



## Reports of Cases

### JUDGMENT OF THE COURT (Grand Chamber)

24 June 2019\*

(Failure of a Member State to fulfil obligations — Second subparagraph of Article 19(1) TEU — Rule of law — Effective judicial protection in the fields covered by Union law — Principles of the irremovability of judges and judicial independence — Lowering of the retirement age of Supreme Court judges — Application to judges in post — Possibility of continuing to carry out the duties of judge beyond that age subject to obtaining authorisation granted by discretionary decision of the President of the Republic)

In Case C-619/18,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 2 October 2018,

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

applicant,

v

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

defendant,

supported by:

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

intervener,

THE COURT (Grand Chamber),

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

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 12 February 2019,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2019,

\* Language of the case: Polish.

gives the following

### **Judgment**

- 1 By its application, the European Commission requests that the Court declare that, first, by lowering the retirement age of the judges appointed to the Sąd Najwyższy (Supreme Court, Poland) and by applying that measure to the judges in post appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

### **Legal context**

#### ***European Union law***

##### *The EU Treaty*

- 2 Article 2 TEU reads as follows:

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

- 3 Article 19(1) TEU provides:

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

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

##### *The Charter*

- 4 Title VI of the Charter, headed 'Justice', includes Article 47 thereof, entitled 'Right to an effective remedy and to a fair trial', which states as follows:

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

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

...'

5 As provided in Article 51 of the Charter:

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

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

### ***Polish law***

#### *The Constitution*

6 Article 183(3) of the Constitution provides that the First President of the Sąd Najwyższy (Supreme Court) is appointed for a 6-year term.

7 Article 186(1) of the Constitution states:

‘The Krajowa Rada Sądownictwa [National Council of the Judiciary] is the guardian of the independence of courts and judges.’

8 Article 187 of the Constitution provides as follows:

‘1. The National Council of the Judiciary is composed of:

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

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

(3) 4 members elected by [the Sejm (the lower chamber of the Polish Parliament)] from among the deputies and 2 members elected by the Senate from among the senators.

...

3. The elected members of the National Council of the Judiciary shall have a mandate of 4 years.

4. The regime applicable to the National Council of the Judiciary, its field of activity, its working procedure and the procedure by which its members are elected shall be laid down by law.’

#### *The New Law on the Supreme Court*

9 Article 30 of the ustawa o Sądzie Najwyższym (Law on the Supreme Court), of 23 November 2002 (Dz. U. of 2002, heading 240), set the retirement age for judges of the Sąd Najwyższy (Supreme Court) at 70. Under that provision, the judges of that court also had the possibility, no later than 6 months before reaching the age of 70, to submit a declaration to the First President of that court indicating

their wish to continue to carry out their duties and to present a certificate confirming that their health was no impediment to carrying out the duties of a judge, in which case they were legally entitled to carry out their duties until the age of 72.

10 On 20 December 2017, the President of the Republic signed the *ustawa o Sądzie Najwyższym* (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, heading 5) ('the New Law on the Supreme Court'), which entered into force on 3 April 2018. That Law was amended on several occasions, inter alia by the *ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw* (Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws), of 10 May 2018 (Dz. U. of 2018, heading 1045) ('the Amending Law of 10 May 2018').

11 Under Article 37 of the New Law on the Supreme Court:

'1. A judge of the [Sąd Najwyższy (Supreme Court)] shall retire on the day of his 65th birthday, unless, not later than 6 months before that day and not earlier than 12 months before that day, he submits a declaration that he is willing to continue to carry out his duties and presents a certificate confirming that his health is no impediment to carrying out the duties of a judge, issued in accordance with the rules specified for candidates applying for the office of judge, and the President of the Republic of Poland grants authorisation for him to continue to carry out his duties at the [Sąd Najwyższy (Supreme Court)].

1a Prior to granting authorisation for a judge to continue to carry out his duties as a judge of the [Sąd Najwyższy (Supreme Court)], the President of the Republic of Poland shall consult the National Council of the Judiciary. The National Council of the Judiciary shall provide the President of the Republic of Poland with an opinion within 30 days of the date on which the President of the Republic of Poland requests submission of such an opinion. If the opinion is not submitted within the period referred to in the second sentence, the National Council of the Judiciary shall be deemed to have submitted a positive opinion.

1b. When drafting the opinion referred to in paragraph 1a, the National Council of the Judiciary shall take into account the interest of the system of justice or an important social interest, in particular the rational use of the staff of the [Sąd Najwyższy (Supreme Court)] or the needs arising from the workload of individual chambers of the [Sąd Najwyższy (Supreme Court)].

2. The declaration and certificate referred to in paragraph 1 shall be submitted to the First President of the [Sąd Najwyższy (Supreme Court)], who shall promptly submit them, together with his or her opinion, to the President of the Republic of Poland. The First President of the [Sąd Najwyższy (Supreme Court)] shall submit his declaration and certificate together with the opinion of the College of the [Sąd Najwyższy (Supreme Court)] to the President of the Republic of Poland.

3. The President of the Republic of Poland may grant authorisation for a judge of the [Sąd Najwyższy (Supreme Court)] to continue to carry out his duties within 3 months of the date of receipt of the opinion of the National Council of the Judiciary referred to in paragraph 1a, or within 3 months of the expiry of the period for the submission of that opinion. Failure to grant authorisation within the period referred to in the first sentence shall be tantamount to the judge retiring on the day of his 65th birthday. If the proceedings related to the extension of the mandate of a judge of the [Sąd Najwyższy (Supreme Court)] are not completed after the age referred to in paragraph 1 has been reached, the judge shall remain in his post until the proceedings are completed.

4. The authorisation referred to in paragraph 1 shall be granted for a period of 3 years, no more than twice. The provisions of paragraph 3 shall apply *mutatis mutandis*. ...'

