Provisional text

OPINION OF ADVOCATE GENERAL

TANCHEV

delivered on 6 May 2021(1)

Case C-791/19

European Commission

v

Republic of Poland

(Failure of a Member State to fulfil obligations – National measures establishing a disciplinary regime for judges – Second subparagraph of Article 19(1) TEU – Rule of law – Judicial independence – Definition of disciplinary offences – Examination by an independent and impartial tribunal established by law – Reasonable time – Rights of the defence – Articles 47 and 48 of the Charter of Fundamental Rights of the European Union – Article 267 TFEU – Impediment to the right of national courts to make a reference for a preliminary ruling)

I. Introduction

1. In the present case, the European Commission has brought proceedings against the Republic of Poland under Article 258 TFEU for failing to fulfil its obligations under the second subparagraph of Article 19(1) TEU and the second and third paragraphs of Article 267 TFEU on account of national measures establishing the new disciplinary regime for the judges of the Sąd Najwyższy (Supreme Court, Poland; 'the Supreme Court') and the ordinary courts instituted by legislation adopted in 2017. (2)

2. Specifically, the Commission contends, in substance, that the Republic of Poland has infringed the second subparagraph of Article 19(1) TEU on four grounds regarding: first, the treatment of the content of judicial decisions as a disciplinary offence; second, the lack of independence and impartiality of the Izba Dyscyplinarna Sądu Nawyższego (Disciplinary Chamber of the Supreme Court, Poland; 'the Disciplinary Chamber'); third, the discretionary power of the President of that chamber to designate the competent court, which prevents disciplinary cases from being decided by a court established by law; and, fourth, the failure to guarantee the examination of disciplinary cases within a reasonable time and the rights of the defence of accused judges, thus taking into account the rights enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter').

3. The Commission also claims that the Republic of Poland has infringed the second and third paragraphs of Article 267 TFEU because the right of national courts to make a reference for a preliminary ruling is limited by the possible initiation of disciplinary proceedings against judges who exercise that right.

4. The present case is situated in the context of the growing number of cases which have been brought before the Court relating to the legislative changes affecting judicial independence in Poland, (3) including the independence of the Disciplinary Chamber, which gave rise to the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, (4) along with other aspects bearing on the new disciplinary regime for judges, as highlighted in the judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*. (5) As is well known, such changes have attracted widespread international criticism, (6) and triggered the Commission's reasoned opinion, issued under Article 7(1) TEU, on the rule of law in Poland. (7)

5. Indeed, this case is the third action lodged by the Commission against the Republic of Poland under Article 258 TFEU for alleged infringement of the second subparagraph of Article 19(1) TEU due to those changes. (8) By its first two judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (9) and of 5 November 2019, *Commission* v *Poland (Independence of the ordinary courts)*, (10) the Court essentially held, in line with my Opinions in those cases, that measures lowering the retirement age of judges of the Supreme Court and the ordinary courts and granting the President of the Republic of Poland ('the President of the Republic') and the Minister for Justice discretionary power to extend the active mandate of those judges are incompatible with the Republic of Poland's obligations under the second subparagraph of Article 19(1) TEU, as they are contrary to the principles of judicial independence and the irremovability of judges guaranteed by that provision.

6. Undoubtedly, this case is of fundamental importance to the Union legal order. Broadly speaking, a disciplinary regime for judges embodies a set of rules that permits judges to be held accountable for serious forms of misconduct and thus contributes to enhancing public confidence in the courts. (11) Yet, there should be sufficient safeguards in place so as not to undermine judicial independence by the threat or imposition of sanctions that may be taken against them. Such a regime, therefore, is linked to the rule of law and, in turn, the functioning and the future of the Union judicial system predicated on the Court of Justice and the national courts.

7. Consequently, this case provides the Court with the opportunity to develop its case-law on the compatibility of measures taken by a Member State concerning the organisation of its justice system, and in particular the disciplinary regime for judges, with the requirements of the second subparagraph of Article 19(1) TEU for ensuring effective judicial protection and respect for the rule of law in the Union legal order. This case also raises some important questions concerning the relationship between the second subparagraph of Article 19(1) TEU and Articles 47 and 48 of the Charter in this context.

8. In this Opinion, I shall set out the reasons why I consider that this action for failure to fulfil obligations should be upheld.

II. Legal framework

A. Union law

9. The second subparagraph of Article 19(1) TEU provides:

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

10. The second and third paragraphs of Article 267 TFEU state:

> '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 whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before

the Court.’

B. Polish law

1. The Law on the Supreme Court

11. The changes to Polish law concerning the new disciplinary regime for the judges of the Supreme Court and the ordinary courts at issue in the present case were introduced by the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5, as amended; ‘the Law on the Supreme Court’), which entered into force on 3 April 2018.

12. According to Article 3(4) and (5) of the Law on the Supreme Court, that law respectively established two new chambers within the Supreme Court called the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs of the Supreme Court, Poland; ‘the Extraordinary Control and Public Affairs Chamber’) and the Disciplinary Chamber.

13. Article 27 of the Law on the Supreme Court states:

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

(1) disciplinary proceedings;

(a) involving Supreme Court judges;

(b) examined by the Supreme Court in connection with disciplinary proceedings under the following laws:

…

– the Law of 27 July 2001 on the system of the ordinary courts;

…’

14. Article 73 of the Law on the Supreme Court provides:

‘1. Disciplinary courts in disciplinary cases concerning judges of the Supreme Court shall include:

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

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

15. Article 97 of the Law on the Supreme Court states:

‘1. If the Supreme Court detects an obvious violation of the law when examining a case, regardless of its other prerogatives, it shall issue a finding of error to the relevant court. Before issuing a finding of error, it must inform the judge or the judges of the adjudicating panel of the possibility of submitting written explanations 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 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 Supreme Court.’

2. The Law on the ordinary courts

16. The disciplinary regime for the judges of the ordinary courts is also regulated by the ustawa – Prawo o ustroju sądów powszechnych (Law on the system of ordinary courts) of 27 July 2001 (Dz. U. of 2001, No 98, item 1070, as amended, in particular, by the Law on the Supreme Court; 'the Law on the ordinary courts').

17. Article 107(1) of the Law on the ordinary courts, in the version applicable at the relevant time, (12) states:

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

18. Article 110(3) of the Law on the ordinary courts states:

'The disciplinary court within whose jurisdiction the judge who is the subject of the disciplinary proceedings holds office shall not hear the cases referred to in paragraph 1(1)(a). The disciplinary court competent to hear the case shall be designated by the President of the Supreme Court directing the work of the Disciplinary Chamber at the request of the disciplinary officer.'

19. Article 112b of the Law on the ordinary courts states:

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

2. The Disciplinary Officer of the Minister for Justice shall be appointed from among the ordinary court judges or the Supreme Court judges. In the case of disciplinary offences having the characteristics of deliberate crimes prosecuted by public indictment, the Disciplinary Officer of the Minister for Justice may also be appointed from among the public prosecutors indicated by the National Public Prosecutor. In justified cases, in particular if the Disciplinary Officer of the Minister for Justice dies or is unable to perform his duties for a prolonged period, the Minister for Justice shall appoint in his place another judge or, in the case of a disciplinary offence having the characteristics of a deliberate crime prosecuted by public indictment, a judge or a 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 appointment of the 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, discontinuing disciplinary proceedings or closing disciplinary proceedings becomes final. The expiry of the function of the Disciplinary Officer of the Minister for Justice shall not preclude the re-appointment by the Minister for Justice of the Disciplinary Officer of the Minister for Justice in the same case.'

20. Article 113a of the Law on the ordinary courts states:

'Activities related to the appointment of *ex officio* defence counsel and the taking up of the defence by that counsel shall not have a suspensive effect on the course of proceedings.'

21. Article 114(7) of the Law on the ordinary courts states:

'Upon notification of the disciplinary charges, the disciplinary officer shall request the President of the Supreme Court directing the work of the Disciplinary Chamber to designate the disciplinary court to examine the case at first instance. The President of the Supreme Court directing the work of the Disciplinary Chamber shall designate that court within seven days of receipt of the request.'

22. Article 115a(3) of the Law on the ordinary courts states:

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

3. The Law on the KRS

23. The Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; ‘the KRS’) is governed by the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. of 2011, No 126, item 714), as amended, in particular, 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’), which entered into force on 17 January 2018.

24. Article 9a of the Law on the KRS states:

> ‘1. The Lower Chamber [of the Polish Parliament] shall elect from among the judges of the Supreme Court, the ordinary, administrative and military courts, 15 members [of the KRS] for a joint four-year term.
>
> 2. In the election referred to in paragraph 1, the Lower Chamber 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] elected from among the judges shall begin on the day following the day of their election. The members [of the KRS] appointed for the previous term of office shall perform their functions until the day on which the joint term of office of the new members [of the KRS] begins.’

III. Pre-litigation procedure

25. On 3 April 2019, the Commission sent the Republic of Poland a letter of formal notice, in accordance with Article 258 TFEU, regarding the conformity of the new disciplinary regime for the judges of the Supreme Court and the ordinary courts – as set out in the Law on the Supreme Court, the Law on the ordinary courts and the Law on the KRS (together, ‘the contested measures’) – with the second subparagraph of Article 19(1) TEU and the second and third paragraphs of Article 267 TFEU, and invited it to submit its observations within two months.

26. On 1 June 2019, the Republic of Poland replied to the letter of formal notice and contested the Commission’s arguments.

27. On 17 July 2019, the Commission addressed a reasoned opinion to the Republic of Poland, alleging that the disciplinary regime in question infringed the Treaty provisions mentioned in point 25 of this Opinion, and invited it to comply with that reasoned opinion within two months of receiving it.

28. On 17 September 2019, the Republic of Poland responded to the reasoned opinion, maintaining that the alleged infringements were unfounded.

