COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

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CASE LAW

A. Court of Justice

Protecting Polish judges from Poland's Disciplinary "Star Chamber": *Commission* v. *Poland (Interim proceedings)*

Case C-791/19 R, *Commission* v. *Poland*, Order of the Court (Grand Chamber) of 8 April 2020, EU:C:2020:277

1. Introduction: The third rule of law-related interim relief order granted against Polish authorities

In these proceedings for interim measures, the Commission requested and secured from the European Court of Justice the suspension of the application of the national provisions relating to the powers of the Disciplinary Chamber of Poland's Supreme Court – a new body created by the 2017 Law on the Supreme Court, in blatant violation of Poland's Constitution[1] – with regard to disciplinary cases concerning judges.

The ECJ's Order in Case C-791/19 R 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 unprecedented, to

1. See most recently, at the time of writing, Poland's Supreme Court Resolution of the Formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, Case BSA I-4110-1/20, 23 Jan. 2020, para 45: the Disciplinary Chamber (DC) "structurally fails to fulfil the criteria of an independent court within the meaning of Article 47 of the Charter and Article 45(1) of the Constitution of the Republic of Poland and Article 6(1) ECHR" and "is an extraordinary court which cannot be established in the times of peace according to Article 175(2) of the Constitution of the Republic of Poland. For those reasons alone, judgments issued by formations of judges in the Disciplinary Chamber are not judgments given by a duly appointed court". English translation available at <www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf> (all websites last visited 15 Nov. 2020). The unconstitutional nature of the DC was also raised, very early on, by international expert bodies. See e.g. Venice Commission, Opinion No. 904/2017, "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 Organization of Ordinary Courts", 11 Dec. 2017, para 130: The creation of the Disciplinary Chamber "is ill-advised" and "the compliance of this model with the Constitution must be checked".

the extent that the ECJ has demanded the immediate suspension, until delivery of the final judgment, 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.[2] This is not, however, the first time the ECJ has granted interim measures requested by the Commission in order to preserve the rule of law and the functioning of the EU legal order from being seriously and irreparably harmed by Polish authorities. It is actually the third time in less than three years.

The first time the ECJ had to step in followed the open disregard of its previous interim relief order demanding the immediate suspension of logging in Poland's Białowież a forest.[3] Faced with this unprecedented act of defiance, the Court responded with an unprecedented remedy and granted the Commission's request to order a penalty payment in the amount of *at least* €100,000 per day of non-compliance on 20 November 2017. The Court pointedly did so having first emphasized the importance of guaranteeing "the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the EU is founded".[4]

The second time the Court was forced to intervene happened in 2018. The Polish authorities were then attempting to capture the Supreme Court via a legislative retroactive lowering of the retirement age of sitting Supreme Court judges, including the First President of the Supreme Court, notwithstanding the fact that her 6-year mandate was explicitly guaranteed in the Polish Constitution. Faced with what the now retired First President of the Supreme Court accurately described as an attempted "purge",[5] the ECJ ordered the immediate suspension of the application of the relevant provisions of the law

2. The ECJ's Order refers to the following judgments of Poland's Supreme Court (paras. 19–21): the judgment of 5 Dec. 2019 of the Labour Law and Social Security chamber issued in relation to the national dispute which gave rise to a request for a preliminary ruling (see Case C-585/18); the judgments of 15 Jan. 2020 of the Labour Law and Social Security Chamber and which are connected to disputes which gave rise to the preliminary Cases C-624 & 625/18. It is unclear why the ECJ did not refer to the Resolution of the Formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of 23 Jan. 2020, cited *supra* note 1. It could be that a reference to this solemn and binding resolution was omitted because it is not directly connected to any dispute previously or currently submitted to the ECJ's attention.

3. Wennerås, "Saving a forest and the rule of law: *Commission* v. *Poland*. Case C-441/17 R, *Commission* v. *Poland*, Order of the Court (Grand Chamber) of 20 November 2017", 56 CML Rev. (2019), 541.

4. Case C-441/17 R, *Commisson* v. *Poland*, EU:C:2017:877, para 102.

5. "Poland Supreme Court judges return to work after EU court ruling", *Euractiv*, 23 Oct. 2018, available at <www.euractiv.com/section/future-eu/news/poland-supreme-court-judges-return-to-work-after-eu-court-ruling/>.

being challenged by the Commission.[6] This meant that Polish authorities had to *restore* the Supreme Court to its situation *prior* to the entry into force of the law until delivery of the final judgment. Indeed, as emphasized by the Court itself, "the implementation of an interim measure suspending the application of a provision entails an obligation to ensure that the rule of law preceding the entry into force of that provision – in the present case, the legal regime laid down by the provisions of national legislation repealed or replaced by the provisions of national legislation at issue – is restored".[7]

In the present and third instance, the subject of this case note, the ECJ has ordered the provisional suspension of the "activity" of the Disciplinary Chamber (DC) as regards all disciplinary cases concerning judges. In addition, the Court ordered that Polish authorities refrained from referring the cases pending before the DC before a panel whose composition does not meet the requirements of independence as defined by the Court, in particular, in its *AK* judgment.[8] The Court's Order is particularly significant, as the DC, which can be understood as the equivalent of a modern "star chamber",[9] is to all intents and purposes the stepping stone on which the new disciplinary regime for judges put in place by Poland's ruling party was built.

