

## **Poland's Rule of Law Breakdown A Five-Year Assessment of EU's (In)Action**

Laurent Pech  
Patryk Wachowicz  
Dariusz Mazur

### **1. Introduction**

On 13 January 2016, the European Commission activated its rule of law framework<sup>1</sup> for the very first time with respect to Poland.<sup>2</sup> This unprecedented step was justified primarily with regard to the situation of the Polish Constitutional Tribunal and the new ruling majority's open violation of the judgments it found not to its liking.<sup>3</sup> Five years later, Poland has become the first ever EU Member State to be simultaneously subject to the EU's exceptional Article 7(1) TEU procedure<sup>4</sup> and the special monitoring procedure of the Council of Europe.<sup>5</sup>

During this period of five years, Poland also became the first EU Member State made liable to pay a penalty payment of at least €100,000 per day by the Court of Justice (hereinafter: ECJ) in November 2017 should it infringe the Court order;<sup>6</sup> the first EU Member State to see its self-described "judicial reforms" provisionally suspended by the Court of Justice via two interim

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<sup>1</sup> European Commission Communication, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final, 11 March 2014. This new addition to the EU's rule of law toolbox is also informally known as the "pre-Article 7 procedure".

<sup>2</sup> D. Kochenov and L. Pech, "Better late than never: On the European Commission's Rule of Law Framework and its first activation" (2016) 54(5) *Journal of Common Market Studies* 1062.

<sup>3</sup> European Commission, Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016, SPEECH/16/71.

<sup>4</sup> European Commission, *Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, COM(2017) 835 final, 20 December 2017.

<sup>5</sup> Council of Europe, PACE, *The functioning of democratic institutions in Poland*, Resolution 2316 (2020), para. 17.

<sup>6</sup> Case C-441/17 R, *Commission v Poland*, EU:C:2017:877. On 18 February 2021, the Commission activated Article 260 TFEU for the first time since Poland's rule of law crisis began due to Polish authorities' failure to implement the judgment on the merits adopted by the ECJ in this case on 17 April 2018: Case C-441/17, *Commission v Poland*, EU:C:2018:255. See European Commission, February infringements package: key decisions, 18 February 2021, INF/21/441. Polish authorities had previously ignored an interim order of the ECJ resulting in another interim order of the ECJ subjecting, for the very first time under Article 279 TFEU, Polish authorities to a penalty payment of at least €100,000 per day: EU:C:2017:877. Despite evidence of subsequent non-compliance with this second ECJ interim order, the Commission failed to return to the ECJ to request the imposition of a penalty payment. For further analysis of the Białowieża Forest Case, see T. K., "The Politics of Resentment and First Principles in the European Court of Justice" in F. Bignami (ed), *EU Law in Populist Times* (CUP, 2020), 457.

orders in 2018;<sup>7</sup> the first EU Member State to be found in 2019 to have failed to fulfil its Treaty obligations under the second subparagraph of Article 19(1) TEU twice in a row;<sup>8</sup> and the first EU Member State to see a new (allegedly judicial) body suspended by the ECJ in April 2020 as its continuing functioning was likely to cause serious and irreparable damage to the EU legal order due to its prima facie lack of independence.<sup>9</sup>

These (few) orders and judgments from the ECJ, however, have not prevented Poland's abrupt descent into authoritarianism.<sup>10</sup> Indeed, Poland can now be considered the first EU Member State to no longer have an independent judicial branch following years of sustained attacks deliberately targeting Polish courts, judges and prosecutors culminating in the adoption of the "muzzle law" on 19 December 2019. This law, for the first time in the history of the EU, "legalised" the blatant unconstitutional and systemic violation of EU and ECHR judicial independence requirements.<sup>11</sup> In practice, this means that any Polish judge at any point in time can now be the subject of arbitrary disciplinary investigations, proceedings and/or sanctions (including dismissals), initiated, conducted and adopted by unlawful bodies (as a matter of EU law) – not to forget the subject of arbitrary criminal proceedings – for fulfilling their EU law duties and applying EU rule of law requirements.

To achieve this outcome and reinstate what amounts to a "Soviet-style justice system",<sup>12</sup> Polish authorities have repeatedly and deliberately violated the Polish Constitution and EU law. Rather than giving a comprehensive account of these repeated violations,<sup>13</sup> this article will focus on the EU's (in)action since Poland's rule of law crisis began at the end of 2015. Section

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<sup>7</sup> C-619/18 R, *Commission v Poland* (Independence of the Supreme Court), EU:C:2018:852 and EU:C:2018:910.

<sup>8</sup> Case C-619/18, *Commission v Poland* (Independence of the Supreme Court), EU:C:2019:531 and Case C-192/18, *Commission v Poland* (Independence of ordinary courts), EU:C:2019:924.

<sup>9</sup> Case C-791/19 R, *Commission v Poland* (Régime disciplinaire des juges), EU:C:2020:277.

<sup>10</sup> V-Dem Institute, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, March 2020, p. 16: "The countries that have autocratized the most over the last 10 years are Hungary, Turkey, Poland, Serbia, Brazil and India."

<sup>11</sup> Venice Commission, *Poland. Joint urgent opinion on amendments to the Law on the common courts, the Law on the Supreme Court, and some other laws*, Opinion No. 977/2019, 16 January 2020, para. 43: "the Venice Commission urges the Polish authorities to remove provisions (on disciplinary offences and other) which prevent the courts from examining the questions of independence and impartiality of other judges from the standpoint of the EU law and the ECHR."

<sup>12</sup> Batory Foundation and ESI, *Poland's deepening crisis. When the rule of law dies in Europe*, 14 December 2019, p. 3: "The Polish case has become a test whether it is possible to create a Soviet-style justice system in an EU member state; a system where the control of courts, prosecutors and judges lies with the executive and a single party"

<sup>13</sup> For the most comprehensive treatment to date, see D. Mazur, *From bad to worse – the Polish judiciary in the shadow of the 'muzzle act'*, Annual report for 2020 (second publication), 31 December 2020, available at <http://themis-sedziowie.eu/materials-in-english/from-bad-to-worse-the-polish-judiciary-in-the-shadow-of-the-muzzle-act-annual-report-for-2020-second-publication>

2 of this article will first show that virtually all of the multiple problematical issues identified by the Commission in its pre-Article 7 recommendations and subsequently, in its Article 7(1) Reasoned Proposal of December 2017, have not been addressed by Polish authorities. Section 3 will then address the Commission and the Council's (in)action. It will be submitted that in several instances, the inaction of these two EU institutions amounts to dereliction of duties. Section 4 will evaluate the ECJ's contribution to date which we view as "mixed". Indeed, while the infringement judgments and orders of the ECJ have had a welcome "containing effect" which has limited the amount of irreparable damage done to judicial independence, the ECJ's judgments in preliminary ruling cases have failed to do so. In this specific context, seemingly to save the EU principle of mutual trust, the ECJ has arguably failed to take full account of the structural reality its own enforcement judgments have accurately depicted. This is however an approach which is seriously increasing the risk of (understandable) bottom-up resistance from national courts<sup>14</sup> keen to prevent Poland's autocratisation from spreading to their systems via EU mutual trust-based mechanisms such as the European Arrest Warrant.<sup>15</sup> Section 5 will offer a number of key lessons and recommendations in light of EU's few successes and many failures highlighted in this article. It will be argued inter alia that more statements, dialogue and reports are *not* going to help contain, let alone solve Poland's rule of law crisis. It is indeed no longer a crisis the EU is facing but a total breakdown in the rule of law which, in turn, represents a threat to the legal order that underpins the EU. Finally, Section 6 will offer concluding remarks taking account of recent developments such as the planned judicial purge announced by Poland's de facto leader<sup>16</sup> and the preliminary steps taken by the new unlawfully appointed "First President" of Poland's Supreme Court to organise non-compliance<sup>17</sup> with judgments of both the European Court of Human Rights<sup>18</sup> and the ECJ.<sup>19</sup> Our main conclusion is that the EU's interconnected legal order is bound to gradually disintegrate while the EU slowing mutates from a community of values into a community of (liberal) democracies and (de facto)

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<sup>14</sup> See e.g. the judgment from the Amsterdam District Court holding that Polish courts are no longer independent from the Polish government and parliament, 31 July 2020, NL:RBAMS:2020:3776.

<sup>15</sup> See P. Bárd, and J. Morijn, Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part II), *VerfBlog*, 19 April 2020, <https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu>.

<sup>16</sup> M. Jałoszewski, "Kaczyński directly announced a purge among judges for the first time", *OKO.press*, 22 December 2020, English translation available at <http://themis-sedziowie.eu/materials-in-english/kaczynski-directly-announced-a-purge-among-judges-for-the-first-time-mariusz-jaloszewski-okopress-22-december-2020/>

<sup>17</sup> See Case K 24/20 (pending before the captured "Constitutional Tribunal" following application lodged by unlawfully appointed "First President" of the Supreme Court): <https://trybunal.gov.pl/s/k-24-20>

<sup>18</sup> H. P. Graver, "A New Nail in the Coffin for the 2017 Polish Judicial Reform: On the ECtHR judgment in the case of *Guðmundur Andri Ástráðsson v. Iceland* (Application no. 26374/18)", *VerfBlog*, 2 December 2020, <https://verfassungsblog.de/a-new-nail-in-the-coffin-for-the-2017-polish-judicial-reform>

<sup>19</sup> M. Jałoszewski, "President Duda wants new 'commissioners' in the Supreme Court", *Rule of Law in Poland*, 25 February 2021, <https://ruleoflaw.pl/president-duda-wants-new-commissioners-in-the-supreme-court-to-withdraw-the-question-requiring-a-preliminary-ruling-of-the-cjeu>

autocracies should the Commission and Council continue to oscillate between procrastination and dereliction of duties in the face of Polish authorities' "carpet bombing"<sup>20</sup> style attacks on judicial independence.

## **2. From bad to worse: Polish authorities' sustained lack of compliance with the Commission's rule of law recommendations since 2016**

Following the first ever activation of its Rule of Law Framework (also informally known as the "pre-Article 7 procedure"), the Commission adopted no less than four successive Rule of Law Recommendations under this procedure on 27 July 2016, 21 December 2016, 26 July 2017 and 20 December 2017.<sup>21</sup> At the time it adopted its fourth Rule of Law Recommendation, the Commission also decided to simultaneously activate, for the very first time, the procedure laid down in Article 7(1) TEU due to the existence of a clear risk of a serious breach by Poland of the rule of law.<sup>22</sup> The main problems identified by the Commission in these Recommendations and its Article 7(1) Reasoned Proposal can be summarised as follows:

- (i) To unlawful appointment of the current individual presiding over the Constitutional Tribunal, the unlawful nomination and appointment of three individuals to the same body with one of these individuals unlawfully appointed Vice-President with the consequence that the judgments rendered by the Tribunal can no longer be considered as providing effective constitutional review;
- (ii) The deliberate refusal to publish and/or fully implement several rulings of the Constitutional Tribunal issued prior to its 'capture' in December 2016;
- (iii) The adoption of several laws which, notably through their combined effect, have increased the systemic threat to the rule of law due to their incompatibility with the Polish Constitution and basic European standards on judicial independence: the law

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<sup>20</sup> To borrow from EU Commissioner Věra Jourová quoted in Joanna Plucinska et al, "Polish judiciary changes are a 'destruction': EU commissioner", *Reuters*, 8 February 2020 <https://reut.rs/31Bz3rT>

<sup>21</sup> See Commission Recommendations 2016/1374; 2017/146; 2017/1520 and 2018/103. The adoption of complementary recommendations based on the Commission's Rule of Law Framework was not explicitly envisaged when this new instrument was adopted in 2014 but can be explained by the Commission's reluctance to activate Article 7(1) TEU in the face of Polish authorities openly refusing to comply with the Commission's non-binding recommendations. On this instrument and more generally, the evolution of the EU's rule of law toolbox, see L. Pech, 'The Rule of Law', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (OUP, 3<sup>rd</sup> edition, forthcoming in 2021).

<sup>22</sup> D. Kochenov, L. Pech, K.L. Scheppele, The European Commission's Activation of Article 7: Better Late than Never?', *VerfBlog*, 23 December 2017, <http://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never>.

on the Supreme Court; the law on the National Council for the Judiciary; the law on Ordinary Courts Organisation and the law on the National School of Judiciary;

- (iv) The failure to refrain from actions and public statements which could undermine further the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole;
- (v) The failure to ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence and is prepared in close cooperation with the judiciary and all interested parties.

Fast forwarding to the year 2021, the situation is worse than ever with Poland having become a country where national rulings are openly and regularly disregarded; where violations of national and European rulings are publicly encouraged by elected officials; where individuals appointed to judicial offices coordinate with the executive to pre-empt the application of European rulings; and where judges are routinely subject to harassment and smear campaigns.<sup>23</sup>

In this respect, the adoption of the “muzzle law” should be seen as the culmination of the deliberate and sustained process of rule of law backsliding<sup>24</sup> which began soon after the parliamentary election of 25 October 2015 which gave a parliamentary majority to the self-labelled Law and Justice party. The main changes brought about by the muzzle law will be outlined following our assessment of the situation in relation to the main critical issues identified by the Commission in its Article 7(1) TEU Reasoned Proposal, starting with the lack of effective constitutional review in Poland.

### *2.1 Issues relating to the (captured) Constitutional Tribunal*

As accurately established by the Commission,<sup>25</sup> following the persistent violation of a number of rulings of the Constitutional Tribunal (hereinafter: CT) issued in December 2015 and March, August and November 2016, Polish authorities were able to take control of the CT in December 2016 via the appointment by the Polish President – in flagrant violation of the Constitution –

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<sup>23</sup> For concrete examples and references, see D. Mazur, *From bad to worse – the Polish judiciary in the shadow of the ‘muzzle act’*, op. cit. and K. Gajda- Roszczynialska and K. Markiewicz, “Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland” (2020) 12 *Hague Journal on the Rule of Law* 451.

<sup>24</sup> See L. Pech and K. L. Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

<sup>25</sup> *Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland. Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, COM(2017) 835 final, para. 57.

of an acting President of the CT (a position which did not legally exist) when the former president retired. Within twenty-four hours of her unlawful appointment, the acting President of the CT admitted three judges which were nominated by the Polish parliament without a valid legal basis. Twenty-four hours later, the acting President was then made President following a vote which only saw the three unlawfully appointed individuals and three judges appointed by the current governing majority casting their votes out of the 14 judges present at the meeting. The Polish President, Andrzej Duda, who had previously decided that the assembly of judges of the CT consisting of nine legally elected judges could *not* present a candidate for the office of CT president due to the lack of quorum (i.e., 10 judges), this time accepted the candidature proposed to him by three judges and three usurpers.<sup>26</sup>

For the European Commission,<sup>27</sup> the *unlawful* appointment of the current president of the CT and the *unlawful* composition of the CT mean inter alia that the constitutionality of Polish laws has not been effectively guaranteed since December 2016. In other words, the unlawfully presided and composed CT under these circumstances can no longer be considered as providing effective constitutional review. In short, the CT cannot be considered to constitute a court anymore.<sup>28</sup> In parallel, no progress has been made also in relation to the judgments of 2016 identified by the Commission in its Article 7 Reasoned Proposal. Indeed, rather than publishing and fully implementing them, Polish authorities instead decided to publish them<sup>29</sup> not as judgments but as “findings delivered in breach of law”.<sup>30</sup> This additional qualification is as blatantly absurd as it is obviously illegal.

