to that court by another court of a request for the recusal of a judge or the designation of a court before which proceedings must be conducted and including, as the case may be, complaints based on the lack of independence of the judge or court concerned, to examine that request where it 'concerns the establishment or the assessment of the lawfulness of the appointment of a judge and of his or her power to carry out judicial functions'.

199 In that regard, it should be observed, in the first place, that, as noted, in essence, in paragraphs 135 to 137 of the present judgment concerning the national provisions called into question by the Commission in the context of the third complaint, the wording characterising the national provisions referred to in the first complaint does not permit the inference, contrary to what the Republic of Poland maintains, that the prohibitions thus laid down relate exclusively to judicial acts the purpose of which is to rule on the validity of the act of appointment of a judge.

200 On the one hand, those national provisions prohibit not only 'establish[ing]', but also 'assess[ing]', in the light of their 'lawfulness', both the 'appointment' itself and the 'power to carry out tasks in relation to the administration of justice that derives from that appointment'. On the other hand, those provisions prohibit, in even more general terms, any 'call[ing] into question' of the 'legitimacy' of 'courts and tribunals' or of the 'constitutional organs of the State and the organs responsible for reviewing and protecting the law'.

201 In view of their relatively broad and imprecise nature, such wording appears to be such as to lead to a wide range of acts or conduct on the part of the ordinary courts, the administrative courts

or the Sąd Najwyższy (Supreme Court) or their organs being capable, by reason of their content or effects, of being caught by the prohibitions thus laid down. That may, in particular, be the case where those courts are required, in accordance with their obligations, which are recalled in paragraphs 128 to 131 of the present judgment, to determine, in certain circumstances, whether they or the judges of whom they are composed or other judges or courts, called upon to rule on cases concerning EU law or which have ruled on them, satisfy the requirements arising from the second subparagraph of Article 19(1) TEU and Article 47 of the Charter relating to the independence, impartiality and previous establishment by law of the courts and judges concerned.

202 In the second place, it should be noted that the terms thus used by the Polish legislature are, as stated in paragraph 140 of the present judgment concerning the national provisions called into question by the Commission in the context of the third complaint, closely linked to a series of questions raised by various Polish courts concerning the compliance with EU law and, more specifically, with the requirements arising from the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, of various recent legislative amendments affecting the organisation of justice in Poland.

203 The amending law and the national provisions covered by the first complaint were adopted, as a matter of urgency, in the context described in paragraphs 141 to 145 of the present judgment, which is characterised, in particular, by the existence, on the one hand, of recent case-law developments relating to the preservation of the rule of law and, more specifically, of the independence of the judiciary in Poland, resulting from the judgment in *A. K. and Others*, and, on the other hand, of a number of references for a preliminary ruling pending at that time before the Court concerning such an issue.

204 In that regard, it is apparent, in particular, from paragraphs 134, 139 and 149 and the operative part of the judgment in *A. K. and Others* that the guidance that can be derived from that judgment, like that of the national case-law referred to in paragraph 143 above, which was developed in the light of the judgment in *A. K. and Others*, concerns the conformity with EU law of the powers conferred on the Disciplinary Chamber, in particular in the light of the rules governing the appointment of the members of that chamber and the lack of independence both of that chamber and of the KRS, which took part in that appointment process.

205 In particular, as noted in paragraph 141 of the present judgment, it was clear from the judgment in *A. K. and Others* that the national courts called upon to rule on cases of that type could be required, under EU law, on the one hand, to rule on the ability of a body such as the Disciplinary Chamber to rule on cases falling within the scope of EU law, by taking into consideration, inter alia, the circumstances in which the members of that chamber were appointed, and, on the other hand, to examine the independence of the KRS and, in the absence of such independence, to rule on the consequences attaching to the involvement of that body in the process of appointing judges of the Disciplinary Chamber.

206 It was clear that, in so doing, those national courts, responsible for applying, in the context of their jurisdiction, provisions of EU law, could be called upon to adopt acts which may be regarded as being capable of ‘calling into question’ the ‘legitimacy of the [courts]’, such as the Disciplinary Chamber, or that of ‘constitutional organs of the State … [or] protecti[ng] the law’, such as the KRS, by making, moreover, on that occasion ‘assessments’ on the ‘lawfulness’ of the ‘appointment’ of the judges sitting in that chamber and ‘the power of [those judges] to carry out [judicial] tasks in relation to the administration of justice’, within the meaning of the national provisions which the Commission disputes in the context of the first complaint.

207 As regards the questions referred for a preliminary ruling, referred to in paragraph 144 of the present judgment, which had been referred to the Court on the date of adoption of the contested national provisions, they related, on the one hand, to the possible non-conformity with EU law of new national rules under which several persons had recently been appointed to judges' positions at the Sąd Najwyższy (Supreme Court) and to the effects likely to result from such a lack of conformity in so far as concerns the judicial acts adopted by the judges concerned. Those questions related, on the other hand, to the possible incompatibility with that law of national rules authorising the adoption of ministerial decisions to second judges to courts other than their court of origin.

208 Depending on their content, the answers then expected to be given by the Court to the questions referred for a preliminary ruling were such as to lead the national courts to have to make, where appropriate, 'assessments' on the 'lawfulness' of the 'appointment' of judges of the Sąd Najwyższy (Supreme Court) or 'of the power of [those judges] to carry out [judicial] tasks in relation to the administration of justice' or to adopt acts capable of being regarded as having 'call[ed] into question' the 'legitimacy of the [courts]', in particular those to which judges had been seconded.

209 Furthermore, as is apparent from the judgments referred to in paragraphs 146 and 148 of the present judgment, the answers given by the Court to the questions referred for a preliminary ruling, the wording of which is set out in paragraph 207 of the present judgment, confirmed the risk that acts or assessments which, in certain circumstances, are a matter for the national courts under the provisions of Article 19(1) TEU in conjunction with Article 47 of the Charter may in fact fall within the prohibitions laid down in the national provisions contested in the first complaint.

210 The Republic of Poland's argument referred to in paragraph 175 above is not such as to call into question the foregoing analysis. It does not follow from that case-law that every national court should have jurisdiction to call into question, of its own motion or at the request of an individual, in any proceedings, the act of appointment of a judge, his or her employment relationship or the exercise of his or her judicial power, after seeking, as the case may be, an interpretation from the Court of Justice in a preliminary ruling.

211 Thus, the Court, in the judgment of 22 March 2022, *Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court – Appointment)* (C-508/19, EU:C:2022:201, paragraphs 70, 71 and 81 to 83), held to be inadmissible a request for a preliminary ruling made in the context of a challenge, before the referring court, to the validity of the appointment of a judge to the Sąd Najwyższy (Supreme Court), after having noted, in particular, on the one hand, that the questions referred in that request intrinsically related to a dispute other than that in the main proceedings and, on the other hand, that the action in the main proceedings sought a form of invalidation *erga omnes* of the appointment of the judge concerned to the duties of judge of that court, even though national law neither authorises nor has ever allowed all subjects of the law to challenge the appointment of judges by means of a direct action for the annulment or invalidation of such an appointment.

212 In the third place, as regards the Republic of Poland's claims that other national rules allow the requirements arising from the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter to be satisfied, it should be noted, first, that, as regards the national provisions concerning the recusal of judges referred to in paragraph 179 above, it follows, on the one hand, from Article 26(3) of the amended Law on the Supreme Court that the assessment of the lawfulness of the appointment of a judge or of his or her power to carry out judicial tasks is not permitted in the context of such a recusal procedure.

213 On the other hand, as is apparent from the very wording of the national provisions on the recusal of judges to which the Republic of Poland has referred, the text of which, at the request of the Court, it has produced, the review authorised by those provisions of national law appears to be capable of covering only part of the requirements arising from the principle of judicial independence and, more specifically, those relating to the internal aspect of that principle, which overlap with the concept of 'impartiality' and concern the equal distance which judges must observe in relation to the parties to the dispute and their respective interests. By contrast, in the light of that wording, those national provisions do not appear to authorise the review of other aspects arising from those requirements, in particular those relating to the external aspect of that principle and, in particular, to the preservation of the body concerned from external intervention or pressure or to the need for that body to have previously been established by law.

214 At the hearing, the Republic of Poland stated, moreover, in that regard, that it followed from recent judgments of the Trybunał Konstytucyjny (Constitutional Court) that those national provisions on recusal did not, inter alia, authorise applications or declarations based on complaints alleging the irregularity of the appointment of a judge or any other circumstance relating to the procedure for appointing a judge.

215 Secondly, as regards the other national mechanisms relied on by the Republic of Poland, also referred to in paragraph 179 of the present judgment, namely those relating to the transfer of a case to the court having jurisdiction and to the review carried out by the higher courts, it should be observed that, as noted in paragraphs 200 and 201 of the present judgment, the national provisions contested in the context of the first complaint are formulated in broad and imprecise terms which do not preclude them from also being such as to paralyse such mechanisms.

216 The prohibitions laid down by those national provisions are also intended to apply to the courts before which the question arises as to whether the case may be referred back to another court pursuant to Article 200(1^4) of the Code of Civil Procedure and appear, therefore, to be capable of preventing such courts from making such a referral, for example, where that would entail, in the circumstances set out in the judgment in *A.K. and Others*, calling into question the compliance with the requirements of independence arising from EU law and, therefore, the legitimacy of the court before which the case concerned should normally be examined or of calling into question, in that context, the legitimacy of a constitutional body such as the KRS.

217 In view of their broad and imprecise wording, the contested national provisions are also liable to prevent a higher court called upon to examine a decision of a lower court from assessing the lawfulness of the appointment of a judge or his or her power to exercise the judicial functions arising from such an appointment or from casting doubt on the legitimacy of courts or tribunals, whether it is a matter of ruling on its own composition or legitimacy as a court of second instance or on those of the lower court.

218 In the fourth place, the Republic of Poland's argument referred to in paragraph 181 of the present judgment, alleging a contradiction between the first and second complaints, must also be rejected. In that regard, it is sufficient to point out that, while the second complaint seeks to maintain that the examination of certain questions falls within the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber, the first complaint, for its part, concerns the compatibility with EU law of provisions laying down certain prohibitions applying to the ordinary courts, the administrative courts and the Sąd Najwyższy (Supreme Court), including the Extraordinary Review and Public Affairs Chamber.

219 It follows from the foregoing that the national provisions referred to in paragraph 198 above infringe the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.

220 Next, as regards Article 55(4) of the amended Law relating to the ordinary courts and Article 8 of the amending law providing for the application of Article 55(4) to cases opened or closed before the entry into force of the latter law, it is apparent, in particular, from the wording of the second sentence of Article 55(4) that 'the provisions relating to the allocation of cases and to the designation and modification of the formations of the court … cannot be a basis for determining … that a court is improperly composed or that a person not authorised or competent to give judgment forms part of that court'.

