ECLI:EU:C:2021:596

JUDGMENT OF THE COURT (Grand Chamber)

15 July 2021(*)

(Failure of a Member State to fulfil obligations – Disciplinary regime applicable to judges – Rule of law – Independence of judges – Effective legal protection in the fields covered by Union law – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Disciplinary offences resulting from the content of judicial decisions – Independent disciplinary courts or tribunals established by law – Respect for reasonable time and the rights of the defence in disciplinary proceedings – Article 267 TFEU – Restriction of the right of national courts to submit requests for a preliminary ruling to the Court of Justice and of their obligation to do so)

In Case C-791/19,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 25 October 2019,

European Commission, represented initially by K. Banks, S.L. Kalėda and H. Krämer, and subsequently by K. Banks, S.L. Kalėda and P.J.O. Van Nuffel, acting as Agents,

applicant,

supported by:

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

Kingdom of Denmark, represented initially by M. Wolff, M. Jespersen and J. Nymann-Lindegren, and subsequently by M. Wolff and J. Nymann-Lindegren, acting as Agents,

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

Republic of Finland, represented by M. Pere and H. Leppo, acting as Agents,

Kingdom of Sweden, represented by C. Meyer-Seitz, H. Shev, A. Falk, J. Lundberg and H. Eklinder, acting as Agents,

interveners,

v

Republic of Poland, represented by B. Majczyna, D. Kupczak, S. Żyrek, A. Dalkowska and A. Gołaszewska, acting as Agents,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal (Rapporteur), M. Vilaras, M. Ilešič, A. Kumin and N. Wahl, Presidents of Chambers, T. von Danwitz, C. Toader, K. Jürimäe, C. Lycourgos, N. Jääskinen, I. Ziemele and J. Passer, Judges,

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 1 December 2020,

after hearing the Opinion of the Advocate General at the sitting on 6 May 2021,

gives the following

Judgment

1 By its application, the European Commission claims that the Court should declare that:

– by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts (Article 107 § 1 of the ustawa – Prawo o ustroju sądów powszechnych (Law on the organisation of the ordinary courts) of 27 July 2001 (Dz. U. No 98, item 1070), in the version resulting from the successive amendments published in the *Dziennik Ustaw Rzeczypospolitej Polskiej* of 2019 (items 52, 55, 60, 125, 1469 and 1495) ('the Law on the ordinary courts'), and Article 97 §§ 1 and 3 of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5), in the consolidated version published in the *Dziennik Ustaw Rzeczypospolitej Polskiej* of 2019 (item 825) ('the new Law on the Supreme Court'));

– by failing to guarantee the independence and impartiality of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) ('the Disciplinary Chamber'), which is responsible for reviewing decisions issued in disciplinary proceedings against judges (Article 3(5), Article 27 and Article 73 § 1 of the new Law on the Supreme Court, read in conjunction with Article 9a of the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. No 126, item 714), as amended by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, item 3) ('the Law on the KRS'));

– by conferring on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts (Article 110 § 3 and Article 114 § 7 of the Law on the ordinary courts) and,

therefore, by failing to guarantee that disciplinary cases are examined by a tribunal ‘established by law’; and

– by conferring on the Minister for Justice the power to appoint a Disciplinary Officer of the Minister for Justice (Article 112b of the Law on the ordinary courts) and, therefore, by failing to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time, and by providing that actions relating to the appointment of defence counsel and the taking up of the defence by that counsel do not have a suspensory effect on the course of the disciplinary proceedings (Article 113a of that law) and that the disciplinary tribunal is to conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel (Article 115a § 3 of that law) and, therefore, by failing to guarantee respect for the rights of defence of accused judges of the ordinary courts,

the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU,

and that,

by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice of the European Union to be restricted by the possibility of triggering disciplinary proceedings, the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU.

Legal context

EU law

The EU and FEU Treaties

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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’

3 Article 19(1) TEU provides:

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

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

4 Under Article 267 TFEU:

‘The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

…'

The Charter

5 Title VI of the Charter of Fundamental Rights of the European Union ('the Charter'), entitled 'Justice', includes, in particular, Article 47 thereof, entitled 'Right to an effective remedy and to a fair trial', which is worded as follows:

'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. …

…'

Polish law

The Constitution

6 Under Article 179 of the Constitution, the President of the Republic of Poland ('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.

7 Article 187 of the Constitution provides:

'1. The [KRS] shall be composed as follows:

(1) the First President of the [Sąd Najwyższy (Supreme Court)], the Minister [for] Justice, the President of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] and an individual appointed by the President of the Republic,

(2) 15 judges chosen from among the judges of the [Sąd Najwyższy (Supreme Court)], the ordinary courts, the administrative courts and the military courts,

(3) Four members chosen by [the Sejm (Lower House of the Polish Parliament)] from among its Deputies and two members chosen by [the Senat (Upper House of the Polish Parliament)] from among its Senators.

…

3. The term of office of those chosen as members of the [KRS] shall be four years.

4. The organisational structure, the scope of activity and procedures for work of the [KRS], as well as the manner of choosing its members, shall be specified by statute.'

The new Law on the Supreme Court

8 The new Law on the Supreme Court, in its initial version, entered into force on 3 April 2018. It established, within the Sąd Najwyższy (Supreme Court), two new chambers, namely the Disciplinary Chamber referred to in Article 3(5) of that law and the Izba Kontroli Nadzwyczajnej i Spraw Publicznych Sądu Nawyższego (Extraordinary Review and Public Affairs Chamber).

9 Under Article 6 of the new Law on the Supreme Court:

'§ 1. The First President of the [Sąd Najwyższy (Supreme Court)] shall submit observations to the competent authorities regarding irregularities or deficiencies found in the law, the removal of which is necessary to ensure the rule of law, social justice and the cohesion of the legal system of the Republic of Poland.

§ 2. The President of the [Sąd Najwyższy (Supreme Court)] who directs the work of the Disciplinary Chamber shall submit observations to the competent authorities regarding irregularities or deficiencies found in the law, the removal of which is necessary to ensure the effective processing of cases falling within the jurisdiction of that chamber or to limit the number of disciplinary offences.'

10 Under Article 7 §§ 3 and 4 of that law:

'§ 3. The First President of the [Sąd Najwyższy (Supreme Court)] shall have the powers of the Minister competent for public finances with regard to the implementation of the budget of the [Sąd Najwyższy (Supreme Court)].

§ 4. The President of the [Sąd Najwyższy (Supreme Court)] who directs the work of the Disciplinary Chamber shall have the powers of the Minister competent for public finances with regard to the implementation of the budget of the [Sąd Najwyższy (Supreme Court)] relating to the functioning of the Disciplinary Chamber.'

11 Article 20 of that law states:

'With regard to the Disciplinary Chamber and the judges who adjudicate in the Disciplinary Chamber, the prerogatives of the First President of the [Sąd Najwyższy (Supreme Court)] as defined in:

– Article 14 § 1(1), (4) and (7), Article 31 § 1, Article 35 § 2, Article 36 § 6, Article 40 §§ 1 and 4 and Article 51 §§ 7 and 14 shall be exercised by the President of the [Sąd Najwyższy (Supreme Court)] who directs the work of the Disciplinary Chamber;

– Article 14 § 1(2) and the second sentence of Article 55 § 3 shall be exercised by the First President of the [Sąd Najwyższy (Supreme Court)] in agreement with the President of the [Sąd Najwyższy (Supreme Court)] who directs the work of the Disciplinary Chamber.'

12 Article 27 § 1 of that law 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 conducted pursuant to the following laws:

…

– [the Law on the ordinary courts] …,

…’

13 Under Article 35 § 2 of the new Law on the Supreme Court, the First President of the Sąd Najwyższy (Supreme Court) may, with the consent of the judge concerned, transfer a judge to a post in another chamber.

14 Article 73 § 1 of that law provides:

‘The disciplinary courts in disciplinary cases concerning judges of the [Sąd Najwyższy (Supreme Court)] shall be:

(1) at first instance – the [Sąd Najwyższy (Supreme Court)] composed of two judges of the Disciplinary Chamber and one lay judge of the [Sąd Najwyższy (Supreme Court)];

(2) at second instance – the [Sąd Najwyższy (Supreme Court)] composed of three judges of the Disciplinary Chamber and two lay judges of the [Sąd Najwyższy (Supreme Court)].’

15 Article 97 of that law is worded as follows:

‘§ 1. If the [Sąd Najwyższy (Supreme Court)] detects an obvious violation of the law when examining a case, it shall - regardless of its other prerogatives - issue a finding of error to the relevant court. Before issuing a finding of error, it must inform the judge or judges of the adjudicating panel of the possibility of submitting explanations in writing within seven days. The detection of an error and the issuance of a finding of error shall not affect the outcome of the case.

…

§ 3. Whenever a finding of error is issued, the [Sąd Najwyższy (Supreme Court)] may file a request for a disciplinary case to be examined by a disciplinary court. The disciplinary court of first instance shall be the [Sąd Najwyższy (Supreme Court)].’

16 The transitional provisions of the new Law on the Supreme Court include, inter alia, Article 131 thereof, which provides:

‘Until all of the judges of the [Sąd Najwyższy (Supreme Court)] [sitting] in the Disciplinary Chamber have been appointed, other judges of the [Sąd Najwyższy (Supreme Court)] cannot be transferred to a post in that chamber.’

17 Article 131 of the new Law on the Supreme Court was amended by Article 1(14) of the ustawa o zmianie ustawy o Sądzie Najwyższym (Law amending the Law on the Supreme Court) of 12 April 2018 (Dz. U. of 2018, item 847), which entered into force on 9 May 2018. That article, as amended, provides:

'Judges occupying posts in other chambers of the [Sąd Najwyższy (Supreme Court)] on the date of entry into force of this law may be transferred to posts in the Disciplinary Chamber. Until the day on which all of the judges of the [Sąd Najwyższy (Supreme Court)] [sitting] in the Disciplinary Chamber have been appointed for the first time, a judge occupying a post in another chamber of the [Sąd Najwyższy (Supreme Court)] shall submit to the [KRS] a request for transfer to a post in the Disciplinary Chamber, after obtaining the consent of the First President of the [Sąd Najwyższy (Supreme Court)] and the President of the [Sąd Najwyższy (Supreme Court)] who directs the work of the Disciplinary Chamber and the President of the chamber in which the judge submitting the request for transfer occupies a post. On a proposal from the [KRS], the [President of the Republic] shall appoint persons to serve as judges in the Disciplinary Chamber at the [Sąd Najwyższy (Supreme Court)] until the day on which all posts in that chamber have been filled for the first time.'

The Law on the ordinary courts

18 Article 107 § 1 of the Law on the ordinary courts provides:

'A judge shall be liable to disciplinary action for professional misconduct, including obvious and gross violations of the law and compromising the dignity of his office (disciplinary offences).'

19 Article 110 §§ 1 and 3 of that law is worded as follows:

'§ 1. In disciplinary cases concerning judges, the following shall adjudicate:

(1) at first instance:

(a) disciplinary tribunals at appellate courts, composed of three judges;

(b) the [Sąd Najwyższy (Supreme Court)], composed of two judges of the Disciplinary Chamber, and one lay judge of the [Sąd Najwyższy (Supreme Court)], in cases concerning disciplinary offences having the characteristics of intentional crimes punishable by criminal prosecution by the public prosecutor or intentional tax offences, or in cases in which the [Sąd Najwyższy (Supreme Court)] has made a request for the disciplinary proceedings to be examined in the context of a finding of error;

(2) at second instance – the [Sąd Najwyższy (Supreme Court)] composed of two judges of the Disciplinary Chamber and one lay judge of the [Sąd Najwyższy (Supreme Court)];

…

§ 3. The disciplinary tribunal within whose jurisdiction the judge who is the subject of the disciplinary proceedings holds office shall not be permitted to hear the cases referred to in § 1(1)(a). The disciplinary tribunal with jurisdiction to hear the case shall be designated by the President of the [Sąd Najwyższy (Supreme Court)] who directs the work of the Disciplinary Chamber at the request of the Disciplinary Officer.'

20 Article 112b of that law provides:

‘§ 1. The Minister for Justice may appoint a Disciplinary Officer of the Minister for Justice to conduct a specific case concerning a judge. The appointing of a Disciplinary Officer of the Minister for Justice shall preclude another officer from acting in the case.

§ 2. … In justified cases, in particular if the Disciplinary Officer of the Minister for Justice dies or is unable to perform his or her duties for a prolonged period, the Minister for Justice shall appoint in that person’s place another judge or, in the case of a disciplinary offence having the characteristics of an intentional crime punishable by criminal prosecution by the public prosecutor, a judge or public prosecutor.

§ 3. The Disciplinary Officer of the Minister for Justice may initiate proceedings at the request of the Minister for Justice or join ongoing proceedings.

§ 4. The appointing of a Disciplinary Officer of the Minister for Justice is equivalent to a request to initiate investigative or disciplinary proceedings.

§ 5. The function of the Disciplinary Officer of the Minister for Justice shall expire as soon as a ruling refusing to initiate disciplinary proceedings or discontinuing disciplinary proceedings or a ruling closing disciplinary proceedings becomes final. The expiry of the function of the Disciplinary Officer of the Minister for Justice shall not preclude a Disciplinary Officer of the Minister for Justice being re-appointed by the Minister for Justice in the same case.’