Unsurprisingly, this repeated failure to comply with the basic requirements of Polish constitutional order led Iustitia, the largest association of Polish judges to publicly declare in

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<sup>26</sup> For further analysis of how the capture of Poland’s CT was deliberately engineered and executed, see generally W. Sadurski, *Poland’s Constitutional Breakdown* (2019, OUP). For a shorter overview, see D. Mazur and W. Żurek, *So-called ‘Good change’ in the Polish system of the administration of justice*, 6 October 2017, pp. 5-18, [https://www.jura.uni-bonn.de/fileadmin/Fachbereich\\_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Sanders/Dokumente/Good\\_change\\_-\\_7\\_October\\_2017\\_-\\_word.pdf](https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Sanders/Dokumente/Good_change_-_7_October_2017_-_word.pdf)

<sup>27</sup> See also more recently European Parliament, *Resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, PA\_TA-PROV(2020)0225.

<sup>28</sup> See e.g. M. Gersdorf and M. Pilich, “Judges and Representatives of the People: A Polish Perspective” (2020) 16(3) *European Constitutional Law Review* 345, p. 356: the CT “no longer exists in practice and cannot be a partner in the dialogue between the courts and the body competent in matters of constitutional review”.

<sup>29</sup> According to Article 190(2) of the Polish constitution: “Judgments of the Constitutional Tribunal (...) shall be required to be immediately published in the official publication in which the original normative act was promulgated:.. This usually takes about a few days. This time, however, the relevant judgments were published more than 700 days after their publication at a time where the CT has effectively ceased to exist as a court.

<sup>30</sup> Commission contribution to the Council on the rule of law in Poland/Article 7(1) TEU Reasoned Proposal. Hearing of Poland, 11 December 2018, Council document 15197/18, p. 15.

October 2020 that it no longer recognises as legitimate the currently unlawfully composed CT.<sup>31</sup> In addition, Iustitia called on independent judges to assess whether its “rulings” may be considered “valid and final” when they are issued by panels which include unlawfully appointed individuals.<sup>32</sup> In a recent instance where a court held a “ruling” of the CT to be null and void,<sup>33</sup> Polish authorities responded with a request for case files.<sup>34</sup> Such action usually results in disciplinary investigation prior to the eventual adoption of disciplinary sanctions and initiation of criminal charges against the judge who issued the relevant judgment.

Therefore, the situation regarding the CT can be considered worse than ever with this body furthermore crossing the EU Rubicon when it indirectly nullified, in breach of EU law and the Polish Constitution, the ECJ judgment of 19 November 2019 in *AK*.<sup>35</sup> Unsurprisingly, the CT also violated its obligation to refer relevant matters to the ECJ in these two instances so as not to give the ECJ the opportunity to confirm it is no longer a court within the meaning of EU law. One may however expect the European Court of Human Rights to confirm that the captured CT cannot be considered a court due to the applications it has received from Poland.<sup>36</sup> In a particularly ironic development showing the extent of the state of lawlessness currently existing in Poland, the Polish government unlawfully refused for several months to publish the abortion declaration<sup>37</sup> – The CT cannot be said to issue judgments anymore – of its own (unlawfully composed) “court” following Poland’s biggest demonstrations since the fall of communism.<sup>38</sup>

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<sup>31</sup> Position of the Polish Judges Association IUSTITIA over the status of the Constitutional Tribunal, 30 October 2020, <https://www.iustitia.pl/en/activity/opinions/4022-position-of-the-polish-judges-association-iustitia-over-the-status-of-the-constitutional-tribunal>. See also Position of the Management Board of the Polish Society of Constitutional Law, 28 October 2020, <http://konstytucyjny.pl/zarząd-polskiego-towarzystwa-prawa-konstytucyjnego-krytykuje-rozstrzygnięcie-tk-w-sprawie-aborcji>

<sup>32</sup> Position of the Polish Judges Association IUSTITIA over the status of the CT, *ibid*.

<sup>33</sup> P. Szymaniak, “Wyrok TK uznany za niebyły”, *Gazeta Prawna*, 3 November 2020.

<sup>34</sup> P. Szymaniak, “Sąd uznał wyrok TK za niebyły. Teraz prokurator żąda wydania akt w sprawie o wykroczenie”, *Gazeta Prawna*, 5 November 2020.

<sup>35</sup> Agnieszka Bień-Kacała, “Polexit is Coming or is it Already Here? Comments on the Judicial Independence Decisions of the Polish Constitutional Tribunal”, *Int’l J. Const. L. Blog*, 28 April 2020, <http://www.iconnectblog.com/2020/04/polexit-is-coming-or-is-it-already-here-comments-on-the-judicial-independence-decisions-of-the-polish-constitutional-tribunal>. On 23 September 2020, the new “Disciplinary Chamber” formally but unlawfully denied any validity to the *AK* judgment in Poland. See Iustitia, Disciplinary Chamber denies validity of CJEU Ruling”, 2 October 2020: <https://www.iustitia.pl/en/disciplinary-proceedings/3980-disciplinary-chamber-denies-validity-of-cjeu-ruling-and-intends-to-rule-in-the-case-of-waiving-igor-tuleya-s-immunity>

<sup>36</sup> A. Bodnar, “Strasbourg Steps in”, *VerfBlog*, 7 July 2020, <https://verfassungsblog.de/strasbourg-steps-in>

<sup>37</sup> A. Mechlinska, “Polish Constitutional Tribunal Abortion Judgment”, *Human Rights Pulse*, 14 December 2020, <https://www.humanrightspulse.com/mastercontentblog/polish-constitutional-tribunal-abortion-judgment>

<sup>38</sup> M. Pronczuk, “Why are there protests in Poland”, *The New York Times*, 27 October 2020, <https://www.nytimes.com/2020/10/27/world/europe/poland-abortion-ruling-protests.html>

## 2.2 Issues relating to the (captured) Supreme Court

With respect to the (flagrantly unconstitutional) changes made to the retirement regime of Supreme Court judges first put forward in 2017 and the connected (also unconstitutional) attempt to prematurely terminate the fixed-term mandate of the First President of the Supreme Court, the European Commission recommended that the Polish authorities ensure that the law on the Supreme Court is amended so as (i) not to apply a lowered retirement age to the current Supreme Court judges<sup>39</sup> and (ii) to remove the discretionary power of the Polish President to prolong the active judicial mandate of Supreme Court judges. Faced with continuing intransigence, the Commission did finally accept that dialogue was leading nowhere and launched an infringement action on 2 July 2018. The Court of Justice confirmed the accuracy of the Commission's assessment in a judgment issued on 24 June 2019 in which it held that the Polish legislation concerning the lowering of the retirement age of judges of the Supreme Court is contrary to EU law as it is not compatible with the principle of judicial independence, including the principle of irremovability of judges.<sup>40</sup>

With respect to the changes made to the structure of the Supreme Court, Polish authorities have continued to disregard the EU's concerns most notably by continuing to make (unlawful) appointments to two new (unconstitutional) bodies known as the Disciplinary Chamber (hereinafter: DC) and the Extraordinary Control and Public Affairs Chamber (hereinafter: ECPAC).<sup>41</sup> In agreement with the Venice Commission,<sup>42</sup> the European Commission questioned the independence, or rather the lack thereof, of these two new chambers. Three then

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<sup>39</sup> Pursuant to the law on the Supreme Court, Supreme Court judges who were due to reach 65 years of age by 3 July 2018 were asked to declare their intention to remain in the Supreme Court by 4 May 2018. 27 judges were affected by this unlawful attempt to retroactively lower the retirement age.

<sup>40</sup> Case C-619/18, *Commission v Poland* (Independence of the Supreme Court), EU:C:2019:531. The Court's judgment is analysed *infra* in Section 4.2.

<sup>41</sup> At the time of finalising this article, the Polish President submitted yet another draft amendment to the Act on the Supreme Court this time to guarantee the total capture of the Supreme Court and prevent its judges *inter alia* from submitting questions to the ECJ: M. Jałoszewski, "President Duda wants new 'commissioners' in the Supreme Court. To withdraw the question requiring a preliminary ruling of the CJEU", *Rule of Law in Poland*, 25 February 2021, <https://ruleoflaw.pl/president-duda-wants-new-commissioners-in-the-supreme-court-to-withdraw-the-question-requiring-a-preliminary-ruling-of-the-cjeu/>

<sup>42</sup> For the Council of Europe's Venice Commission, some aspects the alleged judicial "reforms" targeting Poland's Supreme Court had "a striking resemblance with the institutions which existed in the Soviet Union and its satellites". See *Poland. Opinion on the draft Act amending the Act on the National Council of the Judiciary, on the draft Act amending the Act on the Supreme Court, and on the Act on the organisation of ordinary courts*, Opinion 904/2017, 11 December 2017, para. 89.



still independent chambers of Poland's Supreme Court have since authoritatively established<sup>43</sup> the flagrantly unconstitutional nature of the DC as well as its lack of compliance with EU Law.<sup>44</sup> Most recently, the European Parliament reiterated that the DC cannot be considered a court and called for the Commission to urgently start infringement proceedings in relations to the ECPAC "since its composition suffers from the same flaws" as the DC.<sup>45</sup>

The unlawful nature of the appointment procedure followed by the Polish President is a matter of ongoing litigation before the ECJ.<sup>46</sup> Among other factors which make these appointments flagrantly unlawful in our view, one may mention that the individuals appointed to the DC and the ECPAC have been appointed on the back of a procedure which lacks any legal basis as the President did not obtain the Prime Minister's countersignature when he published vacant seats in the Supreme Court. Furthermore, many of the same individuals were appointed in violation of a freezing order issued by Poland's Supreme Administrative Court.<sup>47</sup> Moreover, the new National Council of the Judiciary has also substantially relaxed the criteria set for candidates to take up office in the Supreme Court, dropping the requirement for them to provide case files and the connected requirement of presenting opinions of the candidates based on these case files.<sup>48</sup> In practice, the recruitment procedure was limited to an interview lasting an average of 15 minutes, which means that it is procedurally more demanding to become a first-instance judge in Poland than a Supreme Court judge. To make matters worse, subsequent amendments to the Act on the National Council of the Judiciary introduced in 2018 eliminated the possibility of any effective judicial review of the correctness of the (unconstitutionally reconstituted) National Council of the Judiciary resolutions nominating candidates for positions in the Supreme Court.<sup>49</sup>

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<sup>43</sup> See resolution of the formation of the combined Civil Chamber, Criminal Chamber and Labour Law and Social Security Chamber of Poland's Supreme Court, Case BSA I-4110-1/20, 23 January 2020, [https://forumfws.eu/bsa-i-4110-1\\_20\\_english.pdf](https://forumfws.eu/bsa-i-4110-1_20_english.pdf)

<sup>44</sup> For references and further analysis, see L. Pech, *Dealing with 'fake judges' under EU Law: Poland as a Case Study*, RECONNECT Working Paper no. 8, May 2020.

<sup>45</sup> European Parliament resolution of 17 September 2020, op. cit., para. 23.

<sup>46</sup> J. Morijn, "What's in the Words", *VerfBlog*, 24 September 2020, <https://verfassungsblog.de/whats-in-the-words>

<sup>47</sup> M. Adamski, "Rzeczpospolita: NSA wstrzymuje kolejne uchwały KRS ws. wyborów do SN", *Rzeczpospolita*, 28 September 2018, <https://www.rp.pl/Sedziowie-i-sady/309289973-NSA-wstrzymuje-kolejne-uchwaly-KRS-ws-wyborow-do-SN.html>

<sup>48</sup> M. Galczynska, "RS "cichaczem" obniża kryteria naboru do SN?", *Onet Wiadomosci*, 12 July 2018: <https://wiadomosci.onet.pl/kraj/krs-cichaczem-obniza-kryteria-naboru-do-sn/yl77c7h>

<sup>49</sup> It is difficult to otherwise understand the solution introduced by the Act amending the Act on the System of Ordinary Courts and other Acts of 20 July 2018 (Journal of Laws of 2018, item 1443) in Article 44 of the Act on the National Council of the Judiciary, according to which an effective appeal against a resolution of the National Council of the Judiciary before the Supreme Administrative Court can only take place when the resolution is appealed against by all candidates for a vacant judicial post, including the candidate who was nominated by the resolution of the National Council of the Judiciary, and who has therefore no legal interest in appealing against this resolution.

These flagrant, deliberate and manifold procedural irregularities were formally denounced by Poland's Supreme Court on 23 January 2020.<sup>50</sup> Unsurprisingly, the unlawfully composed CT subsequently annulled the Supreme Court resolution regardless of its obvious lack of jurisdiction and violated EU law when it did so.<sup>51</sup> At the same time and with the view of completing their capture of the SC, Polish authorities successfully organised the unlawful appointment of a new First President in May 2020. However, this individual cannot be “considered an independent judge in light of the judgment of the ECJ in *A.K. v Sąd Najwyższy* and the subsequent rulings of the Polish Supreme Court.”<sup>52</sup>

Finally, with respect to the so-called “extraordinary appeal procedure”, no progress has been made notwithstanding the Commission repeatedly recommending that the law on the Supreme Court be amended to remove the extraordinary appeal procedure. As of today, the European Commission has (rightly) remained of the view that this procedure is not compatible with the rule of law due in particular to the “broadness of the criteria governing the extraordinary appeal”, the “20-year reach of the extraordinary appeal” and the fact that this procedure “could even justify, for example, the repeal of final judgments by Polish courts applying EU law as interpreted by the case-law of the Court of Justice of the EU.”<sup>53</sup> One must recall in this respect that the composition and manner of appointment of the individuals appointed to the chamber in charge of hearing these “extraordinary appeals” has been repeatedly denounced, with the Parliamentary Assembly of the Council of Europe for instance questioning “their independence and their vulnerability to politicisation and abuse” while also demanding in January 2020 that these issues are addressed as a matter of urgency.<sup>54</sup> To this day, Polish authorities have continued to refuse to do so.

### 2.3 Changes made to the National Council for the Judiciary

In open disregard of Poland's Constitution and defiance of the Commission's recommendation to revise the law on the National Council for the Judiciary (hereinafter: NCJ) to retain the election of judges-members by their peers, and the Commission's warning not to prematurely

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<sup>50</sup> For extensive references and further analysis, see L. Pech, *Dealing with 'fake judges' under EU Law*, op. cit.

<sup>51</sup> European Parliament resolution of 17 September 2020, op. cit., para. 22 (The CT “declared the Supreme Court resolution unconstitutional on 20 April 2020, creating a dangerous judiciary duality in Poland in open violation of the primacy of Union law”).

<sup>52</sup> M. Krajewski and M. Ziolkowski, “Can an Unlawful Judge be the First President of the Supreme Court?”, *VerfBlog*, 26 May 2020, <https://verfassungsblog.de/can-an-unlawful-judge-be-the-first-president-of-the-supreme-court/>

<sup>53</sup> Commission contribution to the Council on the rule of law in Poland/Article 7(1) TEU Reasoned Proposal. Hearing of Poland, 11 December 2018, op. cit., pp. 13-14.

<sup>54</sup> PACE, The functioning of democratic institutions in Poland, Resolution 2316(2020), para. 7.4.

terminate the mandates of the NCJ's judges-members, the lower house of the Polish parliament elected 15 new judges-members on 6 March 2018 *prematurely* ending the four-year mandates of the previous 15 judges-members guaranteed by the Constitution.