221 It must be pointed out that, like the national provisions referred to in paragraphs 133 and 198 above, Article 55(4) of the amended Law relating to the ordinary courts was also very recently introduced into the Polish legal order by the amending law, in the specific context recalled in paragraphs 140 to 145 of the present judgment.

222 In that regard, it should, more specifically, be pointed out that, on the date of adoption of that national provision, the Court was seised, inter alia, of the requests for a preliminary ruling referred to in the third indent of paragraph 144 of the present judgment in the joined cases which gave rise, in the meantime, to the judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931).

223 In the latter judgment, the Court held that the second subparagraph of Article 19(1) TEU must be interpreted as precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

224 Furthermore, when Article 55(4) of the amended Law relating to the ordinary courts was adopted, the Court was also seised, in Case C-791/19, of an action for a declaration of failure to fulfil obligations, brought by the Commission against the Republic of Poland, seeking, inter alia, a declaration that that Member State had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, by conferring on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases relating to judges of the ordinary courts.

225 It must be noted, in that regard, that, in the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), delivered in the meantime, the Court, in paragraphs 164 to 177 thereof, upheld such a complaint and held, consequently, that, by conferring such discretion on the President of the Disciplinary Chamber and, therefore, by failing to guarantee that disciplinary cases are examined by a tribunal 'established by law', the Republic of Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

226 It is thus apparent that, where they are called upon to give due effect to the judgments of the Court referred to in paragraphs 222 and 225 of the present judgment, national courts may have to examine and, therefore, have to use as a 'basis' national provisions, such as those at issue in those judgments, relating to the 'appointment' or 'modification of the formations of the court', in order to find, in a specific case, that, as a result of the application of those provisions of national law and of their being contrary to EU law, a national court is 'improperly composed' or that a person 'not

authorised or competent to give judgment forms part of that court'. In so doing, the national courts concerned fall within the prohibitions thus laid down in Article 55(4) of the amended Law on the ordinary courts. Those prohibitions are, moreover, intended to apply more generally, notwithstanding any objections by an individual to the effect that national provisions relating either to the allocation of cases or to the appointment or modification of the formations of the court or to the application of such provisions would be contrary to the requirements of EU law inherent in the right to an independent and impartial tribunal previously established by law.

227 In the light of the foregoing, it must be held that Article 55(4) of the amended Law relating to the ordinary courts and, consequently, Article 8 of the amending law also infringe the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter.

228 Finally, as regards the alleged infringement of the principle of the primacy of EU law, it should be recalled that that principle requires a national court which is called upon, within the limits of its jurisdiction, to apply provisions of EU law, to ensure that full effect is given to the requirements of EU law in the case before it. In particular, it must disapply, of its own motion, any national rule or practice, even if adopted subsequently, which is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means (see, to that effect, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 24, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 53 and the case-law cited).

229 According to settled case-law, Article 47 of the Charter has direct effect (see, inter alia, judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 56 and the case-law cited) and it is, furthermore, recalled in paragraph 78 of the present judgment that the same is true of the second subparagraph of Article 19(1) TEU.

230 Therefore, in so far as the national provisions referred to in paragraphs 198 and 220 above are, on account of the very prohibitions they lay down, capable of preventing the Polish courts concerned from disapplying certain provisions held to be contrary to provisions of EU law having direct effect, they are also such as to infringe the principle of the primacy of EU law.

231 In the light of all the foregoing, the first complaint must be upheld in so far as it alleges infringements of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and of the principle of the primacy of EU law.

The second complaint

Arguments of the parties

232 By its second complaint, which it is appropriate to examine in the fourth place, the Commission submits, in essence, that questions relating to the independence of a court or judge are 'horizontal issues' which any national court hearing a case falling within the scope of EU law has, including *in limine litis* and when ruling at first instance, the obligation to examine in the light of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, and in respect of which it must be able to make a reference to the Court for a preliminary ruling on the basis of Article 267 TFEU, subsequently disapplying, if necessary in accordance with the principle of the primacy of EU law, any national provisions which are contrary to those provisions of EU law, as interpreted by the Court. Such matters do not constitute specific legal issues in a specific area of law which may, on that basis, fall within the exclusive jurisdiction of an allegedly specialised court.

233 The Republic of Poland has thus failed to fulfil its obligations under those provisions of EU law and that principle of primacy, first, by conferring, under Article 26(2) of the amended Law on the Supreme Court, on the Extraordinary Review and Public Affairs Chamber, exclusive jurisdiction to rule on matters relating to the recusal of judges and the designation of the court having jurisdiction to hear a case in which a complaint alleging the lack of independence of a court or judge is raised and by obliging the court seised of a case before which such questions arise to refer them to that chamber, even though the latter does not have jurisdiction to hear the substance of the case concerned.

234 In so doing, the Polish legislature also wished to prevent the national courts hearing a dispute from verifying, if necessary by referring questions to the Court, whether the judicial body called upon to decide that dispute meets the requirements of independence and impartiality arising from EU law and, in the absence of such independence and impartiality, from complying with their obligation, highlighted by the Court in the judgment in *A. K. and Others*, to disapply the national provision reserving jurisdiction to hear such a dispute for that judicial body. The national provision thus contested is likewise intended to prevent national courts from examining, of their own motion or at the request of a party to the proceedings, the need to recuse a judge who does not satisfy those requirements or to make a reference to the Court of Justice in that regard.

235 Secondly, the provisions and principle of EU law mentioned in paragraph 232 above are also infringed by the provisions of Article 82(2) to (5) of the amended Law on the Supreme Court. By providing, on the one hand, that the Extraordinary Review and Public Affairs Chamber alone has jurisdiction to rule on questions of law relating to the independence of a judge or a court which arise in cases pending before the Sąd Najwyższy (Supreme Court), on the other hand, that, where that chamber adopts such a decision, it is not bound by any other decision of the Sąd Najwyższy (Supreme Court) and, finally, that the decisions of that chamber are binding on all the other formations of the Sąd Najwyższy (Supreme Court), those national provisions deprive formations of the court in other chambers of the Sąd Najwyższy (Supreme Court) of the possibility of ruling on such questions of law and of referring questions to the Court in that regard.

236 Thirdly, those provisions and that principle of EU law are infringed by Article 26(4) to (6) of the amended Law on the Supreme Court conferring on the Extraordinary Review and Public Affairs Chamber exclusive jurisdiction to hear appeals seeking a declaration that rulings or final judgments of all Polish judicial and administrative courts, including those of other chambers of the Sąd Najwyższy (Supreme Court), are unlawful, if the unlawfulness consists of calling into question the status of the person appointed to the position of judge who ruled in the case concerned, since such actions may be brought irrespective of whether the party concerned has exhausted the other legal remedies available to it. Such national provisions prevent those other chambers of the Sąd Najwyższy (Supreme Court) from ruling on those questions and from referring any questions to the Court of Justice for a preliminary ruling in that regard.

237 Fourthly, the provisions and principle of EU law referred to in paragraph 232 above are also infringed by the transitional provisions of Article 10 of the amending law providing, first of all, that the Polish courts, including the other chambers of the Sąd Najwyższy (Supreme Court), are to refer cases pending on 14 February 2020 to the Extraordinary Review and Public Affairs Chamber, before 21 February 2020, concerning matters now falling within the exclusive jurisdiction of that chamber, next, that the national court may, in that case, revoke the acts carried out previously by the court or tribunal which was relieved of its jurisdiction in its favour, which could include a possible reference to the Court for a preliminary ruling, and, finally, that acts carried out in such cases after 14 February 2020, such as a reference for a preliminary ruling, are ineffective.

238 In its defence, the Republic of Poland submits, in the first place, that the Commission misinterprets the judgment in *A. K. and Others*. It follows only from that judgment that, if a party claims that the examination of its case by the court which would normally have jurisdiction would result in an infringement of its rights under Article 47 of the Charter, the court seised may rule on such an objection and, if that objection is well founded, refer the case back to another court which offers the necessary guarantees of independence and which would have jurisdiction under law in the absence of provisions reserving jurisdiction to the court which does not offer such guarantees.

239 By contrast, according to the Republic of Poland, it does not follow from that judgment that all national courts have the right to hear and determine cases of that kind. The argument thus put forward by the Commission also fails to have regard to the requirement relating to the right to a tribunal established by law, which precludes the determination of the court having jurisdiction from being left to the discretion of the judicial authorities. In the judgment in *A. K. and Others*, the Court thus did not create, for the benefit of the referring courts concerned, the power to adopt acts without a legal basis, but rather the power to refer the cases concerned to another court whose jurisdiction derives from an act of the Parliament, in accordance with Article 200(1^4) of the Code of Civil Procedure. The only obligation incumbent on the Member States is, in that regard, to ensure, as required by the second subparagraph of Article 19(1) TEU, that cases having a connection with EU law are brought before courts offering the guarantees required by that provision.

240 Furthermore, the Republic of Poland maintains that the situation thus referred to in the judgment in *A. K. and Others* has no connection with the contested national provisions in so far as they refer to the position of a court hearing an application for recusal, a question of law relating to the independence of a court or doubts as to the lawfulness of a final decision.

241 In the second place, as regards, more specifically, the content of the contested national provisions, the Republic of Poland submits, first, with regard to Article 26(2) of the amended Law on the Supreme Court, that the examination of an application for recusal never came, under Polish law, under the jurisdiction of the judge or court concerned, but previously had to be carried out either by another formation of the same court or by a higher court. Thus, that national provision does not deprive the judges or courts before which such an incidental matter is raised of the jurisdiction which they have previously had. It merely provides that, where the complaints justifying the recusal of certain judges relate to their independence, that question must now be referred to the Extraordinary Review and Public Affairs Chamber. Each Member State remains free to determine by which court such a case must be heard, since EU law requires only that the court with jurisdiction to hear a case of that type provide the guarantees referred to in the second subparagraph of Article 19(1) TEU.

242 As regards, secondly, Article 26(4) to (6) of the amended Law on the Supreme Court, according to the Republic of Poland, the finding that a final decision is unlawful does not constitute an ‘incidental’ matter which may be examined *in limine litis* in the context of other proceedings, but requires the lodging of an extraordinary appeal which, by definition, may be brought only if such a final decision has been delivered, before a court having jurisdiction under the law, which must necessarily be different from the court which delivered that decision. Furthermore, by thus providing that a particular type of appeal is to be examined by the Sąd Najwyższy (Supreme Court), in a chamber specialising in the examination of questions relating to the independence of the judiciary, those national provisions strengthen the procedural guarantees enjoyed by the parties.