12 Article 39 of that Law provides as follows:

‘The President of the Republic of Poland shall ascertain the date on which a judge of the [Sąd Najwyższy (Supreme Court)] retires or is retired.’

13 Article 111 of that Law provides as follows:

‘1. Judges of the [Sąd Najwyższy (Supreme Court)] who by the date of entry into force of this Law have reached the age of 65 or who will have reached the age of 65 within 3 months of the date of entry into force of this Law shall retire on the day following the expiry of 3 months from the date of entry into force of this Law, unless they submit the declaration and certificate referred to in Article 37(1) within 1 month of the date of entry into force of this Law and the President of the Republic of Poland grants authorisation for the judge of the [Sąd Najwyższy (Supreme Court)] to continue to carry out his duties. The provisions of Article 37(2) to (4) shall apply *mutatis mutandis*.

1a Judges of the [Sąd Najwyższy (Supreme Court)] who reach the age of 65 between 3 and 12 months after the date of entry into force of this Law shall retire 12 months from the date of entry into force of this Law, unless they submit the declaration and certificate referred to in Article 37(1) within that period and the President of the Republic of Poland grants authorisation for the judge of the [Sąd Najwyższy (Supreme Court)] to continue to carry out his duties. The provisions of Article 37(1a) to (4) shall apply *mutatis mutandis*.’

14 The Amending Law of 10 May 2018 contains, in addition to provisions amending the New Law on the Supreme Court, certain autonomous provisions governing the procedure for the extension of the period of judicial activity of the judges of the Sąd Najwyższy (Supreme Court) who have reached the retirement age no later than 3 July 2018. Article 5 of that Amending Law is worded as follows:

‘The President of the Republic of Poland shall transmit immediately to the National Council of the Judiciary for the purposes of obtaining its opinion the declarations referred to in Article 37(1) and Article 111(1) of the [New Law on the Supreme Court] which he has not examined by the date of entry into force of this Law. The National Council of the Judiciary shall deliver its opinion within 30 days from the date on which the President of the Republic of Poland invited it to present its opinion. The President of the Republic of Poland may authorise a judge of [Sąd Najwyższy (Supreme Court)] to continue to carry out his duties within 60 days from the date of receipt of the opinion of the National Council of the Judiciary or the expiry of the deadline for the submission of this opinion. The provisions of Article 37(2) to (4) of the [New Law on the Supreme Court], as amended by this Law, shall apply *mutatis mutandis*.’

### **Pre-litigation procedure**

15 Taking the view that, by the adoption of the New Law on the Supreme Court and the subsequent Laws amending that Law, the Republic of Poland had failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the Commission, on 2 July 2018, sent that Member State a letter of formal notice. The Republic of Poland replied by a letter dated 2 August 2018 in which it disputed all the allegations of infringement of EU law.

16 On 14 August 2018, the Commission issued a reasoned opinion in which it maintained that the national legislation mentioned in the preceding paragraph infringed those provisions of EU law. Consequently, that institution invited the Republic of Poland to take the measures necessary to comply with that reasoned opinion within 1 month of receiving it. That Member State replied to that reasoned opinion by a letter dated 14 September 2018 in which it denied the alleged infringements.

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

### **Procedure before the Court**

18 By separate document lodged at the Court Registry on 2 October 2018, the Commission lodged an application for interim measures under Article 279 TFEU and Article 160(2) of the Rules of Procedure of the Court of Justice, seeking an order that the Republic of Poland was, pending the judgment of the Court in the main action:

- to suspend application of Article 37(1) to (4) and of Article 111(1) and (1a) of the New Law on the Supreme Court, of Article 5 of the Amending Law of 10 May 2018 and all other measures adopted in application of those provisions;
- to adopt all necessary measures to ensure that the judges of the Sąd Najwyższy (Supreme Court) affected by those provisions may carry out their duties in the same posts which they held at the date when the New Law on the Supreme Court came into force, namely 3 April 2018, while benefiting from the same staff regulations, the same rights and employment conditions as those under which they were employed until 3 April 2018;
- to refrain from any measure appointing judges to the Sąd Najwyższy (Supreme Court) in the place of those affected by those provisions, and any measure to appoint the new First President of that court or to indicate the person responsible for leading that court in the place of its First President until the appointment of the new First President; and
- to communicate to the Commission, at the latest 1 month after service of the order of the Court granting the interim measures sought and then regularly, each month, details of all the measures which it has adopted in order to comply fully with that order.

19 The Commission also requested, pursuant to Article 160(7) of the Rules of Procedure, that the interim measures mentioned in the preceding paragraph be granted before the defendant had submitted its observations, in view of the immediate risk of serious and irreparable damage for the principle of effective judicial protection in the context of the application of EU law.

20 By her order of 19 October 2018, *Commission v Poland* (C-619/18 R, not published, EU:C:2018:852), the Vice-President of the Court provisionally granted that latter request pending the adoption of an order terminating the proceedings for interim measures.

21 On 23 October 2018, the Vice-President of the Court, in accordance with Article 161(1) of the Rules of Procedure, referred the application for interim measures to the Court which, having regard to its importance, assigned it to the Grand Chamber in accordance with Article 60(1) of the Rules of Procedure.

22 By order of 17 December 2018, *Commission v Poland* (C-619/18 R, EU:C:2018:1021), the Court granted the Commission's application for interim measures until delivery of the final judgment in the present case.

23 In addition, by his order of 15 November 2018, *Commission v Poland* (C-619/18, EU:C:2018:910), the President of the Court, at the request of the Commission, decided that the present case was to be determined under the expedited procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union and Article 133 of the Rules of Procedure.

24 By order of 9 January 2019, the President of the Court granted Hungary leave to intervene in support of the form of order sought by the Republic of Poland.