To add (unlawful) insult to (unconstitutional) injury, the process of collecting signatures of support by those wishing to be appointed to the new NCJ has been established to be unlawful due to at least one new judge-member having failed to submit the required number of supporting letters.<sup>55</sup> In addition, it has also been established that the vast majority of people who supported 11 out of 15 candidates received benefits in return in the form of promotions and various types of additional financial benefits. Moreover, the new judges-members cannot claim in any way to be representative of the majority of Polish judges, one of the alleged objectives of the NCJ "reform", but instead represent a selected group of people who owe their "elections" to the Minister of Justice. Indeed, as many as 10 of the 15 judge-members of the neo-NCJ would not have been "elected" had it not been for the support of judges delegated to the Ministry of Justice, with one judge for instance getting 88% of his "promoters" from within the Ministry of Justice.<sup>56</sup>

In light of the proactive role played by the neo-NCJ when it comes to annihilating judicial independence in Poland, the European Networks of Councils for the Judiciary (hereinafter: ENCJ) suspended the neo-NCJ on 17 September 2018.<sup>57</sup> The ENCJ is now working on its expulsion due inter alia to the fact the neo-NCJ has been acting "in blatant violation of the ENCJ rule to safeguard the independence of the Judiciary, to defend the Judiciary, as well as individual judges".<sup>58</sup> Most recently, and as explained above, evidence emerged in February 2020 that the neo-NCJ was and is still unlawfully composed with the Minister of Justice furthermore publicly confirming in January 2020 that the judges nominated to the new NCJ were selected by himself on the basis that they "were ready to work on the reforms of the

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<sup>55</sup> Iustitia, "The National Council of the Judiciary is not valid anymore" (English translation of article published by OKO.press), 16 February 2020, <https://www.iustitia.pl/en/activity/informations/3710-iustitia-the-national-council-of-the-judiciary-is-not-valid-anymore-okO-press>

<sup>56</sup> Iustitia, "The spokesman for National Council of the Judiciary (NCJ) managed to gather 88 per cent of his signatures in the Ministry of Justice" (English translation of article published by OKO.press), 16 February 2020, <https://www.iustitia.pl/en/activity/informations/3709-the-spokesman-for-national-council-of-the-judiciary-ncj-managed-to-gather-88-per-cent-of-his-signatures-in-the-ministry-of-justice-okO-press>. For further details, see also THEMIS, "Close to the Point of No Return", 20 February 2020, <http://themis-sedziowie.eu/wp-content/uploads/2020/02/Newsletter.pdf>

<sup>57</sup> ENCJ, ENCJ suspends Polish National Judicial Council – KRS, 17 September 2018, <https://www.encj.eu/node/495>

<sup>58</sup> ENCJ, Position Paper of the board of the ENCJ on the membership of the KRS (expulsion), 27 May 2020, <https://www.encj.eu/node/556>

judiciary”.<sup>59</sup> To this already disturbing picture, one must add the media reports claiming that as many as four out of the fifteen judge-members of the neo-NCJ were part of the Ministry of Justice’s secret “troll farm”, headed by former Deputy Minister of Justice Łukasz Piebiak.<sup>60</sup> Notwithstanding the calls from Polish associations of judges<sup>61</sup> and the Parliamentary Assembly of the Council of Europe, an effective investigation of these unlawful activities coordinated from within Poland’s Ministry of Justice is yet to be organised by Polish authorities.

These unprecedented developments led the European Parliament in September 2020 to call on the Commission, itself an extremely rare occurrence, to launch an infringement action targeting the NCJ and request in due course the suspension of the activities of the new NCJ by way of interim measures. As recalled by the European Parliament, while “it is up to the Member States to establish a council for the judiciary”, “where such council is established, its independence must be guaranteed in line with European standards and the Member State’s constitution.”<sup>62</sup>

#### *2.4 Issues relating to the retirement regime of ordinary court judges and the arbitrary dismissal of ordinary court presidents*

In its Article 7(1) TEU Reasoned Proposal of 20 December 2017, the Commission reiterated the need for Polish authorities to amend the law on Ordinary Courts Organisation so as to (i) repeal the new retirement regime for judges of ordinary courts, including the discretionary power of the Ministry of Justice to prolong their mandate and (ii) address the situation of the ordinary court judges who have already been forced to retire because they were affected by the lowered retirement age.<sup>63</sup>

On 5 November 2019, in the second and last infringement judgment to date issued by the ECJ, the Court held that Poland had failed to fulfil its obligations under EU law, first, by establishing a different retirement age for men and women who were judges or public prosecutors and, second, by lowering the retirement age of judges of the ordinary courts while conferring on the Minister for Justice the power to extend the period of active service of those judges.<sup>64</sup> This is

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<sup>59</sup> M. Wilgocki, “Myśmy zgłosili”. Ziobro przypadkiem zdradził, kto poparł sędziów do KRS?”, *Wyborcza*, 15 January 2020, <https://wyborcza.pl/7,75398,25603501.html>

<sup>60</sup> PACE, *The functioning of democratic institutions in Poland*, report, Doc. 15025, 6 January 2020, paras. 105-106. See *infra* Section 2.5 for further analysis.

<sup>61</sup> See e.g. Appeal of the Themis Association of Judges regarding the so-called “Piebak scandal”, 26 August 2019, <http://themis-sedziowie.eu/materials-in-english/appeal-of-the-themis-association-of-judgesof-26-august-2019-regarding-the-so-called-piebiak-scandal>

<sup>62</sup> European Parliament resolution of 17 September 2020, *op. cit.*, para. 24.

<sup>63</sup> COM(2017) 835 final, paras 146-150.

<sup>64</sup> Case C-192/18, *Commission v Poland (Independence of ordinary courts)*, EU:C:2019:924. The Court’s judgment is analysed *infra* in Section 4.2.

the second instance where Polish authorities have been forced to address the Commission's concerns following a judgment of the ECJ. One must note however that Polish authorities only partially implemented this judgment to the extent that they have yet to remedy the situation of the judges affected by the new and unlawful retirement regime and especially the situation of judges who were refused an extension to the age of 70.<sup>65</sup> Yet the Commission appeared to have never investigated what we view as a blatant failure to *fully* implement the Court's judgment.

A similar lack of compliance can be noted in relation to the law on Ordinary Courts Organisation which the Commission recommended to be amended so as to remedy decisions on dismissal of court presidents which took place under a six-month transitional regime in 2017-18 and which saw 158 presidents and vice-presidents of courts<sup>66</sup> lost their posts. This transitional regime gave the Minister for Justice the power to dismiss any president and vice president of any ordinary court *without* any specific criteria, *without* justification and *without* judicial review.<sup>67</sup> No remedy has ever been provided for the judges who have been arbitrarily dismissed under this regime.

In parallel to this sustained defiant behaviour of non-compliance, Polish authorities have actively sought to further capture the judiciary from within. To do so, they have amended the 2017 Act on the Organisation of Ordinary Courts to enable the Minister of Justice to appoint new courts presidents at his own discretion, with no involvement of the self-governing judiciary bodies. It is worth stressing in this respect that courts presidents have a significant influence on an individual judge's working conditions and any eventual decision on transfers between divisions of the court. Furthermore, given that the Minister of Justice currently has the power to appoint court directors at his own discretion rather than through open contests, the possibilities of indirectly harassing individual judges have become even greater. By managing the administrative personnel, a court director is able, for instance, to deprive any judge of a good court recorder or assistant. To put it differently, the Polish Minister of Justice

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<sup>65</sup> In its Opinion regarding Case C-192/18, AG Tanchev refers to a figure which "may be as high as 112 judges", EU:C:2019:529, para. 107. See also Helsinki Foundation for Human Rights, 'It starts with the personnel. Replacement of common court presidents and vice presidents from August 2017 to February 2018', April 2018, at 2: <http://www.hfhr.pl/wp-content/uploads/2018/04/It-starts-with-the-personnel.pdf> ("Information provided by the Ministry indicates that from 12 August 2017 to 28 February 2018 a total of 219 judges filed requests to be allowed to continue serving. The Minister of Justice reviewed 130 requests and granted consent to 69 of them").

<sup>66</sup> M. Jałoszewski, "Lista 158. Stowarzyszenie Iustitia zdobyło nazwiska prezesów i wiceprezesów zwolnionych przez resort Ziobry", OKO.press, 20 May 2018, <https://oko.press/lista-158-stowarzyszenie-iustitia-zdobylo-nazwiska-prezesow-i-wiceprezesow-zwolnionych-przez-resort-ziobry/>

<sup>67</sup> See European Commission contribution to the Council, rule of law in Poland/Article 7(1) TEU Reasoned Proposal. Hearing of Poland, 11 December 2018, Council document 15197/18, p. 15.

has now an unprecedented panoply of administrative means by which to harass judges not to his liking outside any formal disciplinary procedures.<sup>68</sup>

### 2.5 Issues relating to the disciplinary regime

The European Commission has repeatedly raised its concerns as regards the autonomy of the new DC, the removal of procedural guarantees in disciplinary proceedings conducted against ordinary judges and Supreme Court judges, and the influence of the Polish President and the Minister of Justice on the disciplinary officers. More than fifteen months after the adoption of its Article 7(1) Reasoned Proposal, the Commission finally decided to launch its third rule of law infringement action, now pending before the Court (Case C-791/19), due to the existence of a new disciplinary regime which allows authorities to subject Polish judges to political control by allowing sanctions “on account of the content of their judicial decisions”.<sup>69</sup> On 8 April 2020, following an application for interim measures lodged by the Commission on 23 January 2020, the ECJ ordered the immediate suspension of the application of the national provisions on the powers of the DC of the Supreme Court with regard to disciplinary cases concerning judges.<sup>70</sup> Following the adoption of what is informally known as Poland’s ‘muzzle law’, the main features of which will be outlined below, a new infringement action was also launched on 29 April 2020.<sup>71</sup> For the Commission, this new law further broadens the notion of disciplinary offence and thereby increases the number of cases in which the content of judicial decisions can be qualified as a disciplinary offence. As a result, Poland’s new disciplinary regime for judges can and has indeed already been used as a system of political control of the content of judicial decisions.

Most recently, the European Parliament expressed its deep concerns in relation to “the disciplinary proceedings initiated against judges and prosecutors in Poland in connection with their judicial decisions applying Union law or public statements in defence of judicial independence and the rule of law in Poland.”<sup>72</sup> In addition to being subject to industrial-scale disciplinary investigations and proceedings,<sup>73</sup> Polish judges and prosecutors have indeed been

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<sup>68</sup> “If you are not with us we will destroy you. Interview with judge Waldemar Żurek”, English translation of interview published in *Gazeta Wyborcza*, 20 September 2019: [http://themis-sedziowie.eu/wp-content/uploads/2019/10/Electorial-newspaper\\_W\\_Zurek\\_interview\\_wer-1.docx](http://themis-sedziowie.eu/wp-content/uploads/2019/10/Electorial-newspaper_W_Zurek_interview_wer-1.docx)

<sup>69</sup> European Commission, *Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control*, IP/19/1957, 3 April 2019.

<sup>70</sup> Case C-791/19 R, *Commission v. Poland*, EU:C:2020:277. This ECJ order is analysed *infra* in Section 4.1.

<sup>71</sup> European Commission, *Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland*, IP/20/772, 29 April 2020.

<sup>72</sup> European Parliament resolution of 17 September 2020, *op. cit.*, paras 31 and 32.

<sup>73</sup> Arbitrary, politically motivated disciplinary and explanatory proceedings are currently pending against *at least* 81 Polish judges (total derived from media reporting). For further details, see e.g. the report prepared by ‘Themis’ report which was prepared for the EU Justice Scoreboard 2020, 24 March 2020: <http://themis->

subject to sustained state-sponsored smear campaigns. One particularly disturbing aspect of these smear campaigns, which have been ongoing for years,<sup>74</sup> was the secret establishment of a “troll farm” within the Ministry of Justice.<sup>75</sup> For the Parliamentary Assembly of the Council of Europe, the existence of “a politically motivated smear campaign ... organised against members of the judiciary by, and with the involvement of, high ranking officials in the Ministry of Justice and National Council of the Judiciary, is both deplorable and concerning”.<sup>76</sup> To this day, however, Polish authorities have yet to set up an *independent* public inquiry to look into the (criminal) activities of these “high ranking officials” as demanded by the Parliamentary Assembly of the Council of Europe.

By contrast, those seeking to establish the identity of individuals responsible for this “troll farm” have been the subject of disciplinary investigations and/or harassment via pro-governmental media outlets. Indeed, in addition to the pattern of sustained and unlawful leaking of critical judges’ private information and/or disciplinary files to pro-governmental media and anonymous Twitter account(s),<sup>77</sup> which manifestly amounts to a “gross violation of privacy regulations”<sup>78</sup> and continues to this day,<sup>79</sup> State TV has never stopped being used to attack specific judges.<sup>80</sup> State resources have also been used to finance defaming campaigns

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[sedziowie.eu/materials-in-english/legal-harassment-of-polish-judges-report-for-the-needs-of-eu-justice-scoreboard-2020-updated-as-of-24-march-2020](https://sedziowie.eu/materials-in-english/legal-harassment-of-polish-judges-report-for-the-needs-of-eu-justice-scoreboard-2020-updated-as-of-24-march-2020). Additional disciplinary proceedings have been initiated post March 2020 with preliminary disciplinary steps taken against more than 1,200 judges for the “crime” of writing a letter to the OSCE regarding the legal status of the ECPAC. See e.g. S. Gregorczyk-Abram and M. Wawrykiewicz, “We, in Poland are witnessing a unique revolution in Poland against the rule of law’ (Oral submission delivered at the ECJ hearing in Case C-487/19), *Rule of Law in Poland*, 22 September 2020: <https://ruleoflaw.pl/we-in-poland-are-witnessing-a-unique-revolution-in-poland-against-the-rule-of-law/>

<sup>74</sup> For examples from 2017, see e.g. A. Sanders, and L. von Danwitz, Luc, “Defamation of Justice – Propositions on how to evaluate public attacks against the Judiciary”, *VerfBlog*, 31 October 2017.

<sup>75</sup> PACE, *The functioning of democratic institutions in Poland*, report, op. cit., paras. 105-106 (Polish authorities have failed to establish an independent public inquiry into these smears campaigns and those responsible for them by 31 March 2020 as required by PACE).

<sup>76</sup> PACE, *The functioning of democratic institutions in Poland*, Resolution 2316(2020), para. 11.

<sup>77</sup> See e.g. Amnesty International, *Poland: Free Courts, Free People. Judges standing for their independence*, 4 July 2019 (“One account named KastaWatch routinely published tweets amounting to online harassment and abuse of judges known for their criticism of the “reform” of judiciary ... There are indications that KastaWatch draws on classified or semi-classified information from government authorities”).

<sup>78</sup> PACE, *The functioning of democratic institutions in Poland*, report, op. cit., para. 104.

<sup>79</sup> See e.g. *Świadczenie obciążają sędzię Morawiec. Szokujące zeznania ws. szefowej „Themis”*, *TVP info*, 10 October 2020; M. Jalszewski, *Wiadomości*” TVP uderzają w sędzię Beatę Morawiec przeciekami z akt prokuratury, *OKO.press*, 11 October 2020.