243 As regards, thirdly, Article 82(2) to (5) of the amended Law on the Supreme Court, the Republic of Poland asserts that, in accordance with Article 1(1)(a) of that law, the Sąd Najwyższy (Supreme Court) has jurisdiction to adopt resolutions concerning questions of law relating to all

cases falling within the jurisdiction of that court. In that regard, the second complaint is based entirely on an alleged requirement that, where such questions of law relate to the independence of the judiciary, they must be decided by the courts before which those questions are raised, a requirement whose existence the Commission has not, however, in any way substantiated. Moreover, the very purpose of the procedure for resolving a question of law consists precisely, in the presence of a complex matter likely to give rise to differences in interpretation, in allowing a court before which such a question has been raised to refer the examination of that question to a higher specialised formation of the court in order to obtain the necessary clarification and to prevent, in the interests of legal certainty, significant and persistent divergences in the case-law. Furthermore, such a mechanism does not oblige the courts concerned to request a decision on a question of law, but allows them to do so, and such a decision concerns only the interpretation of the law and not its application, which would continue to fall within the jurisdiction of the court seised of the substance of the dispute in question.

244 Fourthly, the transitional provisions contained in Article 10 of the amending law have expired and, in any event, merely ensured that, in accordance with the right to a tribunal established by law, courts which have ceased to have jurisdiction transfer the cases concerned to the court now having jurisdiction.

245 In the third place, the Republic of Poland considers that the contested national provisions do not limit the power of the Polish courts to make a reference to the Court for a preliminary ruling in so far as they act in the context of their territorial and substantive jurisdiction. Furthermore, since the Extraordinary Review and Public Affairs Chamber is a court of last instance, it is required to make a request for a preliminary ruling to the Court whenever it has doubts as to the interpretation of the second subparagraph of Article 19(1) TEU, which thus increases, in practice, the number of cases in which there may be an obligation to make a reference to the Court for a preliminary ruling and, consequently, strengthens the effectiveness of the exercise of the rights derived from Article 47 of the Charter.

246 Furthermore, the transitional provisions contained in Article 10 of the amending law do not authorise the Extraordinary Review and Public Affairs Chamber to withdraw a reference for a preliminary ruling, that chamber being, on the contrary, required, in the event of doubt as to the interpretation of EU law, to confirm the questions previously referred or to refer them in turn. Moreover, those transitional provisions allow the revocation of earlier acts only if they prevent the case from being examined ‘in accordance with the law’, which, by definition, cannot be the case for a reference for a preliminary ruling. Nor do those transitional provisions prevent the national courts subject to the obligation to transfer the cases before them from referring questions for a preliminary ruling, as is shown, moreover, by numerous questions for a preliminary ruling concerning the requirements of judicial independence recently referred to the Court.

247 In the fourth place, the Republic of Poland maintains that the Commission has not substantiated the second complaint concerning an infringement of the principle of the primacy of EU law and the contested national provisions do not concern conflicts between rules in which that principle should be applied.

248 In its reply, the Commission submits that the second complaint seeks, in essence, to criticise the fact that exclusive jurisdiction to examine compliance with the requirements of EU law at issue was removed from the various national courts or the chambers of the Sąd Najwyższy (Supreme Court) having jurisdiction hitherto, and conferred, without particular legitimate reasons, on a new judicial chamber which cannot be regarded as a specialised court. On the one hand, that new judicial chamber has only 20 judges out of the 10 000 judges in the Republic of Poland, with the

result that the right of individuals to judicial protection and the effectiveness of EU law is considerably weakened, whereas it follows from the case-law of the Court that all national courts must apply as widely as possible the provisions of EU law relating to judicial independence. On the other hand, since all the members of the Extraordinary Review and Public Affairs Chamber were appointed on a proposal of the KRS, in its new composition, that is to say, in circumstances which, very often, are precisely those which are relied on in requests for recusal based on the lack of independence of a judge, the question of the impartial assessment of such questions by that chamber arises.

249 As regards Article 267 TFEU, the Commission submits that, in the light, in particular, of the context of the judicial reforms in which the contested national provisions were adopted and of the repeated measures adopted by the Polish authorities in order to prevent the proper functioning of the preliminary ruling mechanism established by that article, it is clear that those national provisions artificially excluded from the substantive jurisdiction of the national courts previously having jurisdiction the examination of the 'horizontal question' of judicial independence that may arise in any case, in order to deprive those national courts of the possibility of referring questions to the Court in that field, in breach of Article 267 TFEU, read in conjunction with the third subparagraph of Article 4(3) TEU.

250 In that regard, the Commission also submits that national rules liable, as in the present case, to result in a national court choosing to refrain from referring questions to the Court for a preliminary ruling undermine the prerogatives granted to national courts by Article 267 TFEU. As regards the argument that transferring all substantive jurisdiction to a court whose decisions are not subject to appeal would strengthen the effectiveness of that article, it disregards the scheme of that article, which provides that lower courts may make a reference to the Court of Justice.

251 As regards the principle of the primacy of EU law, the Commission submits that it pointed out, both in the reasoned opinion and in the application, that the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber in the three categories of cases concerned prevents the Polish courts from disapplying the national provisions under which jurisdiction over cases falling within the scope of EU law is conferred on courts and judges that do not meet the requirements of EU law concerning judicial independence.

252 In its rejoinder, the Republic of Poland submits that the Commission sets out, in its reply, 'new complaints', relying on the fact that the Extraordinary Review and Public Affairs Chamber, which has existed since 2018 and whose conditions for appointing members are well known, is not independent and impartial. Since those complaints do not concern elements that came to light after the opening of the procedure and since the Commission's allegations relating to an alleged lack of independence and impartiality were made only in support of the fourth complaint concerning the Disciplinary Chamber alone, those complaints are out of time and should be rejected in accordance with Article 127(1) of the Rules of Procedure.

253 According to that Member State, those 'new complaints' are, in any event, unfounded. The mere fact that the judges of the Extraordinary Review and Public Affairs Chamber are, like all the other Polish judges, appointed by means of the intervention of a body such as the KRS is not such as to create the dependence of those judges on political authorities. Furthermore, the case-law developed by that chamber fully demonstrates its independence and impartiality.

254 Furthermore, by stating that Article 26(4) to (6) of the amended Law on the Supreme Court deprives the other chambers of the Sąd Najwyższy (Supreme Court) of their jurisdiction to hear actions for a declaration that a final decision is unlawful where the unlawfulness concerned consists

of calling into question the status of the person appointed to the office of judge, the Republic of Poland maintains that the Commission is mistaken about the scope of that national provision. The jurisdiction of those various chambers of the Sąd Najwyższy (Supreme Court) is defined in Articles 23 to 25 of the amended Law on the Supreme Court, which reserve jurisdiction to hear civil cases to the Civil Chamber, jurisdiction to rule in criminal cases to the Criminal Chamber and jurisdiction to rule on, inter alia, cases concerning employment and social security law to the Labour and Social Insurance Chamber. Such substantive jurisdiction is completely unrelated to cases in which the existence of a judge's mandate is called into question, the examination of which falls within the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber.

255 In any event, the Commission has not demonstrated that the second subparagraph of Article 19(1) TEU imposes an obligation to ensure that actions for a declaration that a final decision is unlawful are examined by all the chambers of the Sąd Najwyższy (Supreme Court), or that EU law was applied effectively on the basis of earlier national provisions and that it is no longer applied under the contested national provisions.

256 As regards Article 82(2) to (5) of the amended Law on the Supreme Court, according to the Republic of Poland, the Commission's claim that the Extraordinary Review and Public Affairs Chamber is not a specialised court is arbitrary, since that chamber is composed of experienced lawyers who hold, at least, a postdoctoral degree in law.

257 Finally, the contested national provisions do not prevent either the courts having substantive jurisdiction or those which do not from referring questions to the Court for a preliminary ruling, nor does the Commission explain how those national provisions have the effect of discouraging national courts from referring such questions or of causing them to withdraw them.

Findings of the Court

– *Admissibility*

258 In addition to the principles set out in paragraphs 188 to 190 of the present judgment, it must be noted that it is also settled case-law that, in an action under Article 258 TFEU, the letter of formal notice sent by the Commission to the Member State concerned and the reasoned opinion subsequently issued by the Commission delimit the subject matter of the dispute, so that it cannot afterwards be extended. The opportunity for that Member State to submit observations, even if it chooses not to make use of it, is an essential guarantee intended by the FEU Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the action brought by the Commission must be based on the same complaints as those in the letter of formal notice initiating the pre-litigation procedure (judgment of 22 September 2016, *Commission* v *Czech Republic*, C-525/14, EU:C:2016:714, paragraph 17 and the case-law cited).

259 The purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under EU law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. The proper conduct of that procedure constitutes an essential guarantee required by the FEU Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject matter (judgment of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)*, C-213/19, EU:C:2022:167, paragraph 131 and the case-law cited).

260 In the present case, it must be stated that, as the Republic of Poland rightly asserts, the Commission did not maintain either during the pre-litigation stage or in the application initiating the proceedings that the national provisions that it disputes in the context of the second complaint infringe EU law on account of the composition of the Extraordinary Review and Public Affairs Chamber on which those national provisions confer exclusive jurisdiction and, more particularly, on account of any lack of impartiality capable of affecting that chamber in the exercise of that jurisdiction having regard to the rules governing the appointment of its members, even though the Commission was aware of that composition and those arrangements for appointment.

261 By referring to such considerations only at the stage of the reply, the Commission thus puts forward new arguments capable of substantially altering the scope of the second complaint, as formulated up to that time.

262 Since they were thus put forward out of time and in breach of the requirements set out in paragraphs 258 and 259 of the present judgment, those arguments are inadmissible and must therefore be rejected.

– *Substance*

263 In the first place, it should be noted that it follows from the principles recalled in paragraphs 63 to 74 of the present judgment that, while the distribution or reorganisation of court jurisdiction in a Member State comes, in principle, under the freedom of the Member States guaranteed by Article 4(2) TEU (see, by analogy, judgment of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraph 47), that distribution or reorganisation must not, in particular, undermine respect for the rule of law set out in Article 2 TEU and the requirements arising, in that regard, from the second subparagraph of Article 19(1) TEU, including those relating to independence, impartiality and the previous establishing by law of the courts and tribunals called up to interpret and apply EU law.

264 In the second place, it should be recalled that the Court has, admittedly, repeatedly held that, in the exercise of its jurisdiction relating to the allocation of jurisdiction within a Member State, that Member State may, in certain circumstances, be prompted to confer exclusive jurisdiction to hear and determine certain substantive questions of EU law to a single body or to several decentralised bodies.

265 In that regard, the Court pointed out, inter alia, that the fact that a specific substantive dispute falls within the exclusive jurisdiction of a single court could, where appropriate, prove to be such as to enable that court to acquire special expertise which would be conducive to limiting the average length of proceedings or to ensure a uniform practice in the national territory, thereby contributing to legal certainty (see, to that effect, judgment of 27 June 2012, *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 56). Similarly, it noted that the designation of less decentralised courts, of a higher level than the local courts and in which judges have greater professional experience, could be such as to facilitate a more homogeneous and specialised administration of justice in the field of substantive EU law concerned and more effective protection of the rights which individuals derive from that law (judgment of 12 February 2015, *Baczó and Vizsnyiczai*, C-567/13, EU:C:2015:88, paragraphs 46 and 58).