2. Background: The proliferation of rule of law-related cases regarding the situation in Poland

The Court's Order is connected to Case C-791/19, which is the *third* infringement action brought by the Commission against Poland raising a violation of the principle of judicial independence; it was launched on 3 April 2019.[10] In a nutshell, according to the Commission, Poland's new disciplinary regime is not compatible with the second subparagraph of Article 19(1) TEU, as it fails to protect Polish judges from the ruling party's political control. With this third action, the Commission once more brought to the ECJ's attention

6. Case C-619/18 R, *Commission* v. *Poland*, EU:C:2018:1021.
7. Ibid, para 95.
8. Joined Cases C-585, 624 & 625/18, *AK*, EU:C:2019:982.
9. The so-called "star chamber" was an English court that developed in the late 15th century. See Cheyney, "The Court of Star Chamber", 18 *The American Historical Review* (1913), at 727: "the Court of Star Chamber won enough prominence and enough odium in the sixteenth and early seventeenth centuries to obtain formal abolition by act of Parliament in 1641. It has left its name to later times as a synonym for secrecy, severity, and the wresting of justice".
10. European Commission Press Release, "Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control", Brussels, IP/19/1957, 3 April 2019.

issues the Commission had previously, but unsuccessfully, raised with Polish authorities as part of its dialogue in the Rule of Law Framework and, subsequently, as part of the ongoing Article 7(1) procedure.[11] Case C-791/19 does however raise a new, unprecedented and structurally critical issue from the point of view of the functioning of the EU legal order: Poland's alleged violation of Article 267 TFEU on the grounds that the new disciplinary regime creates "a chilling effect for making use of this mechanism".[12]

As far as the DC is concerned, which is the main focus of Case C-791/19 R, the Commission is of the view that Poland has failed to fulfil its Treaty obligations by failing to guarantee the independence and impartiality of this new body. Created by the new law on the Supreme Court of 8 December 2017 (which entered into force on 3 April 2018), the DC has been given jurisdiction *inter alia* over disciplinary proceedings concerning judges. It is entirely composed of arguably unlawfully appointed individuals selected by Poland's new National Council for the Judiciary (NCJ). The unconstitutional nature and lack of independence of the NCJ have also been repeatedly raised, ever since it was reconstituted in 2018 following the unconstitutional premature termination of the mandate of its judges-members.[13] In addition to the DC, another controversial if not similarly unconstitutional new chamber was created by the same law: the "Extraordinary Control and Public Affairs chamber". In its Article 7(1) TEU proposal, the European Commission stressed that:

> "these two new largely autonomous chambers composed with new judges raise concerns as regards the separation of powers. As noted by the Venice Commission, while both chambers are part of the Supreme Court, in practice they are above all other chambers, creating a risk that the whole

11. For further analysis, see Pech and Scheppele, "Illiberalism within: Rule of law backsliding in the EU", 19 CYELS (2017), 3.

12. Commission press release cited *supra* note 10.

13. See e.g. Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland, COM(2017)835 final, 20 Dec. 2017, recital 140. The unlawful composition of the NCJ (KRS in Polish) has now also been established beyond doubt due to the failure – long kept secret in yet another instance of open violation of a ruling of a national court of last resort, in this case, the Supreme Administrative Court – to comply with the requirement laid down in the law establishing the NCJ, itself arguably unconstitutional, for each judge appointed to the NCJ to first obtain the support of a minimum of 25 judges. For further details, see interview with Ewa Łętowska (Poland's first Commissioner for Human Rights and former judge of the Supreme Administrative Court and of the Constitutional Tribunal), "It was a 'cooperative', and the judges were co-opted to offer support. A new Council must be chosen", *Rule of Law in Poland*, 21 Feb. 2020, available at <ruleoflaw.pl/letowska-it-was-a-cooperative-and-the-judges-were-co-opted-to-offer-support-a-new-council-must-be-chosen>; ENCJ, "Position paper of the board of the ENCJ on the membership of the KRS (expulsion)", 27 May 2020, available at <www.encj.eu/node/556>.