<sup>80</sup> This has been done against specific individuals, for instance, before a disciplinary hearing of a judge such as Judge Beata Morawiec (see fn above), or after specific judgements (see e.g. OSCE-ODIHR, Republic of Poland. Parliamentary elections 13 October 2019, 14 February 2020, p. 18, fn 85: when forced by court orders to air an apology and a correction, TVP “supplemented its apologies with strong criticism of the judiciary and personal attacks against the respective judges”). See also A. Applebaum, “The Disturbing Campaign Against Poland’s

against judges.<sup>81</sup> In addition to the sustained criticism originating from European institutions, the existence of large-scale propaganda against the judiciary in Poland has also been criticised by the UN Special Rapporteur on the independence of judges and lawyers.<sup>82</sup> Most recently, in an unprecedented but warranted statement as regards a member state of the EU, the Parliament Assembly of the Council denounced the behaviour of Polish authorities as being “unworthy of a democracy and a law-governed State.”<sup>83</sup>

## 2.6 Changes introduced by the “muzzle law”

The developments outlined above have taken place in the shadow of the infamous “muzzle law” adopted in December 2019 and rightly described as “blatantly unconstitutional” in addition to being flagrantly contrary to EU law.<sup>84</sup> Indeed, and to put concisely, the muzzle law aims to neutralise the application of EU but also ECHR judicial independence requirements by *inter alia*:<sup>85</sup>

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Judges”, *The Atlantic*, 28 January 2020 regarding the existence of a TV programme called “*Kasta* (“The Caste”), which depicts judges as corrupt and greedy”.

<sup>81</sup> A. Sanders and L. von Danwitz, *op. cit.*

<sup>82</sup> *Report of the Special Rapporteur on the independence of judges and lawyers*, Diego García-Sayán, 17 July 2020, A/75/172, para. 79 referring to the country mission report, (A/HRC/38/38/Add.1, paras. 17-19 and 79).

<sup>83</sup> PACE, *Judges in Poland and in the Republic of Moldova must remain independent*, Resolution 2359 (2021), para 4.

<sup>84</sup> P. Marcisz, “Discipline and Punish: New Polish Reforms of the Judiciary”, *VerfBlog*, 22 December 2019, <https://verfassungsblog.de/discipline-and-punish>.

<sup>85</sup> For comprehensive legal assessments of the “muzzle law”, see A. Bodnar, Polish Commissioner for Human Rights, *Comments on the Act amending the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other acts*, VII.510.176.2019/MAW/PKR/PF/MW/CW, 7 January 2020, 59 pages (see especially pp. 3-4: the muzzle law “introduce tools which are unacceptable from the point view of the constitutional, international and European law (...) The Commissioner for Human Rights’ assessment of the adopted Act is unambiguously negative as he considers the Act to violate the Constitution and the founding principles of the Polish legal order, to be in conflict with Poland’s obligations towards the European Union, and to compromise the protection guaranteed by the European Convention on Human Rights. The entry into force of the Act, in the form adopted by the Sejm, will call into question the legal dimension of Poland’s participation in the European Union and the Council of Europe”; OSCE-ODIHR, *Urgent Interim Opinion on the bill amending the Act on the organization of common courts, the Act on the Supreme Court and certain other acts of Poland (as of 20 December 2019)*, JUD-POL/365/2019 [AIC], 14 January 2020, 34 pages (see especially para. 12: “Several provisions reviewed are inherently incompatible with international standards and OSCE commitments on judicial independence. A number of the breaches of these standards are so fundamental that they may put into question the very legitimacy of the Bill, which should be reconsidered in its entirety and should not be adopted as it is”); Venice Commission, *Poland. Joint urgent opinion on amendments to the Law on the common courts, the Law on the Supreme Court, and some other laws*, Opinion No. 977/2019, 16 January 2020, 14 pages (see especially para. 60: the muzzle law “diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments. Thus, the Venice Commission recommends not to adopt those amendments”).



- introducing new types of disciplinary offences and sanctions for e.g. referring questions to the ECJ regarding the status of individuals appointed with the participation of the new NCJ;
- depriving judicial self-governing bodies of any meaningful self-governance by e.g. removing their right to issue opinions on candidates for the office of judge, depriving them of the right to pass critical resolutions regarding changes in the justice administration and transferring some competencies of the assemblies of judges to the colleges composed of the court presidents appointed by the Minister of Justice;
- politicising criminal proceedings even further by allowing e.g. the DC the exclusive competence to lift a judge's immunity or decide on the temporary detention of a judge;
- granting the ECPAC the exclusive right to assess whether a judge is independent and impartial;
- granting the President of Poland the right to correct the defectiveness of the procedure of appointing a judge by handing a nomination to a judge, in a manner contrary to the constitution;
- changing the process of the election of the First President of the Supreme Court to enable the President to appoint a "minority candidate";
- obliging judges to publicly disclose their membership of associations.

Five years since the start of Poland's rule of law crisis, it would be difficult to deny that the situation is worse than ever and is bound to deteriorate further. We are indeed looking at the deliberate and close to being successful total subjugation of a national judiciary to a ruling coalition itself bound to the will of a politician who is neither President, nor Prime minister. In the face of sustained and deliberate violations of the most basic tenets of the rule of law not to mention the fundamental conditions governing EU membership, the European Commission and the Council of the EU have oscillated between procrastination and dereliction of duties.

### **3. Between procrastination and dereliction of duties: Commission and Council's (in)action since 2016**

Faced with the sustained worsening of the rule of law situation ever since the Commission activated its "pre-Article 7" procedure in January 2016, what have the main EU political institutions done? As will be shown below, the Commission has systematically acted in a too little too late fashion while the Council has systematically sought to delay action and mask its inaction by hiding behind pointless statements or useless dialogues. By contrast, the European Parliament must be commended for repeatedly denouncing the worsening rule of law situation

in Poland<sup>86</sup> and the irresponsible inaction of both the Council and the Commission,<sup>87</sup> whose record (or lack thereof) will be examined below.

### 3.1 *The Council*

Overall, the Council's record is one of doing its best to do as little as possible while hiding this inaction by recalling at regular intervals its "concerns" about the rule of law situation in Poland and recurrently presenting "dialogue" as the way forward. Just to give a flavour of the type of meaningless statements one can regularly find in the (non-binding) conclusions of the Council (General Affairs), a few of these conclusions out of a total of seventeen Council conclusions to date making (brief) references to the rule of law situation in Poland are reproduced below:

16 May 2017: The Commission informed the Council on the state of play of its dialogue with Poland on the rule of law. Ministers emphasised the importance of continuing the dialogue between the Commission and Poland.<sup>88</sup>

27 February 2018: The Commission presented its reasoned proposal under Article 7(1) TEU concerning the rule of law in Poland [...] Ministers stressed the importance of the rule of law and encouraged the continuation of the dialogue between the Commission and the Polish authorities with a view to achieving progress. The next steps in the procedure will depend on the outcome of this dialogue.<sup>89</sup>

16 October 2018: As part of the Article 7(1) TEU procedure, the Commission provided the Council with an update on recent developments regarding the justice reform in Poland. Ministers reiterated the importance of upholding the rule of law in all EU member states and stressed the need to achieve tangible progress.<sup>90</sup>

18 July 2019: The Council took stock of the state of play as regards the rule of law in Poland in the light of recent developments [...] This item on the agenda followed the hearing of Poland at the meetings of the General Affairs Council on 26 June, 18 September and 11 December 2018 as part of the Article 7(1) TEU procedure.<sup>91</sup>

22 September 2020: As part of the Article 7(1) TEU procedure, the Commission updated ministers on the developments in Poland and Hungary since the end of last year. Due to the COVID-19 pandemic,

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<sup>86</sup> European Parliament, *Resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, COM(2017)0835 – 2017/0360R(NLE).

<sup>87</sup> Ibid. Regarding the Council, see also European Parliament, *Resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary*, 2020/2513(RSP), and most recently, European Parliament, "EU values in Hungary and Poland: MEPs deplore lack of progress in Council, worry about setback", Press release 20201127IPR92636, 1 December 2020.

<sup>88</sup> Council meeting no 3536, 9299/17, 16 May 2017, p. 6.

<sup>89</sup> Council meeting no 3599, 6576/18, 27 February 2018, p. 6.

<sup>90</sup> Council Meeting no 3644, 13125/18, 16 October 2018, p. 4.

<sup>91</sup> Council meeting no 3710, 11337/19, 18 July 2019, p. 6.

and the impossibility of holding physical Council meetings, the Council has not been able to hold discussions under Article 7 this year. In its overview on Poland, the Commission focused on disciplinary sanctions for judges and the implementation of the Court of Justice order of 8 April 2020 on the Disciplinary Chamber of the Supreme Court. Concerning Hungary, the Commission outlined the situation in several areas, including the independence of the judiciary, media pluralism and academic freedom.<sup>92</sup>

To make a bad situation worse, the multiple state of play or update discussions held in the Council are organised without any written document being prepared either by the Commission or the Council to guarantee a well-informed discussion or proper follow up. In addition, the discussions held in the Council are not minuted seemingly to guarantee maximum secrecy to the de facto benefit of those undermining the rule of law and prevent citizens from exercising their EU right of access to documents.

Be that as it may, and as indicated in the Council conclusions cited above, the COVID-19 pandemic has since offered the Council – and the different countries which have held the rotating presidency of the Council – a new pretext not to hold Article 7(1) TEU hearings in the General Affairs Council. Indeed, there is no legal obligation whatsoever to hold physical discussions or physical hearings under Article 7(1) TEU contrary to what the Council claims without any supporting evidence.

Prior to the COVID-19 pandemic, three hearings were organised under the Article 7(1) TEU procedure on 26 June, 18 September and 11 December 2018.<sup>93</sup> While these hearings can be considered positive steps, they suffered from several flaws which all favour the government in the dock. To name but a few: The Council has, without any justification, reinterpreted Article 7(1) TEU as providing for hearings in the form of a peer review exercise when the Treaty provision does nothing of the sort; it has also operated a selective selection of the topics for discussion without any public explanations; adopted a set of “modalities” which procedurally favour those undermining the rule of law by allowing them inter alia to get away with misleading or downright factually inaccurate statements; and last but not least, the Council has organised a system of hearings which lacks transparency and rejects the involvement of relevant external stakeholders with expertise on the matters under discussion. These flaws reflect the Council’s traditional yet ill-advised preference for secrecy and deferential attitude when it comes to assessing one of its member’s record. This approach is arguably in breach of the intent and purpose of Article 7 TEU. By adopting modalities which make the hearings as ineffective as possible, the Council has also violated the EU principle of *effet utile*. In more

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<sup>92</sup> Council meeting no 3770, 11024/20, 22 September 2020, p. 5.

<sup>93</sup> For further analysis and references, see L. Pech, “Article 7 TEU: From ‘Nuclear Option’ to ‘Sisyphean Procedure’?” in U. Belavusau and A. Gliszczynska-Grabias (eds), *Constitutionalism under Stress* (Oxford University Press, 2020), 157.

practical terms, these serious shortcomings have resulted in Polish authorities being able to avoid any serious opprobrium within the Council while presiding over one of the most severe examples of autocratisation *in the world* in the past ten years.<sup>94</sup>

Since then, as noted above, the COVID-19 pandemic has offered the Council the perfect pretext to do nothing. This is not to say that the situation pre COVID-19 was better. Indeed, in 2019, prior to the COVID-19 pandemic, the Romanian government, in charge of the rotating presidency of the Council, actively sought to prevent the organisation of a new hearing at a time where it was itself engaged in a severe process of rule of law backsliding.<sup>95</sup> As for the otherwise very active Finnish Presidency in the second semester of 2019, it refused to organise a hearing on the (flawed) basis that it did not want to be seen as interfering with Poland's parliamentary elections of October 2019. The Finnish President did however organise the first two Article 7(1) TEU hearings held in respect of Hungary in September and December 2019.<sup>96</sup> The same year also saw a new pretext being used by some national governments to justify their not untypical lethargy: the alleged need to wait to see how Polish authorities would comply (or not) with the Court of Justice's forthcoming infringement and preliminary rulings considering the increasing number of pending cases before the Court, and which directly or indirectly raise most of the issues highlighted in the Commission's Article 7(1) reasoned proposal.<sup>97</sup>

To return to the situation in 2020, not a single Article 7 hearing was organised with COVID19 being used as a convenient pretext first by the Croatian and subsequently by the German presidencies of the Council, with the latter not even bothering attending a debate organised by the European Parliament on this issue on 30 November 2020.<sup>98</sup> In other words, in 2020, the Council was only able to find *one hour* to organise a *confidential* "state of play" discussion on the "developments" in Poland and Hungary on 22 September 2020.<sup>99</sup> That's it. About one hour in one year. This is from the same Council which committed itself on 17 November 2020 to

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<sup>94</sup> V-Dem Institute, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, March 2020, p. 16: "The countries that have autocratized the most over the last 10 years are Hungary, Turkey, Poland, Serbia, Brazil and India." Regarding the rule of law specifically, see e.g. World Justice Project, *Rule of Law Index 2020 Insights*, 2020, p. 20 which identifies Poland, Hungary and Bulgaria as belonging to the group of countries which have experienced the biggest declines in constraints on government powers in the world since 2015. With a decline of -6.8% over the past five years in relation to this benchmark which aims to identify countries engaged in a process of autocratisation, Poland has experienced the worst decline in the world only surpassed by Egypt.

<sup>95</sup> L. Pech, V. Perju, S. Platon, "How to Address Rule of Law Backsliding in Romania: The case for an infringement action based on Article 325 TFEU", *VerfBlog*, 29 May 2019, <https://verfassungsblog.de/how-to-address-rule-of-law-backsliding-in-romania>

<sup>96</sup> For further details, see "Article 7 TEU: From 'Nuclear Option' to 'Sisyphian Procedure'?", op. cit.

<sup>97</sup> See Section 4 *infra*.

<sup>98</sup> European Parliament, "EU values in Hungary and Poland: MEPs deplore lack of progress in Council, worry about setback", Press release 20201127IPR92636, 1 December 2020.

<sup>99</sup> Council meeting no 3770, 11024/20, 22 September 2020, p. 5.

“advance the rule of law, support the strengthening of independent and impartial judiciary, oppose external pressure against judges and national justice systems” when adopting the EU Action Plan on Human Rights and Democracy 2020-2024.<sup>100</sup> One can only imagine what would be the situation if the Council had not decided to “advance the rule of law”.

### 3.2 *The Commission*

Overall, the Commission’s record since 2016 is one of constantly acting in a too little too late fashion. This is not to say that the Commission should not be commended for activating its pre-Article 7 and Article 7(1) TEU procedures. These two steps were absolutely warranted. Indeed, “the intensity and repeated nature of Poland’s ruling party attacks on the most basic tenets of the rule of law [were] *unprecedentedly aggressive* and *in obvious breach* of the Polish Constitution ... With its neo-Soviet approach to the division of powers, Poland is already closer to Belarus in the structure of its institutions than it is to any other European state.”<sup>101</sup> One must also commend the quality of the Commission’s legal assessments it produced under these two procedures.

However, the Commission, in its capacity as Guardian of the Treaties, may be criticised for waiting almost two years before activating Article 7(1) TEU notwithstanding the multiple instances of bad faith and gross violations of the principle of loyal cooperation by Polish authorities, which were already manifest by the end of 2016.<sup>102</sup> The Commission’s faith in dialogue was similarly as naïve as it was misplaced. Indeed, it had been correctly pointed out at the time, based on the Commission’s prior failure to stop Hungary’s descent into authoritarianism, that any persistent attempt at dialoguing with bad faith autocratic minded authorities was futile and bound to fail in a situation where systemic violations of EU values form part of a governmental plan to *deliberately* set up an ‘illiberal’ aka authoritarian regime.<sup>103</sup> The Commission’s worst mistake was however by far its persistent failure to launch any infringement action until 2018. This failure is due to the Commission’s mistaken political belief that this would exacerbate the situation when this only gave more time to Polish authorities to change the facts on the ground, coupled with the Commission’s long-held mistaken legal

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<sup>100</sup> Council, *EU Action Plan on Human Rights and Democracy 2020-2024*, 12848/20, 18 November 2020, Action 1.5.a, p. 16.