21 Article 113 §§ 2 and 3 of that law provides:

‘§ 2. If the accused judge cannot take part in the proceedings before the disciplinary tribunal on health grounds, the President of the disciplinary tribunal or the disciplinary tribunal itself shall, upon reasoned application by the accused judge, appoint defence counsel, chosen from among lawyers or legal advisers. The accused judge is required to attach to his or her application a certificate issued by a court-authorised doctor certifying that his or her state of health makes it impossible for him or her to take part in the disciplinary proceedings.

§ 3. In exceptional cases, where it is apparent that the failure to submit an application was due to circumstances beyond the control of the accused judge, defence counsel may be appointed in the absence of the application referred to in § 2.’

22 Article 113a of the Law on the ordinary courts is worded as follows:

‘Actions relating to the appointment of defence counsel and the taking up of the defence by that counsel shall not have a suspensory effect on the course of the proceedings.’

23 Under Article 114 § 7 of that law:

‘Upon notification of the disciplinary charges, the Disciplinary Officer shall request the President of the [Sąd Najwyższy (Supreme Court)] who directs the work of the Disciplinary Chamber to designate the disciplinary tribunal responsible for examining the case at first instance. The President of the [Sąd Najwyższy (Supreme Court)] who directs the work of the Disciplinary Chamber shall designate that tribunal within seven days of receipt of the request.’

24 Article 115a § 3 of that law provides:

‘The disciplinary tribunal shall conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel, unless this is contrary to the interests of the disciplinary proceedings being conducted.’

The Law on the KRS

25 Under Article 9a of the Law on the KRS:

‘1. The Sejm shall select, from among the judges of the [Sąd Najwyższy (Supreme Court)], the ordinary courts, the administrative courts and the military courts, 15 members of the [KRS] for a joint term of office of four years.

2. In making the selection referred to in paragraph 1, the Sejm shall, as far as possible, take into account the need for representation within the [KRS] of judges from different types and levels of courts.

3. The joint term of office of new members of the [KRS], selected from among the judges, shall begin on the day following the day of their selection. The members of the [KRS] appointed for the previous term of office shall perform their duties until the day on which the joint term of office of the new members of the [KRS] begins.’

26 The transitional provision contained in Article 6 of the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws, which entered into force on 17 January 2018, provides:

‘The term of office of the members of the [KRS] referred to in Article 187(1)(2) of the [Constitution], selected on the basis of the provisions currently in force, shall continue until the day preceding the beginning of the term of office of the new members of the [KRS] without, however, exceeding 90 days from the date of the entry into force of the present law, unless that term of office has already expired.’

Pre-litigation procedure

27 Taking the view that, by adopting new provisions applicable to the disciplinary regime for judges of the Sąd Najwyższy (Supreme Court) and of the ordinary courts, the Republic of Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU and the second and third paragraphs of Article 267 TFEU, the Commission sent a letter of formal notice to that Member State on 3 April 2019. The latter replied to that letter by letter dated 1 June 2019 in which it denied any infringement of EU law.

28 On 17 July 2019, the Commission issued a reasoned opinion in which it maintained that the new disciplinary regime thus introduced infringed those provisions of EU law. 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. In its reply of 17 September 2019, that Member State took the view that the complaints made by the Commission were unfounded.

29 As it was not satisfied with that reply, the Commission decided to bring the present action.

Procedure before the Court

30 By separate document, lodged at the Registry of the Court on 25 October 2019, the Commission, pursuant to Article 133(1) of the Rules of Procedure of the Court of Justice, requested the Court to determine the present case pursuant to an expedited procedure. In support of that request, the Commission claimed that the complaints made by it in its action against the new disciplinary regime applicable to Polish judges allege systemic breaches of the safeguards required in order to ensure the independence of those judges. The need for legal certainty therefore requires the case to be examined within a short time in order to dispel doubts as to the conformity of that regime with EU law.

31 Article 133(1) of the Rules of Procedure states that, at the request of the applicant or defendant, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the other party, the Judge-Rapporteur and the Advocate General, decide that a case is to be determined pursuant to an expedited procedure derogating from the provisions of those rules.

32 It must be borne in mind, in that regard, that such an expedited procedure is a procedural instrument intended to address matters of exceptional urgency. Furthermore, it is also apparent from the case-law of the Court that the expedited procedure may not be applied where the sensitive and complex nature of the legal problems raised by a case does not lend itself easily to the application of such a procedure, in particular where it is not appropriate to shorten the written part of the procedure before the Court (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 ('the judgment in *Asociaţia "Forumul Judecătorilor din România" and Others*'), paragraph 103 and the case-law cited).

33 In the present case, the President of the Court decided, on 26 November 2019, having heard the Judge-Rapporteur and the Advocate General, that it was appropriate to reject the Commission's request as referred to in paragraph 30 of the present judgment.

34 Indeed, while the questions raised by the present action, which relate to fundamental provisions of EU law, are a priori likely to be of the utmost importance for the proper working of the European Union's judicial system, to which the independence of national courts is essential, the sensitive and complex nature of those questions, which, what is more, arise in the context of wide-ranging reforms in the field of justice in Poland, did not lend itself easily to the application of the expedited procedure (see, by analogy, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 105 and the case-law cited).

35 However, having regard to the subject matter of the action and the nature of the questions which it raises, the President of the Court, by decision of 26 November 2019, granted the present case priority treatment pursuant to Article 53(3) of the Rules of Procedure.

36 Furthermore, by separate document lodged at the Court Registry on 23 January 2020, the Commission lodged an application for interim measures under Article 279 TFEU and Article 160(2) of the Rules of Procedure, requesting that the Court order the Republic of Poland, pending the judgment of the Court ruling on the substance, to:

– suspend the application of Article 3(5), Article 27 and Article 73 § 1 of the new Law on the Supreme Court, which constitute the basis for the jurisdiction of the Disciplinary Chamber to rule, both at first instance and at second instance, in disciplinary cases concerning judges;

– refrain from referring cases pending before the Disciplinary Chamber to an adjudicating panel which does not meet the requirements of independence as defined, inter alia, in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982 ('the judgment in *A. K. and Others*')); and

– inform the Commission, one month after being notified of the order of the Court granting the interim measures sought at the latest, of all the measures it has adopted in order to fully comply with that order.

37 By order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277), the Court granted that application pending delivery of the judgment closing the proceedings in the present case.

38 The Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden were granted leave to intervene in the proceedings in support of the form of order sought by the Commission by decisions of the President of the Court of 11, 19 and 20 February 2020.

39 Following the written part of the procedure, during which the Republic of Poland filed a defence and, subsequently, a rejoinder in response to the reply produced by the Commission, as well as a response to the statements in intervention submitted by each of the five intervening Member States referred to in the preceding paragraph, the parties presented oral argument at a hearing on 1 December 2020. The Advocate General delivered his Opinion on 6 May 2021, on which date the oral part of the procedure was, consequently, closed.

40 By document lodged at the Court Registry on 10 June 2021, the Republic of Poland requested that the oral part of the procedure be reopened. In support of that request, it states, in essence, that it disagrees with the Advocate General's Opinion, from which it is allegedly apparent that the circumstances of the present case have not been sufficiently clarified.

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

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

43 Nevertheless, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information.

44 In the present case, the Court considers, however, after hearing the Advocate General, that, contrary to the Republic of Poland's assertions, it has, following the written part of the procedure and the hearing which was held before it, all the information necessary to give a ruling. In those circumstances, it is not necessary to order that the oral part of the procedure be reopened.

The action

45 In support of its action, the Commission puts forward five complaints, the first four alleging infringements of the second subparagraph of Article 19(1) TEU, and the fifth alleging infringement of the second and third paragraphs of Article 267 TFEU.

The first four complaints, alleging infringement of the second subparagraph of Article 19(1) TEU

The applicability and scope of the second subparagraph of Article 19(1) TEU

– *Arguments of the parties*

46 The Commission argues that, contrary to the Republic of Poland's assertions in its reply to the reasoned opinion, the second subparagraph of Article 19(1) TEU is applicable in the present case. That provision requires the Member States to provide guarantees that national bodies which are capable of ruling, as 'courts or tribunals', within the meaning of EU law, on questions concerning the application or interpretation of that law, which is the case for the Polish ordinary courts and the Sąd Najwyższy (Supreme Court), meet requirements capable of guaranteeing effective judicial protection, including those relating to the independence and impartiality of those bodies.

47 Those requirements of independence and impartiality presuppose, in particular, rules that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of the bodies concerned to external factors and their neutrality with respect to the interests before them. In that regard, judicial independence concerns not only the performance of judicial duties in specific cases, but also judicial organisation and the question whether the body concerned offers guarantees which are such as to ensure an 'appearance of independence' capable of maintaining the trust which courts and tribunals must inspire in a democratic society.

48 To that end, it is necessary, in particular, as is apparent from the case-law of the Court, that the disciplinary regime applicable to judges includes essential guarantees making it possible to avoid any risk of that regime being used as a system of political control of the content of judicial decisions, which requires the enactment of rules that define both the forms of conduct constituting disciplinary offences and the penalties actually applicable, that provide for the involvement of an independent body in accordance with a procedure which fully guarantees the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and that guarantee the possibility of challenging the decisions of disciplinary bodies before a court or tribunal.

49 In its defence, the Republic of Poland contends, inter alia, that Articles 47 and 48 of the Charter are not applicable to disciplinary cases concerning national judges in the absence of a situation where EU law is being implemented for the purposes of Article 51(1) of the Charter. In particular, it argues that the second subparagraph of Article 19(1) TEU does not constitute the source of fundamental rights of the defence or the right to be heard within a reasonable time. That Member State considers that the disciplinary cases conducted on the basis of the procedural provisions challenged by the Commission are of a purely internal nature and that, in defining those

procedures, the Polish authorities have not regulated fields covered by Union law for the purposes of that provision, read in conjunction with Article 5 TEU and Articles 3 and 4 TFEU.

– *Findings of the Court*

50 It should be recalled at the outset that the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them. In particular, it follows from Article 2 TEU that the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in that article (see, to that effect, judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraphs 42 and 43 and the case-law cited, and in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 160 and the case-law cited).

51 In addition, compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU. The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of judges (judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraphs 63 to 65 and the case-law cited, and in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 162).

52 As is provided for by the second subparagraph of Article 19(1) TEU, 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 the second subparagraph of Article 19(1) TEU is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), and which is now reaffirmed by Article 47 of the Charter (judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 190 and the case-law cited).

53 As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision moreover refers to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 50 and the case-law cited, and in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 192 and the case-law cited).

54 Under the second subparagraph of Article 19(1) TEU, every Member State must thus in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the*

Supreme Court – Actions), C-824/18, EU:C:2021:153 (‘the judgment in *A.B. and Others*’), paragraph 112 and the case-law cited).

55 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 courts may be called upon to rule on questions relating to the application or interpretation of EU law and that, as ‘courts or tribunals’, within the meaning of EU law, they come within the Polish judicial system in the ‘fields covered by Union law’ within the meaning of the second subparagraph of Article 19(1) TEU, so that those courts must meet the requirements of effective judicial protection (judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 56, and of 5 November 2019, *Commission* v *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 104).

56 In that regard, it should be borne in mind that although, as the Republic of Poland points out, the organisation of justice in the Member States admittedly falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU (judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 52 and the case-law cited, and of 5 November 2019, *Commission* v *Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 102).

57 Since the second subparagraph of Article 19(1) TEU requires all Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law, within the meaning in particular of Article 47 of the Charter, that latter provision must be duly taken into consideration for the purpose of interpreting the second subparagraph of Article 19(1) TEU (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 45 and the case-law cited). 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, which refers to access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy (judgment in *Asociaţia ‘Forumul Judecătorilor din România’ and Others*, paragraph 194 and the case-law cited).

58 That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 51 and the case-law cited).

59 It is settled case-law of the Court that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 53 and the case-law cited).

60 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 in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 197 and the case-law cited).

61 As regards specifically the rules governing the disciplinary regime applicable to judges, the requirement of independence derived from EU law, and, in particular, from the second subparagraph of Article 19(1) TEU, means that, in accordance with settled case-law, 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. Rules which define, in particular, both forms of conduct amounting to disciplinary offences and the penalties actually applicable, provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 198 and the case-law cited).

62 Having regard to the foregoing, the national rules regarding disciplinary proceedings called into question by the Commission in the first four complaints are amenable to review in the light of the second subparagraph of Article 19(1) TEU and it is therefore necessary to examine whether the infringements of that provision alleged by that institution are established.

The second complaint

– *Arguments of the parties*

63 By its second 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 Disciplinary Chamber which is called upon to rule, at first instance and at second instance, in disciplinary cases concerning judges of the Sąd Najwyższy (Supreme Court) and, as the case may be, either at second instance or both at first instance and at second instance, in disciplinary cases concerning judges of the ordinary courts, does not meet the necessary requirements of independence and impartiality.

64 Although, in general, the intervention of an executive body in the process for appointing judges is not, in itself, such as to affect the independence or impartiality of those judges, account must, however, be taken, in the present case, of the fact that the combination and simultaneous introduction, in Poland, of various legislative reforms have given rise to a structural breakdown which no longer makes it possible either to preserve the appearance of independence and impartiality of justice and the trust which the courts must inspire in a democratic society or to dispel any reasonable doubt in the minds of individuals as to the imperviousness of the Disciplinary Chamber to external factors and its neutrality with respect to the interests before it.