IV. Procedure before the Court

29. By its application lodged on 25 October 2019, the Commission brought the present action before the Court under Article 258 TFEU. It claims that the Court should:

> (1) declare that the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU:

– by allowing the content of judicial decisions to be treated as a disciplinary offence as regards ordinary court judges;

– by failing to guarantee the independence and impartiality of the Disciplinary Chamber, which has jurisdiction for the review of decisions issued in disciplinary proceedings against judges;

– by granting the President of the Disciplinary Chamber the power to designate the competent disciplinary court of first instance in cases concerning ordinary court judges, thus failing to guarantee that such cases are heard by a court established by law;

– by granting the Minister for Justice the power to appoint a Disciplinary Officer of the Minister for Justice, thus failing to guarantee that disciplinary cases against ordinary court judges are heard within a reasonable time, and by providing that acts connected with the designation of defence counsel and that counsel's conduct of the defence do not have a suspensive effect on the course of the disciplinary proceedings and that the disciplinary court is to conduct the proceedings despite the justified absence of the notified accused or his or her defence counsel, thus failing to guarantee the rights of the defence of ordinary court judges;

(2) declare 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 to refer questions for a preliminary ruling to the Court of Justice to be limited by the possibility of the initiation of disciplinary proceedings; and

(3) order the Republic of Poland to pay the costs of the proceedings.

30. In its defence lodged on 9 January 2020, the Republic of Poland contends that the Court should:

(1) dismiss the present action in its entirety as unfounded; and

(2) order the Commission to pay the costs of the proceedings.

31. The Commission and the Republic of Poland also lodged a reply and a rejoinder on 21 February 2020 and 6 May 2020, respectively.

32. By decision of 26 November 2019, the President of the Court rejected the Commission's request that the present case be subject to the expedited procedure and gave it priority treatment under Article 53(3) of the Court's Rules of Procedure.

33. By separate document lodged on 23 January 2020, the Commission brought an application for interim measures, asking the Court to order the Republic of Poland: first, to suspend the application of Articles 3(5), 27 and 73(1) of the Law on the Supreme Court, which form the basis of the competence of the Disciplinary Chamber to adjudicate, at first instance and on appeal, disciplinary cases concerning judges; second, to refrain from referring cases pending before the Disciplinary Chamber to a chamber which does not meet the requirements of independence as defined, inter alia, in the judgment in *A. K. and Others*; and, third, to communicate to the Commission, not later than one month after notification of the Court's order, the measures adopted to comply fully with that order.

34. By orders of 11, 19 and 20 February 2020, the President of the Court granted the Kingdom of Belgium, the Kingdom of Denmark, the Republic of Finland, the Kingdom of the Netherlands and the Kingdom of Sweden leave to intervene in the present case in support of the form of order sought by the Commission.

35. By order of 8 April 2020, (13) the Court granted in full the Commission's application for interim measures until delivery of the final judgment in the present case.

36. A hearing was held on 1 December 2020 at which the Commission, the Kingdom of Belgium, the Kingdom of Denmark, the Republic of Finland, the Kingdom of the Netherlands, the Republic of Poland and the Kingdom of Sweden presented oral argument.

V. Summary of the arguments of the parties

A. The complaints concerning infringement of the second subparagraph of Article 19(1) TEU

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

37. The Commission submits that the second subparagraph of Article 19(1) TEU is applicable to the present case, given that the Supreme Court and the ordinary courts rule on questions relating to the application or interpretation of Union law. In its view, according to the Court's case-law, (14) the second subparagraph of Article 19(1) TEU encompasses all the guarantees deriving from Articles 47 and 48 of the Charter, including the right to a court established by law, the right to have a case heard within a reasonable time and the rights of the defence, as they are intended to avoid the risk of disciplinary measures being used as a system of political control of the content of judicial decisions.

38. The Republic of Poland contends that those rights arising from Articles 47 and 48 of the Charter do not derive from the second subparagraph of Article 19(1) TEU, so the third and fourth complaints cannot be upheld. Having regard to the scope of application of the Charter in relation to the Member States as laid down in Article 51(1) thereof, those rights do not apply to disciplinary cases conducted on the basis of the contested measures, as they are of an internal nature and the disciplinary court in such cases does not apply Union law.

39. According to the Kingdom of Belgium and the Kingdom of Sweden, the second subparagraph of Article 19(1) TEU is applicable to the present case. The Kingdom of Belgium points out that, in the Court's case-law, the substantive guarantees to which effective judicial protection is subject on the basis of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter are the same.

2. The first complaint concerning the treatment of the content of judicial decisions as a disciplinary offence

40. By the first complaint, the Commission submits that, based on their wording, Article 107(1) of the Law on the ordinary courts and Article 97(1) and (3) of the Law on the Supreme Court infringe the second subparagraph of Article 19(1) TEU because they allow the national bodies competent in disciplinary cases involving ordinary court judges to interpret the conditions of disciplinary liability in such a way that the content of judicial decisions can be qualified as a disciplinary offence. This makes it possible to use the disciplinary regime as a means to exercise political control over ordinary court judges contrary to the principle of judicial independence protected by that provision. Even if the definition of disciplinary offences and specifically the category of obvious and gross violations of the law in Article 107(1) of that law was not modified by the legislation instituted in 2017, its interpretation is entrusted to the Disciplinary Chamber, which is not independent, as detailed in the second complaint, and is not bound by the Supreme Court's existing case-law interpreting it restrictively. (15)

41. The Commission contends that the interpretation of Article 107(1) of the Law on the ordinary courts as covering the content of judicial decisions is substantiated in practice by measures taken by the Disciplinary Officer for Ordinary Court Judges and his two deputies, appointed by the Minister for Justice in 2018, who act as prosecutors against judges under the new disciplinary regime. On 29 November 2018, investigations were opened to determine whether three judges committed a disciplinary offence in connection with the references in Cases C−558/18, C−563/18 and C−623/18, in which they were ordered to submit explanations on possible '*ultra vires* conduct' for having made those references. (16) On 3 September 2019, an investigation was taken to determine whether the judge who submitted the references in Cases C−748/19 to C−754/19, concerning, in particular, the requirements of judicial independence in respect of a court whose composition includes a judge seconded by the Minister for Justice, committed a disciplinary offence. (17) On 6 December 2019, disciplinary proceedings were brought against that judge for, inter alia, questioning the independence of the judge concerned and unlawfully issuing the references. (18)

42. The Commission invokes additional examples, occurring after the lodging of this case. By decision of 4 February 2020, (19) the Disciplinary Chamber suspended from office a judge against whom disciplinary proceedings had been initiated on 29 November 2019 concerning that judge's decision to verify the legal status

of a judge in the light of the legislative changes to the composition of the KRS. (20) In that decision, the Disciplinary Chamber stated, inter alia, that the judge's conduct constituted an obvious and gross violation of the law and breach of the dignity of the office under Article 107(1) of the Law on the ordinary courts and that the illegality of the judge's decision was not in doubt. Disciplinary proceedings were also brought against three judges who questioned the legal status of judges due to such changes. (21)

43. The Commission argues that Article 97(1) and (3) of the Law on the Supreme Court reinforces the legal effects of Article 107(1) of the Law on the ordinary courts because it combines the possibility for the Supreme Court to address a finding of error to a court, consisting of an obvious violation of the law, with the initiation of disciplinary proceedings against a judge. It applies in the context of the new extraordinary appeal procedure, involving review of ordinary court judgments going back many years, by the Extraordinary Control and Public Affairs Chamber, which, like the Disciplinary Chamber, is a new chamber of the Supreme Court composed of judges proposed by the newly constituted KRS.

44. The Republic of Poland submits that no disciplinary proceedings based on the content of judicial decisions have been instituted against judges and a 'chilling effect' does not exist. The definition of disciplinary offences has long been in force without issue, as shown by the Supreme Court's existing case-law. (22) The examples cited by the Commission are irrelevant, and the Court's judgment in this case must relate to the situation prevailing at the end of the period laid down in the reasoned opinion. Article 97(1) and (3) of the Law on the Supreme Court applies in a different context, and the Supreme Court only requests the initiation of disciplinary proceedings.

45. The Kingdom of Belgium, the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden emphasised at the hearing numerous reports of national and international bodies criticising the investigations and disciplinary proceedings brought against judges and the broad definition of disciplinary offences. For the Republic of Finland, the Kingdom of the Netherlands and the Kingdom of Sweden, this has a 'chilling effect' on judges. The Kingdom of Denmark adds that the combination with other changes increases the risk that disciplinary measures can be used to exert pressure on judges.

3. The second complaint concerning the independence and impartiality of the Disciplinary Chamber

46. By the second complaint, the Commission submits that Articles 3(5), 27 and 73(1) of the Law on the Supreme Court in conjunction with Article 9a of the Law on the KRS do not guarantee the independence and impartiality of the Disciplinary Chamber. Pursuant to Articles 3(5), 27 and 73(1) of the Law on the Supreme Court, the Disciplinary Chamber constitutes, as regards ordinary court judges, the disciplinary court of second instance and, in certain cases, of first instance, and, as regards Supreme Court judges, the disciplinary court of first and second instance. Article 9a of the Law on the KRS changes the method of appointment of the judicial members of the KRS, the constitutional body whose functions include proposing judges for appointment by the President of the Republic.

47. The Commission contends that several elements taken together and which were simultaneously inserted into Polish law reflect a 'structural break', giving rise to doubts as to the imperviousness of the Disciplinary Chamber to external factors and its neutrality to conflicting interests. Those elements include: (i) it was created *ex nihilo* within the Supreme Court; (ii) it is competent to rule on disciplinary proceedings against judges; (iii) it is characterised by a high degree of organisational and financial autonomy from the other chambers of the Supreme Court; (iv) it is composed of judges appointed after its creation on the proposal of the newly constituted KRS and not by transfer of judges already serving in other chambers of the Supreme Court; and (v) the mandates of the KRS members were prematurely terminated and the rules governing the method of appointment of the judicial members of the KRS were changed, resulting in the politicisation of the KRS with 23 out of 25 members being appointed or represented by the legislative and executive authorities and greater influence of those authorities on the process of appointing judges of the Disciplinary Chamber. It relies on the judgment in *A. K. and Others* and the Supreme Court's case-law applying the criteria in that judgment.

48. The Republic of Poland submits that the procedure for appointing judges under Polish law does not differ from approaches taken in other Member States, and the changes to the method of appointment of the judicial

members of the KRS strengthens their representativeness. In its view, judges of the Disciplinary Chamber benefit from an elaborate system of guarantees linked, inter alia, to their irremovability, immunity and remuneration, which must be taken into account under the Court's case-law. (23) Its high degree of organisational and financial autonomy strengthens its independence, and judges of that chamber receive 40% more remuneration to make up for not taking up certain paid activities. The Disciplinary Chamber's case-law attests to its independence, as shown by the overview annexed to the submissions. The judgment in *A. K. and Others* establishes the conformity of the disputed provisions with Union law, and the Supreme Court's case-law referred to by the Commission is irrelevant.