## The action

- 25 In its action, the Commission puts forward two complaints alleging infringement of the obligations on the Member States under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.
- 26 By its first complaint, the Commission alleges that the Republic of Poland failed to comply with those obligations inasmuch as the New Law on the Supreme Court, in breach of the principle of judicial independence and, in particular, of the principle of the irremovability of judges, provided that the measure lowering the retirement age of judges of the Sąd Najwyższy (Supreme Court) was to apply to judges in post who were appointed to that court before 3 April 2018, the date on which that Law entered into force. By its second complaint, the Commission alleges that that Member State failed to comply with those obligations by granting under that Law to the President of the Republic, in breach of the principle of judicial independence, the discretion to extend, twice, each time for a 3-year term, the period of judicial activity of judges of the Sąd Najwyższy (Supreme Court) beyond the newly fixed retirement age.

## *Whether the proceedings have become devoid of purpose*

- 27 At the hearing, the Republic of Poland submitted that all the national provisions challenged by the Commission in its action have been repealed, and their effects eliminated, by the ustawa o zmianie ustawy o Sądzie Najwyższym (Law amending the New Law on the Supreme Court), of 21 November 2018 (Dz. U. of 2018, heading 2507), signed by the President of the Republic on 17 December 2018 and which entered into force on 1 January 2019.
- 28 According to that Member State, under that Law the serving judges of the Sąd Najwyższy (Supreme Court) who had previously been affected by the lowering of the retirement age under the New Law on the Supreme Court have been retained or re-instated in that court, under the conditions in force before the adoption of that latter law, the performance of their duties moreover being deemed to have continued without interruption. The provisions allowing the President of the Republic to authorise the extension of the period during which a judge of the Sąd Najwyższy (Supreme Court) may carry out his or her duties when the judge has reached the normal retirement age have also been repealed. In those circumstances, the present proceedings seeking a declaration of failure to fulfil obligations have, according to the Republic of Poland, become devoid of purpose.
- 29 The Commission, for its part, stated at the hearing that it was maintaining its action.
- 30 In this connection it must be recalled that it is settled case-law that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State at issue found itself at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, inter alia, judgment of 6 November 2012, *Commission v Hungary*, C-286/12, EU:C:2012:687, paragraph 41 and the case-law cited).
- 31 In the present case, it is common ground that at the date at which the time limit set by the Commission in its reasoned opinion expired, the provisions of the New Law on the Supreme Court which the Commission is challenging by the present action were still in force. It follows that it is necessary for the Court to rule on that action, even if the effect of the entry into force of the Law amending the New Law on the Supreme Court, of 21 November 2018, were to eliminate with retroactive effect all the effects of the national provisions challenged by the Commission, it not being open to the Court to take into account any such event since it took place after the expiry of the time limit set out in the reasoned opinion (see, to that effect, judgment of 6 November 2012, *Commission v Hungary*, C-286/12, EU:C:2012:687, paragraph 45).

### ***The scope of the action***

- 32 At the hearing, the Commission stated that, by its action, it is seeking, in essence, a declaration that the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, has been infringed. According to the Commission, the concept of effective legal protection referred to in the second subparagraph of Article 19(1) TEU must be interpreted having regard to the content of Article 47 of the Charter and, in particular, the guarantees essential to the right to an effective remedy laid down in that latter provision, and accordingly the first of those provisions entails that the preservation of the independence of a body such as the Sąd Najwyższy (Supreme Court), which is entrusted, *inter alia*, with the task of interpreting and applying EU law, must be guaranteed.
- 33 For the purposes of ruling on the present action, it is therefore necessary to examine whether the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

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

#### *Arguments of the parties*

- 34 Relying, in particular, on the judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), the Commission submits that, to meet the obligation imposed on them by the second subparagraph of Article 19(1) TEU to provide for a system of legal remedies sufficient to ensure effective legal protection in the fields covered by Union law, the Member States are required, *inter alia*, to ensure that the national bodies which may rule on issues in relation to the application or interpretation of EU law meet the requirement in respect of judicial independence, that requirement being a key part of the fundamental right to a fair trial as guaranteed, *inter alia*, by the second paragraph of Article 47 of the Charter.
- 35 It submits that, since the Sąd Najwyższy (Supreme Court) constitutes such a body, the national provisions governing the composition, the organisational structure and the working method of that court should ensure that it meets that independence requirement.
- 36 That requirement concerns not only the way in which an individual case is conducted, but also the way in which the justice system is organised. The consequence of a national measure affecting, in general, the independence of the national courts is that an effective legal remedy is no longer guaranteed, *inter alia* when those courts apply or interpret EU law.
- 37 The Republic of Poland, supported in this connection by Hungary, submits that national rules such as those challenged by the Commission in the present action cannot be the object of a review in the light of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.
- 38 First, those provisions of EU law do not include any derogation from the principle of conferral which governs the competences of the European Union and which follows from Article 4(1) and Article 5(1) and (2) and Article 13(2) TEU. It is common ground that the organisation of the national justice system constitutes a competence reserved exclusively to the Member States, so that the EU cannot arrogate competences in that domain.
- 39 Secondly, the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, like general principles of EU law such as the principle of judicial independence, are applicable only in situations governed under EU law.



- 40 According to the Republic of Poland, the national rules called into question by the Commission in the present case have no link with EU law and in this respect can be distinguished from the national legislation which was the subject matter of the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117), legislation which, for its part, was connected with the grant of financial assistance by the European Union to a Member State in the context of combatting excessive budget deficits and which, consequently, was adopted pursuant to EU law.
- 41 Nor is Article 47 of the Charter applicable in the present case, having regard to the absence of any situation in which EU law is being implemented, within the meaning of Article 51(1) of the Charter. Moreover, it follows from Article 6(1) TEU, Article 51(2) of the Charter and Protocol No 30 on the application of the Charter to Poland and to the United Kingdom (OJ 2010 C 83, p. 313) that the Charter does not extend the scope of application of EU law beyond the European Union's competences.