65 That breakdown stems from various factors, including the fact that the Disciplinary Chamber, vested in particular with jurisdiction in disciplinary matters in respect of judges, was created *ex nihilo* while being granted, within the Sąd Najwyższy (Supreme Court), a high degree of organisational and financial autonomy which the other chambers of that court do not enjoy, as well as the fact that it was provided, without any apparent justification, and by way of derogation from the general rule applicable, that the posts to be filled in that new chamber may be filled only by the

appointment of new judges by the President of the Republic, on a proposal from the KRS, and not by a transfer of judges already serving in other chambers of the Sąd Najwyższy (Supreme Court).

66 It is also relevant, in that context, that, just before the appointments of those new judges to posts in the Disciplinary Chamber were made, the KRS underwent a comprehensive restructuring, through the shortening of the existing terms of office of the members of that body, on the basis of new rules governing the method of designating the 15 members of that body who have the status of judge, by providing from that point that those members would no longer be selected by the judges themselves, as was previously the case, but by the Sejm. As a result of those innovations, 23 of the 25 members of the KRS are thus now appointed by the legislative or executive authorities or represent those authorities, which gives rise to the politicisation of that body and, consequently, to an increase in the influence of those authorities on the process for appointing judges of the Disciplinary Chamber, as has been pointed out in particular by both the European Commission for Democracy through Law ('the Venice Commission'), in Opinion No 904/2017 of 11 December 2017 (CDL(2017)031), and the Group of States against Corruption (GRECO), in its ad hoc report on Poland of 23 March 2018.

67 In its defence, the Republic of Poland contends that both the procedure for appointing members of the Disciplinary Chamber, which, moreover, is similar to that in force in other Member States, and the other guarantees enjoyed by those members once appointed, are such as to ensure the independence of that chamber.

68 The conditions which candidates applying to perform the duties of judges of the Sąd Najwyższy (Supreme Court) must satisfy are exhaustively defined by national law and the procedure for appointing such judges entails, after publication of a public call for applications, a selection made by the KRS on the basis of which that body proposes that successful candidates be appointed, resulting, finally, in the notice of appointment, by the President of the Republic, who is not required to follow the KRS's proposal.

69 Moreover, the new composition of the KRS is hardly different from that prevailing in respect of the national councils of the judiciary established in certain other Member States and has contributed to strengthening the democratic legitimacy of that body and to ensuring improved representativeness of the Polish judiciary within that body.

70 Lastly, the independence of judges of the Disciplinary Chamber stems, after their appointment, from the existence of an elaborate system of 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. As regards the high degree of administrative, financial and judicial autonomy enjoyed by the Disciplinary Chamber, it is such as to strengthen the independence of that body by protecting its members from the risks associated with organic professional constraints or collegiality when they are called upon to rule on disciplinary matters in respect of judges of other chambers of the Sąd Najwyższy (Supreme Court).

71 Moreover, the independence of the Disciplinary Chamber with respect to the Polish executive is also reflected in the decisions of that body which reveal, in particular, that, in respect of 18 appeals brought by the Minister for Justice against decisions of disciplinary tribunals delivered at first instance in respect of judges, in seven cases the decisions under appeal were confirmed, in five cases they were varied by the imposition of more severe disciplinary penalties, in two cases the Disciplinary Chamber varied exonerating decisions and imposed disciplinary penalties, in another two cases it varied acquittal decisions, holding that a crime had been committed but abstaining from

imposing a penalty, in one case the decision was set aside and the disciplinary proceedings were closed due to the death of the judge concerned, and, in another case, that chamber varied the decision in question and abstained from imposing a penalty after reclassifying the offence in question as a minor disciplinary offence.

72 In its reply, the Commission argues that the judgment in *A. K. and Others*, delivered after the present action was brought, has, in the meantime, confirmed that the present complaint is well founded.

73 The same is true of the judgment of 5 December 2019 (III PO 7/18) and the orders of 15 January 2020 (III PO 8/18 and III PO 9/18), whereby the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour Law and Social Security Chamber), Poland), which was the referring court in the cases in the main proceedings which gave rise to the judgment in *A. K. and Others*, held, on the basis of the guidance provided by that judgment, that the KRS does not constitute, in its current formation, an impartial court which is independent from the Polish legislature and executive, and that the Disciplinary Chamber is not a 'tribunal' for the purposes of Article 47 of the Charter, Article 6 ECHR and Article 45(1) of the Constitution. In those decisions, the Sąd Najwyższy (Supreme Court) points, in addition to the factors already referred to in paragraph 65 of the present judgment, to the fact that, first, the Disciplinary Chamber has also been given exclusive jurisdiction as regards cases relating to judges of the Sąd Najwyższy (Supreme Court) in the field of labour law, social security and retirement, that is, matters which previously fell within the jurisdiction of the ordinary courts, second, the possibilities, during the procedure for appointing the judges concerned, for an unsuccessful candidate to challenge the resolutions of the KRS have been considerably restricted following various successive amendments to the Law on the KRS, third, the persons appointed as judges of the Disciplinary Chamber have very clear links to the Polish legislature or executive, and fourth, since its creation, the Disciplinary Chamber has, inter alia, worked to ensure that the requests for a preliminary ruling submitted to the Court of Justice in the cases giving rise to the judgment in *A. K. and Others* be withdrawn.

74 The findings thus established in those decisions were subsequently repeated in a resolution of 23 January 2020, having the effect of a principle of law, adopted by the Sąd Najwyższy (Supreme Court) in a formation bringing together the civil, criminal and labour law and social security chambers of that court.

75 Furthermore, judges of the Disciplinary Chamber are in a privileged position compared with judges of the other chambers of the Sąd Najwyższy (Supreme Court). It is also apparent from the judgment of the Sąd Najwyższy (Supreme Court) of 5 December 2019 (III PO 7/18) that the workload of the Disciplinary Chamber is considerably smaller than that imposed on the other chambers of that court, even though, as the Republic of Poland argued in its defence, the members of the Disciplinary Chamber receive remuneration exceeding that of judges of other chambers of the Sąd Najwyższy (Supreme Court) by approximately 40%.

76 As regards the safeguards allegedly protecting judges of the Disciplinary Chamber after their appointment to which the Republic of Poland has made reference, it is clear from the guidance provided by the judgment in *A. K. and Others* that, irrespective of the existence of those safeguards, it remains necessary to ensure, by means of an overall analysis of the provisions of national legislation relating to the creation of the body concerned and relating, in particular, to the powers conferred on it, its composition and the manner in which the judges called upon to sit in that chamber are appointed, that those various factors are not such as to 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.

77 In its rejoinder, the Republic of Poland argues that it is apparent from the Commission's application that its second complaint concerns a legal assessment of the provisions of national legislation which are the subject of the present action and not the establishment of facts. The parameters linked to the independence of the Disciplinary Chamber which, in accordance with the judgment in *A. K. and Others*, had to be examined by the referring court in the cases in the main proceedings which gave rise to that judgment, bear no relation to the assessment of the compatibility in the abstract of those provisions of national legislation with EU law, but fall within the factual sphere. Thus, the decisions delivered by the Sąd Najwyższy (Supreme Court) following the judgment in *A. K. and Others* are irrelevant for the purpose of assessing the alleged failure to fulfil obligations by that Member State in the context of the present action. For its part, the resolution of the Sąd Najwyższy (Supreme Court) of 23 January 2020 did not concern the jurisdiction of the Disciplinary Chamber and that resolution was, moreover, declared unconstitutional by the Trybunał Konstytucyjny (Constitutional Court, Poland) in a judgment of 20 April 2020.

78 Lastly, the Republic of Poland produces, as an annex to its rejoinder, some 2 300 pages in total of documentation offering a full overview of the decisions of the Disciplinary Chamber which, in its view, support that Member State's conviction that that body is acting with complete impartiality and independence. It is apparent, moreover, from a comparative overview of the decisions delivered in the disciplinary proceedings brought on appeal by the Minister for Justice in 2017, 2018 and 2019, also annexed to that pleading, that, whereas, in 2017 and 2018, the Criminal Chamber of the Supreme Court upheld 6 out of 14 appeals brought by the Minister for Justice, the Disciplinary Chamber, in 2018 and 2019, upheld 17 out of 44 such appeals, which shows equivalent proportions.

79 The Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden consider, for their part, that it follows in particular from the guidance in the judgment in *A. K. and Others* that the Disciplinary Chamber does not meet the requirements of impartiality and independence derived from EU law. According to the Kingdom of Belgium, that conclusion may, in addition, be based on various instruments adopted in the context of international bodies, such as the European Charter on the Statute for Judges and Opinion No 977/2019 of 16 January 2020 of the Venice Commission concerning the amendments made on 20 December 2019 to, inter alia, the Law on the ordinary courts and the new Law on the Supreme Court.

– *Findings of the Court*

80 As can be seen from the case-law of the Court referred to in paragraph 61 of the present judgment, it is for every Member State, under the second subparagraph of Article 19(1) TEU, to ensure that the disciplinary regime applicable to judges of the national courts which come within their judicial systems in the fields covered by EU law observe the principle of the independence of judges, inter alia by guaranteeing that decisions issued in the context of disciplinary proceedings initiated in respect of judges of those courts are reviewed by a body which itself meets the requirements inherent in effective judicial protection, including the requirement of independence (order of 8 April 2020, *Commission* v *Poland*, C-791/19 R, EU:C:2020:277, paragraph 35).

81 It follows from Article 27 § 1, Article 73 § 1 and Article 97 § 3 of the new Law on the Supreme Court and from Article 110 § 1 of the Law on the ordinary courts that disciplinary decisions that may be adopted in respect of Polish judges now fall within the jurisdiction of the Disciplinary Chamber, established under the new Law on the Supreme Court. That chamber is to rule, at first instance and at second instance, in disciplinary cases concerning judges of the Sąd

Najwyższy (Supreme Court) and, depending on the case, either at second instance or both at first instance and at second instance, in disciplinary cases concerning judges of the ordinary courts. It thus follows from the principles referred to in the preceding paragraph that, under EU law and, in particular, the second subparagraph of Article 19(1) TEU, a body such as the Disciplinary Chamber must offer all the necessary guarantees as regards its independence and impartiality.

82 As the Court has already explained in that regard, the mere prospect, for judges of the Sąd Najwyższy (Supreme Court) and of the ordinary courts, of running the risk of disciplinary proceedings which could lead to the bringing of proceedings before a body whose independence is not guaranteed is likely to affect their own independence (order of 8 April 2020, *Commission* v *Poland*, C-791/19 R, EU:C:2020:277, paragraph 90).

83 It is important, in particular, to take into account, in that regard, the fact that disciplinary measures may entail serious consequences for the lives and careers of the members of the judiciary who are penalised. As the European Court of Human Rights has also pointed out, the judicial review carried out must thus be appropriate to the disciplinary nature of the decisions in question. When a State initiates such disciplinary proceedings, public confidence in the functioning and independence of the judiciary is at stake; in a democratic State, this confidence guarantees the very existence of the rule of law (see, to that effect, ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, § 196, and ECtHR, 9 March 2021, *Eminağaoğlu v. Turkey*, CE:ECHR:2021:0309JUD007652112, § 97).

84 By its second complaint, the Commission submits, in essence, that, in the light of the particular context in which the Disciplinary Chamber was created, certain characteristics of that chamber, and the process leading to the appointment of the judges called upon to sit in that chamber, that body does not meet the requirements of independence and impartiality thus required under the second subparagraph of Article 19(1) TEU.

85 In that regard, it should be recalled at the outset that, as has been emphasised by the Commission and the interveners, in its judgment in *A. K. and Others*, the Court has already been called upon to examine a request for a preliminary ruling from the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour Law and Social Security Chamber)) concerning, inter alia, the question whether EU law must be interpreted as meaning that a body such as the Disciplinary Chamber meets the requirements of independence and impartiality as referred to in, inter alia, Article 47 of the Charter.

86 As is apparent from the operative part of the judgment in *A. K. and Others*, the Court has ruled, in that regard, that a body does not constitute an independent and impartial tribunal, within the meaning of that provision, where the objective circumstances in which that body was created, the characteristics of that body, and the way in which its members have been appointed are capable of giving rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular, as to the direct or indirect influence of the legislature and the executive, and its neutrality with respect to the interests before it. Such doubts may thus 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 must inspire in those individuals.

87 As is apparent from paragraphs 52 and 57 of the present judgment, Article 47 of the Charter must be duly taken into consideration for the purpose of interpreting the second subparagraph of Article 19(1) TEU.

88 For the purpose of determining whether the Disciplinary Chamber fulfils the criteria of independence and impartiality thus required under EU law, as the body responsible for reviewing decisions issued in the context of disciplinary proceedings initiated in respect of judges who may be called upon to rule on the interpretation and application of EU law, it should be recalled at the outset that, as has been argued by the Commission, the creation of that chamber, by the new Law on the Supreme Court, took place in the wider context of major reforms concerning the organisation of the judiciary in Poland; those reforms include, in particular, the reforms resulting from the adoption of the new Law on the Supreme Court and the respective amendments made to the Law on the ordinary courts and the Law on the KRS.

89 In that context, it is important, in the first place, to note that, as has been argued by the Commission, the Disciplinary Chamber thus created *ex nihilo* has been specifically granted, in accordance with Article 27, Article 73 § 1, and Article 97 § 3 of the new Law on the Supreme Court, as well as Article 110 § 1 of the Law on the ordinary courts, exclusive jurisdiction to hear both disciplinary cases and labour law and social security and retirement cases concerning judges of the Sąd Najwyższy (Supreme Court), as well as jurisdiction to hear, as appropriate, either at second instance, or both at first instance and at second instance, disciplinary cases concerning judges of the ordinary courts.