266 Although it is thus for each Member State to designate in its domestic legal system the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, the Member States are nevertheless responsible for ensuring that those rights are effectively protected in each case. On that basis, as is

clear from settled case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must not, in particular, make it in practice impossible or excessively difficult to exercise rights conferred by EU law, and such a requirement also applies to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on EU law. Failure to comply with that requirement in that respect is – just like a failure to comply with it as regards the definition of detailed procedural rules – liable to undermine the principle of effective judicial protection (see, to that effect, judgments of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraphs 44 to 48; of 27 June 2013, *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraphs 35 to 37 and the case-law cited; and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraphs 22 and 23).

267 In the present case, it is important to note that the Commission does not, however, claim in its action or, a fortiori, establish that the concentration of powers effected by the contested national provisions in favour of the Extraordinary Review and Public Affairs Chamber is liable to give rise to procedural disadvantages which are, as such, liable to undermine the effectiveness of rights conferred by the EU legal order by making it practically impossible or excessively difficult for individuals to exercise those rights.

268 That being so, it must, in the third place, be observed that, unlike the powers relating to provisions of substantive EU law which were at issue, inter alia, in the cases which gave rise to the judgments referred to in paragraphs 265 and 266 of the present judgment, the reorganisation and centralisation of jurisdiction which the Commission disputes by its second complaint concern certain requirements arising from the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, namely provisions of both a constitutional and procedural nature, compliance with which must, moreover, be guaranteed across all the substantive areas of application of EU law and before all national courts seised of cases falling within those areas.

269 As recalled in paragraph 69 of the present judgment, the second subparagraph of Article 19(1) TEU gives concrete expression to the value of the rule of law set out in Article 2 TEU and, in that regard, obliges the Member States to establish a system of legal remedies and procedures ensuring respect for individuals for their right to effective judicial protection in all the fields covered by EU law, the principle of effective judicial protection referred to in the second subparagraph of Article 19(1) TEU being a general principle of EU law now enshrined in Article 47 of the Charter.

270 In that regard, those two provisions of EU law and that general principle are closely linked to the principle of the primacy of EU law. The implementation of that principle by national courts contributes to ensuring the effective protection of the rights which EU law confers on individuals (see, to that effect, judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraphs 53 to 55 and the case-law cited).

271 The principle of the primacy of EU law, which is also constitutional in nature, requires, in accordance with the settled case-law referred to in paragraph 228 of the present judgment, that the national courts which are called upon, within the limits of their jurisdiction, to apply provisions of EU law, ensure that those provisions are fully effective in the disputes before them, if necessary refusing of their own motion to apply any provision of national law which is contrary to a provision of EU law having direct effect, without requesting or waiting for that provision of national law to be first set aside by legislative or other constitutional means.

272 The Court thus held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding

from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law (judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 36 and the case-law cited).

273 The Court has stated that that would be the case if, in the event of a conflict between a provision of EU law and a national law, the solution of the conflict were to be reserved to an authority with a discretion of its own, other than the court called upon to apply EU law (judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 37 and the case-law cited), even if such an impediment to the full effectiveness of EU law were only temporary (judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 57 and the case-law cited).

274 As recalled in paragraph 128 above, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law and, in that context, it is for the national courts and tribunals and the Court of Justice to ensure both the full application of EU law in all the Member States and the effective judicial protection of the rights which individuals derive from EU law.

275 Furthermore, according to the Court's settled case-law, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 41 and the case-law cited).

276 In that context, the Court has held, inter alia, as recalled in paragraphs 129 to 131 of the present judgment, that the fundamental right to an independent and impartial tribunal previously established by law means that any national court called upon to apply EU law is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt appears on that point, such a check being necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction, or that such a national court must, in certain circumstances, be able to verify whether an irregularity vitiating the procedure for the appointment of a judge could lead to an infringement of that fundamental right.

277 That being so, it may be justified for a judge who has not recused him or herself and who is the subject of an application for recusal made by a party to the case on account of a potential conflict of interest on the part of that judge not to participate in the decision ruling on such an application and that the jurisdiction to rule on it, as was the case in Poland before the entry into force of the contested national provisions, is entrusted, according to the assumptions, to another formation of the court concerned or to the court immediately higher than that court. Similarly, it may be consistent with the sound administration of justice for conflicts of substantive or territorial jurisdiction that may arise between several courts to be decided by a third body.

278 By contrast, the obligations referred to in paragraph 276 of the present judgment are such as to preclude the review of compliance by the national courts and the subsequent application of the requirements arising from the provisions of the second subparagraph of Article 19(1) TEU and

Article 47 of the Charter as interpreted by the Court from being capable, in the context of a reorganisation of jurisdiction such as that disputed by the Commission in its second complaint, of falling, in a general and indiscriminate manner, within the jurisdiction of a single national body, all the more so if that body cannot, under national law, examine certain aspects inherent in those requirements.

279 In that regard, it should also be noted that the considerations to which the Court refers in its case-law recalled in paragraph 265 of the present judgment, relating to the advantages potentially linked to specialisation in terms of administration of justice, expertise, limitation of the average duration of procedures, or the uniform application of the law, cannot prevail as regards the requirements flowing from the principle of effective judicial protection, which any national court must, by definition, whatever its degree or scope of substantive jurisdiction, be able to ensure, for the purposes of the specific dispute before it, if necessary by entering into dialogue with the Court on the basis of Article 267 TFEU.

280 In the present case, it must be stated, on the one hand, that the national provisions which the Commission contests in the second complaint are intended to reserve to a single body, in the present case a specific chamber of the Sąd Najwyższy (Supreme Court), the overall review of the requirements stemming from that principle relating to the independence of all courts and judges of both the ordinary and administrative judiciary, by precluding such a review from being carried out by one of those other courts, including, therefore, by the other chambers of the Sąd Najwyższy (Supreme Court) and the Naczelny Sąd Administracyjny (Supreme Administrative Court), and, in so doing, depriving of their powers the national courts which previously had jurisdiction to carry out the various types of review relating to such requirements and to apply directly, in that context, the guidance provided by the case-law of the Court.

281 First, as is apparent from Article 26(2) of the amended Law on the Supreme Court, the Extraordinary Review and Public Affairs Chamber was granted exclusive jurisdiction to rule on ‘applications or declarations’ concerning the ‘recusal’ of a judge or the ‘designation of the court’ before which proceedings must be conducted, including ‘complaints alleging a lack of independence of the court or the judge [concerned]’, applications or declarations which must thus be sent immediately to that chamber by any other court seised of a case, including where the substance of that case falls within an area covered by EU law.

282 Secondly, it is apparent from Article 82(2) to (5) of the amended Law on the Supreme Court that the Extraordinary Review and Public Affairs Chamber sitting in plenary session also has exclusive jurisdiction, where, in the examination of an appeal on a point of law or other appeal pending before the Sąd Najwyższy (Supreme Court), including before the other chambers of that court, ‘a question of law relating to the independence of a judge or of a court arises’. In that situation, Article 82(2) of that law provides that the formation of the Sąd Najwyższy (Supreme Court) hearing the case concerned ‘shall stay the proceedings and refer that question’ to the Extraordinary Review and Public Affairs Chamber, it being further specified that a decision adopted by that chamber on that basis is to be ‘binding on all formations of the [Sąd Najwyższy (Supreme Court)]’.

283 Thirdly, the provisions of Article 26(4) to (6) of the amended Law on the Supreme Court provides inter alia that the Extraordinary Review and Public Affairs Chamber shall have jurisdiction to hear ‘actions for a declaration that final judgments of the [Sąd Najwyższy (Supreme Court)], the ordinary courts, the military courts and the administrative courts, including the [Naczelny Sąd Administracyjny (Supreme Administrative Court)], are unlawful’, if ‘the unlawfulness consists in

the calling into question of the status of the person appointed to a judicial post who adjudicated in the case'.

284 It must be observed that the broad terms in which Article 26(4) to (6) of the amended Law on the Supreme Court is worded appear to allow the Extraordinary Review and Public Affairs Chamber to carry out *ex post* review of all final decisions delivered by all other Polish judicial and administrative courts, including final decisions of other chambers of the Sąd Najwyższy (Supreme Court) and of the Naczelny Sąd Administracyjny (Supreme Administrative Court), whenever the status of a person appointed to the position of judge and who has been called upon to give a ruling at any stage in the handling of the case is called into question.

285 On the other hand, account must be taken of the fact that the national provisions contested in the second complaint were introduced into the Law on the Supreme Court by the amending law, as a matter of urgency and in the particular context described in paragraphs 140 to 145 of the present judgment, concurrently with the other provisions contested by the Commission in the context of the first and third complaints. As is apparent from the findings made by the Court when examining those first and third complaints, the reason given for upholding those complaints is, inter alia, the fact that the contested national provisions, because of the prohibitions and disciplinary offences they impose on judges of the Sąd Najwyższy (Supreme Court) and on all the ordinary and administrative courts, are such as to prevent those judges and courts from making certain findings and assessments which, in certain circumstances, are incumbent on them under EU law, in the light of the requirements arising from the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

286 In such a context, the fact that the national legislature reorganises the jurisdiction applicable and confers on a single national body jurisdiction to verify compliance with certain essential requirements stemming from the fundamental right to effective judicial protection enshrined in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, whereas the need for such verification may, depending on the circumstances, be raised before any national court, is, combined with the introduction of the abovementioned prohibitions and disciplinary offences, liable to contribute to weakening even further the effectiveness of the review of observance of that fundamental right, which EU law nevertheless entrusts to all the national courts. That is all the more so since, as stated in paragraph 198 of the present judgment, that body cannot, in the case in point, examine a request submitted to it by a national court concerning the 'establishment and the assessment of the legality of the appointment of a judge or of his or her authority to carry out judicial functions'.

287 Moreover, by thus preventing without distinction all those other courts, whatever their level or the procedural stage at which they adjudicate and even though cases concerning the application of substantive provisions of EU law may be brought before them, from doing what is necessary immediately in order to ensure the observance of the right of the individuals concerned to effective judicial protection by disapplying, where appropriate, national rules contrary to the requirements of EU law, the national provisions which the Commission disputes in the context of the second complaint also infringe the principle of the primacy of EU law.

288 As regards, lastly, Article 10 of the amending law, it is sufficient to note that, since the purpose of that article is, in essence, to specify to what extent and how the exclusive jurisdiction conferred on the Extraordinary Review and Public Affairs Chamber by the national provisions referred to in paragraphs 281 to 283 of the present judgment must be exercised in respect of cases which were pending on the date of entry into force of that law, that article is inextricably linked to those other provisions and infringes, consequently, for the same reasons as those set out in

paragraphs 268 to 287 of that judgment, both the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and the principle of the primacy of EU law.