### *Findings of the Court*

- 42 As is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union, the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them, EU law being based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values (see, to that effect, judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 63 and the case-law cited).
- 43 That premiss both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected (see, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 30, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 35).
- 44 Likewise, it is important to recall that, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 35 and the case-law cited).
- 45 In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing that consistency and that uniformity in the interpretation of EU law, thereby serving to ensure its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 37).
- 46 Lastly, as is apparent from settled case-law, the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure concerning the application to them of an EU act (judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 31 and the case-law cited, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 49).

- 47 In that context, Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice (see, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 32, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 50 and the case-law cited).
- 48 In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 34 and the case-law cited).
- 49 The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 35 and the case-law cited).
- 50 As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision moreover refers to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 29).
- 51 Contrary to what has been claimed by the Republic of Poland and Hungary in this respect, the fact that the national salary reduction measures at issue in the case which gave rise to the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117) were adopted due to requirements linked to the elimination of the excessive budget deficit of the Member State concerned and in the context of an EU financial assistance programme for that Member State did not, as is apparent from paragraphs 29 to 40 of that judgment, play any role in the interpretation which led the Court to conclude that the second subparagraph of Article 19(1) TEU was applicable in the case in question. That conclusion was reached on the basis of the fact that the national body which that case concerned, namely the Tribunal de Contas (Court of Auditors, Portugal), could, subject to verification to be carried out by the referring court in that case, rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fell within the fields covered by EU law (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 40).
- 52 Furthermore, although, as the Republic of Poland and Hungary point out, the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law (see, by analogy, judgments of 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, paragraph 45, and of 26 February 2019, *Rimšēvičs and ECB v Latvia*, C-202/18 and C-238/18, EU:C:2019:139, paragraph 57) and, in particular, from the second subparagraph of Article 19(1) TEU (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 40). Moreover, by requiring the Member States thus to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself nor is it, therefore, contrary to what is alleged by the Republic of Poland, arrogating that competence.

- 53 Lastly, in respect of Protocol (No 30), it must be observed that it does not concern the second subparagraph of Article 19(1) TEU and it should also be recalled that it does not call into question the applicability of the Charter in Poland, nor is it intended to exempt the Republic of Poland from the obligation to comply with the provisions of the Charter (see, to that effect, judgment of 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 119 and 120).
- 54 It follows from all of the foregoing that the 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 (judgment of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 54 and the case-law cited).
- 55 More specifically, every Member State must, under the second subparagraph of Article 19(1) TEU, ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection (judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 37, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 52).
- 56 In the present case, it is common ground that the Sąd Najwyższy (Supreme Court) may be called upon to rule on questions concerning the application or interpretation of EU law and that, as a ‘court or tribunal’, within the meaning of EU law, it comes within the Polish judicial system in the ‘fields covered by Union law’ within the meaning of the second subparagraph of Article 19(1) TEU, so that that court must meet the requirements of effective judicial protection (order of 17 December 2018, *Commission v Poland*, C-619/18 R, EU:C:2018:1021, paragraph 43).
- 57 To ensure that a body such as the Sąd Najwyższy (Supreme Court) is in a position to offer such protection, maintaining its independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy (see, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 41, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 53).
- 58 That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 48 and 63).
- 59 Having regard to the foregoing, the national rules called into question by the Commission in its action may be reviewed in the light of the second subparagraph of Article 19(1) TEU and it is therefore necessary to examine whether the infringements of that provision alleged by that institution are established.

## *The first complaint*

### *Arguments of the parties*

- 60 By its first complaint, the Commission alleges that the Republic of Poland infringed the second subparagraph of Article 19(1) TEU by reason of the fact that the New Law on the Supreme Court provided that the measure lowering the retirement age of judges of the Sąd Najwyższy (Supreme Court) was to apply to judges in post who were appointed to that court before 3 April 2018, the date on which that Law entered into force. In doing so, it claims, that Member State infringed the principle of judicial independence and, in particular, the principle of the irremovability of judges.
- 61 The Commission observes in this connection that, as a result of Article 37(1) and Article 111(1) and (1a) of the New Law on the Supreme Court, the judges of that court who reached the age of 65 before the date on which that Law entered into force, namely 3 April 2018 or, at the latest, 3 July 2018, theoretically retire on 4 July 2018, and those whose 65th birthday takes place between 4 July 2018 and 3 April 2019 must, theoretically, retire on 3 April 2019. In respect of the judges who reach the age of 65 after 3 April 2019, they should, theoretically, retire once they have reached the age of 65.
- 62 The Commission also points out that those national provisions have affected, immediately, 27 of the 72 judges of the Sąd Najwyższy (Supreme Court) who were in post at the date of the entry into force of the New Law on the Supreme Court, one of whom was the First President of that court. That institution also observes that, as regards the latter, in accordance with Article 183(3) of the Constitution, she was appointed on a 6-year mandate which was, in the present case, to have expired on 30 April 2020.
- 63 The Commission submits that, by thus lowering the retirement age applicable to judges in post within the Sąd Najwyższy (Supreme Court) while moreover enabling, under Articles 112 and 112a of the New Law on the Supreme Court, the President of the Republic to decide of his own motion, until 3 April 2019, to increase the number of posts within that court, the Republic of Poland has rendered possible a profound and immediate change in that court's composition, infringing the principle of the irremovability of judges as a guarantee essential to their independence and, therefore, infringing the second subparagraph of Article 19(1) TEU.
- 64 The Commission takes the view that, while lowering the retirement age of judges cannot be entirely ruled out, appropriate measures, such as a transitional period or a phased approach, which prevent such lowering being used covertly as a means to change the composition of judicial bodies are, on any view, necessary in order, in particular, to avoid giving any impression that the reason for shortening the term of office of the judges concerned is in fact the actions carried out by those judges during their period of judicial activity and in order not to undermine their confidence in their security of tenure.
- 65 According to the Republic of Poland, the second subparagraph of Article 19(1) TEU does not require, in a case where the retirement age is lowered, that a transitional period must be provided for with regard to judges in post with a view to ensuring their independence. Since such a retirement age is generally and automatically applicable to all the judges concerned, it is not such as to give rise to pressure which could influence the persons concerned in the performance of their judicial office.
- 66 In the Polish legal order, the guarantees as to the independence of the judiciary are primarily linked to the protection of the permanent nature of judicial activity, including the guarantee of irremovability, to immunity, to proper remuneration, to the secrecy of deliberations, to incompatibility between holding judicial office and other public office, to the obligation to remain politically neutral and to the prohibition on exercising another economic activity. Dismissal of a judge is authorised only in the event of a disciplinary infringement of the most serious nature or a criminal conviction which has