90 It should be borne in mind, in particular, that, as the Court has already pointed out in paragraphs 148 and 149 of the judgment in *A. K. and Others*, as regards, in particular, cases relating to the retiring of judges of the Sąd Najwyższy (Supreme Court), the assigning to the Disciplinary Chamber of jurisdiction to hear those cases took place alongside the adoption of the provisions of the new Law on the Supreme Court which lowered the retirement age of judges of the Sąd Najwyższy (Supreme Court), applied that measure to judges currently serving in that court and conferred on the President of the Republic the discretionary power to extend the performance of active judicial duties by those judges beyond the new retirement age set by that law. In that regard, the Court held, in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), that, by adopting those provisions of national legislation, the Republic of Poland had undermined the irremovability and independence of judges of the Sąd Najwyższy (Supreme Court) and failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

91 In the second place, it should be noted that, as has been argued by the Commission and as the Court also noted in paragraph 151 of the judgment in *A. K. and Others*, it is apparent from the mechanism put in place by the new Law on the Supreme Court, and in particular from Articles 6, 7 and 20 of that law, that, although formally established as a chamber of the Sąd Najwyższy (Supreme Court), the Disciplinary Chamber enjoys, within that court, a particularly high degree of organisational, functional and financial autonomy in comparison with the other chambers of that court.

92 In that regard, the argument put forward by the Republic of Poland that, in the present case, it is merely a matter of strengthening the independence of judges of the Disciplinary Chamber by protecting them from the risks associated with organic professional constraints or collegiality cannot succeed, since, in particular, the judges who make up the Disciplinary Chamber are themselves capable of being parties to disputes of a disciplinary nature or relating to issues of labour law, social security or retirement, and the Polish legislature has not considered it necessary to entrust another chamber of the Sąd Najwyższy (Supreme Court) with jurisdiction to hear such disputes.

93 In the third place, as regards the fact that the judges who make up the Disciplinary Chamber are entitled to remuneration which exceeds that enjoyed by judges assigned to the other chambers of the Sąd Najwyższy (Supreme Court) by approximately 40%, it should be noted that, according to the explanations provided by the Republic of Poland in its written pleadings and at the hearing, that significant additional remuneration is exclusively justified by the existence of a rule of incompatibility specifically applicable to judges of the Disciplinary Chamber and preventing them from performing academic duties. However, according to those same explanations, the persons concerned remain free, notwithstanding that incompatibility regime, to opt for such academic duties provided that (i) those duties are not contrary to the dignity of the status of judge and (ii) in that case, those persons waive that additional remuneration. It must be stated that such explanations do not, in particular, make it possible to understand the objective reasons why the judges assigned to the other chambers of the Sąd Najwyższy (Supreme Court) could not also have that same power to choose between, on the one hand, the pursuit of academic activities and, on the other, the receipt of such a significant uplift in remuneration.

94 In the fourth place, it is necessary to emphasise the fact, relied on by the Commission and already noted by the Court in paragraph 150 of the judgment in *A. K. and Others*, that, under Article 131 of the new Law on the Supreme Court, the Disciplinary Chamber thus invested with the powers referred to in paragraph 89 of the present judgment was required, when it was initially established, to be made up solely of new judges appointed by the President of the Republic, on a proposal from the KRS, thereby excluding any possibility of transferring to that chamber judges already serving within the Sąd Najwyższy (Supreme Court), even though such transfers of judges from one chamber of the Sąd Najwyższy (Supreme Court) to another are, in principle, permitted under that same law. Moreover, before those appointments were made, the KRS underwent a comprehensive restructuring.

95 As is apparent from the settled case-law referred to in paragraph 59 of the present judgment, the guarantees necessary to ensure the independence and impartiality of judges required under EU law presuppose, inter alia, rules governing the appointment of judges (see, to that effect, judgment in *A.B. and Others*, paragraphs 117 and 121). Similarly, it follows from the case-law of the Court referred to in paragraph 56 of the present judgment that, when exercising their competence, in particular that relating to the enactment of national rules governing the process for appointing judges, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU (see, to that effect, judgments in *A.B. and Others*, paragraphs 68 and 79, and of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 48).

96 In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 54 and the case-law cited).

97 Concerning, more specifically, the circumstances in which decisions to appoint judges of the Sąd Najwyższy (Supreme Court) and, in particular, of the Disciplinary Chamber, are made, it is true that the Court has already had occasion to state that the mere fact that the judges concerned are appointed by the President of a Member State does not give rise to a relationship of subordination of those judges to the latter or to doubts as to the judges' impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 56 and the case-law cited).

98 However, the Court has stated that it is still necessary to ensure that the substantive conditions and procedural rules governing the adoption of those appointment decisions are such that they cannot give rise to reasonable doubts in the minds of individuals as to the imperviousness of the judges concerned to external factors and their neutrality with respect to the interests before them, once they have been appointed as judges, and that it is important, inter alia, in that perspective, that those conditions and procedural rules should 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 (see, to that effect, judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraphs 55 and 57 and the case-law cited).

99 Having noted that, under Article 179 of the Constitution, the judges of the Sąd Najwyższy (Supreme Court) are to be appointed by the President of the Republic on a proposal from the KRS, namely the body entrusted under Article 186 of the Constitution with the task of safeguarding the independence of courts and judges, the Court stated, in paragraph 137 of the judgment in *A. K. and Others* and paragraph 124 of the judgment in *A.B. and Others*, that the participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective, by circumscribing the President of the Republic's discretion in exercising the powers of his or her office.

100 In paragraph 138 of the judgment in *A. K. and Others* and paragraph 125 of the judgment in *A.B. and Others*, the Court stated, however, that this is not the case unless, inter alia, that body is itself sufficiently independent of the legislature and the executive and of the authority to which it is required to deliver such an appointment proposal.

101 In that regard, it should be noted that, under Article 179 of the Constitution, the act by which the KRS puts forward a candidate for appointment to a judge's post at the Sąd Najwyższy (Supreme Court) is an essential condition for that candidate to be appointed to such a post by the President of the Republic. The role of the KRS in that appointment process is therefore decisive (see, to that effect, the judgment in *A.B. and Others*, paragraph 126).

102 In such a context, the degree of independence enjoyed by the KRS in respect of the Polish legislature and executive in performing the tasks thus entrusted to it may become relevant when ascertaining whether the judges which it selects will themselves be capable of meeting the requirements of independence and impartiality derived from EU law (see, to that effect, judgments in *A. K. and Others*, paragraph 139, and *A.B. and Others*, paragraph 127).

103 It is true that, as has been argued by the Republic of Poland, the Court has previously held that the fact that a body, such as a national council of the judiciary, which is involved in the process for appointing judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the independence of the judges appointed at the end of that process (see, to that effect, judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraphs 55 and 56). However, it is also apparent from the case-law of the Court and, more specifically, from the judgments in *A. K. and Others* and *A.B. and Others*, that the situation may be different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads to such doubts being raised.

104 In that regard, it should be noted, first, that, as has been argued by the Commission, whereas the 15 members of the KRS selected from among the judges were previously selected by their peers, the Law on the KRS has recently been amended, so that, as is apparent from Article 9a of that law, those 15 members are now appointed by a branch of the Polish legislature, with the result that

23 of the 25 members of the KRS in that new composition have been appointed by the Polish executive or legislature or are members thereof. Such changes are liable to create a risk, hitherto absent from the selection procedure previously in force, of the legislature and the executive having a greater influence over the KRS and of the independence of that body being undermined.

105 Secondly, as has also been emphasised by the Commission, it is apparent from Article 6 of the Law of 8 December 2017 reproduced in paragraph 26 of the present judgment that the thus newly constituted KRS was established through the shortening of the existing four-year term of office, provided for in Article 187(3) of the Constitution, of the members which had, until that point, made up that body.

106 Thirdly, it is important to point out that the legislative reform which thus governed the process whereby the KRS was established in that new composition took place at the same time as the adoption of the new Law on the Supreme Court which carried out a wide-ranging reform of the Sąd Najwyższy (Supreme Court) including, in particular, the creation, within that court, of two new chambers, one being the Disciplinary Chamber, and the introduction of the mechanism, since held to be contrary to the second subparagraph of Article 19(1) TEU and which has already been discussed in paragraph 90 of the present judgment, providing for a lowering of the retirement age for judges of the Sąd Najwyższy (Supreme Court) and the application of that measure to serving judges of that court.

107 It is, accordingly, common ground that the premature termination of the terms of office of certain then-serving members of the KRS and the reorganisation of the KRS in its new composition took place in a context in which it was expected that numerous posts would be soon be vacant within the Sąd Najwyższy (Supreme Court), and in particular within the Disciplinary Chamber, as the Court of Justice has already emphasised, in essence, in paragraphs 22 to 27 of the order of 17 December 2018, *Commission* v *Poland* (C-619/18 R, EU:C:2018:1021), in paragraph 86 of the judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), and in paragraph 134 of the judgment in *A.B. and Others*.

108 It must be held that the factors highlighted in paragraphs 104 to 107 of the present judgment are such as to give rise to legitimate doubts as to the independence of the KRS and its role in an appointment process such as that resulting in the appointment of the members of the Disciplinary Chamber.

109 Furthermore, it is apparent from paragraphs 89 to 94 of the present judgment, first, that that appointment process applies to candidates for the post of member of a newly created judicial chamber created to give rulings, inter alia, in disciplinary proceedings concerning national judges and on issues relating to the reform of the provisions relating to the Sąd Najwyższy (Supreme Court), certain aspects of which have already led to a finding of a failure to fulfil obligations under the second subparagraph of Article 19(1) TEU on the part of the Republic of Poland, and, second, that that body is required to be made up exclusively of new judges who are not already sitting within the Sąd Najwyższy (Supreme Court) and who will receive a significantly higher level of remuneration, and has a particularly high degree of organisational, functional and financial autonomy in comparison with the conditions prevailing in the other judicial chambers of the Sąd Najwyższy (Supreme Court).

110 Those factors, taken in the context of an overall analysis including the important role played by the KRS – a body whose independence from the political authorities is questionable, as is apparent from paragraph 108 of the present judgment – in appointing members of the Disciplinary

Chamber, are such as to give rise to reasonable doubts in the minds of individuals as to the independence and impartiality of that Disciplinary Chamber.

111 Regarding the data relating to the case-law of the Disciplinary Chamber referred to in paragraphs 71 and 78 of the present judgment, it is sufficient to note, in that regard, that, besides the fact that the statistics discussed in paragraph 71 seem rather to attest to the fact that the Disciplinary Chamber has, in the majority of cases in which it has heard an appeal brought by the Minister for Justice against a decision issued by a disciplinary court of first instance, maintained or increased the disciplinary liability of the judges concerned, the Commission's second complaint does not, in any event, as has been emphasised by that institution, concern the specific judicial activity carried out by the Disciplinary Chamber and by the judges making up that chamber, but rather concerns the fact that that chamber is not seen to be independent and impartial for the purposes of the case-law referred to in paragraph 86 of the present judgment. Consequently, neither the statistics referred to by the Republic of Poland in its defence and rejoinder nor, more generally, the 2 300 or so pages of decisions attributed to the Disciplinary Chamber produced by the Republic of Poland in support of its rejoinder, merely stating, in a general manner, that those decisions are not such as to cast doubt on the independence and impartiality of that body, are capable of calling into question the merits of the present complaint.

112 Having regard to all the considerations set out in paragraphs 89 to 110 of the present judgment, it must be held 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. Such a development constitutes a reduction in the protection of the value of the rule of law for the purposes of the case-law of the Court referred to in paragraph 51 of the present judgment.

113 It follows, inter alia, that, by failing to guarantee the independence and impartiality of the Disciplinary Chamber which is called upon to rule, at first instance and at second instance, in disciplinary cases concerning judges of the Sąd Najwyższy (Supreme Court) and, depending on the case, either at second instance or both at first instance and at second instance, in disciplinary cases concerning judges of the ordinary courts and by thereby undermining the independence of those judges at, what is more, the cost of a reduction in the protection of the value of the rule of law in that Member State for the purposes of the case-law of the Court referred to in paragraph 51 of the present judgment, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

114 Accordingly, the second complaint must be upheld.

The first complaint

– *Arguments of the parties*

115 By its first complaint, which it is appropriate to examine second, the Commission submits that Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court infringe the second subparagraph of Article 19(1) TEU, inasmuch as those provisions of national legislation allow, in breach of the principle of judicial independence, the

disciplinary liability of judges of the Polish ordinary courts to be put in issue on account of the content of their judicial decisions and thus allow the disciplinary regime applicable to those judges to be used as a means of exerting political control over their judicial activity.

116 First, Article 107 § 1 of the Law on the ordinary courts defines a disciplinary offence as encompassing, inter alia, cases of 'obvious and gross violations of the law'. Such wording permits an interpretation according to which the disciplinary liability of judges extends to the performance, by those judges, of their adjudicating duties.

117 This is, moreover, confirmed by the interpretative practice recently developed by the Disciplinary Officer responsible for cases concerning judges sitting in the ordinary courts and that officer's deputies (together, 'the Disciplinary Officer'). The Disciplinary Officer opened investigations in respect of three judges in relation to the requests for a preliminary ruling which those judges had submitted to the Court of Justice in the cases giving rise to the judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234), and to the order of 6 October 2020, *Prokuratura Rejonowa w Słubicach* (C-623/18, not published, EU:C:2020:800), and, by letters of 29 November 2018, ordered each of those judges to file a written statement concerning a possible exceeding of jurisdiction relating to those requests, before explaining, in that regard, in a letter of 4 January 2019, that it 'considered it [its] duty to examine whether the referring of questions for a preliminary ruling, in breach of the conditions clearly set out in Article 267 TFEU … [could] constitute a disciplinary offence'.