289 It follows from all of the foregoing that the second complaint must be upheld in so far as it alleges infringement of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and of the principle of the primacy of EU law.

290 As regards Article 267 TFEU, it must be stated that the very fact of conferring on a single body, namely, in the present case, the Extraordinary Review and Public Affairs Chamber, exclusive jurisdiction to settle certain questions relating to the application of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter is such as to prevent or, at the very least, discourage other courts, which have thus been deprived of any internal jurisdiction to rule on those questions themselves, from making a reference to the Court for a preliminary ruling in that regard, which, as is apparent from the principles recalled in paragraphs 155 to 158 of the present judgment, infringes Article 267 TFEU.

291 Moreover, as regards the more general context in which the amending law and the contested national provisions were adopted, it should also be recalled that, as the Commission maintains and as is apparent from guidance in several recent judgments of the Court, the attempts by the Polish authorities to discourage or prevent national courts from referring questions concerning interpretation to the Court of Justice for a preliminary ruling regarding the second subparagraph of Article 19(1) TEU and Article 47 of the Charter in relation to the recent legislative reforms that have affected the judiciary in Poland have recently increased (see, inter alia, judgment of 2 March 2021, *A. B and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 99 to106 and the case-law cited).

292 In the light of all the foregoing, the second complaint must be upheld.

The fifth complaint

Arguments of the parties

293 By its fifth complaint, the Commission submits that Article 88a of the amended Law relating to the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law relating to the administrative courts infringe Article 7 and Article 8(1) of the Charter and points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR.

294 According to the Commission, in so far as those national provisions require the judges of the various courts concerned to submit a written declaration concerning their membership of an association, a non-profit foundation or a political party, as well as the positions held therein, and require the publication of such information in the *Biuletyn Informacji Publicznej*, they involve the processing of personal data, since such information concerns clearly identified natural persons acting in the private sphere.

295 Furthermore, the Commission submits that the collection and publication of those personal data do not fall within the scope of the organisation of justice and, in any event, any functional link between those data and the performance of judicial office does not allow such measures to be excluded from the scope of the GDPR. Those measures are intended to influence the career of judges and the performance of their duties and are liable to affect their independence, whereas the

protection of that office should be guaranteed under the second subparagraph of Article 19(1) TEU when those judges are called upon to apply and interpret EU law.

296 The personal data at issue also fall within the categories of sensitive data subject to the regime of prohibition and enhanced protection established in Article 9(1) of the GDPR, as data capable of revealing the political opinions or philosophical beliefs of the judges concerned.

297 The Commission maintains that, even if the objectives, apparent from the explanatory memorandum to the draft which led to the adoption of Article 88a of the amended Law relating to the ordinary courts, seeking to safeguard the political neutrality and impartiality of judges, as well as confidence in that impartiality, and to protect the dignity of their duties, may be regarded as legitimate, the reporting and publication obligations at issue are not, however, necessary in order to achieve those objectives. Accordingly, the interferences which those obligations entail in the right of the persons concerned to respect for their private life and to the protection of their personal data do not comply with the principle of proportionality and thus infringe the requirements arising from the various provisions of EU law referred to in paragraph 293 of the present judgment.

298 The Commission asserts that such measures are not strictly limited to what is necessary to achieve those objectives, since less restrictive means exist for that purpose, such as procedures for recusal and the making available to the bodies responsible for ensuring compliance with professional rules, or for appointing the members of the formations of the court hearing cases, of information relating to certain activities carried out by judges outside their duties which might give rise to conflicts of interest on their part in a given case. Those less intrusive means would also make it possible to avoid using the information thus collected for purposes other than those allegedly pursued, such as the exertion of external pressure on judges that undermines their independence or a desire to harm, on the one hand, their professional reputation and their authority by promoting public mistrust towards them and, on the other hand, the progress of their careers by exposing them to discrimination.

299 Furthermore, according to the Commission, a person's past membership of a political party falls within the scope of that person's private life before his or her appointment as a judge and is not capable of directly affecting his or her current activity. The same applies, in particular, to membership of a political party before 29 December 1989, since obtaining such information is entirely irrelevant for the purpose of assessing the impartiality of a judge in cases brought before him or her more than 30 years later. Thus, the mandatory declaration and publication of such personal data are also not appropriate for attaining the objectives alleged in the present case.

300 The Commission claims that the national measures at issue are in fact a mechanism for the supervision of judges, the sudden introduction of which does not correspond to any justification or specific necessity, since the fact that they are apolitical and impartial has been safeguarded for a long time, in particular, by Article 178 of the Constitution which provides for their apoliticism and by the oath in which judges swear to administer justice 'with full impartiality' and by their obligation to refrain from any act that could 'undermine confidence in their impartiality' binding on them under Articles 66 and 82 of the Law relating to the organisation of the ordinary courts.

301 In its defence, the Republic of Poland submits, first of all, that the GDPR does not apply to the processing of personal data at issue, on the ground that that processing is carried out in the context of an activity which does not fall within the scope of EU law, within the meaning of Article 2(2)(a) of that regulation, namely the organisation and administration of justice, with which the information concerned has a 'direct connection' since it relates to the performance of the duties of a judge.

302 Next, the Republic of Poland submits that, even if the GDPR were applicable in the present case, the legitimate objective of the contested national provisions is to strengthen the impartiality and political neutrality of judges by informing individuals of the possible existence of grounds for recusal which they may rely on in a given case and that those national provisions are proportionate for that purpose.

303 First, a former affiliation to a political party, including where it predates 29 December 1989 and forms part of a historical context of politicisation of the judiciary, is likely to have an effect on the current and future judicial activity of the judge concerned.

304 Secondly, according to the Republic of Poland, the Commission does not in any way support its assertions that the contested national provisions are liable to damage the professional reputation of judges and their independence, and entail a risk of discrimination in their professional career or of being used for such purposes. In particular, the provision of the information concerned would not affect the jurisdiction of the judge to deliver justice, the allocation of cases within the court to which he or she belongs, or the career progress of the person concerned. Nor would the provision of that information have the effect of affecting the independence of the judge concerned or his or her impartiality in the cases before him or her or of leading to the automatic recusal of the person concerned in the context of those cases. Moreover, the Commission does not refer to any specific case in which such information was used in the manner thus suggested.

305 Thirdly, the Republic of Poland asserts that the objective pursued by the contested national provisions cannot be achieved by less restrictive means, since, without access to the information concerned, individuals could not be aware of possible grounds for recusal of the judges called upon to adjudicate in a case concerning them.

306 Furthermore, according to the Republic of Poland, the data concerned do not fall within the categories referred to in Article 9(1) of the GDPR, since the contested national provisions do not seek to have a judge disclose information relating to his or her political opinions or philosophical beliefs. Moreover, those national provisions do not contain any list of the types of affiliation to be mentioned and it is therefore necessary to assess, on a case-by-case basis, whether the obligation to declare applies, taking into account, inter alia, the limits governing interference with private life and, in particular, Article 53(7) of the Constitution, which prohibits public authorities from requiring disclosure of a person's 'world view', beliefs or religion. In any event, for the reasons set out above by the Republic of Poland, those national provisions also satisfy the requirement of proportionality laid down in Article 9(2)(g) of the GDPR.

307 Finally, that Member State asserts that the Commission is attempting to reverse its burden of proof by suggesting that it is for the Republic of Poland to present the facts justifying the adoption and proportionality of those national provisions simply because they did not previously exist.

Findings of the Court

– *Preliminary observations*

308 As a preliminary point, it should be observed, in the first place, that, by its fifth complaint, the Commission asks the Court to declare that, by adopting Article 88a of the amended Law relating to the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law relating to the administrative courts, the Republic of Poland has failed to fulfil both its obligations under points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR and those resulting from Article 7 and Article 8(1) of the Charter.

309 In those circumstances, it is for the Court to rule on the separate infringements thus alleged by the Commission (see, by analogy, judgments of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 131, and of 18 June 2020, *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 143).

310 In the second place, as regards the subject matter of the national provisions contested by the Commission in the context of the fifth complaint, it should be noted, on the one hand, that they require judges of the Sąd Najwyższy (Supreme Court), the ordinary courts and the administrative courts to make, according to the court to which they belong and their position within that court, a declaration which must, in most cases, be made to the president of an ordinary or administrative court, and more exceptionally, as regards the presidents of a Sąd Apelacyjny (Court of Appeal), the First President of the Sąd Najwyższy (Supreme Court) and the President of the Naczelny Sąd Administracyjny (Supreme Administrative Court), either to the KRS or to the Minister for Justice. Under the same national provisions, those various national authorities must then, within 30 days, place the information contained in those declarations online in the *Biuletyn Informacji Publicznej*.

311 Since the collection of that information is criticised by the Commission in so far as it takes place for the purpose of placing that information online, those two operations must be considered together in the light of the provisions of EU law which the Commission alleges have been infringed in the present case.

312 On the other hand, it should be noted that, as is apparent from the contested national provisions, and more specifically from the wording of Article 88a of the amended Law relating to the ordinary courts, a provision referred to in Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law relating to the administrative courts, the declaration information thus submitted for the purposes of being made available online falls into three categories. That information relates, first, to the fact that the judge concerned belongs to an association, with an indication of the name and registered office of that association, the positions held and the period of membership of that association, secondly, to the positions held by the judge within a body of a non-profit foundation, indicating the name and registered office of that foundation and the period during which the position was held, and, thirdly, to the fact that the person concerned belonged to a political party before his or her appointment to a judge's post and during his or her term of office before 29 December 1989, indicating the name of that political party, the positions held and the period of membership.

– *The applicability of the GDPR*

313 While the Republic of Poland submits that the GDPR is not applicable to the contested national provisions, it should be noted at the outset that, under Article 2(1) of the GDPR, that regulation applies to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.

314 Article 2(2)(a) of the GDPR states, however, that that regulation does not apply to the processing of personal data 'in the course of an activity which falls outside the scope of EU law'.

315 In that regard, it should be noted, in the first place, that neither the fact that the information which is the subject of the contested national provisions relates to judges, nor the fact that that information might have certain links with the performance of their duties is, in itself, such as to remove those national provisions from the scope of the GDPR.

316 It should be noted that, in so far as the exception laid down in Article 2(2)(a) of the GDPR renders inapplicable the system of protection of personal data laid down by that regulation and thus deviates from the objective underlying it, namely to ensure the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data, such as the right to respect for private and family life and the right to the protection of personal data, guaranteed by Articles 7 and 8 of the Charter, that exception must, like the other exceptions to such applicability laid down in Article 2(2), be interpreted strictly (see, to that effect, judgments of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraph 41 and the case-law cited, and of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)*, C-439/19, EU:C:2021:504, paragraph 62 and the case-law cited).