49. The Kingdom of Belgium asserts that the lack of the Disciplinary Chamber's independence is supported by guidelines issued by international bodies on judicial independence. For the Kingdom of Denmark and the Republic of Finland, this is confirmed by the Court's case-law, including the judgment in *A. K. and Others*.

4. The third complaint concerning the power of the President of the Disciplinary Chamber to designate the disciplinary court

50. By the third complaint, the Commission submits that Articles 110(3) and 114(7) of the Law on the ordinary courts, which give the President of the Disciplinary Chamber virtually unlimited power to designate the competent disciplinary court of first instance in cases involving ordinary court judges, do not guarantee those cases are examined by a court established by law and thus are contrary to the second subparagraph of Article 19(1) TEU, having regard to the Court's case-law and judgments of the European Court of Human Rights ('ECtHR') on Article 6(1) of the European Convention on Human Rights ('ECHR'). Given that the Disciplinary Chamber is not independent, the attribution of such power to the President of that chamber cannot constitute an effective guarantee of judicial independence, and the panel of judges to decide the case is appointed by drawing lots from among the judges of a given court who are themselves appointed by the Minister for Justice.

51. The Republic of Poland contends that any disciplinary court of first instance is a court established by law whose positions have been filled in accordance with the law. The President of the Disciplinary Chamber appoints one of the disciplinary courts established by law, while the specific panel of judges is appointed by drawing lots from a list of all the judges of that court, which prevents undue influence.

52. According to the Kingdom of Denmark, the complaint is reinforced by the Disciplinary Chamber's lack of independence. For the Kingdom of the Netherlands, this is corroborated by ECtHR case-law.

5. The fourth complaint concerning the non-observance of procedural rights of judges

53. By the fourth complaint, which is divided into two branches, the Commission submits that Articles 112b, 113a and 115a(3) of the Law on the ordinary courts are incompatible with the second subparagraph of Article 19(1) TEU because they fail to guarantee that disciplinary cases against ordinary court judges are heard within a reasonable time and the rights of the defence of accused judges.

54. As regards the first branch, the Commission contends that, by virtue of Article 112b of the Law on the ordinary courts, the Minister for Justice has the possibility of permanently maintaining charges against a judge by appointing a Disciplinary Officer of the Minister for Justice, who can initiate proceedings at the request of the Minister for Justice, intervene in the proceedings at any stage and reopen proceedings in the same case, even after it has been closed. In the light of the ECtHR's case-law on the criminal limb of Article 6(1) ECHR, (24) the reasonable time requirement is not guaranteed. Arguments based on the *ne bis in idem* principle do not take account of the clear wording of that provision, and Article 112b(2) of the same law governs situations where that officer's function is terminated for other reasons.

55. As regards the second branch, the Commission argues that Article 113a of the Law on the ordinary courts, which provides for the continuation of the proceedings even in the absence of the appointment of *ex officio* defence counsel or when that counsel has not yet taken up the defence, violates the rights of the defence, having regard to the ECtHR's case-law on Article 6(3)(c) ECHR (25) on the right of access to counsel. It disputes that that provision is intended only to allow the disciplinary court to appoint *ex officio* defence counsel, as that is

regulated by Article 113(2) and (3) of the same law. In its view, Article 115a(3) of that law, which provides that the disciplinary court can conduct the proceedings despite the justified absence of the accused judge or his or her counsel, contravenes the *audiatur et altera pars* principle, which is part of the rights of the defence. The interests of the proceedings are not the same as those of the judge, and the possibility to submit evidence and written explanations at previous stages does not compensate for participating in the proceedings.

56. The Republic of Poland submits, as regards the first branch, that the Commission has not presented any arguments challenging the institution of the Disciplinary Officer of the Minister for Justice provided for in Article 112b of the Law on the ordinary courts and, as regards Article 112b(5) thereof, it has not submitted sufficient evidence under the Court's case-law (26) to show a national practice violating the reasonable time requirement. Article 112b(5) of that law applies only to proceedings which have not been the subject of a final decision and in which the Disciplinary Officer of the Minister for Justice can no longer perform his or her duties for other reasons, such as death or termination of employment. Since the final decision concludes the proceedings, the initiation of new proceedings leads to dismissal under the *ne bis in idem* principle, and the *res judicata* principle likewise precludes the indefinite maintenance of charges against a judge whose case has been closed. There is no connection between the length of the proceedings and the fact that they may be conducted by the Disciplinary Officer of the Minister for Justice, who is subject to the same time limits as the Disciplinary Officer for Ordinary Court Judges and his deputies for the various stages of the proceedings.

57. The Republic of Poland claims, as regards the second branch, that Article 113a of the Law on the ordinary courts concerns only the appointment of *ex officio* defence counsel, which is an exceptional situation governed by Article 113(2), (3) and (4) of that law. As for Article 115a(3) thereof, the interests of the proceedings coincide with those of the judge and are assessed by an independent court. The judge's right to be heard is guaranteed already at previous stages.

B. The complaint concerning infringement of the second and third paragraphs of Article 267 TFEU

58. By the fifth complaint, the Commission submits that Article 107(1) of the Law on the ordinary courts and Article 97(1) of the Law on the Supreme Court allow judges to be subject to disciplinary proceedings for making a reference, as demonstrated by the four examples in the context of the first complaint set out in point 41 of this Opinion. The failure to have safeguards protecting judges against the threat of disciplinary liability when they make a reference infringes Article 267 TFEU and has a 'chilling effect' on judges.

59. The Republic of Poland contends that no disciplinary proceedings have been instituted against a judge for making a reference and the examples invoked by the Commission do not prove otherwise. Investigations which are carried out on an exceptional basis and do not necessarily result in disciplinary proceedings do not infringe judicial independence, and a 'chilling effect' does not exist.

60. The Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden assert that, as confirmed by the judgment in *Miasto Łowicz*, the submission of a reference cannot lead to disciplinary proceedings. For the Republic of Finland and the Kingdom of Sweden, the 'chilling effect' on judges must be taken into account.

VI. Analysis

61. My analysis is structured in three main parts. First, I will address the Republic of Poland's objections regarding the applicability and scope of the second subparagraph of Article 19(1) TEU in the context of the third and fourth complaints (section A). Then, I will examine the merits of the complaints concerning infringement of the second subparagraph of Article 19(1) TEU (section B) and the second and third paragraphs of Article 267 TFEU (section C).

62. On the basis of that analysis, I have come to the conclusion that the second subparagraph of Article 19(1) TEU includes the right to a court established by law, the right to have a case examined within a reasonable time and the rights of the defence, and that the complaints based on that provision and Article 267 TFEU are well founded.

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

63. As the Court has consistently held, Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of Union law in all Member States and judicial protection of the rights of individuals under that law to national courts and the Court of Justice. (27) While the organisation of justice in principle falls within the competences of the Member States, they must, in the exercise of that competence, respect the obligations arising from Union law, in particular the second subparagraph of Article 19(1) TEU. (28) Under that provision, the Member States must ensure that the bodies which, as 'courts and tribunals' defined by Union law, come within their judicial system in the fields covered by Union law meet the requirements of effective judicial protection. (29)

64. It is also well established that, as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter. (30) It follows that the second subparagraph of Article 19(1) is applicable in relation to any national court whenever it may rule on questions concerning the application or interpretation of Union law and thus falling within the fields covered by Union law. (31)

65. In the present case, it is common ground that the Supreme Court and the ordinary courts in Poland rule on questions concerning the application or interpretation of Union law and thus falling within the fields covered by Union law. (32) Consequently, the second subparagraph of Article 19(1) TEU is applicable to this action for failure to fulfil obligations seeking to contest the compatibility with that provision of national measures relating to the disciplinary arrangements for the judges of those courts. The fact that disciplinary cases conducted on the basis of the contested measures do not involve the implementation of Union law is irrelevant, as is the fact that the Union has no general competence concerning the disciplinary liability of judges.

66. It is not disputed that the obligation to guarantee access to an independent and impartial court derives from the second subparagraph of Article 19(1) TEU and thus covers the assessment of the contested measures on such grounds. However, the present case raises the question whether that provision encompasses other guarantees enshrined in Articles 47 and 48 of the Charter, namely, the right to a court established by law, the right to have a case examined within a reasonable time and the rights of the defence, in relation to those measures. (33)

67. In my view, that question should be answered in the affirmative.

68. As the Court has held, (34) the guarantees of judicial independence arising from the second subparagraph of Article 19(1) TEU include, in the context of a disciplinary system for judges, rules which 'provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence'. It follows that the requirement for the establishment of a disciplinary regime which guarantees the rights enshrined in Articles 47 and 48 of the Charter derives from the second subparagraph of Article 19(1) TEU.

69. This analysis is also consistent with the case-law in which the Court has linked the guarantees of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. For example, the Court has recognised that '[t]he second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law, meaning that the latter provision must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU'. (35) This may be considered to stem from the fact that the principle of effective judicial protection, referred to in the second subparagraph of Article 19(1) TEU, constitutes a general principle of Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR and which is now reaffirmed by Article 47 of the Charter. (36) Indeed, as expressed in my Opinion in *A. K. and Others*, (37) there is a 'constitutional passerelle' between the second subparagraph of Article 19(1) TEU and Article 47 of the Charter and the case-law concerning them inevitably intersects, given that those provisions share common legal

sources. Thus, the rights covered by each are bound to overlap, and the second subparagraph of Article 19(1) TEU includes, but is not limited to, the obligation to have independent and impartial courts.

70. In that connection, it should be recognised that the right to a court established by law is directly connected to judicial independence, (38) and that it is also one of the requirements that must be met for the purposes of constituting a 'court or tribunal' within the meaning of Union law under Article 267 TFEU. (39) It is apparent from the case-law that the Court interprets the requirement of judicial independence on the basis of Article 267 TFEU in the light of that set out in the second subparagraph of Article 19(1) TEU. (40) It would therefore seem to hold true for this requirement as well.