118 Similarly, after the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), in Joined Cases C-748/19 to C-754/19, submitted requests for a preliminary ruling to the Court of Justice concerning the requirements to be met regarding the independence of the panel on which a judge seconded to that court on a decision of the Minister for Justice is sitting, the Disciplinary Officer stated, by communication of 3 September 2019, that measures of inquiry had been taken in order to determine whether the conduct of the judge chairing that panel, who had made those requests, could constitute a disciplinary offence.

119 Secondly, Article 97 §§ 1 and 3 of the new Law on the Supreme Court authorises the Sąd Najwyższy (Supreme Court), including the Extraordinary Review and Public Affairs Chamber of that court when it is hearing an extraordinary appeal, to issue a 'finding of error' to the court concerned in the event of an 'obvious violation of the law', and to submit, in that case, a request to the Disciplinary Chamber for a disciplinary examination in respect of the judges concerned, in accordance with Article 110 § 1(1)(b) of the Law on the ordinary courts. The concept of 'obvious violation of the law' in turn permits an interpretation according to which the disciplinary liability of judges extends to the performance, by those judges, of their adjudicating duties.

120 In its defence, the Republic of Poland contends that the definition of disciplinary offence contained in Article 107 § 1 of the Law on the ordinary courts is not such as to allow political control of the content of judicial decisions. In that regard, it argues that the Commission failed to take account of the well-established restrictive interpretation of that provision by the Sąd Najwyższy (Supreme Court). It follows from the settled case-law of that court that a disciplinary offence cannot be the result of a common error in the interpretation or application of the law stemming from a judicial decision, but solely of 'obvious and gross' violations of the law, namely, in principle, infringements of procedural rules not directly related to the decision itself, which may be detected immediately by anyone and which have produced significant negative effects detrimental to the interests of the parties, to other individuals or to the administration of justice.

121 According to the Republic of Poland, the classification of such forms of conduct, where they arise from bad faith or deep ignorance on the part of a judge, as disciplinary offences is justified in order to ensure effective judicial protection for individuals and to preserve the image of fairness inherent in the judiciary. Being limited to such cases, the prospect of possible disciplinary proceedings would not be likely to affect the independence of the judiciary.

122 In those circumstances, the mere fear that the provision of national legislation at issue might be given a different interpretation from that thus consistently used by the Sąd Najwyższy (Supreme Court) is disconnected from reality and purely hypothetical. The Disciplinary Officer is merely an investigating and prosecuting body whose assessments are not binding on disciplinary courts.

123 According to the Republic of Poland, the same considerations must apply as regards Article 97 §§ 1 and 3 of the new Law on the Supreme Court.

124 In its reply, the Commission claims that the arguments put forward by the Republic of Poland are not such as to call into question the conclusion that the concepts referred to in paragraphs 116 and 119 of the present judgment may be interpreted as referring to the content of judicial decisions, to which, moreover, the disciplinary proceedings initiated after the present action was brought continue to attest.

125 Thus, on 6 December 2019, the Disciplinary Officer initiated such proceedings in respect of the judge referred to in paragraph 118 of the present judgment, indicating, in a communication, that, in its view, that judge, ‘going beyond the deliberations of the adjudicating panel, set out her personal position regarding the existence of additional grounds for adjourning the hearing and publicly challenged that panel, which had been established in accordance with the legislation in force in order to hear that case, calling into question the impartiality and independence of the judge concerned, a member of the panel, denying him the right to sit on that panel’ and that she had, in addition, ‘exceeded her powers by adopting, when adjourning the appeal trial, unlawfully and without consulting the other two duly appointed members of the panel, the order for reference’.

126 For its part, the Disciplinary Chamber, a body on which the interpretation of the concepts referred to in paragraphs 116 and 119 of the present judgment is now entirely dependent, has, as is apparent from a decision of 4 February 2020 (II DO 1/20) produced by the Commission, suspended a judge of the Sąd Rejonowy w Olsztynie (District Court, Olsztyn, Poland) in respect of whom disciplinary proceedings had been initiated from office, on the ground, inter alia and as can be seen from a communication published on 29 November 2019 by the Disciplinary Officer, that, when examining an appeal, the actions of that judge ‘had led to the adoption of a decision with no legal basis’ ordering the Sejm to produce the lists of citizens and judges who had supported applications for the posts of members of the KRS in its new composition.

127 In the grounds of that decision, the Disciplinary Chamber held, inter alia, that, ‘if, having regard to the type of act committed by the judge, the authority of the court or the essential interests of the service require that he be relieved immediately of his service obligations, the president of the court or Minister for Justice may immediately suspend the judge’s activities pending the disciplinary court’s decision taken within a period of less than one month. Two of the above conditions (the authority of the court and the essential interests of the service) apply in the present case in relation to the conduct of the judge being in the form of an obvious and gross violation of the law compromising the dignity of his office within the meaning of Article 107 § 1 of the [Law on the ordinary courts]’. In the same decision, the Disciplinary Chamber also stated that ‘there is no doubt as to the unlawfulness of the judicial decision. The judgment of the Court of Justice of the

European Union does not provide a basis for encroaching on the prerogatives of the Head of State and for the taking of a decision, by judges, on who is and is not a judge'.

128 Lastly, alluding to the disciplinary proceedings referred to in paragraphs 125 and 126 of the present judgment, as well as other disciplinary proceedings initiated in respect of judges because they had cast doubt on the validity of the appointment of certain judges discussed in two communications of the Disciplinary Officer dated 15 December 2019 and 14 February 2020 produced by the Commission, the Sąd Najwyższy (Supreme Court) referred, in its resolution of 23 January 2020, referred to in paragraph 74 of the present judgment, to the 'fact that a political body, such as the Minister for Justice, is carrying out, through Disciplinary Officers appointed by him, repressive actions against judges performing judicial duties and aiming to clarify doubts as to the way in which selection procedures for recruiting judges are organised'.

129 In its rejoinder, the Republic of Poland argues that the decisions of the Disciplinary Officer and the decision of the Disciplinary Chamber referred to by the Commission in its reply are irrelevant because the Commission's complaint concerns the compatibility in the abstract of legal definitions of the disciplinary offence with the second subparagraph of Article 19(1) TEU, and not an infringement of EU law resulting from specific actions of State bodies. Furthermore, the judgment of the Court should relate to the situation prevailing at the end of the period laid down in the reasoned opinion. Lastly, the decision referred to in paragraph 125 of the present judgment concerns the fact that a judge has exceeded her powers by deciding alone to make orders for reference in cases which should be decided by three judges, while the decision of the Disciplinary Chamber relates to proceedings not based on an obvious and gross violation of the law but on a suspected misuse of powers compromising the dignity of the office and is, moreover, an interim measure.

130 All the Member States intervening in support of the form of order sought by the Commission consider that the provisions of national legislation criticised in the present complaint are capable of having a deterrent effect on the judges of the ordinary courts in the performance of their judicial duties and that they thus undermine the requirement, derived from the second subparagraph of Article 19(1) TEU, that those judges be independent.

131 The Kingdom of Denmark takes the view that, although Article 107 § 1 of the Law on the ordinary courts is not contrary to the principle of judicial independence on the basis of its wording alone, the vague wording of that provision nonetheless confers a broad discretion on the disciplinary authority for the purpose of establishing a disciplinary offence. Taken together with the problematic composition of the bodies responsible for its application, and in particular of the Disciplinary Chamber, as well as the way in which it is interpreted and applied in practice, that provision of national legislation creates a risk that the disciplinary regime might be used as a means of exerting pressure on judges and politically controlling the content of judicial decisions. The same is true of the definition of the offence contained in Article 97 § 1 of the new Law on the Supreme Court, particularly in view of the fact, which is difficult for the Kingdom of Denmark to understand, that the Extraordinary Review and Public Affairs Chamber has the power to initiate, of its own motion, disciplinary proceedings on the basis of errors in the content of the decisions which it examines.

132 For its part, the Republic of Finland argues that it is apparent from various independent and reliable sources such as the evidence referred to in the judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234), that use has in fact been made of the possibility of initiating disciplinary proceedings in respect of judges because of the content of their judicial decisions.

133 In its response to the statements in intervention, the Republic of Poland contends that the definitions of disciplinary offences contained in the legislation of various Member States are no less broad than that contained in Article 107 § 1 of the Law on the ordinary courts. References to general concepts are both frequent and inevitable in this area and a negative assessment of the provisions concerned cannot be carried out without taking account of their content, purpose and practical application by national disciplinary courts.

– *Findings of the Court*

134 As is apparent from paragraph 61 of the present judgment, the requirement of independence and impartiality derived from, inter alia, the second subparagraph of Article 19(1) TEU which must be met by national courts or tribunals who, like the Polish ordinary courts, may be called upon to interpret and apply EU law, requires, in order to avoid any risk of the disciplinary regime applicable to those whose task is to adjudicate being used as a system of political control of the content of judicial decisions, that such a regime include, in particular, rules defining the forms of conduct which constitute a disciplinary offence.

135 By its first complaint, the Commission submits that, in defining the forms of conduct constituting a disciplinary offence on the part of judges of the ordinary courts as covering, respectively, any 'obvious and gross violations of the law' and any 'error' entailing an 'obvious violation of the law', Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court permit such political control, as is evidenced, moreover, by the various specific cases where those provisions have been applied that have been referred to by that institution.

136 In that regard, it should be noted at the outset that it is true that the disciplinary regime applicable to judges falls within the organisation of justice and, therefore, within the Member States' competence, and that, in particular, the possibility that a Member State's authorities may put in issue the disciplinary liability of judges can, inter alia, depending on the Member States' choice, be a factor which contributes to the accountability and effectiveness of the judicial system. However, as can be seen from paragraphs 56, 57 and 61 of the present judgment, in exercising that competence, the Member States must comply with EU law, by safeguarding, inter alia, the independence of the courts called upon to rule on questions concerning the application or interpretation of EU law, in order to ensure the effective judicial protection of individuals required by the second subparagraph of Article 19(1) TEU (see, by analogy, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraphs 229 and 230).

137 In that context, the safeguarding of that independence cannot, in particular, 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.

138 On the other hand, it appears 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 or pressure on judges, that the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law, or in the

assessment of the facts and the appraisal of the evidence, cannot in itself trigger the disciplinary liability of the judge concerned (see, by analogy, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 234).

139 Consequently, it is important that the putting in issue of the disciplinary liability of a judge as a result of a judicial decision should be limited to entirely exceptional cases such as those referred to in paragraph 137 of the present judgment 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 and thus helping to dispel, in the minds of individuals, any reasonable doubts as to the imperviousness of the judges concerned and their neutrality with respect to the interests before them (see, by analogy, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 233).

140 To that end, it is essential that, inter alia, rules should be laid down which define, in a manner that is sufficiently clear and precise, the forms of conduct which may trigger the disciplinary liability of judges, in order to guarantee the independence inherent in their task and to avoid exposing them to the risk that their disciplinary liability may be triggered solely because of the decisions taken by them (see, by analogy, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 234).

141 In the present case, it should be noted that, having regard to their wording alone, Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court do not meet the requirements of clarity and precision set out in paragraph 140 of the present judgment. It must be pointed out that the expressions 'obvious and gross violations of the law' and 'finding of error' entailing an 'obvious violation of the law' used in those respective provisions are not such as to prevent the liability of judges from being triggered solely on the basis of the supposedly 'incorrect' content of their decisions while ensuring that that liability is always strictly limited to entirely exceptional situations, such as those referred to in paragraph 137 of the present judgment.

142 Furthermore, it follows from settled case-law of the Court that the scope of national legislative provisions which are the subject of infringement proceedings must, as a general rule, be assessed in the light of the interpretation given to them by national courts (see, to that effect, judgments of 18 July 2007, *Commission* v *Germany*, C-490/04, EU:C:2007:430, paragraph 49 and the case-law cited, and of 16 September 2015, *Commission* v *Slovakia*, C-433/13, EU:C:2015:602, paragraph 81).

143 In that regard, it is true that the Republic of Poland has referred in detail before the Court to the case-law developed over many years by the Sąd Najwyższy (Supreme Court) with regard to the various constituent elements of the concept of 'obvious and gross violations of the law' for the purposes of Article 107 § 1 of the Law on the ordinary courts. The national case-law thus described, the existence and content of which have not been disputed by the Commission, does indeed appear to have adopted a particularly restrictive interpretation in relation to that concept, displaying a clear concern to preserve judicial independence.

144 However, it should be noted, first of all, that the two provisions covered by the present complaint use partially different wording, since Article 97 §§ 1 and 3 of the new Law on the Supreme Court refers only to 'obvious' violations of the law. The omission, from that new provision, of the wording regarding the 'gross' nature of the violations of the law which, by contrast, is contained in Article 107 § 1 of the Law on the ordinary courts – wording which has,

inter alia, been taken into account in the settled case-law of the Sąd Najwyższy (Supreme Court) referred to in paragraph 143 of the present judgment – is such as to give rise to doubts as to the respective scope of those provisions. Furthermore, the fact that, on the basis of Article 97 §§ 1 and 3 of the new Law on the Supreme Court, the chamber concerned may, when issuing a 'finding of error' on the part of a judge whose decision it is reviewing and when it considers, in that context, that that 'error' reflects an 'obvious violation of the law', directly request that a disciplinary case in respect of that judge be examined before the Disciplinary Chamber, could be understood as meaning that the liability of judges may be triggered solely on the basis of the allegedly 'incorrect' content of their judicial decisions in cases not limited to the entirely exceptional situations referred to in paragraph 137 of the present judgment.