become final. The retirement of a judge does not constitute a dismissal, since the person concerned retains the title of judge and, in that capacity, still enjoys immunity and the right to proper remuneration, while continuing to be subject to various rules of professional conduct.

- 67 Furthermore, it follows from the judgments of 21 July 2011, *Fuchs and Köhler* (C-159/10 and C-160/10, EU:C:2011:508), and of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117), that the Member States retain the option to adapt the employment conditions applicable to judges and, thus, their retirement age, in particular in order, as in the present case, to bring that retirement age into line with that provided for in the general retirement scheme, while improving the age structure of officers of the court concerned.
- 68 Lastly, were it necessary to find that the age at which a judge retires must depend on the law in force at the date as of which the person concerned began to carry out their duties, account would have to be taken, in the present case, of the fact that there was a reform to the retirement age of judges of the Sąd Najwyższy (Supreme Court) in 2002, re-establishing it at 70 years of age after it had been fixed at 65 years of age between 1990 and 2002. Yet, 17 of the 27 judges in post who were affected by the lowering of the retirement age resulting from the New Law on the Supreme Court were appointed between 1990 and 2002 so that, so far as they are concerned, there has been no shortening of the initial duration of their period in post.
- 69 Accepting as a criterion for the purposes of determining the retirement age of a judge of the Sąd Najwyższy (Supreme Court) the date at which that judge was appointed would, furthermore, lead to a risk of discrimination between the judges of that court, some of them, in particular those who were appointed after the entry into force of the New Law on the Supreme Court, being called upon to retire earlier than others who, for their part, were appointed prior to the entry into force of that Law at a time when the retirement age was 70.
- 70 According to Hungary, the Commission has not proved that the lowering of the retirement age of the judges of the Sąd Najwyższy (Supreme Court) and the retirement of some of the judges of that court which followed from that measure would be such as to affect that court's capacity to guarantee effective judicial protection in the fields covered by European Union law.

### *Findings of the Court*

- 71 The requirement that courts be independent, a requirement which the Member States must — under the second subparagraph of Article 19(1) of the TEU and as is apparent from paragraphs 42 to 59 of the present judgment — ensure is observed in respect of national courts which, like the Sąd Najwyższy (Supreme Court), are called upon to rule on issues linked to the interpretation and application of EU law, has two aspects to it.
- 72 The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 44 and the case-law cited).
- 73 The second aspect, which is internal in nature, is for its part linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 65 and the case-law cited).



- 74 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 53 and the case-law cited, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 66 and the case-law cited).
- 75 In particular, that freedom of the judges from all external intervention or pressure, which is essential, requires, as the Court has held on several occasions, certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 64 and the case-law cited).
- 76 The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed.
- 77 In that latter respect, it is apparent, more specifically, from the Court's case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 67).
- 78 In the present case, it must be held that the reform being challenged, which provides that the measure lowering the retirement age of judges of the Sąd Najwyższy (Supreme Court) is to apply to judges already serving on that court, results in those judges prematurely ceasing to carry out their judicial office and is therefore such as to raise reasonable concerns as regards compliance with the principle of the irremovability of judges.
- 79 In those circumstances, and having regard to the cardinal importance of that principle, recalled in paragraphs 75 to 77 above, such an application is acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it.
- 80 In the present case the Republic of Poland claims that the decision to lower to 65 the retirement age of the judges of the Sąd Najwyższy (Supreme Court) was taken with the goal of standardising that age with the general retirement age applicable to all workers in Poland and, in doing so, of improving the age balance among senior members of that court.