71. Alongside judicial independence, the right to a court established by law, the right to have a case heard within a reasonable time and the rights of the defence form part of the right to fair trial protected by the second paragraph of Article 47 of the Charter, along with Article 48(2) thereof with regard to the rights of the defence. This argues for including those rights within the guarantees covered by the second subparagraph of Article 19(1) TEU, given their association with judicial independence as together forming key elements of the right to effective judicial protection and the fundamental right to a fair trial.

72. I therefore take the view that the second subparagraph of Article 19(1) TEU includes the right to a court established by law, the right to have a case examined within a reasonable time and the rights of the defence, as enshrined in Articles 47 and 48 of the Charter. Thus, Articles 47 and 48 of the Charter apply to national measures concerning disciplinary arrangements for judges that are adopted by a Member State in order to give effect to the second subparagraph of Article 19(1) TEU, such as the measures at issue. It follows that the Republic of Poland's objections that such rights do not derive from that provision for the purposes of the third and fourth complaints should be rejected.

B. The complaints concerning infringement of the second subparagraph of Article 19(1) TEU

1. The first complaint concerning the treatment of the content of judicial decisions as a disciplinary offence

73. The Commission alleges that Article 107(1) of the Law on the ordinary courts and Article 97(1) and (3) of the Law on the Supreme Court infringe the principle of judicial independence because they allow the content of judicial decisions to be treated as a disciplinary offence. It bases this complaint on the wording of Article 107(1) of the Law on the ordinary courts and in particular the category of disciplinary offences consisting of obvious and gross violations of the law, in the light of its application and the broader context, including the finding of error mechanism in Article 97(1) and (3) of the Law on the Supreme Court.

74. The Republic of Poland argues that the Commission has not demonstrated that the disputed provisions infringe that principle, taking account, in particular, of the wording and established interpretation of Article 107(1) of the Law on the ordinary courts and the different context of Article 97(1) and (3) of the Law on the Supreme Court.

75. It should be recalled at the outset that the Member States are not obliged to adopt a particular model of disciplinary regime for judges under the second subparagraph of Article 19(1) TEU. What is important is that the rules governing that regime 'provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions'. (41) In particular, rules that define the conduct amounting to disciplinary offences are part of those guarantees. (42)

76. It should also be observed that the disciplinary liability of judges is part of the guarantees of judicial independence in guidelines issued by international bodies on judicial independence. (43) In that regard, disciplinary action should be instituted against a judge for the most serious forms of professional misconduct, and not on account of the content of judicial decisions generally involving the assessment of facts, the evaluation of evidence and the interpretation of the law. (44) Yet, there is no uniform approach when it comes to the material conditions for disciplinary liability and, in many States, the definition of disciplinary offences is often framed in general terms. (45)

77. This argues for the importance of taking account of the legal framework and the broader context in which the particular definition of disciplinary offences is interpreted and applied. (46) Indeed, as regards the assessment of the principle of judicial independence, the Court follows an overall approach, which takes into consideration all the relevant factors relating to the context and application of the national measures at issue and their cumulative effects. (47) As a result, even if a national measure in isolation may not be liable to infringe that principle, this may not be true if the various factors are considered together. (48)

78. In the present case, I consider that the Commission has sufficiently demonstrated that the disputed provisions infringe the principle of judicial independence, whose observance is necessary to meet the requirements of effective judicial protection under the second subparagraph of Article 19(1) TEU.

79. It should be noted that, as seen in point 17 of this Opinion, Article 107(1) of the Law on the ordinary courts set out, at the relevant time, (49) a definition of disciplinary offences, consisting of obvious and gross violations of the law and breach of the dignity of the office, which is expressed in general terms. I acknowledge that that provision and in particular the category of obvious and gross violations of the law may not be liable in itself to infringe the principle of judicial independence. Nevertheless, it should be considered that that provision allows for the possible treatment of the content of judicial decisions as a disciplinary offence and thus does not constitute an effective guarantee against interference with judicial independence, taking account of the broader context and its practical application in Poland, which is not comparable to the situations existing in other Member States.

80. In that regard, Article 107(1) of the Law on the ordinary courts is situated within the legislative changes to the Polish justice system and in particular the new disciplinary regime for judges, which add to the risk that disciplinary proceedings or measures may be taken under that provision to exert political pressure on judges for the content of their decisions. In particular, it should be pointed out that its definitive interpretation is entrusted to the Disciplinary Chamber whose independence has been put in doubt as will be discussed below in the second complaint and which has already carried out an interpretation of that provision as covering the content of judicial decisions (see point 42 of this Opinion). As indicated by the Kingdom of Belgium, the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden, there are numerous reports issued by international bodies, (50) highlighting the detrimental impact of the new disciplinary regime and in particular the risks presented by the broadly worded definition of disciplinary offences in Polish law on judicial independence.

81. The possibility for judges to incur liability for the content of their decisions seems to me to be enhanced by Article 97(1) and (3) of the Law on the Supreme Court, which allows the Supreme Court to request the initiation of disciplinary proceedings against a judge if it finds an obvious violation of the law in the context of its review of a case for a finding of error. Even if, as the Republic of Poland contends, the concept of obvious violation of the law under that provision is situated in a different context than that of obvious and gross violations of the law in Article 107(1) of the Law on the ordinary courts, it cannot be excluded that the way that provision is articulated with Article 107(1) of the Law on the ordinary courts in the context of the new disciplinary regime does not provide sufficient guarantees to protect judges.

82. It follows from Article 97(1) and (3) of the Law on the Supreme Court that the Disciplinary Chamber is the disciplinary court of first instance, including cases involving ordinary court judges. That provision is to be applied by the Extraordinary Control and Public Affairs Chamber – also created by the Law on the Supreme Court and composed of judges proposed by the newly constituted KRS – in the context of the new extraordinary appeal procedure, allowing that chamber to review final decisions of the ordinary courts going back to 1997. (51) While that chamber and that procedure have not been put at issue in this case, they still form part of the context in which the disputed provisions are situated. As the Kingdom of Denmark indicated, the link between the consideration of appeals, including extraordinary appeals, and the initiation of disciplinary proceedings contributes to putting pressure on judges when exercising their judicial functions.

83. Furthermore, as seen in points 41 and 42 of this Opinion, the Commission has adduced evidence regarding the application of Article 107(1) of the Law on the ordinary courts in practice, which in my view demonstrates the treatment of the content of judicial decisions as a disciplinary offence. The arguments put forward by the Republic of Poland contesting the relevance of the examples mentioned by the Commission are

not convincing. In particular, it is true that, under settled case-law, the question whether a Member State has failed to fulfil its obligations is determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, which in this case is 17 September 2019, and the Court cannot take account of subsequent changes. (52) However, as indicated by the Commission, while some of those examples concerned later events, they serve to confirm the arguments and evidence in its application relating to that period and thus are relevant in the context of the present case. (53)

84. Even if, as the Republic of Poland claims, certain examples did not concern obvious and gross violations of the law, they still substantiate that the definition of disciplinary offences in Article 107(1) of the Law on the ordinary courts can indeed be used to cover the content of judicial decisions and that it does not contain sufficient guarantees to protect judges. The examples invoked by the Commission attest to disciplinary proceedings or measures taken against judges on account of decisions they issued in connection with the changes to the Polish justice system and the independence of Polish judges. (54) The fact that the investigations did not lead to disciplinary charges against the judges concerned or that the disciplinary officer's assessment is not binding on disciplinary courts is irrelevant, as such measures are liable to exert pressure on judges. The mere possibility that disciplinary proceedings or measures could be taken against judges on account of the content of their judicial decisions undoubtedly creates a 'chilling effect' not only on those judges, but also on other judges in the future, which is incompatible with judicial independence.

85. In light of the foregoing reasons, the first complaint raised by the Commission is well founded.

2. The second complaint concerning the independence and impartiality of the Disciplinary Chamber

86. The Commission submits that Articles 3(5), 27 and 73(1) of the Law on the Supreme Court, read in conjunction with Article 9a of the Law on the KRS, do not guarantee the independence and impartiality of the Disciplinary Chamber. It bases its claim on a number of elements, along with the judgment in *A. K. and Others* and the Supreme Court's case-law applying that judgment.

87. The Republic of Poland contends that no violation of judicial independence has been made out, taking account, in particular, of the procedure for appointing the judges of the Disciplinary Chamber and the guarantees afforded to them under Polish law.

88. It follows from the Court's case-law that the rules concerning the disciplinary regime applicable to judges contribute to guaranteeing the independence and impartiality of courts in order to remove any legitimate doubts, in the minds of subjects of the law, as to the imperviousness of such a court to external factors, in particular, the direct or indirect influence of the legislative and the executive authorities, and as to its neutrality with respect to the interests before it. Therefore, any lack of appearance of independence or impartiality of the court prejudicing the trust which justice in a democratic society inspires in subjects of the law must not be allowed. (55)

89. In the judgment in *A. K. and Others*, (56) the Court clarified the scope of the requirements of independence and impartiality in the context of the establishment of the Disciplinary Chamber. It observed that the mere fact that the judges of that chamber were appointed by the President of the Republic does not give rise to doubts as to their impartiality, if, once appointed, they are free from influence when carrying out their role. However, the Court identified several factors, which taken in combination were capable of calling this into question.

90. In that judgment, (57) the Court found that, as regards the independence of the KRS, which is relevant when ascertaining whether the judges which it selects are capable of meeting the requirements of independence and impartiality, those elements included, in particular, that the newly constituted KRS was formed by reducing the four-year mandate of the previous members and the 15 judicial members of the KRS, previously elected by their peers, are now elected by the legislative authorities. As regards the elements directly characterising the Disciplinary Chamber, the Court indicated: first, it has exclusive jurisdiction to rule on cases concerning measures that the Court had found, in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, (58) were incompatible with the second subparagraph of Article 19(1) TEU; second, it is

constituted of newly appointed judges, excluding judges already serving on the Supreme Court; and, third, it enjoys a particularly high degree of autonomy compared to other chambers of that court.