145 Next, it should be noted that the decisions of the Sąd Najwyższy (Supreme Court) relating to Article 107 § 1 of the Law on the ordinary courts thus referred to by the Republic of Poland were adopted not by the current Disciplinary Chamber of that court but by the chamber of that court which had jurisdiction before the reform.

146 In addition, it should be borne in mind in that regard that, as is apparent from paragraph 61 of the present judgment, in order to ensure that the putting in issue of the disciplinary liability of judges is accompanied by guarantees intended to avoid any risk of external pressure on the content of judicial decisions, the rules defining the forms of conduct constituting an offence in the context of the disciplinary regime applicable to judges must be taken together with the other rules characterising such a regime and, in particular, with those which are required to provide that decisions issued in the context of disciplinary proceedings initiated in respect of judges are taken or reviewed by an independent and impartial court or tribunal.

147 In the present case, as is apparent from the reasoning whereby the Court upheld the second complaint relied on by the Commission in support of its action, the Disciplinary Chamber recently established by the new Law on the Supreme Court, which has been entrusted with jurisdiction to hear, depending on the case, either as the court of second instance, or as the court of first and second instance, disciplinary proceedings concerning judges of the ordinary courts, does not meet that requirement of independence and impartiality.

148 Accordingly, that fact is, in turn, liable to increase the risk that provisions such as Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court, which define disciplinary offences in terms which do not meet the requirements of clarity and precision set out in paragraph 140 of the present judgment and do not ensure that the putting in issue of the liability of judges as a result of their decisions is strictly limited to the situations referred to in paragraph 137 of the present judgment, will be the subject of an interpretation which will thus permit the disciplinary regime to be used in order to influence judicial decisions.

149 The existence of a risk that the disciplinary regime will in fact be used in order to influence judicial decisions is, moreover, confirmed by the decision of the Disciplinary Chamber of 4 February 2020 referred to in paragraphs 126 and 127 of the present judgment.

150 In that regard, it is necessary at the outset to reject the Republic of Poland's line of argument according to which that decision of the Disciplinary Chamber cannot be taken into consideration by the Court for the purpose of assessing that Member State's alleged failure to fulfil obligations, on the ground that that failure must, in accordance with settled case-law, be assessed on the date on which the period prescribed in the reasoned opinion expired. As the Commission correctly argued at the hearing before the Court, that decision of the Disciplinary Chamber is merely an item of evidence produced after the reasoned opinion was issued, intended to illustrate the complaint set out

both in that reasoned opinion and in the present action concerning the risk that, in the context resulting from the legislative reforms recently implemented in Poland, the disciplinary regime applicable to judges of the Polish ordinary courts could be used in order to influence the content of judicial decisions. As has already been noted by the Court, the taking into account of an item of evidence produced after the reasoned opinion was issued does not constitute a change in the subject matter of the dispute as set out in that reasoned opinion (see, to that effect, judgment of 11 July 2002, *Commission* v *Spain*, C-139/00, EU:C:2002:438, paragraph 21).

151 It is apparent from that decision of the Disciplinary Chamber that a judge may, in principle, be accused of a disciplinary offence on the basis of Article 107 § 1 of the Law on the ordinary courts for having ordered the Sejm, allegedly in obvious and gross violation of the law, to produce documents relating to the process for appointing members of the KRS in its new composition.

152 Such a broad interpretation of Article 107 § 1 of the Law on the ordinary courts is a departure from the particularly restrictive interpretation of that provision used by the Sąd Najwyższy (Supreme Court) as referred to in paragraph 143 of the present judgment and thus reflects a reduction, within the Member State concerned, in the protection of the value of the rule of law.

153 It should be added that, where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with EU law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear and precise to ensure its application in compliance with EU law (see, to that effect, judgment of 9 December 2003, *Commission* v *Italy*, C-129/00, EU:C:2003:656, paragraph 33).

154 Lastly, the Commission has referred to various specific recent cases in which the Disciplinary Officer, in the context of the new disciplinary regime introduced by the Law on the ordinary courts, initiated disciplinary investigations in respect of judges because of the content of the judicial decisions adopted by those judges, without it appearing that the judges concerned had committed breaches of their duties such as those referred to in paragraph 137 of the present judgment. In that regard, it should be noted, more specifically, that disciplinary proceedings have been initiated, inter alia, because of judicial decisions whereby requests for a preliminary ruling had been submitted to the Court of Justice seeking clarification as to the compatibility of certain provisions of national law with the provisions of EU law relating to the rule of law and the independence of judges.

155 Even though the Republic of Poland contends that the complaints made by the Disciplinary Officer in those cases do not concern obvious and gross violations of the law for the purposes of Article 107 § 1 of the Law on the ordinary courts, but the exceeding, by the judges concerned, of their jurisdiction or the bringing into disrepute by those judges of their judicial office, the fact remains that those complaints are directly related to the content of the judicial decisions taken by those judges.

156 The mere prospect of such disciplinary investigations being opened is, as such, liable to exert pressure on those who have the task of adjudicating in a dispute (see, to that effect, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 199).

157 Having regard to all the foregoing considerations, the Court considers it to be established that, in the particular context resulting from the recent reforms that have affected the Polish judiciary and the disciplinary regime applicable to judges of the ordinary courts, and in particular having regard to the fact that the independence and impartiality of the judicial body with jurisdiction to rule in disciplinary proceedings concerning those judges are not guaranteed, the definitions of disciplinary

offence contained in Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court do not help to avoid that disciplinary regime being used in order to create, with regard to those judges who are called upon to interpret and apply EU law, pressure and a deterrent effect, which are likely to influence the content of their decisions. Those provisions thus undermine the independence of those judges and do so, what is more, at the cost of a reduction in the protection of the value of the rule of law in Poland within the meaning of the case-law referred to in paragraph 51 of the present judgment, in breach of the second subparagraph of Article 19(1) TEU.

158 Accordingly, the first complaint must be upheld.

The third complaint

– *Arguments of the parties*

159 By its third complaint, the Commission submits that Article 110 § 3 and Article 114 § 7 of the Law on the ordinary courts do not meet the requirement derived from the second subparagraph of Article 19(1) TEU that disciplinary cases concerning judges of the ordinary courts must be amenable to review by a tribunal 'established by law', since those provisions of national legislation confer on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with territorial jurisdiction to hear such cases.

160 The Commission considers, in that regard, that, in the absence, in particular, of any criteria laid down by law to circumscribe the exercise of that power, that power could be used in order to assign a case to a specific disciplinary court and, consequently, at the very least, be perceived as a means whereby the disciplinary regime could be used for the purposes of political control of the content of judicial decisions. Furthermore, such a risk is increased in the present case by the fact that the Disciplinary Chamber is not an independent and impartial body.

161 In its defence, the Republic of Poland argues that it follows from Article 110 § 1(1)(a) and Article 110a §§ 1 and 3 of the Law on the ordinary courts that disciplinary cases fall within the jurisdiction of the 11 disciplinary tribunals which are established at the courts of appeal and whose members are appointed, following an opinion of the KRS, by the Minister for Justice from among the judges of the ordinary courts and sit, in permanent formation, for a period of six years. It follows that those courts are indeed established by law.

162 For his part, the President of the Disciplinary Chamber merely designates one of those disciplinary tribunals, taking into account factors such as procedural economy, the level of the workload of those tribunals, distance, and possible links between the parties to the proceedings and those tribunals. The setting of those criteria in the law would serve no identifiable objective, in particular in terms of the protection of the rights of the judge being prosecuted or of the interests of justice, since all the disciplinary tribunals that may be designated provide the same guarantees of jurisdiction and independence.

163 It is precisely in order to ensure the impartiality of those disciplinary tribunals that a solution was introduced consisting of designating, as having territorial jurisdiction, a court of appeal situated in a territorial jurisdiction other than that in which the judge concerned sits. In addition, since the members of the disciplinary tribunal called upon to sit within that tribunal are selected by the drawing of lots from among all the judges of that court, there is no basis for the allegation that the power to designate the disciplinary tribunal with territorial jurisdiction to hear the case might be used for the purposes of political control of the content of judicial decisions.

– *Findings of the Court*

164 As has been recalled in paragraphs 61 and 80 of the present judgment, the requirement of independence derived from, inter alia, the second subparagraph of Article 19(1) TEU, which must be met by national courts which, like the Polish ordinary courts, may have to interpret and apply EU law, requires that the rules governing the disciplinary regime applicable to the judges who make up those courts provide, inter alia, for the involvement of bodies which themselves meet the requirements inherent in effective judicial protection in accordance with a procedure fully guaranteeing the rights enshrined in Articles 47 and 48 of the Charter.

165 It should be borne in mind, moreover, that, in so far as the Charter sets out rights corresponding to rights guaranteed under the ECHR, Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed under the ECHR, without thereby adversely affecting the autonomy of EU law. According to the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the second paragraph of Article 47 of the Charter corresponds to Article 6(1) ECHR and Article 48 of the Charter is the same as Article 6(2) and (3) ECHR. The Court must, accordingly, ensure that its interpretation of the second paragraph of Article 47 and of Article 48 of the Charter ensures a level of protection which does not disregard that guaranteed by Article 6 ECHR, as interpreted by the European Court of Human Rights (judgment of 29 July 2019, *Gambino and Hyka*, C-38/18, EU:C:2019:628, paragraph 39 and the case-law cited).

166 Under the first sentence of the second paragraph of Article 47 of the Charter, everyone is entitled to a fair and public hearing within a reasonable time by an ‘independent and impartial tribunal previously established by law’.

167 As has been held by the Court, 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. Verification of the requirement that a body, as composed, constitutes such a tribunal is necessary in particular for the trust which the courts in a democratic society must inspire in individuals (see, to that effect, judgment of 26 March 2020, *Review Simpson* v *Council* and *Review HG* v *Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 57).

168 Furthermore, it is apparent from the case-law of the European Court of Human Rights that the expression ‘established by law’ in Article 6(1) ECHR concerns not only the legal basis for the very existence of the tribunal but also the composition of the bench in each case. The purpose of that expression is to prevent the organisation of the judicial system from being left to the discretion of the executive and to ensure that that matter is governed by a law. Nor, moreover, in codified law countries, can the organisation of the judicial system be left to the discretion of the judicial authorities, which does not, however, rule out conferring on them a certain power to interpret the relevant national legislation. Furthermore, the delegation of powers in matters relating to judicial organisation is acceptable in so far as that possibility falls within the framework of the national law of the State in question, including the relevant provisions of its Constitution (see, inter alia, ECtHR, 28 April 2009, *Savino and Others v. Italy*, CE:ECHR:2009:0428JUD001721405, §§ 94 and 95 and the case-law cited).

169 In the present case, the provisions of Article 110 § 3 and Article 114 § 7 of the Law on the ordinary courts, which the Commission calls into question, do not relate to the very existence of disciplinary courts called upon to rule in disciplinary proceedings initiated in respect of judges of

the Polish ordinary courts, but to the conditions under which disciplinary proceedings concerning those judges are assigned to such disciplinary courts.

170 By its third complaint, the Commission does not in fact target the conditions under which the Polish disciplinary courts are established or the judges which make up those courts are appointed, but the conditions under which the disciplinary court is designated which, of the disciplinary courts situated in the various territorial jurisdictions existing in Poland, will be called upon to rule in specific disciplinary proceedings conducted in respect of a judge.

171 In that regard, it should be noted that, as regards Article 6(1) ECHR, the European Court of Human Rights has held, inter alia, that the requirement that courts must be established by law means that the reassignment of a case to a court situated in another territorial jurisdiction cannot fall within the discretionary power of a particular body. The European Court of Human Rights considered, more specifically, that the fact that neither the reasons for which such reassignment may take place nor the criteria to be fulfilled in carrying out such reassignment have been specified in the applicable legislation is capable of creating a situation where the court thus designated is not seen to be independent and impartial and does not offer the degree of forseeability and certainty required for such a court to be considered 'established by law' (see, to that effect, ECtHR, 12 January 2016, *Miracle Europe kft v. Hungary*, CE:ECHR:2016:0112JUD005777413, §§ 58, 63 and 67).

172 In the present case, it should be observed that the provisions of national legislation challenged by the Commission in the context of the present complaint confer on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with territorial jurisdiction to hear a disciplinary case conducted in respect of a judge of the ordinary courts without the criteria to be fulfilled by such a designation having been specified in the applicable legislation.

173 As has been argued by the Commission, where no such criteria have been laid down, such a power could, inter alia, be used in order to direct certain cases to certain judges while avoiding assigning them to other judges, or in order to put pressure on the judges thus designated (see also, to that effect, ECtHR, 12 January 2016, *Miracle Europe kft v. Hungary*, ECHR:2016:0112JUD005777413, § 58).

174 In the present case, as has also been argued by the Commission, such a risk is increased by the fact that the person responsible for designating the disciplinary tribunal with territorial jurisdiction is none other than the President of the Disciplinary Chamber, namely the body called upon to hear, as the court of second instance, appeals brought against decisions issued by that disciplinary tribunal, a disciplinary chamber whose independence and impartiality are not guaranteed, as is apparent from paragraphs 80 to 113 of the present judgment.

175 Lastly, contrary to the Republic of Poland's assertions, the mere fact that the judges responsible for ruling in a particular set of disciplinary proceedings are selected by the drawing of lots is not such as to exclude the risk referred to in paragraph 173 of the present judgment, because those lots are drawn exclusively from among the members of the disciplinary tribunal designated by the President of the Disciplinary Chamber.