<sup>101</sup> D. Kochenov, L. Pech, K.L. Scheppele, “The European Commission’s Activation of Article 7: Better Late than Never?”, *VerfBlog*, 23 December 2017, <https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never>

<sup>102</sup> See L. Pech, “Systemic Threat to the Rule of Law in Poland: What should the Commission do next?”, *VerfBlog*, 31 October 2016: <https://verfassungsblog.de/systemic-threat-to-the-rule-of-law-in-poland-what-should-the-commission-do-next>

<sup>103</sup> See D. Kochenov and L. Pech, “Better late than never: On the European Commission’s Rule of Law Framework and its first activation” (2016) 54(5) *Journal of Common Market Studies* 1062, pp. 1066-1067.

assumption that the Treaties would not allow for infringement action(s) directly targeting governmental attacks on judicial independence on the basis of Article 19(1) TEU.<sup>104</sup>

In its seminal ruling in the “Portuguese judges” case,<sup>105</sup> the ECJ made clear to the European Commission that its previous interpretation of Article 19(1) TEU was mistaken which led the Commission to seemingly and finally accept the complete failure of its repeated dialogue attempts with Polish authorities and the need to launch infringement actions. The Commission did so twice in 2018 followed by a third one in 2019 and a fourth one in 2020. This means less than one infringement action per year on average since the beginning of Poland’s rule of law crisis. To put this in broader perspective, this meant in 2019 only one new infringement action to defend judicial independence launched by the Commission out of a total of 797 new infringement actions launched the same year. Furthermore, only the Commission’s first two infringement actions dealing with new (arbitrary) retirement rules in respect of Supreme Court judges and ordinary court judges and prosecutors have so far resulted in two ECJ rulings on the merits and which will be analysed in this paper’s next Section.

While some enforcement is better than no enforcement, one may nonetheless be extremely critical of the repeated failure of the Commission to enforce EU requirements relating to judicial independence *promptly* and *meaningfully* by targeting *all* rather than some of the captured institutions which have been used by Polish authorities to legalise the systemic violation of EU rule of law standards and organise the systematic persecution of Polish judges and prosecutors unwilling to be complicit in this process.

In this respect, 2020 was for instance yet another year of acting in a too little too late fashion<sup>106</sup> when time is absolutely of the essence.<sup>107</sup> Indeed, in twelve months, the Commission was only able to lodge a single application for interim measures with the ECJ regarding Poland’s

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<sup>104</sup> The launch of infringement actions based inter alia on Article 19(1) TEU to protect the rule of law had been previously advocated by Kochenov, Scheppele and one of the present authors. See e.g. Kochenov and Pech, “Better late than never”, *ibid.*, p. 1065; see also L. Pech et al., “An EU mechanism on democracy, the rule of law and fundamental rights – Annex I (EPRS study)”, PE 579.328, Apr. 2016, at 200 (use of infringement actions based on Art. 2 TEU in conjunction with Arts. 4(3) and/or 19(1) TEU is presented as one of the options the Commission should explore in order to better protect the rule of law in the EU).

<sup>105</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117. For further analysis, see L. Pech and S. Platon, “Judicial independence under threat: The Court of Justice to the rescue in the ASJP case” (2018) 55 *Common Market Law Review* 1827.

<sup>106</sup> L. Pech, K.L. Scheppele, W. Sadurski, “Before It’s Too Late: Open Letter to the President of the European Commission regarding the Rule of Law Breakdown in Poland”, *VerfBlog*, 28 September 2020, <https://verfassungsblog.de/before-its-too-late>

<sup>107</sup> A. Bodnar, P. Filipek, “Time Is of the Essence: The European approach towards the rule of law in Poland should not only focus on budgetary discussions”, *VerfBlog*, 30 November 2020, <https://verfassungsblog.de/time-is-of-the-essence>

“Disciplinary Chamber” (hereinafter: DC) and launch a single infringement action with respect to Poland’s muzzle law. To make matters worse, the Commission failed to react for months in the face of repeated violations of the ECJ order of 8 April 2020 which granted the interim measures the Commission requested.<sup>108</sup> When finally shamed into action following inter alia the unusual statement by a sitting ECJ judge making it publicly clear that the ECJ order was being violated,<sup>109</sup> the Commission, instead of returning to the ECJ to ask for the imposition of a daily penalty payment, went for the least possibly effective way forward by adopting an additional letter of formal notice on 3 December 2020 in connection to its pending action against the “muzzle law”.<sup>110</sup> While we do fully agree with the Commission’s assessment that Poland continues to violate EU law by allowing the DC “to decide on further matters which directly affect judges”,<sup>111</sup> including cases for the lifting of judicial immunity, the Commission ought to have returned to the ECJ directly and request it to fine Polish authorities for their violation of the order of April 2020 as the Commission had indeed done in the past.<sup>112</sup>

Adding insult to injury, the Commission has continued to fail to project any sense of urgency in respect of what is, in our view, the most flagrant and systemic violation of the most fundamental principles underlying the EU legal order committed by a Member State in this history of EU law. This is indeed what the Commission itself compellingly demonstrated in its letter of formal notice adopted on 29 April 2020 in which it states that the muzzle law (i) *increases* the already existing possibility to use the disciplinary regime as a system of political control of the content of judicial decisions; (ii) *prevents* Polish courts from fulfilling their obligation to apply EU law or request preliminary rulings from the ECJ; (iii) *prevents* Polish courts from assessing, in the context of cases pending before them, the power to adjudicate cases by other judges; (iv) *violates* the right to respect for private life and the right to the protection of personal data of judges by requiring them to disclose specific information about their non-professional activities.<sup>113</sup>

Considering its own damning assessment, one would have thought that the Commission would have done its utmost bring the “muzzle law” to the ECJ as quickly as possible. Yet one would

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<sup>108</sup> Case C-791/19 R, *Commission v. Poland*, EU:C:2020:277.

<sup>109</sup> See L. Pech, “Protecting Polish judges from Poland’s Disciplinary “Star Chamber”: *Commission v. Poland* (Interim proceedings)” (2020) 58 *Common Market Law Review* 137, p. 160.

<sup>110</sup> European Commission, *Rule of Law: Commission follows up on infringement procedure to protect judicial independence of Polish judges*, INF/20/2142, 3 December 2020.

<sup>111</sup> *Ibid.*

<sup>112</sup> See Case C-441/17 R, EU:C:2017:877 and the analysis of T. Konciewicz, “The Białowieża case. A Tragedy in Six Acts”, *VerfBlog*, 17 May 2018, <https://verfassungsblog.de/the-bialowieza-case-a-tragedy-in-six-acts>

<sup>113</sup> European Commission, *Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland*, IP/20/772, 29 April 2020. The Reasoned Opinion in this case was adopted six months later: European Commission, *Rule of Law: European Commission takes next step in infringement procedure to safeguard the independence of judges in POLAND*, INF/20/1687, 30 October 2020.

have been wrong to think so. To briefly demonstrate the extent of the von der Leyen Commission's procrastination,<sup>114</sup> one may compare its record to the Juncker Commission's handling of the Polish law relating to the attempted purge of the Supreme Court:

**“Supreme Court Purge Law”** adopted on 8 December 2017 and amended on 10 May 2018  
 LFN adopted on 2 July 2018  
 Reasoned opinion adopted on 14 August 2020  
 Referral to the ECJ announced on 24 September 2018

**Total: Less than 10 months for action to reach ECJ from date of adoption**

**“Muzzle Law”** adopted on 20 December 2019  
 LFN adopted on 29 April 2020  
 Reasoned opinion adopted on 30 October 2020  
 Additional LFN adopted on 3 December 2020 and reasoned opinion adopted on 27 January 2021

**Total: TBC as no ECJ referral yet at the time of finalising this article in February 2021**

This is not to say that the Juncker Commission is beyond reproach. Far from it. Indeed, as previously mentioned, when looking at the overall number of infringement actions ever since the pre-Article 7 procedure was activated in January 2016, we reach a dismal average of *less than one action per year* to project the rule of law in its judicial independence dimension. This is just irresponsible considering the substance, sustained nature and volume of the violations of the rule of law deliberately organised by Polish authorities since the end of 2015.

Instead of always looking for mostly spurious reasons not to act or further delay action, the Commission ought to urgently launch several infringement actions on the following issues:

- (i) The unlawfully composed “Constitutional Tribunal” in relation to the violation of the EU Treaties it committed in the two cases highlighted above so as to unlawfully prevent the application of the ECJ judgment in *AK*,<sup>115</sup>
- (ii) The unlawfully composed and unconstitutionally set up new NCJ due to its role in repeatedly undermining judicial independence and presiding over flagrantly

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<sup>114</sup> L. Pech, W. Sadurski, K.L. Scheppele, Open Letter to the President of the European Commission regarding Poland's “Muzzle Law”, *VerfBlog*, 9 March 2020, <https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission-regarding-polands-muzzle-law>

<sup>115</sup> Joined Cases C-585/18, C-624/18 and C-625/18, *AK e.a. (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982.



unlawful judicial appointments and its own lack of independence from executive and legislative authorities;

- (iii) The ECPAC “since its composition suffers from the same flaws”<sup>116</sup> as the DC while the ECPAC has been unlawfully granted the sole competence to rule on issues regarding judicial independence;
- (iv) The unlawful appointment of the current individual acting as First President of Poland’s Supreme Court;
- (v) The special unit established in 2016 within the national prosecutor’s office tasked with investigating judges and prosecutors,<sup>117</sup> as well as the special team of disciplinary commissioners<sup>118</sup> set up under Poland’s new disciplinary regime for judges as they both flagrantly violate EU law by inter alia failing to demonstrate any degree of operational and investigative independence as required under EU law;<sup>119</sup>
- (vi) The adoption of unlawful ministerial instructions<sup>120</sup> which aim to create a chilling effect so as to dissuade Polish judges from complying with i.a. the ECJ judgments in the cases of *Celmer*<sup>121</sup> and *AK*<sup>122</sup> with the implicit threat of disciplinary proceedings,<sup>123</sup> which could lead to (unlawful) dismissals, underlying these instructions.

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<sup>116</sup> European Parliament resolution of 17 September 2020, op. cit., para. 23.

<sup>117</sup> M. Jałoszewski, “The National Public Prosecutor’s Office is prosecuting seven judges for taking decisions which favour an oppressed prosecutor”, *Rule of Law in Poland*, 17 December 2020, <https://ruleoflaw.pl/the-national-public-prosecutors-office-is-prosecuting-seven-judges-for-taking-decisions-which-favour-an-oppressed-prosecutor/>

<sup>118</sup> M. Jałoszewski, “Half a million for prosecuting defiant judges. The Law and Justice authority is throwing money at Ziobro’s disciplinary commissioners”, *Rule of Law in Poland*, 16 November 2020, <https://ruleoflaw.pl/half-a-million-for-prosecuting-defiant-judges/>

<sup>119</sup> See Opinion of AG Bobek in Joined Cases C-83/19, C-127/19, C-195/19 et al, EU:C:2020:746.

<sup>120</sup> See judgment of Amsterdam Court in respect of a European Arrest Warrant received from Poland (NL:RBAMS:2021:420) and in which the Dutch Court applied the ECJ judgment in Joined Cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie*, EU:C:2020:1033. This ECJ judgment is analysed *infra* in Section 4.2.

<sup>121</sup> Case C-216/18 PPU, *LM*, EU:C:2018:586.

<sup>122</sup> Joined Cases C-585/18, C-624/18 and C-625/18, op. cit.

<sup>123</sup> For further details, see THEMIS, *Response of the Polish authorities to the CJEU judgment of 19 November 2019*, 31 December 2020: [http://themis-sedziowie.eu/wp-content/uploads/2021/01/wer\\_Response-of-Polish-authorities-to-CJEU-judgement\\_wer11\\_01\\_2020\\_FC\\_wer-1\\_RW\\_201220-2.pdf](http://themis-sedziowie.eu/wp-content/uploads/2021/01/wer_Response-of-Polish-authorities-to-CJEU-judgement_wer11_01_2020_FC_wer-1_RW_201220-2.pdf)

In addition, it would be good to see the Commission ceasing to defend the most possibly restrictive interpretation of the scope of application of EU law in pending preliminary ruling cases as it has done most recently in Case C-824/18 which concerns a Polish law excluding the possibility for legal review of the (unconstitutionally established) NCJ's assessment of judicial candidates to the Supreme Court.<sup>124</sup> This gives the impression of a Guardian of the Treaties keen not to do its job by almost systematically refusing to adopt a rule of law enhancing interpretation of EU law in judicial independence preliminary cases.

The von der Leyen Commission has a choice: Either take its job as Guardian of the Treaties seriously or face the embarrassment of seeing more national parliaments follow the lead of the Dutch Parliament which required the Dutch government to report back by 1 February 2021 on the possible launch of an infringement action under Article 259 TFEU,<sup>125</sup> which was of the one of the recommendations we made in January 2017.<sup>126</sup> Unfortunately, the Dutch government has since decided to hide behind the Commission's reasoned opinion of 27 January 2021 and the (alleged) lack of support from other national capitals to a joint Article 259 action to delay any decision on this front. In the meantime, the Commission has seemingly decided to rewrite history and is now claiming that they "have opened many infringement procedures when we saw a clear breach of the Treaties" while also showing "determination by bringing those cases to the European Court of Justice."<sup>127</sup> In reality, as noted above, the Commission has brought *less than one infringement action per year* to defend the rule of law in Poland since the start of Poland's rule of law crisis. They have furthermore refused to acknowledge and react to the

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<sup>124</sup> To give a single example, contrary to the Commission's (restrictive) submission (para. 40: "the second subparagraph of Article 19(1) TEU does not preclude national provisions such as those in the main proceedings, save for a structural rupture in the appointment process, capable of putting in doubt the independence of that candidate after appointment. As a consequence, the adoption of a national provision which causes actions seeking judicial review of such resolutions to be discontinued by operation of law (Article 3 of the Law of 26 April 2019) is not precluded by Article 19(1) TEU"), AG Tanchev correctly argued in our view that Article 19(1) TEU has direct effect and can be used by the referring court to disapply *inter alia* the Law of 26 April 2019, which was introduced to exclude the possibility for legal review of the Polish NCJ's assessment of judicial candidates to the Supreme Court, and declare itself competent to rule on the cases in the main proceedings in the legal framework which was applicable before the adoption of that Law: Opinion of AG Tanchev in Case C-824/18, *AB and others*, EU:C:2020:1053.

<sup>125</sup> See generally K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union (2021) *Yearbook of European Law* 1.

<sup>126</sup> L. Pech and P. Wachowicz, "1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)", *VerfBlog*, 17 January 2019, <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii>

<sup>127</sup> Speech of Vice-President Jourová at a high-level online event of the RECONNECT research project, *Towards a Stronger EU. Democratic Resilience and Rule of Law*, 2 February 2021: [https://ec.europa.eu/commission/commissioners/2019-2024/jourova/announcements/speech-vice-president-jourova-high-level-online-event-reconnect-research-project-headed-catholic\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/jourova/announcements/speech-vice-president-jourova-high-level-online-event-reconnect-research-project-headed-catholic_en)

nullification of the ECJ judgment in *AK* and the repeated violations of the ECJ order of 8 April 2020 regarding the DC.<sup>128</sup> Furthermore, not a single infringement action to protect judicial independence in any other EU country has been launched by the Commission at a time where the ECJ, in an unprecedented development, has received more than forty requests for a preliminary ruling raising judicial independence issues from Polish but also Romanian,<sup>129</sup> Hungarian<sup>130</sup> and Maltese<sup>131</sup> judges.