91. By judgment of 5 December 2019, (59) the Supreme Court (ruling in the formation of the Labour Law and Social Security Chamber on one of the cases giving rise to the judgment in *A. K. and Others*) held – on the basis of the judgment in *A. K. and Others* – that the KRS is not, in its current composition, an independent body and that the Disciplinary Chamber is not a court for the purposes of Article 47 of the Charter, Article 6 ECHR and Article 45(1) of the Polish Constitution. As regards the KRS, that judgment mentioned, inter alia, defects in the process of electing its members, its subservience to the political authorities and its activities which ran counter to judicial independence. As regards the Disciplinary Chamber, that judgment indicated, in particular, that all judges appointed to that chamber have strong ties to the legislative or executive authorities; the conditions of the competition for the appointment of those judges were changed in the course of the proceedings; the Supreme Court did not participate in the process of appointment of those judges; the Disciplinary Chamber's activities were aimed at the withdrawal of references for preliminary rulings; and the disciplinary cases decided by the Disciplinary Chamber demonstrated that a judge can be accused of disciplinary offences as a result of the adoption of judicial decisions, whereas this was not previously the case.

92. By orders of 15 January 2020, (60) the Supreme Court (ruling in the same formation on the other cases giving rise to the judgment in *A. K. and Others*) held on similar grounds that the Disciplinary Chamber is not an independent and impartial court due to the conditions regarding its establishment, powers and composition, along with the involvement of the KRS in the selection of its members.

93. By resolution of 23 January 2020, (61) the Supreme Court (ruling in the formation of the combined Civil Chamber, Criminal Chamber and Labour Law and Social Security Chamber) agreed with the judgment of 5 December 2019 that the KRS and the Disciplinary Chamber are not independent bodies. In particular, that resolution stated that the KRS is subordinated to the political authorities, so that competitions for the office of judge carried out by it are defective, thus creating fundamental doubts as to the motivations for the appointment of persons to the office of judge. Likewise, by reason of its organisation, system, appointment procedure and autonomy, judgments issued by formations of judges of the Disciplinary Chamber are not judgments issued by a duly appointed court. Consequently, according to that resolution, court formations were unlawfully composed when they delivered rulings with the participation of judges selected by the newly constituted KRS.

94. In the present case, the Commission has sufficiently demonstrated that the disputed provisions do not guarantee the independence and impartiality of the Disciplinary Chamber and are therefore contrary to the second subparagraph of Article 19(1) TEU.

95. It should be pointed out that the judgment in *A. K. and Others* is pertinent to the present case. While the findings concerned Article 47 of the Charter, the Court noted that they would have been the same with regard to the second subparagraph of Article 19(1) TEU. (62) Contrary to the Republic of Poland's arguments, that judgment does not establish the conformity of the disputed provisions with Union law. The fact that the Court did not declare that the national provisions concerning the KRS and the Disciplinary Chamber were incompatible with the second subparagraph of Article 19(1) TEU stems from its competences under Article 267 TFEU. (63) Indeed, in my view, the judgment in *A. K. and Others* provides strong support for finding that, on the basis of the combination of elements invoked by the Commission and which were examined in that judgment, the Disciplinary Chamber does not meet the requirements of independence and impartiality under the second subparagraph of Article 19(1) TEU. As I concluded in my Opinion in that case, (64) the mandates of the previous KRS members were prematurely terminated and the changes to the method of appointment of the judicial members means that 23 out of 25 KRS members come from the legislative and executive authorities which, taken together, disclose deficiencies that compromise the KRS's independence.

96. Furthermore, in the light of the judgment in *A. K. and Others* and my Opinion in that case, (65) there are several elements relating to the characteristics of the Disciplinary Chamber which, taken together, give rise to legitimate doubts as to the independence and impartiality of that chamber: first, it was created as part of the legislative measures on the Polish justice system and tasked with deciding cases concerning the status of judges, in particular, disciplinary cases, which are aspects concerned by those measures; second, it is composed of newly

appointed judges, proposed by the newly constituted KRS, thus excluding currently serving judges of the Supreme Court; and, third, it has a high degree of organisational and financial autonomy compared to other chambers of that court.

97. In the decisions of the Supreme Court referred to in points 91 to 93 of this Opinion, that court itself acknowledged the lack of independence of the KRS and the Disciplinary Chamber. Contrary to what the Republic of Poland argues, those judgments address the very elements mentioned by the Commission and are therefore relevant to this case. The fact that, as indicated by that Member State, the Supreme Court's resolution of 23 January 2020 was held to be unconstitutional by the Trybunał Konstytucyjny (Constitutional Court, Poland), (66) or that the legislative changes concerning the composition of the KRS were upheld by that court, (67) does not have bearing on the requirements of judicial independence that that chamber must meet under Union law.

98. The arguments advanced by the Republic of Poland that the high degree of organisational and financial autonomy of the Disciplinary Chamber strengthens the independence of that chamber fail to persuade me when combined with those elements and the broader context. The fact that only the judges of that chamber receive 40% more remuneration than other Supreme Court judges without any apparent correlation to the specific activity concerned or the workload of that chamber is liable, in my view, to raise legitimate doubts as to whether such benefits are motivated by other purposes. Similar doubts are raised by: the fact that the President of the Disciplinary Chamber exercises in relation to that chamber certain functions normally assigned to the First President of the Supreme Court; the income and expenditure of the Disciplinary Chamber is adopted without the right of review by the First President of the Supreme Court; and the President of the Disciplinary Chamber has been given the powers of the competent minister for the purposes of executing the budget related to the functioning of that chamber, as it is difficult to see how those elements are linked to the apparent aim of protecting the judges of the Disciplinary Chamber from the risks of collegiality.

99. Moreover, the arguments regarding the constitutional prerogative of the President of the Republic to appoint judges, the formal guarantees of independence applicable to the judges of the Disciplinary Chamber and statistics concerning that chamber's decisions do not seem to me to be sufficient to dispel the legitimate doubts about the lack of the appearance of independence of that chamber when viewed in the light of the entirety of the legal framework and taking into account all the elements set out in points 95 to 97 of this Opinion.

100. In light of the foregoing reasons, the second complaint raised by the Commission is well founded.

3. The third complaint concerning the power of the President of the Disciplinary Chamber to designate the disciplinary court

101. The Commission submits that, by conferring discretionary power on the President of the Disciplinary Chamber to designate the competent disciplinary court of first instance in cases concerning ordinary court judges, Articles 110(3) and 114(7) of the Law on the ordinary courts infringe the requirement that such a court must be established by law under the second subparagraph of Article 19(1) TEU, having regard to the case-law of this Court and of the ECtHR.

102. The Republic of Poland contends that the Commission has not demonstrated that the disputed provisions infringe that requirement, taking account of the guarantees of independence enjoyed by disciplinary courts.

103. On the basis of the analysis propounded in points 67 to 72 of this Opinion, the second subparagraph of Article 19(1) TEU encompasses the right to a court established by law, which is enshrined in the second paragraph of Article 47 of the Charter. Thus, the meaning and scope of that concept should be developed by having regard to the ECtHR's case-law on Article 6(1) ECHR in the light of which that article of the Charter is to be interpreted (68)

104. As the Court has recognised, (69) the concept of a tribunal 'established by law' in Article 6(1) ECHR covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, if breached, renders the participation of one or more judges

in the examination of a case irregular. In its case-law, (70) the ECtHR has emphasised that the requirement under Article 6(1) ECHR that a tribunal must always be 'established by law' ensures that the organisation of justice is based on rules emanating from the legislative branch and so is neither dependent on the discretion of the executive branch nor on that of the judicial authorities themselves, although this does not mean that the courts do not have some latitude to interpret relevant domestic legislation.

105. In particular, in the judgment of 12 January 2016, *Miracle Europe Kft. v. Hungary*, (71) the ECtHR found that, where the assignment of a case is discretionary in the sense that the modalities thereof are not prescribed by law, that situation puts at risk the appearance of impartiality by allowing speculation about the influence of political or other forces on the assignee court. On that basis, the ECtHR held that it was contrary to Article 6(1) ECHR for a national measure to confer on the newly established President of the National Judicial Office (who had extensive powers over administrative issues and to some extent the personal status of judges) the discretionary power to reallocate a case to another court because the criteria for such reallocation were not laid down in the applicable rules. It was not the lawful existence of a court that was at issue, but the lawfulness of the allocation of a case to that court. For the ECtHR, the discretionary nature of the reassignment manifested itself in the fact that there were neither ascertainable reasons nor criteria as to which cases were to be transferred.

106. In the present case, the Commission has sufficiently demonstrated that the disputed provisions infringe the right to a court established by law whose observance is necessary to meet the requirements of effective judicial protection under the second subparagraph of Article 19(1) TEU.

107. In my view, the arguments relied on by the Republic of Poland, to the effect that the disputed provisions do not concern the existence and composition of the disciplinary courts, which are laid down by law, but only the designation by the President of the Disciplinary Chamber of the court with territorial jurisdiction should be rejected. In the light of the ECtHR's case-law on Article 6(1) ECHR mentioned in points 104 and 105 of this Opinion, the absence of indications in the disputed provisions of the criteria according to which the President of the Disciplinary Chamber is entitled to designate the competent disciplinary court, aside from the court in which the accused judge sits, gives rise to the risk that this discretionary power may be exercised in such a way as to undermine the status of the disciplinary courts as courts established by law.

108. This risk appears to be reinforced by additional elements relating to the broader context of the new disciplinary regime. In particular, the lack of independence of the Disciplinary Chamber, which is the subject of the second complaint, may be considered to contribute to legitimate doubts as to the independence of the President of that chamber. It is also not disputed that, as regards ordinary court judges, that regime established permanent disciplinary courts attached to courts of appeal and which are staffed by judges appointed by the Minister for Justice, on the proposal of the KRS – whose independence is also in doubt as discussed in the second complaint – for a six-year term. This means that while the panel of judges to hear a given case is appointed by drawing lots from a list of the judges of a given disciplinary court, the judges who will decide the case have been chosen by the Minister for Justice, coupled with the fact that the Minister for Justice decides on the number of judges in each disciplinary court. This exacerbates the risk that the disputed provisions can be used to assign a particular case to a particular court to achieve a particular result, contrary to the requirement that a court must be established by law under the second subparagraph of Article 19(1) TEU.