176 It follows from all of the foregoing that Article 110 § 3 and Article 114 § 7 of the Law on the ordinary courts, inasmuch as they confer on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with territorial jurisdiction to hear disciplinary proceedings in respect of judges of the ordinary courts, that is to say, judges who may be called upon to interpret and apply EU law, do not meet the requirement derived from the second

subparagraph of Article 19(1) TEU that such cases must be examined by a tribunal ‘established by law’.

177 The third complaint must, accordingly, be upheld.

The fourth complaint

– *Arguments of the parties*

178 By its fourth complaint, which consists of two parts, the Commission argues that Articles 112b and 113a of the Law on the ordinary courts, as well as Article 115a § 3 of that law, infringe the second subparagraph of Article 19(1) TEU, inasmuch as they do not ensure either the examination within a reasonable time of disciplinary cases concerning judges of those courts or the rights of defence of the accused judge.

179 As regards the first part of that complaint, the Commission takes the view that it follows from Article 112b § 3 of the Law on the ordinary courts that the Minister for Justice may appoint a Disciplinary Officer of the Minister for Justice to replace the Disciplinary Officer who has been handling the case concerned until that point at any stage of a set of disciplinary proceedings, including after the case has been assigned to the disciplinary tribunal or during the examination of an appeal against the decision of that tribunal. Moreover, under Article 112b § 5 of that law, where a ruling refusing to initiate disciplinary proceedings or discontinuing disciplinary proceedings or a ruling closing such proceedings becomes final, those situations would not prevent a Disciplinary Officer of the Minister for Justice from being re-appointed in the same case, such that that minister would be able to maintain permanently the charges against a judge. Compliance with the reasonable time requirement would not therefore be guaranteed.

180 By the second part of its fourth complaint, the Commission submits that the principle of respect for the rights of the defence is infringed, first, by Article 113a of the Law on the ordinary courts, inasmuch as that provision states that proceedings before a disciplinary court may proceed without the appointment of defence counsel to represent a judge who cannot participate in the proceedings before that court on health grounds, or where the defence counsel appointed by that judge has not yet taken up the defence of his or her interests.

181 Second, Article 115a § 3 of the Law on the ordinary courts, inasmuch as it provides that the disciplinary court is to conduct the proceedings despite the justified absence of the accused judge or his or her defence counsel, infringes the principle *audi alteram partem*, which constitutes one of the essential elements of the rights of the defence. In that regard, it is irrelevant that that provision states that the proceedings are to be conducted only if this is not contrary to the interests of those proceedings, since such a concept cannot be equated with taking into consideration the legitimate interests of the judge in question. The same is true of the fact that Article 115 §§ 2 and 4 of that law provides that, at the same time as it serves the summons to appear, the disciplinary tribunal is to invite the accused judge to provide explanations in writing and all the evidence, as respect for the rights of the defence also requires that that judge be allowed to participate in the proceedings where the admissibility and probative value of that evidence will be examined by that court.

182 In its defence, the Republic of Poland contends that, although, by the first part of the complaint as set out in the form of order sought in the application, the Commission calls into question the very creation of the post of Disciplinary Officer of the Minister for Justice, as well as Article 112b of the Law on the ordinary courts as a whole, that institution has not specified the

reasons why the appointment of such an officer would be contrary to EU law, but has in fact merely challenged the second sentence of Article 112b § 5 of that law.

183 As regards the second sentence of Article 112b § 5 of that law, the Commission's arguments do not relate to the normative content of that provision, but only to the possibility that the Minister for Justice may, despite a final decision in a disciplinary case, try to use that provision in order to maintain permanently the same charges against a judge. In that regard, however, the Commission has merely provided a purely hypothetical reading of that provision of national legislation, which has never been verified in practice and is at odds with the state of the national law applicable. The first sentence of Article 112b § 5 of the Law on the ordinary courts provides that the function of the Disciplinary Officer of the Minister for Justice is to expire in the three situations referred to in that provision and the expiry of that function is to be final, since the principle *non bis in idem* stemming from Article 17 § 1(7) of the Code of Criminal Procedure – a provision which applies, *mutatis mutandis*, to disciplinary proceedings, pursuant to Article 128 of the Law on the ordinary courts – precludes a fresh action in the same case.

184 According to the Republic of Poland, there is, moreover, no link between the duration of the proceedings and the fact that those proceedings are conducted by the Disciplinary Officer or by the Disciplinary Officer of the Minister for Justice, since the latter's involvement has no bearing on the course of the actions already taken or on the binding procedural time limits which apply, without distinction, according to whether the proceedings are conducted by either of those officers.

185 As regards the second part of the fourth complaint, the Republic of Poland argues that the sole purpose of Article 113a of the Law on the ordinary courts is to ensure the effective conduct of disciplinary proceedings by preventing any obstruction at the stage of the examination of the dispute by the disciplinary tribunal.

186 As regards Article 115a § 3 of that law, the condition relating to the proper conduct of disciplinary proceedings is to be examined by an independent tribunal which is to assess whether the investigation of all the facts, both for and against the accused judge, allows the proceedings to be conducted in the absence of that judge or his or her defence counsel. Moreover, the right of the judge concerned to be heard is guaranteed at the stage of the proceedings conducted by the Disciplinary Officer or by the Disciplinary Officer of the Minister for Justice, as is apparent from Article 114 of that law, since those officers may, first of all, invite that judge to submit a written statement concerning the subject matter of the examination, must then invite him or her, when notifying him or her of the disciplinary charges, to provide explanations in writing and all the evidence and may, finally, interview that judge in order to hear his or her explanations – and indeed must do so where the person concerned so requests. Moreover, where the disciplinary tribunal summons the parties to the hearing, it is, in accordance with Article 115 of that law, required to ask them to produce evidence and to ask the accused judge to provide explanations in writing.

– *Findings of the Court*

187 As has been recalled in paragraph 164 of the present judgment, the second subparagraph of Article 19(1) TEU requires that the rules governing the disciplinary regime applicable to judges who may have to interpret and apply EU law lay down a procedure which fully guarantees the rights enshrined in Articles 47 and 48 of the Charter.

188 It should be noted at the outset that it is already apparent from the examination and acceptance of the Commission's first, second and third complaints that, contrary to the requirements thus derived from the second subparagraph of Article 19(1) TEU, the disciplinary regime applicable

to judges of the Polish ordinary courts is characterised, in particular, by the fact that the courts involved in disciplinary proceedings do not meet the requirement of independence and impartiality or the requirement of being established by law, and by the fact that the forms of conduct constituting a disciplinary offence are not defined by Polish legislation in a way that is sufficiently clear and precise. The fourth complaint must be considered having regard in particular to the normative context of the provisions of national legislation which the Commission criticises by its fourth complaint.

189 Under the second paragraph of Article 47 of the Charter, everyone is entitled to a hearing within a reasonable time and must have the possibility of being advised, defended and represented. For its part, Article 48(2) of the Charter states that respect for the rights of the defence of anyone who has been charged is to be guaranteed.

190 Moreover, as is apparent from paragraph 165 of the present judgment, the Court must ensure that its interpretation of the second paragraph of Article 47 and of Article 48 of the Charter ensures a level of protection which does not disregard that guaranteed by Article 6 ECHR, as interpreted by the European Court of Human Rights.

191 Regarding the first part of the fourth complaint, it must be borne in mind that the right of persons to have their case heard within a reasonable time constitutes a general principle of EU law enshrined in Article 6(1) ECHR and, as has just been recalled, in the second paragraph of Article 47 of the Charter with respect to court proceedings (see, to that effect, judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 71 and the case-law cited).

192 In the present case, however, the Commission does not claim that the right to be tried within a reasonable time has been infringed in a given specific case, a situation which falls within the scope of Article 47 of the Charter, but complains that the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU on the ground, in essence, that the provisions of national legislation criticised by that institution are designed in such a way that the result of those provisions is that that right cannot be fully guaranteed as regards disciplinary proceedings conducted in respect of judges of the Polish ordinary courts.

193 In that regard, it follows, in particular, from the second subparagraph of Article 19(1) TEU that it is important, in order to preserve the independence of judges who may be called upon to interpret and apply EU law and in order to avoid any risk of the disciplinary regime applicable to those judges being used as a system of political control of the content of their judicial decisions, that the national rules governing disciplinary proceedings relating to such judges are not designed in such a way as to prevent their case from being heard within a reasonable time (see, by analogy, judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, paragraph 221).

194 It should be noted at the outset that it is not apparent, in that regard, in the light of the arguments put forward by the Commission in support of the first part of its fourth complaint, how the mere fact, referred to in the form of order sought in the application, that Article 112b of the Law on the ordinary courts, referred to in its entirety, has '[conferred] on the Minister for Justice the power to appoint a Disciplinary Officer of the Minister for Justice' is such as to lead to a systematic exceeding of reasonable time in disciplinary proceedings brought against judges of the Polish ordinary courts and thus to prevent their case from being heard within such a reasonable time.

195 By contrast, it is apparent from those arguments that the Commission's criticisms relate, in that regard, more specifically, to the specific provision of the second sentence of Article 112b § 5 of the Law on the ordinary courts.

196 In that regard, it must be stated that it follows from the very wording of Article 112b § 5 of the Law on the ordinary courts that, in the situations referred to in the first sentence of that provision in which the function of the Disciplinary Officer of the Minister for Justice is to be terminated, namely where there is a final ruling either refusing to initiate disciplinary proceedings or closing such proceedings, such rulings do not prevent such a Disciplinary Officer from being re-appointed by the Minister for Justice in the same case.

197 Such a provision, the clear wording of which thus suggests that, after a judge has been the subject of an investigation and disciplinary proceedings which have been closed by a final ruling, that judge may once again be subject to such investigations and proceedings in the same case, such that that judge will permanently remain under the potential threat of such investigations and proceedings, notwithstanding the fact that such a ruling has taken place, is, by its very nature, liable to prevent that judge's case from being heard within a reasonable time.

198 The fact, highlighted by the Republic of Poland, that the existence of other fundamental principles, such as the principle *non bis in idem*, precludes such investigations and proceedings being initiated after the adoption of such a final ruling does not invalidate that finding.

199 First, the fact that the second sentence of Article 112b § 5 of the Law on the ordinary courts may, in the light of its wording, also, as the case may be, prove to be incompatible with fundamental principles other than that to which the Commission referred in support of the first part of its fourth complaint cannot in any way preclude a finding, where appropriate, that the Republic of Poland has failed to fulfil its obligations in respect of the infringement of the latter principle.

200 Second, that fact is not such as to affect the conclusion that the mere existence of a provision of national legislation worded in such a way is capable of giving rise, in respect of the judges concerned, to the threat referred to in paragraph 197 of the present judgment and thus of giving rise to a risk of the disciplinary regime being used as a system of political control of the content of the judicial decisions which those judges are called upon to give.

201 Similarly, the fact that the Commission did not refer to any specific case in which the second sentence of Article 112b § 5 of the Law on the ordinary courts was applied where there had been a final ruling such as those referred to in the first sentence of Article 112b § 5 of that law is entirely irrelevant for the purpose of assessing the merits of the alleged failure to fulfil obligations, which relates to the actual adoption of the contested provision of national legislation and the undermining of the independence of judges of the Polish ordinary courts likely to result from it.

202 It follows from all of the foregoing that the second sentence of Article 112b § 5 of the Law on the ordinary courts, inasmuch as it undermines the independence of judges of the Polish ordinary courts by failing to ensure that their case concerning disciplinary proceedings can be heard within a reasonable time, does not meet the requirements derived from the second subparagraph of Article 19(1) TEU. Consequently, the first part of the fourth complaint must be upheld inasmuch as it relates to that provision of national legislation.

203 Concerning the second part of that complaint, it should be recalled at the outset that the fundamental principle of effective judicial protection of rights, reaffirmed in Article 47 of the Charter, and the concept of 'a fair trial', referred to in Article 6 ECHR, consist of various elements, which include, in particular, respect for the rights of the defence and the right to be advised, defended and represented (see, to that effect, judgments of 26 June 2007, *Ordre des barreaux francophones et germanophone and Others*, C-305/05, EU:C:2007:383, paragraph 31, and of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, paragraph 32 and the case-law cited).

204 Similarly, respect for the rights of the defence is, in all proceedings in which penalties may be imposed, a fundamental principle of EU law which has been enshrined in Article 48(2) of the Charter (see, to that effect, judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others*, C-550/07 P, EU:C:2010:512, paragraph 92 and the case-law cited).

205 It is also apparent from the case-law of the Court that the right to be heard in all proceedings is inherent in respect for the rights of the defence thus enshrined in Articles 47 and 48 of the Charter (see, to that effect, judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 28 and the case-law cited, as well as paragraph 29), and that such a right guarantees every person the opportunity to make known his or her views effectively during those proceedings (see, to that effect, judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, paragraph 34).

206 Regarding the right of access to a lawyer, the Court has specified that that lawyer must, in addition, actually be able to carry out satisfactorily his or her task of advising, defending and representing his or her client, failing which that client would be deprived of the rights conferred on him or her by Article 47 of the Charter and by Article 6 ECHR (see, to that effect, judgment of 26 June 2007, *Ordre des barreaux francophones et germanophone and Others*, C-305/05, EU:C:2007:383, paragraph 32).

207 Lastly, although it is true that, according to the settled case-law of the Court, fundamental rights, such as respect for the rights of the defence, which includes the right to be heard, do not constitute unfettered prerogatives and may be restricted, this is, however, on the condition that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not entail, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, paragraph 38 and the case-law cited).