#### 4. Defending Judicial Independence while Denying Reality to Save Mutual Trust: The Court of Justice's Mixed Contribution

With the Commission finally coming to the realisation in July 2017<sup>132</sup> that dialogue with Polish authorities was leading nowhere and the welcome but belated combined use of the infringement procedure and interim relief procedure in September 2018,<sup>133</sup> the Court was at last finally able to step in. Its two infringement judgments and three orders to date have helped limiting the amount of irreparable damage done to judicial independence in Poland.<sup>134</sup> The same cannot be said, however, of the Court's judgments in preliminary ruling cases. Indeed, in this context, the Court appears to date reluctant to take full account of the structural reality its own infringement

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<sup>128</sup> One may therefore be less than convinced by Vice-President Jourová's claim that the Commission "will not accept half-measures or feet-dragging when it comes to implementing the rulings of the Court", *ibid.*

<sup>129</sup> Joined Cases C-83/19, C-127/19 and C-195/19, *Asociația 'Forumul Judecătorilor din România' and others*; Case C-291/19, *SO*; Case C-355/19, *Asociația 'Forumul Judecătorilor din România' and others* (judgment pending at time of writing). In his Opinion of 23 December 2020, EU:C:2020:746, AG Bobek argued *inter alia* that the national provisions on the establishment of a specific prosecution section with exclusive jurisdiction for offences committed by members of the judiciary are contrary to EU Law. It is important to stress in this respect that the European Commission has never launched a single infringement action in respect of the rule of law situation in Romania.

<sup>130</sup> Case C-564/19, *IS* (judgment pending at time of writing). It is worth emphasising that the European Commission is yet to launch a single infringement action directly based on the EU principle of judicial independence as regards Hungary. Worse, the Commission failed to do so even when faced with a flagrant violation of Article 19(1) TEU and Article 267 TFEU by the Prosecutor General acting *de concert* with Hungary's (captured) Supreme Court. For further analysis, P. Bárd, "Luxembourg as the Last Resort: The Kúria's Judgment on the Illegality of a Preliminary Reference to the ECJ", *VerfBlog*, 23 September 2019, <https://verfassungsblog.de/luxemburg-as-the-last-resort>

<sup>131</sup> Case C-896/19, *Repubblika* (judgment pending at time of writing). In his Opinion of 17 December 2020, EU:C:2020:1055, AG Hogan suggested to the ECJ that it finds Article 19(1) TEU, read in the light of the right to a fair and effective trial under the Charter, to be applicable when a national court is assessing the validity of a procedure for the appointment of judges such as that provided for by the Maltese Constitution

<sup>132</sup> European Commission, *European Commission launches infringement against Poland over measures affecting the judiciary*, Press release IP/17/2205, 29 July 2017.

<sup>133</sup> European Commission, *Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court*, Press release IP/18/5830, 24 September 2018.

<sup>134</sup> See generally D. Kochenov and P. Bárd, "The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU" (2019) 1 *European Yearbook of Constitutional Law* 243.

judgments and orders have accurately depicted seemingly to save the principle of mutual trust. One cannot however save mutual trust when judicial independence has been *structurally* disabled. This approach may also seem unwise as it seriously increases the risk of inciting bottom-up resistance from national courts<sup>135</sup> by forcing them to continue to apply EU mutual trust based mechanisms regardless of Poland's authoritarian reality.

#### 4.1 *The Court's strong record in infringement cases*

With the Commission progressively emerging from its unproductive dialogue phase when it launched in first infringement action regarding a new Polish law on the organisation of ordinary courts, the ECJ was finally able to adopt two decisive interim orders and two decisive judgments on the merits.



<sup>135</sup> See e.g. the judgment from the Amsterdam District Court holding that Polish courts are no longer independent from the Polish government and parliament, 31 July 2020, NL:RBAMS:2020:3776.

In a context of repeated threats of non-compliance made by Polish elected officials, compliance with these orders and judgments has however inexorably decreased with the point of no return reached at the end of 2019 when the “muzzle law” was adopted. This entry into force of this law, which legalised the systemic violation of ECJ’s rule of law case law, was followed by the de facto and de jure nullification in 2020 of the ECJ preliminary judgment in *AK* by the unlawfully composed CT and the unlawful DC.<sup>136</sup>

(i) First ever suspension of arbitrary retirement rules targeting Supreme Court judges: Case C-619/18 R, *Commission v. Poland (Independence of the Supreme Court)*<sup>137</sup>

On 2 July 2018, the Commission launched an infringement procedure against Poland in respect of the new law on the Supreme Court which, inter alia, retroactively lowered the retirement age of Supreme Court judges, including the First President of the Supreme Court notwithstanding the fact that her 6-year mandate was explicitly guaranteed in the Constitution. Rather than emphasising non-discrimination based on age as it did previously in a broadly similar previous instance when a purge of senior Hungarian judges took place in 2012,<sup>138</sup> the Commission rightly submitted at last that the law in dispute was not compatible with Article 19(1) TEU read in connection with Article 47 CFR. In the absence of any satisfactory answers from Polish authorities, the Commission referred Poland to the Court and requested it to order interim measures pending the delivery of a judgment on the merits.

The most noteworthy and welcome aspect of the Commission’s application for interim measures was the request that the Court orders measures which would *restore* Poland’s Supreme Court to its situation *before* 3 April 2018 when the contested measures were adopted. The Court obliged and ordered the immediate suspension of the application of relevant measures. The Court’s reasoning in its final order of 17 December 2018 is particularly rich and instructive. The reasoning’s most striking element is arguably the unprecedented emphasis on the imperative need to protect the general interest of the EU in the proper functioning of its legal order and the link made between the preservation of the independence of Poland’s Supreme Court and the preservation of the proper functioning of the EU legal order.

In the present instance, the practical consequences of the ECJ order were as welcome as they were decisive: A number of judges previously forcibly retired immediately returned to work while those who had previously refused to stop working, including the First President of the

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<sup>136</sup> See *infra* Section 4.2.

<sup>137</sup> Case C-619/18 R, *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2018:1021.

<sup>138</sup> U. Belavusau, ‘On Age Discrimination and Beating Dead Dogs: *Commission v. Hungary*’ (2013) 50 *Common Market Law Review* 1145

Supreme Court, were vindicated in their (brave) decisions to previously disregard the (blatantly unconstitutional) law now suspended by the ECJ (as a matter of EU law) in a context where they had been subject to an unprecedented state-sponsored smear and intimidation campaign.

(ii) First ever violations of the second subparagraph of Article 19(1) TEU: Case C-192/18, *Commission v Poland (Independence of the ordinary courts)*<sup>139</sup> and Case C-619/18, *European Commission v Poland (Independence of the Supreme Court)*<sup>140</sup>

In 2019, the Court issued its first two judgements on the merits regarding the two infringement cases launched by the Commission on 29 July 2017 (Case C-192/18) and 2 July 2018 (C-619/18). The Court found against Polish authorities in these two instances, which was not in the slightest surprising considering the obvious arbitrary nature of the changes made in relation to the retirement regime of Supreme Court judges, ordinary court judges and public prosecutors.

In Case C-619/18, which the Court decided before Case C-192/18, the Court, *for the very first time*, reviewed the compatibility of a set of national measures targeting the judiciary, misleadingly sold to the public as “judicial reforms”, with the principle of judicial independence in the context of an infringement action. This is also the Court’s first judgment which unambiguously rejected the validity of the claim, repeated ad nauseam by Polish and Hungarian authorities, that the ECJ would allegedly lack the jurisdiction to review national “reforms” of the national justice systems. To the best of our knowledge, this was also the first time the ECJ described the principle of the irremovability of judges as being of “cardinal importance”.<sup>141</sup>

As these infringement rulings having been comprehensively analysed elsewhere,<sup>142</sup> let us only highlight one additional aspect: Not only do these judgments demonstrate the ludicrous nature of the justifications put forward by Polish authorities – to give a single example, the lowering of the retirement age of female ordinary court judges was justified “on account of their particular social role connected with motherhood and child raising” – they also show their total disregard for the EU principle of loyal cooperation.

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<sup>139</sup> EU:C:2019:924.

<sup>140</sup> EU:C:2019:531.

<sup>141</sup> Case C-619/18, op. cit., para. 79.

<sup>142</sup> See L. Pech and S. Platon, “The beginning of the end for Poland’s so-called “judicial reforms”?” *RECONNECT Blog*, 2 July 2019, <https://reconnect-europe.eu/blog/pech-platon-poland-ecj-rule-of-law-reform>; M. Coli, “The Judgment of the CJEU in *Commission v Poland II (C-192/18)*”, *Diritti Comparati Blog*, 21 November 2019, <https://www.diritticomparati.it/judgment-cjeu-commission-v-poland-ii-c-192-18-resurgence-infringement-procedures-tool-enforce-rule-law>; P. Petra Bárd and A. Sledzinska-Simon, “On the principle of irremovability of judges beyond age discrimination: *Commission v. Poland*” (2020) 57 *Common Market Law Review* 1555.

Indeed, the Court comes close to publicly stating that the Polish government sought to deliberately mislead it. One may for instance refer to paragraph 82 of the ruling where the Court expresses its “serious doubts as to whether the reform of the retirement age of serving judges” of the Supreme Court was made in pursuance of the objectives rather than “with the aim of side-lining a certain group of judges of that court”. The Court subsequently invokes the doubts that “surround the true aims of the reform being challenged”.<sup>143</sup> The blunt nature of the Court’s judgment and the unambiguous rejection of the legitimacy of the objectives officially put forward by the Polish government make quite a welcome contrast with the approach of the Court in Case C-286/12, *Commission v Hungary*. Considering the lack of serious and deliberately misleading nature of the claims made by the Polish government, the Court had no choice but to find that Poland had violated the second subparagraph of Article 19(1) TEU.

The Court deplored – albeit implicitly – a similar lack of good faith from Polish authorities in its judgment in Case C-192/18. Unsurprisingly, therefore, the Court held that the Polish rules adopted in 2017 relating to the retirement age of prosecutors and judges of the ordinary courts, coupled with the new rules governing a possible extension to the period of active services of those judges, are not compatible with the requirements relating to the independence of judges and in particular the principle of irremovability of judges.<sup>144</sup> The Commission’s additional submission that Poland had also infringed Article 157 TFEU and Directive 2006/54 due to the fact that the rules in dispute fixed different retirement ages directly on the basis of sex, was also upheld by the Court.

(iii) First ever suspension of a disciplinary body masquerading as a court: Case C-791/19 R, *Commission v. Poland (Lack of independence of the DC)*<sup>145</sup>

On 8 April 2020, the Court’s Grand Chamber granted the Commission’s request to order the suspension of the application of the national provisions relating to the powers of Poland’s “Star Chamber” regarding disciplinary cases concerning judges. As noted by one of the present authors, this order is both significant and unprecedented: “It is significant, because it makes clear that EU law prohibits Member States from setting up national disciplinary bodies which, themselves, fail to satisfy the guarantees inherent in effective judicial protection. It is

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<sup>143</sup> Case C-619/18, *op. cit.*, para. 87.

<sup>144</sup> This infringement action did not, however, target Polish Minister of Justice’s arbitrary power to appoint and dismiss presidents of courts in total impunity, an obvious threat to judicial independence and one of the core issues highlighted in the Commission’s Article 7(1) TEU proposal. For a critique of this seemingly deliberate and in our view, irresponsible omission, see M. Taborowski, ‘The Commission takes a step back in the fight for the Rule of Law’, *VerfBlog* 3 January 2018, <https://verfassungsblog.de/the-commission-takes-a-step-back-in-the-fight-for-the-rule-of-law>

<sup>145</sup> EU:C:2020:277.

unprecedented, to the extent that the ECJ has demanded the immediate suspension [...] of the processing of all disciplinary cases regarding judges pending before a body which views itself as a court notwithstanding multiple judgments to the contrary by three chambers of Poland's Supreme Court."<sup>146</sup>

The Court's order however suffers from one key weakness which derives from the Commission's incomprehensible failure to pre-empt an arbitrary use of the procedure to waive judicial immunity under the auspices of the DC acting hand in hand with Poland's National Prosecution Office. In this respect, it is important to recall that in 2016 the office of Public Prosecutor General was merged with that of the Minister of Justice on the basis of a law described by the Venice Commission as "unacceptable in a State governed by the rule of law as it could open the door to arbitrariness".<sup>147</sup> The ECJ could also have prevented this entirely predictable abusive lifting of judicial immunity by tighter language regarding how the notion of disciplinary proceeding must be understood; by better emphasising that measures which may lead to "any dismissal of those who have the task of adjudicating"<sup>148</sup> form part of the disciplinary regime; and holding that the processing of *all* cases pending before the DC must be suspended as it appears, *prima facie*, to be a body *not* established by law.<sup>149</sup>

That said, it has always been ludicrous to pretend that the waiving of judicial immunity by the DC does not amount to a violation of the ECJ order as this would allegedly amount to a procedure of a criminal nature. Suffice it to point out in this respect that the DC has continued to impose *disciplinary* sanctions when lifting the judicial immunity of judges who happened – pure coincidence no doubt – to be the most vocal defenders of judicial independence. It was good but still exasperating to see the Commission waking up about six months too late when it finally issued an additional letter of formal notice on 3 December 2020 making clear that Poland is violating EU law by allowing the DC to decide matters such as cases for the lifting of immunity. Meanwhile, the number of victims of Poland's rule of law breakdown continues to increase. Had the Commission applied for interim measures at the time it referred Poland's new disciplinary regime for judges to the ECJ on 25 October 2019 (instead of doing so on 23 January 2020) *and* requested the suspension of *all* proceedings regarding judges before the

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<sup>146</sup> L. Pech, "Protecting Polish judges from Poland's Disciplinary "Star Chamber": *Commission v. Poland* (Interim proceedings)" (2020) 58 *Common Market Law Review* 137, pp. 137-138.

<sup>147</sup> Venice Commission, Opinion on the Act on the Public Prosecutor's Office as amended, Opinion 892/2017, 11 December 2017, para. 97.

<sup>148</sup> C-619/18, *op. cit.*, para. 77.

<sup>149</sup> See generally regarding the flagrant unconstitutional nature of this body established by Poland's current ruling coalition, W. Wróbel, "The Disciplinary Chamber of the Supreme Court as an exceptional court in the meaning of Article 175, para. 2 of the Polish Constitution" (English translation of article first published in Polish in the journal of the Polish Supreme Bar Council, no 1-2/2019, pp. 17-34), [http://themis-sedziowie.eu/wp-content/uploads/2020/01/Włodzimierz-Wróbel\\_Disciplinary-Chamber-as-exceptional-court\\_def.pdf](http://themis-sedziowie.eu/wp-content/uploads/2020/01/Włodzimierz-Wróbel_Disciplinary-Chamber-as-exceptional-court_def.pdf)



(unconstitutional) DC, we could have avoided continuing irreparable damage being done to the rule of law in Poland, not to mention prevented many judges from being persecuted and unlawfully sanctioned by the DC which, to this day, continues to unlawfully function.

#### 4.2 *The Court's weaker record in preliminary ruling cases*

No more than *two* judgments on the merits have been issued by the Court of Justice in answer to the total of *thirty five* requests received from Polish courts in the period 2016-2020: (i) Joined Cases C-585/18, C-624/18 et C-625/18, *A.K. e.a. (Independence of the disciplinary chamber of the Supreme Court)*;<sup>150</sup> (ii) Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny*.<sup>151</sup> When one compares the number of national requests for a preliminary ruling raising violations of EU judicial independence requirements to the number of infringement actions launched by the Commission, it is difficult not to interpret the quantitative difference as further evidence of the Commission's reluctance to fulfil its duties as Guardian of the Treaties. Be that as it may, if one adds the national requests for a preliminary ruling received from judges from other EU countries in relation to EAW requests received from Poland, two additional preliminary rulings must be mentioned, the last one of which will be analysed below: Case C-216/18 PPU, *LM*<sup>152</sup> and Joined Cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie*.<sup>153</sup>

As the diagram below shows, one can however expect a significant additional number of preliminary rulings to be issued by the ECJ considering the unprecedented number of Article 267 TFEU requests the Court has received from Polish judges.