109. In light of the foregoing reasons, the third complaint raised by the Commission is well founded.

4. The fourth complaint concerning the non-observance of procedural rights of judges

110. The Commission alleges, first, that by granting the Minister for Justice the possibility of permanently maintaining charges against ordinary court judges through the appointment of a Disciplinary Officer of the Minister for Justice, Article 112b of the Law on the ordinary courts infringes the right to have a case examined within a reasonable time and, second, that by providing that activities relating to the appointment of *ex officio* defence counsel do not interrupt the proceedings and that those proceedings can be conducted in the absence of the judge or his or her defence counsel, Articles 113a and 115a(3) of that law infringe the rights of the defence, those rights deriving from the second subparagraph of Article 19(1) TEU. It bases its complaint on the wording of those provisions and ECtHR case-law on Article 6 ECHR.

111. The Republic of Poland contends that no such violation has been shown, taking account of the guarantees granted to judges in Polish law.

112. It should be recalled from point 68 of this Opinion that the rules governing the disciplinary regime for judges, including those which 'provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence' are among the essential guarantees of judicial independence under the second subparagraph of Article 19(1) TEU. It follows that the standards of Articles 47 and 48 of the Charter apply to disciplinary proceedings against judges on the basis of that provision. (72)

113. This is reflected in guidelines issued by international bodies on judicial independence, according to which such proceedings should be determined by an independent body operating under a procedure providing the guarantees of a fair trial and full rights of the defence. (73)

114. Specifically, the second paragraph of Article 47 of the Charter guarantees the right to a fair trial, which comprises various elements, in particular, the right to have a case heard within a reasonable time, the rights of the defence, the principle of equality of arms and the right to be advised, defended and represented. (74) Respect for the rights of the defence for anyone who has been charged is also guaranteed by Article 48(2) of the Charter. According to the Explanations relating to the Charter, the second paragraph of Article 47 of the Charter corresponds to Article 6(1) ECHR and Article 48(2) of the Charter is the same as Article 6(3) ECHR, so those articles of the Charter must receive an interpretation that does not fall below the standards of Article 6 ECHR, as interpreted by the ECtHR. (75)

115. In the Court's case-law, (76) the reasonable time requirement must be assessed in the light of all of the relevant circumstances of the case, taking account of its importance for the person concerned, its complexity and the conduct of the competent authorities and the parties, and, moreover, in criminal law, that requirement must be respected not only during the trial procedure, but also during the stage of the preliminary investigation from the moment when the person becomes the accused. Likewise, the question whether there is an infringement of the rights of the defence must be examined in relation to the specific circumstances of the case, including the nature of the act at issue, the context in which it was adopted and the legal rules governing the matter in question. (77) In that regard, the rights of the defence encompass, in particular, the adversarial and *audiatur et altera pars* (also referred to as *audi alteram partem*) principles, which basically ensure that the parties are apprised of and are able to debate and be heard on the matters of fact and law which determine the outcome of the proceedings, (78) while the principle of equality of arms guarantees that each party has a reasonable opportunity to present its case under conditions that do not place it in a clearly less advantageous position compared to its opponent. (79)

116. Similarly, in its case-law, (80) the ECtHR has recognised the reasonable time requirement, the adversarial principle and the principle of equality of arms as key elements of a fair trial protected under the civil and criminal limbs of Article 6(1) ECHR. In that regard, the ECtHR examines the reasonableness of the length of proceedings in the light of the specific circumstances of the case by reference to its complexity, the conduct of the applicant and the relevant authorities and what is at stake for the applicant. (81) The period generally begins to run when proceedings are instituted in civil cases, (82) or when the person is charged or in any event 'substantially affected' by the measures taken in the context of criminal cases, (83) and covers the whole of the proceedings in question, (84) thus putting an end to the uncertainty concerning the person's legal position. (85) Moreover, in criminal cases, Article 6(3) ECHR encompasses specific guarantees that are particular aspects of the rights of the defence protected by Article 6(1) ECHR. (86) This includes the right of access to counsel under Article 6(3)(c) ECHR, which ensures that the proceedings against the accused will not take place without adequate representation at every stage and may apply during the pre-trial phase depending on the circumstances. (87)

117. It should also be pointed out that, in its case-law on Article 6 ECHR, (88) the ECtHR has noted the growing importance which international courts and other bodies attach to procedural fairness in cases involving the removal or dismissal of judges. In that connection, the ECtHR has emphasised that, even if disciplinary penalties do not come within the criminal limb of Article 6 ECHR, they nevertheless entail serious consequences for the lives and careers of judges. Consequently, the judicial review carried out must be appropriate to the subject

matter of the dispute, which applies with even greater force to disciplinary proceedings against judges, who must enjoy the respect that is necessary for the performance of their duties. When a Member State initiates such proceedings, public confidence in the functioning and independence of the judiciary is at stake; in a democratic State, that confidence guarantees the very existence of the rule of law. (89)

118. In the present case, the Commission has sufficiently demonstrated that the disputed provisions infringe the right to have a case examined within a reasonable time and the rights of the defence, which are requirements of effective judicial protection under the second subparagraph of Article 19(1) TEU.

119. As regards the first branch of the fourth complaint, the Commission alleges that Article 112b of the Law on the ordinary courts infringes the reasonable time requirement because it provides the Minister for Justice with the possibility to appoint an ad hoc Disciplinary Officer of the Minister for Justice to conduct a specific disciplinary case against a judge, even in the case of proceedings which have been closed by a final decision, as indicated by Article 112b(5) of that law. Contrary to what the Republic of Poland claims, it is apparent that this complaint is based on the wording of that provision and not its implementation, so the Court's case-law (90) relating to the evidence to substantiate an alleged national practice does not apply.

120. It is common ground that Article 112b of the Law on the ordinary courts allows the Minister for Justice to appoint a Disciplinary Officer of the Minister for Justice, which is a new institution established under that provision, in any disciplinary case concerning an ordinary court judge. Pursuant to Article 112b(3) of that law, that officer can initiate or join ongoing proceedings and, under Article 112b(4) thereof, the appointment of such an officer is equivalent to a request to initiate investigative or disciplinary proceedings. Moreover, according to Article 112b(5) of that same law, while the role of the Disciplinary Officer of the Minister for Justice expires when a decision refusing to commence, discontinuing or concluding the disciplinary proceedings becomes final, that does not preclude the Minister for Justice from re-appointing that officer in the same case. Notwithstanding the *ne bis in idem* and *res judicata* principles in Polish law, it should be observed that the express wording of that provision indicates the possibility of the reopening of proceedings in the same case concerning the same judge after they have been closed by a final decision. That provision therefore presents the risk that a situation of uncertainty can remain in place for an ordinary court judge and thus that the judge's right to a final decision in the proceedings within a reasonable time may not be guaranteed.

121. Contrary to what the Republic of Poland contends, and as indicated by the Commission, the lack of adequate safeguards against the possibility for prolonging or reopening proceedings under that provision is not offset by the specific time limits for certain stages of the proceedings, since it appears that there are no time limits for the establishment of disciplinary charges against judges. The Republic of Poland's arguments that Article 112b(5) of the Law on the ordinary courts applies only to proceedings which have not been the subject of a final decision and in which the Disciplinary Officer of the Minister for Justice can no longer perform his or her duties for other reasons fail to convince me, given that such a situation is dealt with in Article 112b(2) of that law.

122. It should be added that the risk of prolonging or reopening proceedings through the appointment of the Disciplinary Officer of the Minister for Justice under Article 112b of the Law on the ordinary courts may be reinforced by the broader context of the new disciplinary regime. In particular, it is apparent that that provision enhances the control of the Minister for Justice over investigative and disciplinary proceedings against ordinary court judges by allowing the Minister for Justice to appoint his or her own specific officer to cases concerning specific judges. This raises legitimate doubts whether a reasonable time, in which disciplinary proceedings will finally be decided against a judge, can be guaranteed.

123. As regards the second branch of the fourth complaint, it follows from Article 113a of the Law on the ordinary courts that activities related to the appointment of *ex officio* defence counsel for the accused judge and that counsel's conduct of the defence do not have a suspensive effect on the disciplinary proceedings. That provision allows for the possibility that procedural or substantive issues, relevant for the outcome of the case, may be decided before the *ex officio* defence counsel is appointed or before that counsel is able to formulate the defence, thus curtailing the right of access to counsel and the adversarial principle. That provision should

therefore be considered to infringe the rights of the defence under the second subparagraph of Article 19(1) TEU, read in the light of Articles 47 and 48 of the Charter.

124. Likewise, according to Article 115a(3) of the Law on the ordinary courts, the disciplinary court can continue the proceedings in the justified absence of the accused judge or his or her defence counsel, except where this is contrary to the interests of the disciplinary proceedings. It follows that the disciplinary court may only hear the disciplinary officer's case even if the absence of the judge or his or her defence counsel was justified. The fact that a judge can provide evidence and written explanations at previous stages of the proceedings does not compensate, in my view, for non-participation of the judge or his or her defence counsel in the proceedings before the disciplinary court. That provision, too, significantly curtails the rights of the defence and the principle of equality of arms contrary to the second subparagraph of Article 19(1) TEU, read in the light of Articles 47 and 48 of the Charter. This is so, especially when taking account of the broader context of the new disciplinary regime. In particular, to recall from point 108 of this Opinion, the Minister for Justice appoints the judges of the disciplinary courts, which interpret and apply that provision, including the exception regarding the interests of the proceedings, with appeal to the Disciplinary Chamber whose independence is in doubt as discussed in the second complaint.

125. In light of the foregoing reasons, the fourth complaint raised by the Commission is well founded.

C. The complaint concerning infringement of the second and third paragraphs of Article 267 TFEU

126. The Commission alleges that, by allowing the right of national courts to make a reference for a preliminary ruling to be limited by the possible initiation of disciplinary proceedings, Article 107(1) of the Law on the ordinary courts and Article 97(1) and (3) of the Law on the Supreme Court infringe the second and third paragraphs of Article 267 TFEU, taking account, in particular, of the Court's case-law and the application of the former provision.

127. The Republic of Poland contends that no infringement has been made out, as no disciplinary proceedings have been instituted against judges for making references and a 'chilling effect' does not exist.