208 In the present case, it follows, first, from Article 113a of the Law on the ordinary courts, read in conjunction with Article 113 §§ 2 and 3 of that law, that, where the accused judge cannot take part in the proceedings before the disciplinary tribunal on health grounds and where that tribunal or its President appoints, at the request of that judge or of its own motion, defence counsel to take up that judge's defence, actions relating to that appointment and that taking up of the defence do not have a suspensory effect on the conduct of the proceedings.

209 Secondly, Article 115a § 3 of the Law on the ordinary courts provides that proceedings are to be conducted by the disciplinary tribunal despite the justified absence of the accused judge or his or her defence counsel, unless this would be contrary to the interests of the disciplinary proceedings being conducted.

210 It must be stated, in that regard, that such procedural rules are liable to restrict the rights of judges against whom disciplinary proceedings have been brought to be heard effectively by the disciplinary court and to be able to benefit from an effective defence before that court. Those rules are not such as to ensure that, in the event of the justified absence of the judge concerned or his or her defence counsel during the proceedings conducted before that court, that judge will still remain in a position to make known his or her views effectively, if necessary with the assistance of defence counsel who also has an effective opportunity to ensure his or her defence.

211 Nor, contrary to the Republic of Poland's assertions, does such a guarantee follow either from the fact that Article 115a § 3 of the Law on the ordinary courts specifies that the disciplinary court

is to conduct the proceedings only if this is not contrary to the interests of those proceedings or from the fact that Article 115 of that law provides that, when it serves the summons to appear, the disciplinary tribunal is to invite the accused judge to provide explanations in writing and all the evidence that he or she considers useful.

212 As the Commission emphasises in its application, those provisions are not capable of guaranteeing respect for the rights of defence of the judge concerned in the context of the proceedings before the disciplinary court.

213 National procedural rules, such as those covered by the second part of the present complaint, may, especially where, as in the present case, they are applied in the context of a disciplinary regime displaying the shortcomings referred to in paragraph 188 of the present judgment, prove to be such as to increase still further the risk of the disciplinary regime applicable to those whose task is to adjudicate being used as a system of political control of the content of judicial decisions. The judges concerned may be led to fear, if they rule in a particular way in the cases before them, that disciplinary proceedings will be brought against them which thus fail to provide guarantees capable of meeting the requirements of a fair trial and, in particular, the requirement relating to respect for the rights of the defence. In this way, the restrictions on the rights of the defence arising from those procedural rules undermine the independence of judges of the Polish ordinary courts and thus do not meet the requirements derived from the second subparagraph of Article 19(1) TEU.

214 In those circumstances, the second part of the fourth complaint must also be upheld and, accordingly, the fourth complaint must be upheld in its entirety.

The fifth complaint, alleging infringement of the second and third paragraphs of Article 267 TFEU

– *Arguments of the parties*

215 The Commission argues that, as evidenced by the specific cases of application to which it referred in the arguments put forward by it in support of its first complaint, the provisions of Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court may expose a judge to disciplinary proceedings upon the adoption of a decision to submit a request for a preliminary ruling to the Court of Justice, which infringes Article 267 TFEU.

216 The possibility that disciplinary investigations and proceedings may thus be conducted in respect of judges of the Polish ordinary courts on the ground that those judges have submitted a request for a preliminary ruling to the Court of Justice undermines the right to put questions to that Court which is conferred on those judges by that provision of EU law and is likely to deter them from exercising that right in order not to be exposed to the risk of disciplinary penalties. The independence of the national courts would therefore be affected, even though such independence is essential to the proper functioning of the system of judicial cooperation between those national courts and the Court of Justice relating to the preliminary ruling mechanism.

217 In its defence, the Republic of Poland argues that the Commission failed to take account of the fact that Article 114 of the Law on the ordinary courts draws a clear distinction between two procedural stages, namely (i) the investigation, which is opened and conducted in order to establish the possible existence of a disciplinary offence and in order to identify the perpetrator of that offence without being carried out in respect of one particular person, and (ii) disciplinary proceedings which, for their part, are initiated only if the findings of the investigation justify doing so. In the specific cases to which the Commission refers, it is not disciplinary proceedings which

have been carried out in respect of judges who have submitted a request for a preliminary ruling to the Court of Justice, but only investigations; investigations which have, moreover, been closed in the meantime.

218 The first investigation concerned a suspicion of disciplinary offences under Article 107 § 1 of the Law on the ordinary courts committed by certain judges as a result of their having exercised an unlawful influence over those chairing adjudicating panels who had submitted a request for a preliminary ruling to the Court of Justice. That first investigation was closed after statements were filed by two of the judges concerned, who did not confirm that they had been subject to pressure. For its part, the second investigation concerned the suspicion that those judges had compromised the dignity of their office following the adoption of orders for reference with reasoning which was, in essence, identical, as well as the possibility that at least one of the judges mentioned had made a false statement inasmuch as he had affirmed that he himself had drafted his order for reference. That investigation also concerned the question whether the indefinite suspension of significant and complex criminal proceedings as a result of such a reference for a preliminary ruling, potentially made in breach of Article 267 TFEU, could constitute a disciplinary offence on the part of the judge concerned. However, that second investigation was also closed, since the analysis of the evidence, including the statements filed by the judges concerned, did not permit the conclusion that there had been such breaches on the part of those judges.

219 According to the Republic of Poland, since such investigations are exceptional and do not necessarily give rise to disciplinary proceedings, they do not undermine the independence of judges because they are intended not to call into question the validity of the decisions which judges have adopted, but to denounce any obvious and gross breaches of their duties, as that Member State argued in its response to the Commission's first complaint. The disciplinary regime challenged in the present action has thus had no effect either on the effective exercise by the courts concerned of their power to submit a request for a preliminary ruling to the Court of Justice or on their ability to make references for a preliminary ruling in the future.

220 In addition, the mere fact that a disciplinary officer thus makes complaints or examines a particular case cannot, in the absence of any judicial decision confirming such an interpretation, lead to the conclusion that the act of submitting a request for a preliminary ruling to the Court of Justice in itself might constitute a disciplinary offence. Neither the wording of Article 107 § 1 of the Law on the ordinary courts nor the established interpretation of that provision to which the Republic of Poland referred in its response to the first complaint enables the disciplinary liability of a judge to be triggered on that ground alone.

221 According to the five Member States intervening in support of the form of order sought by the Commission, it is clear both from the way in which Article 107 § 1 of the Law on the ordinary courts is interpreted and applied and the facts brought to the Court's attention by the referring courts in the context of the cases giving rise to the judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234), and from the guidance provided by that judgment, that the Republic of Poland has infringed Article 267 TFEU. It is of little importance, in that regard, that the investigations concerned have been closed without the judges concerned being subject to legal proceedings, since nothing other than the deterrent effect resulting from the risk of being the subject of such proceedings is liable to affect the decision of the judges as to the need to submit a request for a preliminary ruling to the Court of Justice in a given case.

– *Findings of the Court*

222 It should be recalled at the outset that the keystone of the judicial system established by the Treaties is 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 uniformity in the 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 (Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited, and judgment in *A.B. and Others*, paragraph 90 and the case-law cited).

223 According to the 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, or consideration of their validity, which are necessary for the resolution of the case before them (judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 26, and in *A.B. and Others*, paragraph 91 and the case-law cited).

224 Moreover, in the case of courts or tribunals 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 case-law of the Court, by an obligation to make a reference for a preliminary ruling to the Court of Justice (judgment in *A.B. and Others*, paragraph 92 and the case-law cited).

225 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 in *A.B. and Others*, paragraph 93 and the case-law cited).

226 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 (see, to that effect, judgment in *A.B. and Others*, paragraph 94 and the case-law cited).

227 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 225 of the present judgment (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 58).

228 For those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence, that independence being, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 59 and the case-law cited).

229 In the present case, it must be borne in mind that it is already apparent from the examination which led the Court to uphold the first complaint brought by the Commission that the definitions of the disciplinary offence contained in the provisions of Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court do not meet the requirements derived from the second subparagraph of Article 19(1) TEU, since they give rise to the risk that the disciplinary regime at issue might be used for the purpose of creating, in respect of judges of the Polish ordinary courts, pressure and a deterrent effect which are likely to influence the content of the judicial decisions which those judges are called upon to give.

230 Such a risk also concerns the decisions by which a national court is called upon to choose to exercise its discretion under Article 267 TFEU to submit a request for a preliminary ruling to the Court of Justice or, where appropriate, to comply with its obligation to make such a reference for a preliminary ruling under that provision.

231 As attested to by the examples highlighted by the Commission and discussed, in particular, in paragraphs 117, 118 and 125 of the present judgment, the practice initiated by the Disciplinary Officer confirms that such a risk has, to date, materialised through the opening of investigations concerning decisions whereby Polish ordinary courts have submitted requests for a preliminary ruling to the Court of Justice; investigations which have included, in particular, interviewing the judges concerned and sending those judges questionnaires concerning the question whether the references for a preliminary ruling which had thus been made by those judges were likely to have given rise to disciplinary offences.

232 In addition, it must be stated that, in its defence, the Republic of Poland merely minimised the scope of such practices by claiming, inter alia, that those investigations were carried out not by the disciplinary courts themselves, but by disciplinary officers, that the investigation stage had to be distinguished from that relating to the disciplinary proceedings themselves, that those investigations had in the meantime been closed and that they had, moreover, related to the circumstances surrounding the adoption of the orders for reference concerned and the conduct of the judges in question on that occasion, rather than the orders themselves.

233 It must be borne in mind, in that regard, first, that strict compliance with Member State obligations derived from Article 267 TFEU is required in respect of all State authorities and, therefore, in particular, in respect of a body which, like the Disciplinary Officer, is responsible for investigating, if necessary under the authority of the Minister for Justice, disciplinary proceedings that may be brought against judges. Second, as has been argued by both the Commission and the Member States intervening in support of the form of order sought by that institution, the mere fact that the Disciplinary Officer conducts investigations under the conditions referred to in paragraph 231 of the present judgment is sufficient to give concrete expression to the risk of forms of pressure and of a deterrent effect referred to in paragraph 229 of the present judgment and to undermine the independence of the judges who are the subject of those investigations.

234 It follows that the fifth complaint, alleging that the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice to be restricted by the possibility of triggering disciplinary proceedings, must be upheld.

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

– by failing to guarantee the independence and impartiality of the Disciplinary Chamber, which is responsible for reviewing decisions issued in disciplinary proceedings against judges

(Article 3(5), Article 27 and Article 73 § 1 of the new Law on the Supreme Court, read in conjunction with Article 9a of the Law on the KRS);

– by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts (Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court);

– by conferring on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts (Article 110 § 3 and Article 114 § 7 of the Law on the ordinary courts) and, therefore, by failing to guarantee that disciplinary cases are examined by a tribunal 'established by law'; and

– by failing to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time (second sentence of Article 112b § 5 of the Law on the ordinary courts), and by providing that actions relating to the appointment of defence counsel and the taking up of the defence by that counsel do not have a suspensory effect on the course of the disciplinary proceedings (Article 113a of that law) and that the disciplinary tribunal is to conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel (Article 115a § 3 of the same law) and, therefore, by failing to guarantee respect for the rights of defence of accused judges of the ordinary courts,

the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU,

and that:

by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice to be restricted by the possibility of triggering disciplinary proceedings, the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU.

Costs

236 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Poland has been unsuccessful, the latter must be ordered to pay the costs, including those relating to the proceedings for interim relief.

237 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 failing to guarantee the independence and impartiality of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland), which is responsible for reviewing decisions issued in disciplinary proceedings against judges (Article 3(5), Article 27 and Article 73 § 1 of the ustawa o Sądzie Najwyższym (Law on the Supreme Court)

of 8 December 2017, in the consolidated version published in the *Dziennik Ustaw Rzeczypospolitej Polskiej* of 2019 (item 825), read in conjunction with Article 9a of the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011, as amended by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017);

– by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts (Article 107 § 1 of the ustawa – Prawo o ustroju sądów powszechnych (Law on the organisation of the ordinary courts) of 27 July 2001, in the version resulting from the successive amendments published in the *Dziennik Ustaw Rzeczypospolitej Polskiej* of 2019 (items 52, 55, 60, 125, 1469 and 1495), and Article 97 §§ 1 and 3 of the Law on the Supreme Court, in the consolidated version published in the *Dziennik Ustaw Rzeczypospolitej Polskiej* of 2019 (item 825));

– by conferring on the President of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court) the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts (Article 110 § 3 and Article 114 § 7 of the Law on the organisation of the ordinary courts, in the version resulting from the successive amendments published in the *Dziennik Ustaw Rzeczypospolitej Polskiej* of 2019 (items 52, 55, 60, 125, 1469 and 1495)) and, therefore, by failing to guarantee that disciplinary cases are examined by a tribunal 'established by law'; and

– by failing to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time (second sentence of Article 112b § 5 of the Law on the organisation of the ordinary courts), and by providing that actions relating to the appointment of defence counsel and the taking up of the defence by that counsel do not have a suspensory effect on the course of the disciplinary proceedings (Article 113a of that law) and that the disciplinary tribunal is to conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel (Article 115a § 3 of the same law) and, therefore, by failing to guarantee respect for the rights of defence of accused judges of the ordinary courts,

the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

2. **Declares that, by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice of the European Union to be restricted by the possibility of triggering disciplinary proceedings, the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU;**

3. **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;**

4. **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]

* Language of the case: Polish.