317 The Court thus held that Article 2(2)(a) of the GDPR, read in the light of recital 16 and Article 2(2)(b) of that regulation and of the first indent of Article 3(2) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), of which Article 2(2)(a) and (b) of that regulation represents a partial continuation, must be regarded as having the sole purpose of excluding from the scope of the GDPR the processing of personal data carried out by State authorities in the course of an activity which is intended to safeguard national security or of an activity which may be classified in the same category, with the result that the mere fact that an activity is an activity characteristic of the State or of a public authority is not a sufficient ground for that exception to be automatically applicable to such an activity (see, to that effect, judgments of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)*, C-439/19, EU:C:2021:504, paragraph 63 to 66 and the case-law cited, and of 20 October 2022, *Koalitsia 'Demokratichna Bulgaria – Obedinenie'*, C-306/21, EU:C:2022:813, paragraphs 36 to 39).

318 The activities having the aim of safeguarding national security that are envisaged in Article 2(2)(a) of the GDPR encompass, in particular, those that are intended to protect essential State functions and the fundamental interests of society (judgments of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)*, C-439/19, EU:C:2021:504, paragraph 67, and of 20 October 2022, *Koalitsia 'Demokratichna Bulgaria – Obedinenie'*, C-306/21, EU:C:2022:813, paragraph 40).

319 Although ensuring the proper administration of justice in the Member States and, in particular, the enactment of rules applicable to the status of judges and the performance of their duties fall within the competence of those States, the fact remains that the operations governed by the national provisions contested by the Commission in the context of the fifth complaint cannot be regarded as being part of an activity which does not fall within the scope of EU law, within the meaning of Article 2(2)(a) of the GDPR, such as an activity intended to safeguard national security.

320 In that regard, it is expressly stated in recital 20 of the GDPR that that regulation applies, inter alia, to the activities of courts and other judicial authorities, subject to certain accommodations provided for or authorised by that regulation where such courts or other judicial authorities are acting in their judicial capacity.

321 It should be observed that, although, as noted in paragraph 312 of the present judgment, the contested national provisions provide that the operations of collecting and placing online the information concerned are indeed, as a general rule, the responsibility of court presidents either of the ordinary or administrative courts and, exceptionally, of the KRS or the Minister for Justice, such operations are not connected with the exercise of judicial functions by the authorities concerned, with the result that Article 2(2)(a) of the GDPR is not applicable to those operations.

322 In the second place, it should be recalled that, under Article 4(1) of the GDPR, ‘personal data’ means ‘any information relating to an identified or identifiable natural person’. For its part, Article 4(2) of the GDPR defines the term ‘processing’ as ‘any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means’, citing, by way of example of such operations, inter alia, ‘the collection, recording, … dissemination or otherwise making available’ of such data.

323 In the present case, it must be held, on the one hand, that information the declaration and placing online of which has been made compulsory relates to identified or identifiable natural persons and therefore falls within the concept of ‘personal data’ within the meaning of Article 4(1) of the GDPR. That information concerns persons identified by name and relates to their membership of associations, non-profit foundations and political parties and to the functions which those persons perform or have carried out there. The fact that that information forms part of the professional activity of declarants is not such as to deprive them of such a classification (judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 65 and the case-law cited).

324 On the other hand, national provisions consisting, as in the present case, in making the declaration and placing online of the information at issue compulsory involve operations consisting of the collection, recording and dissemination of that information, namely a set of operations which constitutes ‘processing’ of personal data, within the meaning of Article 4(2) of the GDPR (see, as regards the placing online of personal data, judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 65 and the case-law cited).

325 In the light of the foregoing, it must be held that the contested national provisions fall within the scope of the GDPR and that they must, therefore, comply with the provisions of that regulation, which the Commission claims has been infringed in the present case.

– *The applicability of Article 7 and Article 8(1) of the Charter*

326 As Article 51(1) of the Charter provides, its provisions are addressed to the Member States only when they are implementing EU law.

327 In the present case, it is apparent from the considerations set out in paragraphs 313 to 325 of the present judgment that the contested national provisions involve the processing of personal data and that they fall within the scope of the GDPR. It follows that, when those national provisions were adopted, the Republic of Poland was required, inter alia, to implement the GDPR.

328 Furthermore, since those personal data include information on identified individuals, the access of any member of the general public to those data affects the fundamental right of the persons concerned to respect for their private life, guaranteed in Article 7 of the Charter, and it is of no relevance, in that respect, that the data concerned may relate to activities of a professional nature. In addition, making available those data to the general public in that manner constitutes the processing of personal data falling under Article 8 of the Charter (see, to that effect, judgment of 22 November 2022, *Luxembourg Business Registers*, C-37/20 and C-601/20, EU:C:2022:912, paragraph 38 and the case-law cited).

329 Thus, the making available of those personal data to third parties constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, whatever the subsequent use of the information communicated. In that connection, it does not matter whether the information in question relating to private life is sensitive or whether the persons concerned have been

inconvenienced in any way on account of that interference (see, to that effect, judgment of 22 November 2022, *Luxembourg Business Registers*, C-37/20 and C-601/20, EU:C:2022:912, paragraph 39 and the case-law cited).

330 It follows from the above that Article 7 and Article 8(1) of the Charter are applicable in the present case and that the contested national provisions must therefore comply with those articles (see, to that effect, judgment of 18 June 2020, *Commission* v *Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 103).

– *The alleged infringement of the provisions of points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR and of Article 7 and Article 8(1) of the Charter*

331 It is appropriate to emphasise at the outset, on the one hand, the close links between the GDPR and the provisions of Article 7 and Article 8(1) of the Charter, provisions in the light of which that regulation must be interpreted.

332 It is also apparent from Article 1(2) of the GDPR, read in conjunction with recitals 4 and 10 thereof, that that regulation has the objective in particular of ensuring a high level of protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data; that right is also recognised in Article 8 of the Charter and is closely connected to the right to respect for private life, enshrined in Article 7 of the Charter (judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 61). As the Advocate General also observed in particular in point 235 of his Opinion, for as long as the conditions governing the legal processing of personal data under that regulation are fulfilled, such processing meets, in principle, the requirements of Articles 7 and 8 of the Charter (see, by analogy, judgment of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraph 102).

333 On the other hand, as is apparent from the arguments which it puts forward in support of the fifth complaint, the Commission questions the fact that the contested national provisions genuinely pursue the objectives put forward by the Republic of Poland and submits that the interferences with fundamental rights to the protection of personal data and to respect for private life resulting from those provisions do not, in any event, comply with the requirement of proportionality arising from the various provisions of EU law which it claims have been infringed. Since the Commission has not alleged that those national provisions do not satisfy other requirements arising from those provisions of EU law, the Court must confine itself to examining the complaint thus formulated by the Commission and, consequently, examine those national provisions solely from the perspective of their proportionality in the light of the objectives alleged by the Republic of Poland.

334 In that regard, it should indeed be borne in mind, first, that it follows from settled case-law that the fundamental rights to respect for private life and to the protection of personal data, guaranteed in Articles 7 and 8 of the Charter, are not absolute rights, but must be considered in relation to their function in society and be weighed against other fundamental rights. Limitations may therefore be imposed, so long as, in accordance with Article 52(1) of the Charter, they are provided for by law, respect the essence of the fundamental rights and observe the principle of proportionality. Under the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. They must apply only in so far as is strictly necessary and the legislation which entails the interference must lay down clear and precise rules governing the scope and application of the measure in question (judgment of 1 August 2022,

Vyriausioji tarnybinės etikos komisija, C-184/20, EU:C:2022:601, paragraph 70 and the case-law cited).

335 As regards, secondly, the first subparagraph of Article 6(1) of the GDPR, that provision sets out an exhaustive and restrictive list of cases where the processing of personal data can be regarded as lawful. Thus, in order to be capable of being regarded as such, processing must fall within one of the cases provided for in that provision (judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 67 and the case-law cited).

336 Under point (c) of the first subparagraph of Article 6(1) of the GDPR, processing is lawful where it is necessary for compliance with a legal obligation to which the controller is subject. Under point (e) of the first subparagraph of Article 6(1) of that regulation, processing which is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller is also lawful.

337 Article 6(3) of the GDPR specifies, in respect of those two situations where processing is lawful, that the processing must be based on EU law or on Member State law to which the controller is subject, and that that legal basis must meet an objective of public interest and be proportionate to the legitimate aim pursued. Since those requirements constitute an expression of the requirements arising from Article 52(1) of the Charter, they must be interpreted in the light of the latter provision (judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 69).

338 In the present case, the purpose of the national provisions at issue consists, as stated in paragraph 310 of the present judgment, in requiring the judges concerned to make, depending on the court to which they belong and their position within that court, a declaration which must, in most cases, be addressed to court presidents either of the ordinary or the administrative courts and, exceptionally, of the KRS or the Minister for Justice, for the purposes of the publication, in the *Biuletyn Informacji Publicznej*, by such authorities, of the information set out in that declaration.

339 Given that the obligation to collect, record and place information online, to which those authorities are thus subject, follows from the provisions referred to in paragraph 310 of the present judgment, the processing of personal data at issue must be regarded as necessary for compliance with a legal obligation which is binding on those authorities as controller in respect of that processing. Accordingly, that processing falls within the situation envisaged in point (c) of the first subparagraph of Article 6(1) of the GDPR (see, to that effect, judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 71).

340 As regards the situation where processing is lawful referred to in point (e) of the first subparagraph of Article 6(1) of the GDPR, it should be noted that the pursuit of the objective of impartiality of judges, put forward, inter alia, in the explanatory memorandum to the amending law relating to the national provisions contested by the Commission in the context of its fifth complaint, contributes to ensuring the proper performance of the judicial function which constitutes a task carried out in the public interest, within the meaning of that provision of that regulation.

341 As regards, thirdly, Article 9(1) of the GDPR, that provision prohibits, inter alia, the processing of personal data revealing a natural person’s political opinions or religious or philosophical beliefs. According to the title of Article 9, these are ‘special categories of personal data’, and those data are also classified as ‘sensitive data’ in recital 10 of the GDPR.

342 Certain exceptions to such a prohibition are provided for in Article 9(2) of the GDPR. As is apparent from Article 9(2)(g) of that regulation, that prohibition is not to apply, inter alia, where processing is necessary for reasons of substantial public interest, on the basis of EU or Member State law which is to be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

343 It is thus apparent from the wording of Article 9 of the GDPR that the prohibition laid down by that provision applies, subject to the exceptions laid down by that regulation, to any type of processing of the special categories of data referred to in that provision and to all controllers carrying out such processing (see, to that effect, judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraph 42).