128. It should be recalled that the second and third paragraphs of Article 267 TFEU respectively give national courts the discretion, and, where appropriate, impose on them the obligation, to make a reference for a preliminary ruling where they consider that a case pending before them raises questions involving the interpretation or validity of Union law which are necessary for the resolution of the case. (91) As the Court held in the judgment in *Miasto Łowicz*, (92) national measures which expose national judges to disciplinary proceedings because they made a reference cannot be permitted. Indeed, the mere prospect of being the subject of such proceedings as a result of making a reference is likely to undermine the effective exercise by the judges concerned of the discretion and the functions entrusted to them under Article 267 TFEU. For those judges, not being exposed to disciplinary proceedings or measures for having exercised their right to refer constitutes a guarantee that is essential to judicial independence and the functioning of the preliminary ruling procedure.

129. It should also be pointed out that, in the judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, (93) the Court itself recognised that the Polish authorities had stepped up initiatives to curb references to the Court on the question of the independence of the courts in Poland and to call into question the decisions of the Polish courts which made such references.

130. In the present case, the Commission has sufficiently demonstrated that the disputed provisions infringe the second and third paragraphs of Article 267 TFEU, since they do not provide sufficient guarantees protecting judges against the possible initiation of disciplinary proceedings for submitting references.

131. In line with the analysis advanced in points 79 to 85 of this Opinion, while the disputed provisions taken in isolation may not be considered to infringe Article 267 TFEU, there are reasonable grounds to consider that they can be interpreted in such a way that national judges may be subject to disciplinary proceedings or measures for making a reference, having regard to the broader context and application in practice. Contrary to the Republic of Poland's arguments, the examples referred to by the Commission in point 41 of this Opinion indicate that judges

have been subject to investigations and disciplinary proceedings in connection with their decisions to refer questions to the Court. Specifically, three judges were the subject of investigations relating, in particular, to suspicion of possible '*ultra vires* conduct' for having made the references, (94) and the fourth case involved disciplinary proceedings brought against the judge concerned, inter alia, on account of allegedly unlawfully referring questions regarding judicial independence. The fact that those investigations were closed, that investigations are taken on an apparently exceptional basis or that the investigations and disciplinary proceedings concerned offences other than obvious and gross violations of the law fail to convince.

132. What is decisive in the present case is that, as confirmed in the judgment in *Miasto Łowicz*, national measures that in any way prevent or obstruct national courts from making use of their discretion or obligation to make a reference infringe Article 267 TFEU. The fact that the disputed provisions allow for the possibility that disciplinary proceedings can be taken against national judges in connection with their decisions to refer questions to the Court not only undermines the functioning of the preliminary ruling procedure, but also is likely to influence the decisions of other national judges in the future as to whether to make a reference, thus giving rise to a 'chilling effect'. To my mind, the mere prospect that a national judge may be subject to disciplinary proceedings or measures for making a reference strikes at the heart of the procedure governed by Article 267 TFEU and with it, the very foundations of the Union itself.

133. In light of the foregoing reasons, the fifth complaint raised by the Commission is well founded.

VII. Costs

134. Under Article 138(1) of the Court's Rules of Procedure, the unsuccessful party pays the costs if they have been applied for in the successful party's pleadings. Under Article 140(1) thereof, the Member States that intervened in the proceedings bear their own costs. Accordingly, since the Commission applied for costs and the Republic of Poland has been unsuccessful, the latter should pay the costs. The Kingdom of Belgium, the Kingdom of Denmark, the Republic of Finland, the Kingdom of the Netherlands and the Kingdom of Sweden should bear their own costs.

VIII. Conclusion

135. In the light of the foregoing considerations, I propose that the Court should:

(1) declare that by allowing, pursuant to Article 107(1) of the Law on the ordinary courts and Article 97(1) and (3) of the Law on the Supreme Court, the content of judicial decisions to be treated as a disciplinary offence; by failing to guarantee, pursuant to Articles 3(5), 27 and 73(1) of the Law on the Supreme Court and Article 9a of the Law on the KRS, the independence and impartiality of the Disciplinary Chamber; by granting, pursuant to Articles 110(3) and 114(7) of the Law on the ordinary courts, the President of the Disciplinary Chamber the power to designate the competent disciplinary court of first instance in cases concerning ordinary court judges; by granting, pursuant to Article 112b of the Law on the ordinary courts, the Minister for Justice the power to appoint a Disciplinary Officer of the Minister for Justice and by providing, pursuant to Article 113a of the Law on the ordinary courts, that activities related to the appointment of *ex officio* defence counsel and that counsel's taking up of the defence do not have a suspensive effect on the course of the proceedings and, pursuant to Article 115a(3) of the Law on the ordinary courts, that the disciplinary court is to conduct the proceedings despite the justified absence of the notified accused or his or her defence counsel, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

(2) declare that, by allowing the right of national courts to make a reference for a preliminary ruling to be limited by the possibility of the initiation of disciplinary proceedings, the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU;

(3) order the Republic of Poland to bear its own costs and to pay the costs of the Commission; and

(4) order the Kingdom of Belgium, the Kingdom of Denmark, the Republic of Finland, the Kingdom of the Netherlands and the Kingdom of Sweden to bear their own costs.

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1 Original language: English.

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2 The ordinary courts, also referred to as common courts, are divided into district, regional and appellate courts, numbering about 10 000 judges by recent accounts.

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3 See judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C−216/18 PPU, EU:C:2018:586); of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C−354/20 PPU and C−412/20 PPU, EU:C:2020:1033); and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C−824/18, EU:C:2021:153); and footnotes 4, 5, 9 and 10 of this Opinion.

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4 C−585/18, C−624/18 and C−625/18, EU:C:2019:982 ('judgment in *A. K. and Others*').

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5 C−558/18 and C−563/18, EU:C:2020:234 ('judgment in *Miasto Łowicz*'). In that judgment, the Court held that the references made by the judges concerned (see point 41 of this Opinion) were inadmissible due to the lack of a substantive connection between the main proceedings and the provisions of Union law.

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6 See my Opinion in *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:2019:551 ('Opinion in *A. K. and Others*'), point 1 footnote 4).

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7 See Commission, Reasoned Proposal in accordance with Article 7(1) TEU regarding the rule of law in Poland, COM(2017) 835 final, 20 December 2017.

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8 The Commission has initiated a fourth infringement action against the Republic of Poland relating to the new disciplinary regime (see Press Release, 27 January 2021, IP/21/224). See further footnote 49 of this Opinion.

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9 C−619/18, EU:C:2019:531. See also my Opinion in *Commission* v *Poland (Independence of the Supreme Court)* (C−619/18, EU:C:2019:325).

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10 C−192/18, EU:C:2019:924. See also my Opinion in *Commission* v *Poland (Independence of ordinary courts)* (C−192/18, EU:C:2019:529).

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11 For a general overview, see Devlin, R., and Wildeman, S. (eds), *Disciplining Judges: Contemporary Challenges and Controversies*, Edward Elgar, 2021.

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12 See footnote 49 of this Opinion.

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13 *Commission* v *Poland* (C−791/19 R, EU:C:2020:277).

14 The Commission refers, in particular, to the judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C−619/18, EU:C:2019:531).

15 The Commission refers, inter alia, to the judgment of the Supreme Court of 29 October 2003 (SNO 48/03).

16 Communications of the Deputy Disciplinary Officer for Ordinary Court Judges, 29 November 2018, to Judges of the Regional Court in Łódź, the Regional Court in Warsaw and the Regional Court in Gorzów Wielkopolski; Communication of the Disciplinary Officer for Ordinary Court Judges, 17 December 2018, on investigations in connection with preliminary references to the Court of Justice.

17 Communication of the Disciplinary Officer for Ordinary Court Judges, 3 September 2019, concerning a Judge of the Regional Court in Warsaw.

18 Communication of the Disciplinary Officer for Ordinary Court Judges, 6 December 2019, concerning a Judge of the Regional Court in Warsaw.

19 Decision of the Disciplinary Chamber of 4 February 2020 (II DO 1/20).

20 Communication of the Disciplinary Officer for Ordinary Court Judges, 29 November 2019, concerning a Judge of the District Court in Olsztyn.

21 Communication of the Disciplinary Officer for Ordinary Court Judges, 15 December 2019, concerning Judges of the Court of Appeal in Katowice; Communication of the Deputy Disciplinary Officer for Ordinary Court Judges, 14 February 2020, concerning a Judge of the Regional Court in Jelenia Góra.

22 The Republic of Poland refers, inter alia, to the judgments of the Supreme Court of 29 October 2003 (SNO 48/03), and of 17 October 2006 (SNO 59/06).

23 The Republic of Poland refers to the judgments in *A. K. and Others*, and of 9 July 2020, *Land Hessen* (C−272/19, EU:C:2020:535).

24 The Commission refers, in particular, to the judgment of 17 December 2004, *Pedersen and Baadsgaard v. Denmark* (CE:ECHR:2004:1217JUD004901799).

25 The Commission refers to the judgment of 24 September 2009, *Pishchalnikov v. Russia* (CE:ECHR:2009:0924JUD000702504).

26 The Republic of Poland refers, in particular, to the judgment of 12 May 2005, *Commission* v *Belgium* (C−287/03, EU:C:2005:282).

27 See judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C−619/18, EU:C:2019:531, paragraph 47).

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28 See judgment of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C−192/18, EU:C:2019:924, paragraph 102).

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29 See judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C−619/18, EU:C:2019:531, paragraph 55).

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30 See judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C−824/18, EU:C:2021:153, paragraph 111).

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31 See judgment in *Miasto Łowicz* (paragraph 34).

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32 See 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 ordinary courts)* (C−192/18, EU:C:2019:924, paragraph 104).

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33 With particular regard to Article 47 of the Charter, there are varying positions in the literature; see, for example, Rizcallah, C., and Davio, V., 'L'article 19 du Traité sur l'Union européenne: sésame de l'Union de droit', *Revue trimestrielle des droits de l'homme*, vol. 31, 2020, pp. 155−185, at pp. 178−181; Torres Pérez, A., 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence', *Maastricht Journal of European and Comparative Law*, vol. 27, 2020, pp. 105−119, at pp. 111−112.

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34 See judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C−619/18, EU:C:2019:531, paragraph 77), and of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C−192/18, EU:C:2019:924, paragraph 114).

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35 See judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C−824/18, EU:C:2021:153, paragraph 143, citations omitted); see also, for example, judgments of 6 October 2020, *État luxembourgeois (Judicial protection against requests for information in tax law)* (C−245/19 and C−246/19, EU:C:2020:795, paragraph 47), and of 20 April 2021, *Repubblika* (C−896/19, EU:C:2021:311, paragraph 45).