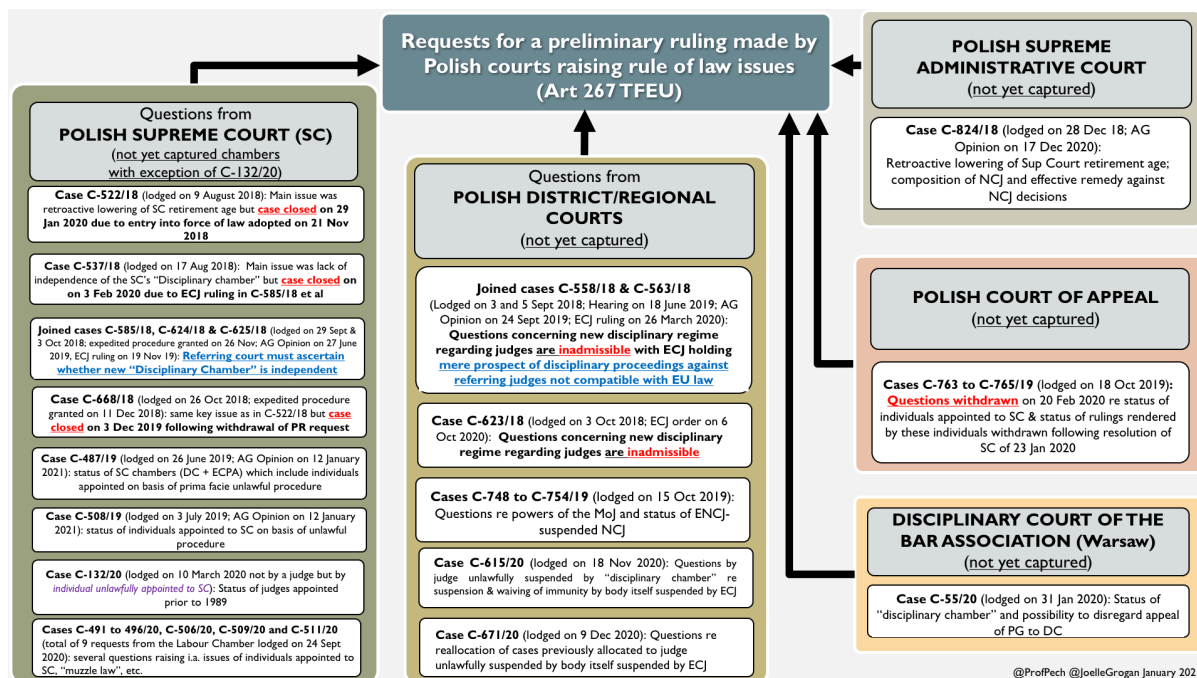
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<sup>150</sup> EU:C:2019:982.

<sup>151</sup> EU:C:2020:234.

<sup>152</sup> EU:C:2018:586.

<sup>153</sup> EU:C:2020:1033.



These numerous national requests will offer the ECJ additional opportunities to fine-tune its case law and hopefully, decisively address unaddressed issues such as the lack of independence of the Poland's new ECPAC and the status of the individuals (unlawfully) appointed to the Supreme Court.

(i) *Joined Cases C-585/18, C-624/18 and C-625/18 AK e.a. (Independence of the Disciplinary Chamber of the Supreme Court)*<sup>154</sup>

In a seminal (preliminary) ruling comprehensively analysed elsewhere,<sup>155</sup> the Grand Chamber of the ECJ meticulously explained how the referring chamber of Poland's Supreme Court can ascertain whether the DC is sufficiently independent to constitute a court within the meaning of EU law. In the same preliminary ruling, the ECJ also explains how to ascertain the independence (or lack thereof) of the neo-NCJ – another body which has been highlighted as problematic by the European Commission and many other organisations.<sup>156</sup> Overall, the ECJ's interpretation makes it implicitly obvious that neither the DC nor the NCJ satisfy the basic

<sup>154</sup> EU:C:2019:982.

<sup>155</sup> M. Krajewski and M. Ziółkowski, "EU judicial independence decentralized: A.K." (2020) 57 Common Market Law Review 1107.

<sup>156</sup> See *supra* Section 2.3.

requirements of independence established by EU law, as previously made explicitly clear by Advocate General Tanchev.<sup>157</sup>

Unsurprisingly, the referring court (the Labour and Social Security Chamber of the Supreme Court) subsequently established on 5 December 2019<sup>158</sup> that the neo-NCJ does not offer a sufficient guarantee of independence from the legislative and executive authorities before ruling that the DC does not constitute a “court” within the meaning of EU law and therefore not a court within the meaning of Polish law as well. Polish authorities have however refused to obey this judgment and subsequent judgments, including a solemn resolution adopted on 23 January 2020 by the (then still independent) chambers of Poland’s Supreme Court. As previously outlined, this *deliberate* policy of violating any judgment which would force them to respect the principle of judicial independence culminated in the de facto followed by the de jure nullification of the ECJ judgment in *AK* respectively in April and September 2020 by two captured bodies masquerading as courts.

Considering the pattern of non-compliance with ECJ/national judgments Polish authorities do not approve of, not to forget the systemic harassment of judges who seek to uphold Polish and EU judicial independence requirements, one may argue that the ECJ should have answered the questions it received from the (under siege) referring judges more explicitly. Indeed, while judicial self-restraint can be a virtue in fair weather conditions, it is not one when the mere action of asking question to the ECJ and/or applying EU law can quickly result in a judge being the subject of (unlawful) disciplinary investigations and proceedings following by (unlawful) sanctions such as a pay cut and an indefinite suspension. By not directly and more explicitly addressing the questions raised by the referring court, the ECJ offered Polish authorities a pretext to disregard national judgments seeking to apply *AK* by claiming that they were not doing so correctly while offering captured bodies such as the ECPAC the opportunity to apply *AK* in bad faith and holding that the DC satisfies EU judicial independence requirements.<sup>159</sup> In the end, as previously noted, the DC decided to formally neutralise the application of *AK* in Poland in September 2020 on the basis of ludicrous procedural arguments leading it to absurdly conclude that the referring court acted unlawfully when it referred questions to the ECJ.

While one must indeed accept that the jurisdiction of the ECJ in preliminary ruling cases is “narrower” than its jurisdiction within the framework of infringement actions as the Court cannot, in principle, directly apply rules of EU law to a particular case, the Court could have been more explicit to avoid any abusive bad faith interpretation by Polish authorities and their

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<sup>157</sup> Opinion of A.G. Tanchev in Joined Cases C-585/18, C-624/18 & C-625/18, *A.K.*, EU:C:2019:551.

<sup>158</sup> Case III PO 7/18.

<sup>159</sup> Resolution of 8 January 2020 in Case I NOZP 3/19, [https://ruleoflaw.pl/wp-content/uploads/2020/02/I-NOZP-3-19-2\\_English.pdf](https://ruleoflaw.pl/wp-content/uploads/2020/02/I-NOZP-3-19-2_English.pdf).

captured bodies. One could for instance think of what the ECJ did in the Sunday trading saga when in the face of conflicting applications by national judges “in an area which touched at the heart of a national tradition”,<sup>160</sup> the Court essentially put an end to these conflicting applications by answering the proportionality question itself to put an end to national judges reaching different conclusions. That said, the main culprit remains in our view the Commission which, in its capacity as Guardian of the Treaties, ought to have launched an infringement action targeting the DC two years before actually doing so in December 2020. As for the neo-NCJ, we are still waiting for the Commission to do so notwithstanding the Parliament reminded the Commission of the urgency of doing so yet again in 2020.

(ii) Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny*

This Grand Chamber judgment originates from two requests for a preliminary ruling submitted by two Polish judges. Possibly for the first time ever, these two requests were, in part, motivated by the referring judges’ “fear of retribution if they do not adjudicate in favour of the State.”<sup>161</sup> And indeed, in yet another unprecedented and sinister development, the two judges “were called to account for their decisions to submit the present requests for a preliminary ruling by way of investigation procedures.”<sup>162</sup> Subsequent to the ECJ judgment in the present case, Judge Tuleya, one of the two referring judges, was unlawfully suspended and his judicial immunity unlawfully waived by a panel of the DC,<sup>163</sup> which included a presumed member of the Ministry of Justice’s “troll farm” denounced by the Parliamentary Assembly of the Council of Europe.<sup>164</sup> In one last brave move before he was denied access to the courtroom and his case files, Judge Tuleya was able to submit a request for a preliminary ruling to the ECJ.<sup>165</sup>

While the ECJ ultimately found both requests inadmissible in Joined Cases C-558/18 and C-563/18, the Court’s reasoning is particularly instructive, with the ruling itself containing the strongest warning to date that Polish authorities must cease to threaten or expose national judges to disciplinary proceedings for submitting references for a preliminary ruling. Indeed, “the mere prospect ... of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference” violates EU law.<sup>166</sup>

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<sup>160</sup> C. Barnard, “Sunday Trading: A Drama in Five Acts” (1994) 57 *The Modern Law Review* 449, p. 452.

<sup>161</sup> AG Tanchev Opinion of 24 September 2019, EU:C:2019:775, para. 3

<sup>162</sup> *Ibid.*

<sup>163</sup> See e.g. American Bar Association Center for Human Rights, *The Case of Judge Igor Tuleya*, November 2020, [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/justice-defenders/igor-tuleya.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/igor-tuleya.pdf)

<sup>164</sup> See *supra* Section 2.5.

<sup>165</sup> See pending Case C-615/20 lodged with the ECJ on 18 November 2020.

<sup>166</sup> Joined Cases C-558/18 and C-563/18, *op. cit.*, para. 58.

As shown in Section 2 of this article, this warning has remained unheeded. Furthermore, notwithstanding the welcome warning regarding the chilling effect of disciplinary proceedings, the Court's ruling in *Łowicz* suffers from three main shortcomings. First, it may be understood as abandoning national referring judges to their fates by deciding that “not every judge in every procedure is in the position to remedy potential violations of judicial independence with a reference to Luxembourg”.<sup>167</sup> Second, it fails to adequately make clear that disciplinary *investigations* also violate EU law when they aim to dissuade judges from applying EU law, which has led authoritarian-minded authorities to deliberately leave targeted judges in limbo by delaying the formal initiation of disciplinary *proceedings*. Third, it fails to draw the logical conclusion from the Court's own observation, to support its finding of inadmissibility, that the investigation proceedings concerning the referring judges have since been closed. But “in taking note of this, the Court contradicts its own insistence on the fact that the mere prospect of being disciplined is enough to deter judges from discharging their judicial duty in a truly independent manner”.<sup>168</sup>

(iii) *Joined Cases C-354/20 PPU and C-412/20 PPU, Openbaar Ministerie*<sup>169</sup>

On 17 December 2020, the Court's Grand Chamber held that the existence of evidence of systemic or generalised deficiencies concerning judicial independence in Poland (or indeed, even evidence of an *increase* in those deficiencies) cannot in itself suffice to justify a refusal to execute European arrest warrants (EAWs) issued by Polish courts. Instead, each national court (when acting as an executing judicial authority) must continue to assess in each case whether there is a specific risk of a breach of the right to a fair trial of the person concerned should he/she be surrendered.

Notwithstanding some minor improvements such as the new emphasis on the need to “exercise vigilance” in a situation where rule of law deficiencies have increased, this ruling mostly reiterates the flawed logic of the *Celmer* ruling.<sup>170</sup> What's more, to save mutual trust, the ECJ omitted from its reasoning inconvenient facts such as the *legalisation* of the *systemic violation*

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<sup>167</sup> L. Spieker, “The Court gives with one hand and takes away with the other: The CJEU's judgment in *Miasto Łowicz*”, *VerfBlog*, 26 March 2020, <https://verfassungsblog.de/the-court-gives-with-one-hand-and-takes-away-with-the-other/>

<sup>168</sup> S. Platon, “Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: *Miasto Łowicz* (2020) 57 *Common Market Law Review* 1843, p. 1863.

<sup>169</sup> EU:C:2020:1033.

<sup>170</sup> W. van Ballegooij, P. Bárd, “The CJEU in the *Celmer* case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU”, *VerfBlog*, 29 July 2018, <https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu>

of EU judicial independence requirements organised by the muzzle law, and the DC's decision of 23 September 2020 which formally voided its own ruling in *AK*.<sup>171</sup>

By requiring national courts to implement a two-pronged case-by-case assessment before refusing any surrender, the ECJ refused to accept that “in a situation of systemic attacks *targeting the whole judicial system*, there is, by definition, *already* a “real risk” of a breach of the fundamental rights to an independent tribunal and to a fair trial in *every single case*.”<sup>172</sup> As the Irish Supreme Court diplomatically put it in a 2019 judgment, one may question whether “there is then room or need for further inquiry”<sup>173</sup> once systemic deficiencies have been found. Indeed, the Court's reasoning means that even if Poland were to become a formal dictatorship and no unanimous agreement was found to sanction Poland under Article 7(2) and (3) TEU, national courts from other EU countries would still need to assess each EAW on a case-by-case basis. EU primary law does not warrant this misguided interpretation which derives from a flawed interpretation of a *non-binding recital* of the EAW Framework Decision which was adopted *prior* the insertion of Article 7(1) TEU into the Treaties. Holding that the EU law “requirement that courts be independent precludes the possibility that they may be subject to a hierarchical constraint or subordinated to any other body” is also of no help when Polish courts are *already* subject to systemic interferences from the executive. The compliance of the *Celmer* two-step test with Article 6(1) ECHR requirements may also be questioned due inter alia to the disproportionate and unworkable burden it imposes on those subjects to EAWs.<sup>174</sup>

In our opinion, the right to a fair trial in Poland can be said to be *systematically* violated following the adoption of the muzzle law in a situation where the ECJ order of 8 April 2020 is furthermore openly violated and the ECJ judgment of 19 November 2019 formally recognised as lacking legal effect in Poland, and where disciplinary proceedings are initiated against all judges who try to execute this judgment, as a result of which one of the judges (Paweł Juszczyszyn) has already been removed from adjudicating.<sup>175</sup>

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<sup>171</sup> II DO 52/20. English translation of this (unlawful) decision is available at <<https://ruleoflaw.pl/wp-content/uploads/2020/10/Case-II-DO-52-20.pdf>>

<sup>172</sup> L. Pech, P. Wachowiec, “1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)”, *VerfBlog*, 17 January 2019, <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii>

<sup>173</sup> *The Minister for Justice and Equality and Celmer*, S:AP:IE:2018:000181.

<sup>174</sup> R. Spano, “The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary” (2021) *European Law Journal* 1, p. 16: “if confronted with an application lodged under the Convention directed at the operation of the EAW system under Article 6 of the Convention, within the context of judicial independence, the Strasbourg Court will have to determine to what extent it can take due account of the nature and purposes of the EU system of mutual recognition”.

<sup>175</sup> For further details, see THEMIS, *Response of the Polish authorities to the CJEU judgment of 19 November 2019*, op. cit.