- 81 It must be stated in this connection, in the first place, that the Court has admittedly acknowledged that employment policy objectives such as those seeking, on the one hand, to standardise, in the context of professions in the public sector, the age limits for mandatorily ceasing activity and, on the other hand, to encourage the establishment of a more balanced age structure by facilitating the access for young people to, inter alia, the profession of judge may be regarded as legitimate (see, to that effect, judgments of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paragraph 50, and of 6 November 2012, *Commission v Hungary*, C-286/12, EU:C:2012:687, paragraphs 61 and 62).
- 82 However, it must be observed, first, that, as the Commission points out and as has already been observed by the European Commission for Democracy through Law (‘Venice Commission’), in points 33 and 47 of its Opinion No. 904/2017 (CDL-AD(2017)031), the explanatory memorandum to the draft New Law on the Supreme Court contains information that is such as to raise serious doubts as to whether the reform of the retirement age of serving judges of the Sąd Najwyższy (Supreme Court) was made in pursuance of such objectives, and not with the aim of side-lining a certain group of judges of that court.
- 83 Secondly, it is important to note that the lowering of the retirement age of the judges of the Sąd Najwyższy (Supreme Court) who were in post at the date of the entry into force of the New Law on the Supreme Court was accompanied in the present case by the implementation of a new mechanism allowing the President of the Republic to decide, on a discretionary basis, to extend the thus-shortened period during which a judge carries out his or her duties by two consecutive 3-year periods.
- 84 On the one hand, the introduction of that possibility of extending by 6 years the period for which the judge carries out his or her duties at the same time as the lowering by 5 years of the retirement age of judges of the Sąd Najwyższy (Supreme Court) who were in post upon the entry into force of the New Law on the Supreme Court is such as to raise doubts as to the fact that the reform made genuinely seeks to standardise the retirement age of those judges with that applicable to all workers and to improve the age balance among senior members of that court.
- 85 On the other hand, the combination of those two measures is also such as to reinforce the impression that in fact their aim might be to exclude a pre-determined group of judges of the Sąd Najwyższy (Supreme Court), since the President of the Republic, notwithstanding the application of the measure lowering the retirement age to all the judges of that court who were in post when the New Law on the Supreme Court came into force, retains the discretion to maintain in their post some of the persons concerned.
- 86 Thirdly, it must be held that the measure lowering by 5 years the retirement age of the judges of the Sąd Najwyższy (Supreme Court) who were in post at the time of the entry into force of the New Law on the Supreme Court and the shortening of the period during which those judges carry out their duties that resulted therefrom affected, immediately, almost a third of the serving members of that court, including, in particular, the First President of that court, whose 6-year mandate, guaranteed under the Constitution, was also shortened as a consequence. As the Commission submits, that finding demonstrates the potentially considerable impact of the reform at issue on the composition and the functional continuity of the Sąd Najwyższy (Supreme Court). As the Advocate General observed in point 76 of his Opinion, such a major restructuring of the composition of a supreme court, through a reform specifically concerning that court, may itself prove to be such as to raise doubts as to the genuine nature of such a reform and as to the aims actually pursued by it.
- 87 The doubts that thus surround the true aims of the reform being challenged and that result from all the considerations set out in paragraphs 82 to 86 above cannot be dispelled by the arguments put forward by the Republic of Poland according to which (a) some of the serving judges of the Sąd Najwyższy (Supreme Court) affected by that reform were appointed to that post at a time when the

retirement age for judges of that court was fixed at 65 years of age and (b) such judges, once retired, nevertheless retain their judicial titles, continue to enjoy immunity and to receive emoluments and remain subject to various rules of professional conduct.

- 88 Those facts, even if they are taken to be established, are not such as to call into question the fact that the retirement of the judges concerned means the immediate and, in relation to that which was envisaged before the adoption of the reform being challenged, premature cessation of their period of judicial office.
- 89 In the second place, as the Republic of Poland confirmed at the hearing, the general retirement age for workers, with which that Member State stated it wished to bring into line the retirement age of the judges of the Sąd Najwyższy (Supreme Court), does not entail the automatic retirement of those workers but only the right, and not the obligation, for them to cease their professional activity and to receive, in that case, a retirement pension.
- 90 In those circumstances, the Republic of Poland has not demonstrated that the measure being challenged constitutes an appropriate means for the purposes of reducing the diversity of the age limits for the mandatory cessation of activities in respect of all the professions concerned. In particular, that Member State has not put forward any objective reason why, for the purposes of bringing the retirement age of judges of the Sąd Najwyższy (Supreme Court) into line with the general retirement age applicable to all workers in Poland, it was necessary to provide for the automatic retirement of those judges subject to a decision made on a discretionary basis by the President of the Republic to allow them to continue to carry out their duties whereas, for other workers, retirement at the age provided for by law is optional.
- 91 In the third place, it is important to note, with regard to the objective of standardising the retirement age, that the Court has already held that national provisions immediately and significantly lowering the age limit for compulsorily ceasing to serve as a judge, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned who are in post upon the entry into force of those provisions, do not comply with the principle of proportionality (see, to that effect, judgment of 6 November 2012, *Commission v Hungary*, C-286/12, EU:C:2012:687, paragraphs 68 and 80).
- 92 As regards the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), to which the Republic of Poland also referred for the purposes of justifying the lawfulness of the national measure being challenged by the Commission in its first complaint, that judgment concerned a measure reducing the amount of the judges' remuneration. In that judgment, the court held, after observing that that salary reduction measure was both limited, in terms of the amount, and temporary and that it had not been specifically adopted in respect of the members of the Tribunal de Contas (Court of Auditors, Portugal) but was, on the contrary, a measure of general application, that Article 19 TEU must be interpreted as meaning that the principle of judicial independence does not preclude the application of such a measure.
- 93 Seen from the perspective of the protection of judicial independence, the effects of that limited and temporary salary reduction are in no way comparable to the effects of a measure which consists in lowering the retirement age of serving judges which, for its part, has the result of ending, prematurely and definitively, the judicial career of the persons concerned.
- 94 In the fourth place, neither can the immediate application of the reform being challenged to the judges of the Sąd Najwyższy (Supreme Court) in post at the date of the entry into force of the New Law on the Supreme Court be justified by the concern, expressed by the Republic of Poland, to prevent any discrimination, in terms of the duration of judges' period of judicial activity, between those judges and the judges who are appointed to that court after that date.

- 95 As the Commission contends, those two categories of judge are not in analogous situations, since only the career of the former category is shortened while they are in post within the Sąd Najwyższy (Supreme Court), the latter category, for their part, being required to be appointed to that court under the new legislation providing for a statutory retirement age of 65. Furthermore, and in so far as the Republic of Poland also suggests in its arguments that the judges already in post within the Sąd Najwyższy (Supreme Court) will not be granted, unlike their colleagues appointed after the entry into force of the New Law on the Supreme Court, the possibility of benefiting from the new retirement age introduced by that Law, it must be pointed out, as it was by the Commission, that it would have been possible to have provided for the option for the persons concerned to agree voluntarily to cease their period of judicial activity when they reach that new retirement age without therefore requiring them to do so.
- 96 Having regard to all the foregoing considerations, it must be held that the application of the measure lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court) to the judges in post within that court is not justified by a legitimate objective. Accordingly, that application undermines the principle of the irremovability of judges, which is essential to their independence.
- 97 It follows that the Commission's first complaint, alleging breach of the second subparagraph of Article 19(1) TEU, must be upheld.