344 In order to determine whether the contested national provisions fall within the scope of Article 9 of the GDPR, it should be noted, at the outset, that that provision applies to processing not only of inherently sensitive data, but also of data revealing information of that nature indirectly, following an intellectual operation involving deduction or cross-referencing (see, to that effect, judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 123).

345 It must also be borne in mind that, as the Court has held, a wide interpretation of the concept of 'sensitive data' is confirmed by the objective of the GDPR, recalled in paragraph 316 above, which is to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data concerning them. Such an interpretation also complies with the purpose of Article 9(1) of the GDPR, namely to ensure enhanced protection as regards processing which, because of the particular sensitivity of the data processed, is liable to constitute, as follows from recital 51 of the GDPR, a particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, guaranteed by Articles 7 and 8 of the Charter (see, to that effect, judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija,* C-184/20, EU:C:2022:601, paragraphs 125 and 126 and the case-law cited).

346 In the present case, it must be stated that the collection and placing online of information relating to the past 'membership' of a judge of a 'political party' and to the 'positions' held in that party, referred to in Article 88a(1)(3) of the amended Law relating to the ordinary courts, constitute processing operations capable of revealing the political opinions of the person concerned, within the meaning of Article 9(1) of the GDPR.

347 As regards the information relating to the past or current 'membership' of a judge of an 'association' and to the 'positions' held by that judge in the context of that membership or to the 'positions' that he or she has held or holds in a 'non-profit foundation', referred to in points 1 and 2 of Article 88a(1) of the amended Law relating to the ordinary courts, it must be held, as the Advocate General observed in points 244 and 245 of his Opinion, in the light of the very broad and imprecise nature of the terms used by the Polish legislature, the collection and placing online of such information is, depending on the precise nature of the associations and foundations concerned, likely to reveal the religious or philosophical beliefs of the persons concerned, within the meaning of Article 9(1) of the GDPR, as the Commission submits.

348 It follows that, in order to escape the prohibition laid down in Article 9(1), the contested national provisions must correspond to one of the situations referred to in Article 9(2) and satisfy

the requirements set out therein, namely, in the present case, the requirements laid down in Article 9(2)(g) of the GDPR.

349 It follows from all of the foregoing that, since the contested national provisions fall within the scope of points (c) and (e) of the first subparagraph of Article 6(1) and Article 9(1) of the GDPR, and of Article 7 and Article 8(1) of the Charter, it is now necessary to assess their possible justification in the light of Article 6(3) and Article 9(2)(g) of that regulation and Article 52(1) of the Charter.

350 In that regard, it is apparent from paragraphs 334, 337 and 342 of the present judgment that, in order for the contested national provisions, as legal bases for the processing of personal data at issue, to satisfy the requirements arising, respectively, from Article 52(1) of the Charter, Article 6(3) of the GDPR and Article 9(2)(g) of that regulation, those processing operations must, inter alia, meet an objective of public interest and be proportionate to the legitimate aim thus pursued (see, to that effect, judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 73).

351 In the present case, the Commission submits in its application that it is apparent from the statement of reasons relating to the draft law which led to the adoption of Article 88a of the amended Law relating to the ordinary courts that that draft law was motivated by a desire to preserve the political neutrality and impartiality of judges, public confidence in that impartiality and, lastly, the dignity of the duties performed by them.

352 In its defence, the Republic of Poland, in order to justify the adoption of the contested national provisions, referred to the objective of strengthening the political neutrality and impartiality of judges and the confidence of individuals in that impartiality, while stating, as regards that political neutrality, that, in the present case, those national provisions are intended, more specifically, to enable individuals to be informed of the previous political activities of the judges concerned where those activities are such as to cast doubt on the objectivity of the judge in a given case and therefore to lead to his or her possible recusal.

353 In that regard, it should be noted at the outset that the objective thus alleged by the Republic of Poland, in so far as it consists of guaranteeing the political neutrality and impartiality of judges and reducing the risk that judges may be influenced, in the performance of their duties, by considerations relating to private or political interests, is, as stated in paragraph 340 of the present judgment, indisputably in the public interest and, consequently, legitimate (see, by analogy, judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraphs 75 and 76). The same is true of the objective of strengthening the confidence of individuals as regards the existence of such impartiality.

354 As the Court has emphasised on several occasions, that requirement that courts be independent and impartial, which is inherent in the task of adjudication, forms part of the essence of the fundamental right to effective judicial protection and 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 (see, to that effect, judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 51 and the case-law cited, and of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 94 and the case-law cited).

355 It is settled case-law that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of a court and the grounds for

objection to its members, which 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 (see, to that effect, judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 95 and the case-law cited). As recalled in paragraph 95 of the present judgment, those rules must, in particular, be such as to exclude types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned and thus preclude a lack of appearance of independence or impartiality on their part liable to undermine the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

356 It follows that the objective which the Republic of Poland claims it wished to pursue in the present case corresponds, as such, to an objective of general interest recognised by the European Union, within the meaning of Article 52(1) of the Charter, or to an objective of public interest and is, therefore, legitimate, within the meaning of Article 6(3) of the GDPR, since such an objective of public interest may, moreover, be classified as 'substantial' within the meaning of Article 9(2)(g) of that regulation.

357 Consequently, in accordance with those provisions of EU law, such an objective authorises limitations on the exercise of the rights guaranteed in Articles 7 and 8 of the Charter, provided, inter alia, that those limitations genuinely meet that objective and are proportionate to it (see, to that effect, judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 81).

358 According to settled case-law, the proportionality of the measures which result in interference with the rights guaranteed in Articles 7 and 8 of the Charter requires compliance not only with the requirements of appropriateness and of necessity but also with that of the proportionate nature of those measures in relation to the objective pursued (judgment of 22 November 2022, *Luxembourg Business Registers*, C-37/20 and C-601/20, EU:C:2022:912, paragraph 63 and the case-law cited).

359 More specifically, derogations from and limitations on the protection of personal data should apply only in so far as is strictly necessary, it being understood that where there is a choice between several measures appropriate to meeting the legitimate objectives pursued, recourse must be had to the least onerous. In addition, an objective of general interest may not be pursued without having regard to the fact that it must be reconciled with the fundamental rights affected by the measure at issue, and by properly balancing the objective of general interest against the rights at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued. Thus, the question whether a limitation on the rights guaranteed in Articles 7 and 8 of the Charter may be justified must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the objective of general interest pursued by that limitation is proportionate to that seriousness (see, to that effect, judgments of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 98 and the case-law cited, and of 22 November 2022, *Luxembourg Business Registers*, C-37/20 and C-601/20, EU:C:2022:912, paragraph 64 and the case-law cited).

360 In the same way, recital 39 of the GDPR stresses, in particular, that the requirement of necessity is met where the objective of general interest pursued cannot reasonably be achieved just as effectively by other means less restrictive of the fundamental rights of data subjects, in particular the rights to respect for private life and to the protection of personal data guaranteed in Articles 7 and 8 of the Charter, since derogations and limitations in relation to the principle of protection of such data must apply only in so far as is strictly necessary (see, to that effect, judgments of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 85 and the case-law cited).

361 In those circumstances, it is necessary to ascertain, first, whether, assuming that they are actually guided by the pursuit of the public interest objective alleged by the Republic of Poland, the contested national provisions prove appropriate for attaining that objective. Where appropriate, it will be necessary to examine, secondly, whether the interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter resulting from those national provisions is limited to what is strictly necessary, in the sense that that objective could not reasonably be achieved just as effectively by other means less prejudicial to those fundamental rights, and, thirdly, whether that interference is disproportionate in relation to that objective, which entails, inter alia, a balancing of the importance of that objective and the seriousness of that interference (see, to that effect, judgment of 22 November 2022, *Luxembourg Business Registers*, C-37/20 and C-601/20, EU:C:2022:912, paragraph 66).

362 As regards, in the first place, the question whether the publication in the *Biuletyn Informacji Publicznej* of the information collected by means of the declarations at issue is appropriate for attaining the objective of general interest allegedly pursued in the present case, it must be stated that the Republic of Poland has not provided clear and concrete explanations as to why the mandatory uploading of information relating to a person's membership of a political party before his or her appointment to a judicial position and during the exercise of his or her term of office before 29 December 1989 would be such as to contribute to strengthening the right of individuals to have their case heard by a court meeting the requirement of impartiality and their confidence in such impartiality.

363 In that regard, it should, moreover, be recalled that the Court has already held, more generally, that the circumstances surrounding the initial appointment of a judge, made during the period during which the undemocratic regime of the Polish People's Republic was in place, cannot per se be regarded as capable of giving rise to legitimate and serious doubts in the minds of individuals as to the independence and impartiality of that judge in the exercise of subsequent judicial functions (judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraphs 82 to 84 and 107).

364 Moreover, the adoption of the national provisions contested by the Commission in its fifth complaint, which appear, like those referred to in the first and third complaints, in the amending law, adopted as a matter of urgency and in the context described in paragraphs 141 to 145 and 291 of the present judgment, permits the view, as the Commission maintains, that those provisions, in so far as they relate to information concerning the membership of a political party of judges before their appointment and during the exercise of their term of office before 29 December 1989, were in fact adopted in order to damage the professional reputation of the judges concerned and the perception held by individuals of them or even to stigmatise those judges and, therefore, to curb the career development of the persons concerned.

365 It follows from the foregoing that, in so far as the contested national provisions concern such information, with the obligation to include the name of the political party concerned, the positions held and the period of affiliation thereto, namely personal data, which is, moreover, 'sensitive', for the purposes of Article 9 of the GDPR, those national provisions are, even if they genuinely sought to pursue the legitimate objective alleged in the present case, in any event inappropriate for the purpose of attaining that objective.

366 The findings made in paragraphs 362 to 365 of the present judgment are sufficient to rule out the possibility that, in so far as the contested national provisions provide for the collection of information and the placing online of that information concerning a person's membership of a political party before his or her appointment to a judicial position and during the exercise of his or

her term of office before 29 December 1989, those national provisions can satisfy the requirements arising from the principle of proportionality set out in Article 52(1) of the Charter and in Article 6(3) and Article 9(2)(g) of the GDPR. It follows that, in so far as those national provisions relate to such information, they infringe both the provisions of points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR and those of Article 7 and Article 8(1) of the Charter.

367 By contrast, as regards the other information referred to in the contested national provisions, that is to say, that relating to the current or past membership of an association and the current or past holding of positions within that association or in a non-profit foundation, it cannot be ruled out, a priori, that the fact of placing such information online might contribute to revealing the existence of possible conflicts of interest liable to influence the performance of the duties of the judges concerned in the handling of individual cases, by contributing to the impartial performance of those duties and, thus, the strengthening of the confidence of individuals in judicial proceedings (see, to that effect, judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 83).

368 Consequently, it is necessary, in the second place, to ascertain whether the objective alleged by the Republic of Poland could reasonably be achieved just as effectively by other measures less prejudicial to the rights of the judges concerned to respect for their private life and to the protection of their personal data and whether the interference at issue is disproportionate in relation to that objective, which entails, inter alia, a weighing up of the importance of that objective and the seriousness of that interference.