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36 See judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C−824/18, EU:C:2021:153, paragraph 110).

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37 See Opinion in *A. K. and Others* (point 85). See also Opinion of Advocate General Hogan in *Repubblika* (C−896/19, EU:C:2020:1055, points 45 to 47).

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38 See judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C−542/18 RX−II and C−543/18 RX−II, EU:C:2020:232, paragraph 75); judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, §§ 231 to 234). See also my Opinions in *W.Ż.*

(Chambre de contrôle extraordinaire and des affaires publiques de la Cour suprême – Nomination) (C−487/19, EU:C:2021:289), and in *Prokurator Generalny (Chambre disciplinaire de la Cour suprême – Nomination)* (C−508/19, EU:C:2021:290).

39 See judgment of 24 May 2016, *MT Højgaard and Züblin* (C−396/14, EU:C:2016:347, paragraph 23).

40 See judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C−64/16, EU:C:2018:117, paragraph 43); of 21 January 2020, *Banco de Santander* (C−274/14, EU:C:2020:17, paragraph 56); and of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)* (C−658/18, EU:C:2020:572, paragraph 45).

41 See judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C−619/18, EU:C:2019:531, paragraph 77); Opinion of Advocate General Bobek in *Asociaţia "Forumul Judecătorilor din România" and Others* (C−83/19, C−127/19, C−195/19, C−291/19 and C−355/19, EU:C:2020:746, point 265).

42 See judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C−619/18, EU:C:2019:531, paragraph 77).

43 See, for example, Council of Europe, European Charter on the statute for judges, 8 to 10 July 1998, point 5; United Nations Basic Principles on the Independence of the Judiciary, 1985, points 17 to 20.

44 See, for example, Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on Judges: independence, efficiency and responsibilities, 17 November 2010, point 66; United Nations Human Rights Council, Report of the Special Rapporteur on disciplinary measures against judges (A/75/172), 17 July 2020, point 21.

45 See, for example, Consultative Council of European Judges (CCJE), Opinion No 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, 19 November 2002, points 63 to 65; United Nations Report, cited in footnote 44 of this Opinion, point 22.

46 See, in that regard, judgment of 9 January 2013, *Volkov v. Ukraine* (CE:ECHR:2013:0109JUD002172211, §§ 175 to 185). See also Opinion of Advocate General Bobek in *Statul Român – Ministerul Finanţelor Publice* (C−397/19, EU:C:2020:747, points 100 and 101).

47 See judgments in *A. K. and Others* (paragraph 142), and of 9 July 2020, *Land Hessen* (C−272/19, EU:C:2020:535, paragraph 57).

48 See judgment in *A. K. and Others* (paragraph 152).

49 That provision was amended by domestic legislation (referred to in the media as the 'muzzle law'), which entered into force on 14 February 2020. That legislation, inter alia, added certain categories of disciplinary offences, whilst retaining in substance those at issue in this case. It is the subject of the Commission's fourth infringement action initiated against the Republic of Poland (see footnote 8 of this Opinion).

50 See, inter alia, Venice Commission and Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, Opinion No 977/2020 (CDL-AD(2020)017), 22 June 2020, point 44; Parliamentary Assembly of the Council of Europe, Resolution 2316 on the functioning of democratic institutions in Poland, 28 January 2020, point 11; Group of States against Corruption (GRECO), Fourth Evaluation Round, Second Addendum to the Second Compliance Report (GrecoRC4(2019)23), 6 December 2019, in particular points 58 and 66.

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51 As indicated by the Commission, that procedure was criticised, inter alia, in the Venice Commission Opinion No 904/2017 (CDL-AD(2017)031), 11 December 2017, points 53 to 63.

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52 See judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C−619/18, EU:C:2019:531, paragraph 30). Here, two months from receipt of the reasoned opinion on 17 July 2019 (see point 27 of this Opinion).

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53 See judgment of 10 December 2009, *Commission* v *United Kingdom* (C−390/07, not published, EU:C:2009:765, paragraphs 59 and 63).

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54 Those examples are mentioned in various reports issued by national and international bodies concerning disciplinary proceedings and measures taken against Polish judges. See, inter alia, Amnesty International, Poland: Free Courts, Free People, July 2019; Helsinki Foundation for Human Rights, Disciplinary Proceedings Against Judges and Prosecutors, February 2019; Themis Association of Judges, Response of the Polish authorities to the CJEU judgment of 19 November 2019, updated as of 31 December 2020. As indicated in point 69 of CCJE Opinion No 3 (2002), cited in footnote 45 of this Opinion, disciplinary measures denote any measure which adversely affects a judge's status or career.

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55 See judgment in *A. K. and Others* (in particular paragraphs 123 to 129 and 153).

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56 See judgment in *A. K. and Others* (paragraphs 133 and 134).

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57 See judgment in *A. K. and Others* (paragraphs 137 to 151). With regard to the KRS, see also judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C−824/18, EU:C:2021:153, paragraphs 130 to 135), and my Opinion in *A.B. and Others* (C−824/18, EU:C:2020:1053, points 116 to 126).

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58 C−619/18, EU:C:2019:531.

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59 Judgment of 5 December 2019 (III PO 7/18), in particular paragraphs 38 to 81.

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60 Orders of 15 January 2020 (III PO 8/18 and III PO 9/18).

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61 Resolution of 23 January 2020 (BSA I−4110−1/20), in particular paragraphs 31 to 45. That resolution has the force of law (see paragraphs 2 and 3).

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62 See judgment in *A. K. and Others*, paragraphs 167 to 169.

63 See judgment in *A. K. and Others*, paragraph 132.

64 See Opinion in *A. K. and Others* (points 131 to 137).

65 See Opinion in *A. K. and Others* (points 138 and 139).

66 Judgment of 20 April 2020 (U 2/20).

67 Judgment of 25 March 2019 (K 12/18).

68 See judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C−542/18 RX−II and C−543/18 RX−II, EU:C:2020:232, paragraph 72).

69 See judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C−542/18 RX−II and C−543/18 RX−II, EU:C:2020:232, paragraph 73).

70 See, for example, judgment of 28 April 2009, *Savino and Others v. Italy* (CE:ECHR:2009:0428JUD001721405, § 94).

71 CE:ECHR:2016:0112JUD005777413, §§ 57 to 63 and 67.

72 See points 67 to 72 of this Opinion. See also Opinion of Advocate General Bobek in *Asociaţia "Forumul Judecătorilor din România" and Others* (C−83/19, C−127/19, C−195/19, C−291/19 and C−355/19, EU:C:2020:746, point 265).

73 See, for example, European Charter, cited in footnote 43 of this Opinion, point 5.1; CCJE Opinion No 3 (2002), cited in footnote 45 of this Opinion, points 69, 71 and 77; United Nations Basic Principles, cited in footnote 43 of this Opinion, points 17, 19 and 20.

74 See, in that regard, judgment of 6 November 2012, *Otis and Others* (C−199/11, EU:C:2012:684, paragraph 48).

75 See judgment of 29 July 2019, *Gambino and Hyka* (C−38/18, EU:C:2019:628, paragraph 39).

76 See judgment of 5 June 2018, *Kolev and Others* (C−612/15, EU:C:2018:392, paragraphs 71 and 72).

77 See judgment of 16 May 2017, *Berlioz Investment Fund* (C−682/15, EU:C:2017:373, paragraph 97).

78 See judgments of 21 February 2013, *Banif Plus Bank* (C−472/11, EU:C:2013:88, paragraphs 29 and 30), and of 4 June 2013, *ZZ* (C-300/11, EU:C:2013:363, paragraph 55).

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79 See judgment of 16 October 2019, *Glencore Agriculture Hungary* (C−189/18, EU:C:2019:861, paragraph 61).

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80 For an application involving disciplinary proceedings against judges, see judgment of 5 February 2009, *Olujić v. Croatia* (CE:ECHR:2009:0205JUD002233005, §§ 77 to 91) (finding violation of the reasonable time requirement and equality of arms).

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81 See judgment of 25 June 2019, *Virgiliu Tănase v. Romania* (CE:ECHR:2019:0625JUD004172013, § 209).

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82 See judgment of 19 January 2010, *Rangdell v. Finland* (CE:ECHR:2010:0119JUD002317208, § 36). However, this period may cover mandatory preliminary steps in the procedure: see judgment of 28 June 1978, *Konig v. Germany* (CE:ECHR:1978:0628JUD000623273, § 98).

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83 See judgment of 27 July 2006, *Mamič v. Slovenia (no 2)* (CE:ECHR:2006:0727JUD007577801, §§ 23 and 24).

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84 See judgment of 28 June 1978, *Konig v. Germany* (CE:ECHR:1978:0628JUD000623273, § 98).

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85 See, in that regard, van Dijk, P. et al. (eds), *Theory and Practice of the European Convention on Human Rights*, Fifth edition, Intersentia, 2018, pp. 588-592.

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86 See judgment of 2 November 2010, *Sakhnovskiy v. Russia* (CE:ECHR:2010:1102JUD002127203, § 94).

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87 See judgment of 13 September 2016, *Ibrahim and Others v. United Kingdom* (CE:ECHR:2016:0913JUD005054108, § 253).

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88 See judgments of 23 June 2016, *Baka v. Hungary* (CE:ECHR:2016:0623JUD002026112, § 121), and of 23 May 2017, *Paluda v. Slovakia* (CE:ECHR:2017:0523JUD003339212, § 45).

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89 See judgment of 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal* (CE:ECHR:2018:1106JUD005539113, § 196).

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90 See judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C−808/18, EU:C:2020:1029, paragraph 113).

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91 See judgments of 16 December 2008, *Cartesio* (C−210/06, EU:C:2008:723, paragraph 88), and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C−824/18, EU:C:2021:153, paragraphs 91 and 92).

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92 See judgment in *Miasto Łowicz* (paragraphs 58 and 59). See also judgment of 5 July 2016, *Ognyanov* (C−614/14, EU:C:2016:514, paragraph 25); order of 12 February 2019, *RH* (C−8/19 PPU, EU:C:2019:110, paragraph 47).

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93 C−824/18, EU:C:2021:153, paragraph 100.

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94 See, in that regard, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C−824/18, EU:C:2021:153, paragraph 101).