At the very least, the burden of proof should be on the Polish judicial issuing authority.<sup>176</sup> The pragmatic concern of ensuring the proper working of the judicial cooperation system embodied by the preliminary mechanism cannot justify disregarding the *structural* violation of the principle of judicial independence, which the ECJ itself described as essential to guarantee the effective judicial protection of individual's rights under EU law. The ECJ ought instead to establish a *rebuttable* presumption that Polish courts are no longer independent. This would acknowledge reality without cutting off access to the ECJ and violating Article 6(1) ECHR requirements.

One may further consider that Polish courts can no longer be considered “judicial authorities” notwithstanding the continuing bravery of so many individual judges. We cannot however leave the right to a fair trial at the mercy of individual judges’ bravery in a situation where each Polish judge may be subject to arbitrary disciplinary sanctions for applying EU judicial independence requirements or refusing to obey ministerial instructions which compel them not to directly answer *Celmer*-related questions.<sup>177</sup> In practice, the intention of these instructions is to prohibit Polish judges from directly emailing their EU counterparts and force them to correspond via the government. One may also mention additional instructions issued in 2020 – only made public in January 2021<sup>178</sup> – which require presidents of common courts to report to the Ministry of Justice any application of the ECJ *AK* judgment and connected rulings issued by Poland’s Supreme Court. The underlying aim of this reporting system is obvious: to facilitate the initiation of disciplinary investigations should an ordinary court judge dare assessing the independence of the “judges” appointed on the back of Poland’s so-called reforms from the standpoint of EU law and/or ECHR law.<sup>179</sup> Justice cannot however be done in such a situation regardless of whether the executive directly or does not directly interfere in any specific case.

## 5. Key lessons and recommendations

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<sup>176</sup> P. Bárd, W. van Ballegooij, “The AG Opinion in the *Celmer* Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue”, *VerfBlog*, 2 July 2018, <https://verfassungsblog.de/the-ag-opinion-in-the-celmer-case-why-lack-of-judicial-independence-should-have-been-framed-as-a-rule-of-law-issue>

<sup>177</sup> An English translation of these instructions was made available via Twitter on 1 December 2020 by *Rule of Law in Poland*, a joint initiative of Wiktor Osiatyński Archive and the Civil Development Forum (FOR) in cooperation with the Helsinki Foundation for Human Rights: <https://twitter.com/RULEOFLAWpl/status/1333879241184849922?s=20>

<sup>178</sup> See English translation of this letter made available via Twitter on 11 January 2021 by *Rule of Law in Poland*: <https://twitter.com/RULEOFLAWpl/status/1348634676634771457?s=20>.

<sup>179</sup> Venice Commission, *Poland. Joint Urgent Opinion on amendments to the Law on the Common Courts, the Law on the Supreme Court, and some other laws*, Opinion No 977/2020, 22 June 2020, paras 36-37.

Considering the EU's (few) successes and (many) failures highlighted above, the following key lessons and recommendations are offered:<sup>180</sup> First, EU institutions but also national governments and parliaments must stop denying the reality of the process of democratic and rule of law backsliding currently happening if not spreading in the EU. This process represents an *existential* threat to the EU as it *structurally* undermines the *fundamental premise* on which the EU legal order is based. This is also a process which does not happen by chance. Rather, we are faced with national authorities engaged in a *deliberate* and *multifaceted process* of dismantlement and/or capture of all checks and balances, in particular courts, which results in the progressive consolidation of hybrid/electoral autocracies. The European Commission, as the Guardian of the EU Treaties, has a special responsibility in this respect. Should it continue to fail to decisively act, EU Member States, including their national courts, are likely to resort to self-help "to protect themselves from a politically compromised judiciary in a Member State where national judges are forbidden from enforcing EU rule of law standards".<sup>181</sup>

Second, dialogue with *bad faith* actors who are *deliberately* undermining the rule of law does not work. National governments professing their attachment to the rule of law while still professing the need for dialogue or presenting dialogue as the way forward cannot and should not be taken seriously. Authoritarian minded national authorities have indeed learned they can beat the EU by creating new irreversible facts on the ground while pretending to be interested in further "dialogue".<sup>182</sup> This means that the European Commission in particular must seek to *systematically* launch infringement actions *in parallel* to dialogue-based processes (such as for instance, the pre-Article 7 procedure) with the view of avoiding the creation of *faits accomplis*.

Third, the Commission must review both how it politically and legally reacts to deliberate attacks on the rule of law: Politically speaking, the Commission must *publicly, promptly* and *unambiguously* condemn flagrant threats and/or violations of the EU rule of law requirements instead of expressing euphemistic "concerns" on a regular basis. Legally speaking, the Commission must stop considering enforcement as a last resort option and restricting itself to launching infringement cases only when there is a 100% chance of winning in Luxembourg, which is why the Commission, despite winning several important cases in the past two years, has so far lost the autocratisation battle with Hungary which became the EU's first authoritarian

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<sup>180</sup> This Section borrows and summarises from L. Pech, *Written submission in response to the Rule of Law call by the Joint Committee on EU Affairs of the Houses of the Oireachtas, RECONNECT Policy Brief*, January 2021, <https://reconnect-europe.eu/publications/policy-briefs>

<sup>181</sup> L. Pech, K.L. Scheppele, W. Sadurski, "Before It's Too Late: Open Letter to the President of the European Commission regarding the Rule of Law Breakdown in Poland", *VerfBlog*, 28 September 2020, available at <https://verfassungsblog.de/before-its-too-late>

<sup>182</sup> L. Pech, D. Kochenov, B. Grabowska-Moroz and J. Grogan, "The Commission's Rule of Law Blueprint for Action: A missed opportunity to fully confront legal hooliganism", *RECONNECT blog*, 4 September 2019, <https://reconnect-europe.eu/blog/commission-rule-of-law-blueprint>



member state in 2019.<sup>183</sup> In practice, the Commission must seek to *systematically* and *proactively* initiate *accelerated* infringement actions coupled with applications for *interim* measures to avoid irreparable damage to the rule of law,<sup>184</sup> as well as promptly use Article 260 TFEU in the face of flagrant violation of ECJ judgments.

Fourth, the Commission must adopt a *holistic/systemic* enforcement approach to address the *cumulative* impact of the usually coordinated attacks for instance on national courts and the chilling effect which follows from the targeting of the most vocal and independent judges and prosecutors. This means inter alia targeting *every single legal stepping stone* on which would-be autocratic regimes build their autocratisation strategy. The Commission's failure to do so to date means that the Commission always ends up fighting yesterday's violations of the rule of law while autocrats have already replaced the challenged measures and/or captured institutions having in the meantime gangrened the judiciary from within by appointing a plethora of "fake judges" who engage in guerrilla-type tactics to torpedo any case which may bring their lack of independence to the fore and bully independent judges into submission. It is also crucial the Commission does *publically, promptly* and *strongly* react when the orders and/or judgments of the ECJ are openly violated, especially in countries subject to Article 7 TEU proceedings, if only to preserve both its authority as Guardian of the Treaties and the authority of the ECJ.

Finally, as far as the Council is concerned, it would be good to see most pro-rule of law national governments within it actively seeking to maximise Article 7(1) TEU's potential. In particular, as regards the ongoing Article 7(1) proceedings in respect of Poland and Hungary, the Council ought to organise regular, structured and more transparent hearings as well as adopt concrete recommendations with specific deadlines to be met. Should these concrete recommendations and specific deadlines be ignored, national governments, individually or in a coalition, ought to then consider launching Article 259 actions in respect of the many issues not currently the subject of infringement actions launched by the Commission. Instead, as outlined above and to date, only three confidential Article 7(1) hearings have been organised with no new hearing organised since December 2018. This is irresponsible considering the extent and irreparable nature of the damage being done to judicial independence in Poland since the Commission activated the pre-Article 7 procedure in January 2016.

## 6. Concluding remarks: The end of the road for judicial independence

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<sup>183</sup> V-Dem Democracy Report 2020: <https://www.v-dem.net/en/publications/democracy-reports/>

<sup>184</sup> *Strengthening the Rule of Law within the European Union: Diagnoses, Recommendations, and What to Avoid*, RECONNECT Policy Brief, 14 June 2019, 27p: <https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf>

According to the European Commission itself – a diagnosis it offered in 2019 prior to the adoption of this “muzzle law” – the Polish executive and legislative powers can now “interfere throughout the entire structure and output of the justice system”.<sup>185</sup> Since the Commission activated the pre-Article 7 procedure in January 2016 to then to now, the rule of law situation in Poland has since gone from bad to worse to devastating as we have now reached a stage where Polish authorities have recently engaged in a process of systemic non-compliance with ECJ but also ECHR judgments<sup>186</sup> while also relying on their unlawfully appointed “judges” to prevent more ECJ (preliminary) judgments from being issued,<sup>187</sup> in a broader context where the violation of the most fundamental legal principles underlying the EU legal order has been “legalised” by Poland’s “muzzle law”.<sup>188</sup> It follows, in our opinion, that judicial independence must now be said to have been structurally disabled by Polish authorities. This means inter alia that the individual right to an independent and impartial tribunal established by law is being systematically violated since Polish authorities can now interfere at will with judicial output using the threat or actual disciplinary/criminal proceedings and/or via their de facto control of ordinary courts, the Supreme Court and the Constitutional Tribunal.

During the last two years of its mandate (December 2017-November 2019), the European Commission under Juncker seemed to have finally accepted that dialogue with Polish authorities is both futile and harmful from the point of view of the rule of law. Instead and positively, the Commission activated Article 7(1) TEU and launched three infringement actions. Unfortunately, the Juncker Commission only applied for interim measures in a single case (C-619/18). The Juncker Commission also repeatedly refused to target key captured bodies such as the unlawfully composed “Constitutional Tribunal” and “National Council for the Judiciary” which are being routinely used to undermine judicial independence and gangrene the Polish judiciary from within.

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<sup>185</sup> 2019 European semester report for Poland, 27 February 2019, SWD(2019) 1020 final, p. 42.

<sup>186</sup> Regarding the issue of organised non-compliance with ECHR law, see most recently the case lodged by the unlawfully appointed “First President” of the Supreme Court with the unlawfully composed and presided “Constitutional Tribunal”: Case K 24/20: <https://trybunal.gov.pl/s/k-24-20>. This pending case aims to prevent Polish courts from applying the ECHR right to a tribunal established by law as interpreted most recently by the European Court of Human Rights in *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418. See H. P. Graver, “A New Nail in the Coffin for the 2017 Polish Judicial Reform”, *VerfBlog*, 2 December 2020, <https://verfassungsblog.de/a-new-nail-in-the-coffin-for-the-2017-polish-judicial-reform>

<sup>187</sup> See Ł. Woźnicki, J. Dobrosz-Oracz, “First President of the Supreme Court tries to remove judges who approached the CJEU”, English translation of the text published on 13 February 2021 in *Gazeta Wyborcza* provided by *Rule of Law in Poland*, 15 February 2021, <https://ruleoflaw.pl/first-president-of-the-supreme-court-tries-to-remove-judges-who-approached-the-cjeu>. As noted in the footnote above, the current First President of Poland’s Supreme Court was manifestly unlawfully appointed to her post and must therefore be considered an “usurper”. See L. Pech, Dealing with ‘fake judges’ under EU law, *op. cit.*, p. 23 et seq.

<sup>188</sup> See *supra* Section 2.6.

Making the situation worse, the von der Leyen Commission repeated the initial mistake of the Juncker Commission by de facto pausing enforcement actions with the vain and naïve hope that a renewed offer of dialogue may help convince Polish authorities to stop their attacks on judicial independence.<sup>189</sup> Unsurprisingly for anyone familiar with the situation, Polish authorities saw instead an opportunity to create more irreversible facts on the ground when offered this new “dialogue window”. Indeed, soon after von der Leyen became the new Commission President on 1 December 2019, they doubled down by adopting a “muzzle law” which has since organised a de facto Poxit<sup>190</sup> from EU judicial independence requirements. To further consolidate the takeover of Poland’s judicial branch, they have subsequently used their captured judicial bodies to nullify the ECJ preliminary judgment in *AK*.<sup>191</sup> At the time of finalising this article, the Guardian of the Treaties is yet to formally react to this flagrant and deliberate disregard of the authority of the ECJ. In an unprecedented development, which aptly symbolises the current Commission’s present failure to defend both Polish judges and the authority of the ECJ, a Dutch court has formally contradicted the Commission’s assessment that the ECJ order of 8 April 2020 regarding Poland’s DC is not being violated.<sup>192</sup>

As for the European Council and Council of the EU, we can offer a shorter concluding assessment as they have systematically failed to meaningfully respond to the systemic undermining of judicial independence in Poland.<sup>193</sup> As regards the Council of the EU, and to give a single example, it did not spend more than one hour discussing behind closed doors the rule of law “situation” in Poland in 2020. The same year, the only time where the European Council decided to discuss rule of law issues ended up with the European Council violating the

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<sup>189</sup> “We first need to seek dialogue. Seeking dialogue does not begin with the most severe of threats ... We must all learn that complete rule of law [sic] is our goal, but no one is perfect”, U. von der Leyen quoted in Z. Weise, “Von der Leyen rows back on ‘United States of Europe’”, *Politico*, 18 July 2019.

<sup>190</sup> See e.g. A. Bodnar, Polish Commissioner for Human Rights, *Comments on the Act amending the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other acts*, VII.510.176.2019/MAW/PKR/PF/MW/CW, 7 January 2020. See also A. Bodnar quoted in A. Chapman, “Poland’s leadership doesn’t need ‘Poxit’ – it can undermine the EU from within”, *The Guardian*, 10 March 2020 (the muzzle law amounts to “major step towards a legal Poxit”).

<sup>191</sup> See *supra* Section 2.1.

<sup>192</sup> See judgment of Amsterdam Court of 10 February 2021, para. 5.3.5: “the Court finds that a disciplinary chamber was set up in Poland and is actually operating, although this is contrary to the interim measure of the Court of Justice, based on which the operation of this disciplinary chamber should have been suspended”. This Dutch judgment applies the ECJ judgment in Joined Cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie*, EU:C:2020:1033, analysed *infra* in Section 4.2.

<sup>193</sup> See *supra* Section 3.1.

EU Treaties to placate the Polish and Hungarian governments' concerns about the new EU rule of law conditionality Regulation.<sup>194</sup>

The Commission and Council's oscillation between procrastination and dereliction of duties is not merely seriously endangering the functioning of the EU legal order, it has also led to unprecedented and irreparable damage made to the rule of law in Poland with multiple Polish judges and prosecutors having to sacrifice their careers and family life to defend the (EU) rule of law.<sup>195</sup> Viewed in this light and with a widespread judicial purge around the corner,<sup>196</sup> the EU's repeated failure to promptly and determinedly act to prevent the consolidation of a Soviet-style justice system in Poland not only undermines its credibility and legitimacy, it is also bound to lead to the unravelling of the EU's interconnected legal order.

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<sup>194</sup> See Regulation 2020/2092 and the analysis of K.L. Scheppele, L. Pech, S. Platon, "Compromising the Rule of Law while Compromising on the Rule of Law", *VerfBlog*, 13 December 2020, <https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law>

<sup>195</sup> See e.g. the individual examples mentioned by L. Pech, K.L. Scheppele, W. Sadurski, "Before It's Too Late: Open Letter to the President of the European Commission regarding the Rule of Law Breakdown in Poland", *VerfBlog*, 28 September 2020, available at <https://verfassungsblog.de/before-its-too-late>

<sup>196</sup> M. Jałoszewski, "Kaczyński directly announced a purge among judges for the first time", *OKO.press*, 22 December 2020, English translation available at <http://themis-sedziowie.eu/materials-in-english/kaczynski-directly-announced-a-purge-among-judges-for-the-first-time-mariusz-jaloszewski-oko-press-22-december-2020>