369 Those assessments must be carried out in the light of all the matters of fact and law specific to the Member State concerned – such as the existence of other measures designed to guarantee such impartiality and to prevent conflicts of interest (see, to that effect, judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 86).

370 In that regard, although, while it is true, as the Commission submits and as is apparent from paragraph 300 of the present judgment, various national provisions already exist for the purpose of establishing and helping to guarantee the impartiality of judges in Poland, it does not follow that measures which are intended to further strengthen that impartiality, including the appearance of impartiality, and the confidence of individuals in it are to be regarded as going beyond what is necessary for such purposes.

371 Moreover, making the information in question available to the authorities called upon to decide or to prevent possible conflicts of interest, as the Commission suggests, would not necessarily enable individuals themselves to be aware of that information and to detect the possible existence of such conflicts arising from that information and, where appropriate, to rely on that information in order to request the recusal of a judge called upon to adjudicate on a particular case. Similarly, the placing online of that information is, in principle, such as to enable the individuals concerned to have it in complete transparency and without having to take steps to inquire into those who are called upon to settle disputes to which they are parties. Such transparency may, at the same time, contribute to strengthening the confidence of individuals in the administration of justice.

372 However, it is important, on the one hand, to note that, in the present case, the personal data concerned relate in particular to periods preceding the date from which a court is required to make the declaration required under the contested national provisions, irrespective of the time elapsed. In the absence, at the very least, of a temporal limitation as regards the earlier periods thus concerned, it cannot reasonably be considered that, in so far as they relate to such earlier periods, the measures

at issue are limited to what is strictly necessary for the purposes of helping to strengthen the right of individuals to have, in a given case, their case heard by a court meeting the requirement of impartiality, and confidence on the part of those individuals in that impartiality.

373 Secondly, having regard to the case-law recalled in paragraph 359 of the present judgment, it is also necessary, for the purpose of assessing the proportionality of the processing called into question by the Commission, to measure the seriousness of the interference with the fundamental rights to respect for private life and to the protection of personal data that that processing involves and to determine whether the importance of the objective of general interest pursued by the processing is proportionate to the seriousness of the interference.

374 In order to assess the seriousness of that interference, account must be taken, inter alia, of the nature of the personal data at issue, in particular of any sensitivity of those data, and of the nature of, and specific methods for, the processing of the data at issue, in particular of the number of persons having access to those data and the methods of accessing them (judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 99 and the case-law cited). As stated in paragraph 369 of the present judgment, account must also be taken for that purpose of all the matters of law and of fact specific to the Member State concerned.

375 In the present case, it should be noted, first, that the placing online of the named information at issue is, depending on the object of the non-profit associations or foundations concerned, liable to reveal information on certain sensitive aspects of the private life of the judges concerned, in particular their religious or philosophical beliefs, such information falling, as previously established, within the scope of Article 9(1) of the GDPR.

376 Secondly, it should be noted that the processing of the personal data at issue results in those data being made freely accessible on the internet to the general public and, consequently, to a potentially unlimited number of persons, with the result that that processing is liable to enable that information to be freely accessed also by persons who, for reasons unrelated to the alleged public interest objective of ensuring the impartiality of judges and preventing conflicts of interest with regard to them, seek to obtain information about the personal situation of the declarant (see, to that effect, judgment of 22 November 2022, *Luxembourg Business Registers*, C-37/20 and C-601/20, EU:C:2022:912, paragraph 42 and the case-law cited).

377 Thirdly, account must also be taken of the fact that, as the Commission submits and as stated in paragraph 364 of the present judgment, in the particular context, specific to the Member State concerned, in which the contested national provisions were adopted, the placing online of the personal data at issue is liable, for example, to expose the judges concerned to risks of undue stigmatisation, by unjustifiably affecting the perception of those judges by individuals and the public in general, as well as the risk that the progress of their careers would be unduly hampered.

378 Therefore, the processing of personal data such as that established by the contested national provisions must be regarded as constituting a particularly serious interference with the fundamental rights of the persons concerned to respect for their private life and to the protection of their personal data enshrined in Article 7 and Article 8(1) of the Charter.

379 The seriousness of that interference must therefore be weighed against the importance of the alleged objective of general interest, which is to ensure the impartiality of judges, including the appearance of impartiality, and to prevent conflicts of interest on their part, while at the same time increasing the transparency and confidence of individuals in that impartiality.

380 To that end, it is necessary to take into consideration, in particular, the fact and the extent of the risk thus allegedly combated and the objectives genuinely pursued by the contested national provisions, having regard, in particular, to the context in which those provisions are adopted, so that the result of the weighing up to be carried out of those objectives, on the one hand, and a data subject's rights to respect for private life and to the protection of personal data, on the other, is not necessarily the same for all the Member States (see, to that effect, judgment of judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 110 and the case-law cited).

381 In the present case, it must be held that, having regard to the general and specific national context to which the contested national provisions belong, and to the particularly serious consequences liable to stem from those national provisions for the judges concerned, the result of the weighing up of the interference resulting from the placing online of the personal data concerned and the alleged objective of general interest is not balanced.

382 In comparison with the *status quo ante* resulting from the pre-existing national legal framework, the placing online of the personal data concerned represents a potentially significant interference with the fundamental rights guaranteed in Article 7 and Article 8(1) of the Charter, without that interference being capable, in the present case, of being justified by any benefits that might result from it in terms of preventing conflicts of interest on the part of judges and increasing confidence in their impartiality.

383 In that context, it must, moreover, be pointed out that every judge is obliged, under the rules generally applicable to the status of judges and the performance of his or her duties, to withdraw from any case in which a circumstance, such as his or her current or past membership of an association or the current or past holding of positions within that association or in a non-profit foundation, could legitimately give rise to doubt as to his or her impartiality.

384 In the light of all the foregoing, it must be held that the contested provisions infringe both the provisions of points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR and those of Article 7 and Article 8(1) of the Charter, also in so far as they concern the collection and placing online of personal data relating to the current or past membership of an association and the current or past holding of positions within that association or within a non-profit foundation.

385 In those circumstances, the fifth complaint must be upheld in its entirety in so far as it alleges infringement of those provisions of EU law.

386 Having regard to all the foregoing considerations, it must be held that:

– by conferring on the Disciplinary Chamber, whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office, such as, on the one hand, applications for authorisation to initiate criminal proceedings against judges and trainee judges or to detain them and, on the other hand, cases relating to employment and social security law that concern judges of the Sąd Najwyższy (Supreme Court) and cases relating to the compulsory retirement of those judges, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

– by adopting and maintaining in force points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts and points 1 to 3 of Article 72(1) of the amended Law on the

Supreme Court, under which the examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law may be classified as a disciplinary offence, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU;

– by adopting and maintaining in force Article 42a(1) and (2) and Article 55(4) of the amended Law relating to the ordinary courts, Article 26(3) and Article 29(2) and (3) of the amended Law on the Supreme Court, Article 5(1a) and (1b) of the amended Law relating to the administrative courts, and Article 8 of the amending law, prohibiting any national court from verifying compliance with the requirements stemming from EU law relating to the guarantee of an independent and impartial tribunal previously established by law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and under the principle of the primacy of EU law;

– by adopting and maintaining in force Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and Article 10 of the amending law, which place the examination of complaints and questions of law concerning the lack of independence of a court or judge under the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU and the principle of the primacy of EU law;

– by adopting and maintaining in force Article 88a of the amended Law relating to the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law relating to the administrative courts, the Republic of Poland has infringed the right to respect for private life and the right to protection of personal data, guaranteed by Article 7 and Article 8(1) of the Charter and by points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR.

387 The action is dismissed as to the remainder, namely, in so far as the Commission seeks, by its first complaint, a declaration of infringement of Article 267 TFEU.

Costs

388 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 essentially been unsuccessful, the latter must be ordered to pay the costs, including those relating to the proceedings for interim relief.

389 In accordance with Article 140(1) of the Rules of Procedure, the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden are to bear their own costs.

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

1. **Declares that by conferring on the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court, Poland), whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office, such as, on the one hand, applications for authorisation to initiate criminal proceedings against judges and trainee judges or to detain**

them and, on the other hand, cases relating to employment and social security law that concern judges of the Sąd Najwyższy (Supreme Court) and cases relating to the compulsory retirement of those judges, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

2. **Declares that by adopting and maintaining in force points 2 and 3 of Article 107(1) of the ustawa – Prawo o ustroju sądów powszechnych (Law relating to the organisation of the ordinary courts) of 27 July 2001, as amended by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws) of 20 December 2019, and of points 1 to 3 of Article 72(1) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017, as amended by that law of 20 December 2019, which allow the examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law to be classified as a disciplinary offence, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, and under Article 267 TFEU;**

3. **Declares that by adopting and maintaining in force Article 42a(1) and (2) and Article 55(4) of the Law relating to the organisation of the ordinary courts, as amended by the abovementioned law of 20 December 2019, Article 26(3) and Article 29(2) and (3) of the Law on the Supreme Court, as amended by that law of 20 December 2019, Article 5(1a) and (1b) of the ustawa – Prawo o ustroju sądów administracyjnych (Law relating to the organisation of the administrative courts) of 25 July 2002, as amended by the law of 20 December 2019, and Article 8 of the law of 20 December 2019, prohibiting any national court from verifying compliance with the requirements stemming from EU law relating to the guarantee of an independent and impartial tribunal previously established by law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights, and under the principle of the primacy of EU law;**

4. **Declares that by adopting and maintaining in force Article 26(2) and (4) to (6) and Article 82(2) to (5) of the Law on the Supreme Court, as amended by the abovementioned law of 20 December 2019, and Article 10 of the law of 20 December 2019, which establish the exclusive jurisdiction of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court) to examine complaints and questions of law concerning the lack of independence of a court or a judge, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU and the principle of the primacy of EU law;**

5. **Declares that by adopting and maintaining in force Article 88a of the amended Law relating to the organisation of the ordinary courts, as amended by the law of 20 December 2019, Article 45(3) of the Law on the Supreme Court, as amended by the law of 20 December 2019, and Article 8(2) of the Law relating to the organisation of the administrative courts, as amended by the law of 20 December 2019, the Republic of Poland has infringed the right to respect for private life and the right to protection of personal data, guaranteed by Article 7 and Article 8(1) of the Charter of Fundamental Rights and by points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons**

with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation);

6. **Dismisses the action as to the remainder;**

7. **Orders the Republic of Poland to bear its own costs and to pay those incurred by the European Commission, including those relating to the proceedings for interim relief;**

8. **Orders the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland, and the Kingdom of Sweden to bear their own costs.**

[Signatures]

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* Language of the case: Polish.