### ***The second complaint***

#### *Arguments of the parties*

- 98 By its second complaint, the Commission alleges that the Republic of Poland infringed the second subparagraph of Article 19(1) TEU by granting, under the New Law on the Supreme Court, to the President of the Republic, the discretion to extend, twice, each time for a 3-year term, the period of judicial activity of judges of the Sąd Najwyższy (Supreme Court) beyond the new retirement age fixed in that Law.
- 99 According to the Commission, in the absence both of binding criteria governing the decision as to whether or not to grant such extensions to the period during which a judge carries out his or her duties and of the obligation to give reasons for such decisions and the possibility of their judicial review, the President of the Republic is in a position to exercise influence over the judges of the Sąd Najwyższy (Supreme Court). The prospect of having to apply to the President of the Republic for such extensions and then, once such applications have been introduced, waiting for the latter's decision would be likely to create, for the judge concerned, pressure such as to lead him or her to comply with any wishes of the President of the Republic so far as the cases before that judge are concerned, including where he or she is called upon to interpret and apply provisions of EU law.
- 100 The obligation on the President of the Republic to consult the National Council of the Judiciary, provided for in Article 37(1a) and (1b), and Article 111a of the New Law on the Supreme Court and in Article 5 of the Amending Law of 10 May 2018, does not affect the foregoing conclusion. The criteria assigned to that Council for the purposes of issuing its opinion are too general and that opinion does not bind the President of the Republic. In addition, having regard to the recent reform of the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary), of 12 May 2011 (Dz. U. of 2011, heading 714), made 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, heading 3), the 15 members of that Council who, out of the 27 members of which it is composed, must be elected from amongst the judges, would henceforth be elected not by their peers as previously but by the lower chamber of the Polish Parliament, so that doubt may be cast on their independence.



- 101 Lastly, the Commission submits that, so far as the judges of the Sąd Najwyższy (Supreme Court) who will reach the age of 65 after 3 July 2018 are concerned, no time limit has been set within which the President of the Republic must consult the National Council of the Judiciary, which has the potential effect of increasing the period during which the President of the Republic effectively has discretion over the retaining of the judge concerned in his or her post.
- 102 Those various factors are such as to lead to a situation in which the Sąd Najwyższy (Supreme Court) will no longer be regarded as providing the guarantee that it acts, in all circumstances, impartially and independently.
- 103 The Republic of Poland submits that the authorisation conferred on the President of the Republic to decide as to whether to allow the judges of the Sąd Najwyższy (Supreme Court) to continue to carry out their duties once they have reached retirement age constitutes a power derived from the prerogative to appoint judges conferred on him under the Constitution. That prerogative, the specific purpose of which is to protect the judiciary both from interference by the legislative authority and from that by the executive authority, should be exercised personally by the President of the Republic subject solely to constitutional rules and principles, and it is settled case-law that decisions of the President of the Republic refusing to appoint a candidate to a post as judge constitute acts which do not fall within the sphere of administrative activity and cannot be the subject of judicial proceedings.
- 104 Nevertheless, it contends, the opinions forwarded to the President of the Republic by the National Council of the Judiciary take into account, as is apparent from Article 37(1b) of the New Law on the Supreme Court, the interest of the system of justice or an important social interest, in particular the rational use of the staff of the Sąd Najwyższy (Supreme Court) or the needs resulting from the workload of individual chambers of that court. In addition, although such opinions cannot be binding on the President of the Republic without undermining the constitutional prerogatives of the latter mentioned in the preceding paragraph, it is obvious that, in practice, the President of the Republic will take those opinions into account. It is likewise clear that, even though that Law does not provide for any time limit in this connection, the President of the Republic will request the opinion of the National Council of the Judiciary as soon as he has received an application made by a judge of the Sąd Najwyższy (Supreme Court) for an extension to the period during which he or she may carry out his or her duties.
- 105 So far as the composition of the National Council of the Judiciary is concerned, the Republic of Poland states that it does not share the Commission's concerns. It also submits that such concerns are of no relevance for the purposes of the assessment of the present case since the Commission in essence criticises that Member State for leaving the decision as to whether or not to authorise a judge of the Sąd Najwyższy (Supreme Court) to continue to carry out his or her duties beyond the statutory retirement age to the discretion of the President of the Republic, without there being any possibility of judicial review of that decision, and since the opinion of the National Council of the Judiciary is, for its part, in any event not binding upon the President of the Republic.
- 106 Lastly, the Republic of Poland takes the view that the judges of the Sąd Najwyższy (Supreme Court) will not, in practice, be influenced by the President of the Republic with the sole aim of extending the period during which they carry out their duties instead of retiring with the advantage of a good pension, given that the rule that deliberations are in secret will prevent the President from having any information as to the way in which each judge voted. Moreover, the period within which the President of the Republic must decide upon the application made by a judge to continue to carry out his or her duties, namely approximately 4 months, is relatively short.
- 107 Similar systems for the extension of the period of judicial activity beyond the normal retirement age furthermore exist in Member States other than the Republic of Poland and the renewal of the mandate of a judge of the Court of Justice of the European Union also itself depends upon the discretion of the government of the Member State of the judge concerned.



*Findings of the Court*

- 108 As pointed out in paragraphs 72 to 74 above, the guarantees of the independence and impartiality of the courts require that the body concerned exercise its functions wholly autonomously, being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions, with due regard for objectivity and in the absence of any interest in the outcome of proceedings. The rules seeking to guarantee that independence and impartiality must be such that they enable any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it to be precluded.
- 109 Here, it must be observed at the outset that the national rule which the Commission's second complaint concerns does not deal with the process for the appointment of candidates to carry out the duties of judge, but with the possibility, for serving judges who thus enjoy guarantees essential to carrying out those duties, to continue to carry them out beyond the normal retirement age, and that that rule thereby concerns the conditions under which their careers progress and end.
- 110 Furthermore, although it is for the Member States alone to decide whether or not they will authorise such an extension to the period of judicial activity beyond normal retirement age, the fact remains that, where those Member States choose such a mechanism, they are required to ensure that the conditions and the procedure to which such an extension is subject are not such as to undermine the principle of judicial independence.
- 111 In that connection, the fact that an organ of the State such as the President of the Republic is entrusted with the power to decide whether or not to grant any such extension is admittedly not sufficient in itself to conclude that that principle has been undermined. However, it is important to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them.
- 112 To that end, it is necessary, in particular, that those conditions and procedural rules are designed in such a way that those judges are protected from potential temptations to give in to external intervention or pressure that is liable to jeopardise their independence (see, to that effect, judgment of 31 January 2013, *D. and A.*, C-175/11, EU:C:2013:45, paragraph 103). Such procedural rules must thus, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (see, by analogy, judgments of 16 October 2012, *Commission v Austria*, C-614/10, EU:C:2012:631, paragraph 43, and of 8 April 2014, *Commission v Hungary*, C-288/12, EU:C:2014:237, paragraph 51).
- 113 In the present case, the conditions and the detailed procedural rules provided for under the New Law on the Supreme Court with regard to a potential extension beyond normal retirement age of the period for which a judge of the Sąd Najwyższy (Supreme Court) carries out his or her duties do not satisfy those requirements.
- 114 In that respect, in the first place, under the New Law on the Supreme Court, such an extension is now subject to a decision of the President of the Republic, which is discretionary inasmuch as its adoption is not, as such, governed by any objective and verifiable criterion and for which reasons need not be stated. In addition, any such decision cannot be challenged in court proceedings.
- 115 In the second place, with regard to the fact that the New Law on the Supreme Court provides that the National Council of the Judiciary is required to deliver an opinion to the President of the Republic before the latter adopts his or her decision, it is admittedly true that the intervention of such a body,

in the context of a procedure for extending the period during which a judge carries out his or her duties beyond the normal retirement age, may, in principle, be such as to contribute to making that procedure more objective.

- 116 However, that is only the case in so far as certain conditions are satisfied, in particular in so far as that body is itself independent of the legislative and executive authorities and of the authority to which it is required to deliver its opinion, and in so far as such an opinion is delivered on the basis of criteria which are both objective and relevant and is properly reasoned, such as to be appropriate for the purposes of providing objective information upon which that authority can take its decision.
- 117 It is sufficient to note in this connection, as the Republic of Poland confirmed at the hearing, that the National Council of the Judiciary, when required to deliver such opinions to the President of the Republic, has, as a general rule and in the absence of any rule obliging it to state reasons for them, merely delivered opinions, whether positive or negative, for which sometimes no reasons at all have been stated or for which sometimes purely formal reasons have been stated which simply make general reference to the terms in which the criteria fixed in Article 37(1b) of the New Law on the Supreme Court are set out. In those circumstances, without it even being necessary to determine whether criteria such as those mentioned in that provision are sufficiently transparent, objective and verifiable, it must be stated that such opinions are not such as to be apt to provide the President of the Republic with objective information with regard to the exercise of the power with which he is entrusted for the purposes of authorising, or refusing to allow, a judge of the Sąd Najwyższy (Supreme Court) to continue to carry out his or her duties after he or she has reached the normal retirement age.
- 118 Having regard to the foregoing, it must be held that the discretion held by the President of the Republic for the purposes of authorising, twice and each time for a 3-year term, between the ages of 65 and 71, a judge of a national supreme court such as the Sąd Najwyższy (Supreme Court) to continue to carry out his or her duties is such as to give rise to reasonable doubts, inter alia in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them.
- 119 Lastly, the Republic of Poland's argument as to an alleged similarity between the national provisions thus challenged and the procedures applicable in other Member States or applicable at the time of any renewal of the mandate of a judge of the Court of Justice of the European Union cannot succeed.
- 120 First, even if a procedure laid down in another Member State were to contain, from the perspective of the second subparagraph of Article 19(1) TEU, similar defects to those which have been noted with regard to the national provisions at issue in the present case, which has not been proven, the fact remains that a Member State cannot rely on a possible infringement of EU law by another Member State to justify its own default (see, to that effect, judgment of 6 June 1996, *Commission v Italy*, C-101/94, EU:C:1996:221, paragraph 27 and the case-law cited).
- 121 Secondly, unlike members of the national judicial personnel, who are appointed until they reach statutory retirement age, the appointment of judges within the Court of Justice occurs, as provided for in Article 253 TFEU, for a 6-year fixed term. Moreover, under that article, a new appointment to such a post held by a judge whose mandate is coming to an end requires, as was the case in respect of the initial appointment of that judge, the common accord of the Governments of the Member States, after consultation of the panel provided for in Article 255 TFEU.
- 122 The conditions thus set under the Treaties cannot modify the scope of the obligations imposed on the Member States pursuant to the second subparagraph of Article 19(1) TEU.
- 123 It follows that the Commission's second complaint, alleging breach of the second subparagraph of Article 19(1) TEU, and, accordingly, the action in its entirety, must be upheld.

<sup>124</sup> Having regard to all the foregoing considerations, it must be held that, first, by providing that the measure consisting in lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court) is to apply to judges in post who were appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

### **Costs**

<sup>125</sup> Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs and the Republic of Poland has been unsuccessful, the latter must be ordered to pay the costs.

<sup>126</sup> In accordance with Article 140(1) of the Rules of Procedure, Hungary is to bear its own costs.

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

- 1. Declares that, first, by providing that the measure consisting in lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) is to apply to judges in post who were appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;**
- 2. Orders the Republic of Poland to pay the costs;**
- 3. Declares that Hungary is to bear its own costs.**

[Signatures]