> judicial system will be dominated by these chambers which are composed of new judges elected with a decisive influence of the ruling majority".[14]

Prior to the Commission's third rule of law infringement action against Poland – the Court's judgment on the merits in Case C-791/19 is expected in 2021 – the Commission launched two infringement actions directly alleging a violation of the second subparagraph of Article 19(1) TEU; this was the first time such a basis had been used. With the rulings in Case C-619/18, *Independence of the Supreme Court*[15] and Case C-192/18, *Independence of the ordinary courts*,[16] Poland made history by becoming the first ever EU Member State to be found to have violated the dual principles of the irremovability of judges and judicial independence twice in a row.[17] Poland had previously made history by becoming the first EU Member State to be subject to the Commission's Rule of Law Framework and, subsequently, to the Article 7(1) TEU procedure. Most recently, Poland became the first EU Member State to be subject simultaneously to the Article 7(1) procedure and the Council of Europe's special monitoring procedure.[18] One may note that in parallel with the Commission's infringement actions, the worsening situation in Poland has led to a "proliferation"[19] of preliminary ruling requests. At the time of writing there are more than twenty cases originating from Polish courts raising issues connected to the country's rule of law crisis – if not breakdown.[20]

14. Reasoned Proposal, cited previous note, Recital 135.

15. Case C-619/18, *Commission* v. *Poland,* EU:C:2019:531.

16. Case C-192/18, *Commission* v. *Poland*, EU:C:2019:924.

17. For further analysis, see Bárd and Śledzińska-Simon, "On the principle of irremovability of judges beyond age discrimination", 57 CML Rev. (2020), 1555–1584.

18. Council of Europe, "PACE decides to open monitoring of Poland over rule of law", 28 Jan. 2020, available at <assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7766>.

19. Address by the President of the CJEU, Mr Lenaerts, Press release 1/2020, 13 Jan. 2020: "More recently, concerns regarding respect for the rule of law, democracy and fundamental rights and freedoms have emerged in several Member States and have led to a proliferation of cases, particularly requests for preliminary rulings, before the Court."

20. Case C-522/18, *Zakład Ubezpieczeń Społecznych*, EU:C:2020:42 (case closed on 29 Jan. 2020); Case C-537/18, *Krajowa Rada Sądownictwa*, EU:C:2020:136 (case closed on 3 Feb. 2020); Joined Cases C-558 & 563/18, *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234 (ruled inadmissible on 26 March 2020); Joined Cases C-585, 624 & 625/18, *AK* (judgment issued on 19 Nov. 2019); Case C-623/18, *Prokuratura Rejonowa w Słubicach*, EU:C:2020:800 (now pending); Case C-668/18, *Uniparst*, EU:C:2019:1093 (case closed on 3 Dec. 2019); Case C-824/18, *A.B. and others*; Case C-487/19, *W. Ż.* (pending); Case C-508/19, *Prokurator Generalny* (pending); Cases C-748-754/19, *Prokuratura Rejonowa Warszawa* (total of 7 cases from same court now pending); Joined Cases C-763-765/19, *R.B.P.* (total of 3 cases from the same court, withdrawn on 20 Feb. 2020); Case C-55/20, *Ministerstwo Sprawiedliwości* (this case originates from the disciplinary court of the Bar association and is now pending). On 15 July 2020, the Labour Chamber of the Supreme Court of Poland referred additional

Indeed, soon after the ECJ issued its order suspending the application of the national provisions on the powers of the DC, the Commission had no choice but to launch a fourth infringement action in respect of yet another (unconstitutional[21]) piece of legislation targeting Polish courts in evident violation of the fundamental tenets of EU law.[22] This piece of legislation, informally known as the "muzzle law", entered into force on 14 February 2020. It aims, *inter alia*, to render the ECJ's judgment in Joined Cases C-585, 624 & 625/18, *AK,* ineffective by providing "that, if the validity of a judge's appointment or the legitimacy of a constitutional body is called into question by a court, disciplinary measures will be taken against the judge or judges sitting in that court".[23] The muzzle law furthermore "makes any examination of complaints relating to the lack of independence of a judge or court subject to the exclusive jurisdiction"[24] of the Extraordinary Control and Public Affairs Chamber (ECPAC), which, similarly to the DC, is another body masquerading as a court, and composed of unlawfully appointed individuals.[25]

Most recently, the European Parliament has recommended the launch of three additional infringement actions in respect of the Constitutional Tribunal,

questions in connection with multiple cases: See pending Joined Cases C-491 to 496/20, C-506/20, C-509/20 and C-511/20. The ECJ issued its very first preliminary ruling in response to questions raised by two Polish courts on 19 Nov. 2019 in Joined Cases C-585, 624 & 625/18, *AK*. Applying the ECJ's preliminary ruling, several chambers of Poland's Supreme Court subsequently found the DC not to constitute a court within the meaning of both EU and Polish law.

21. See Marcisz, "Discipline and punish: New polish reforms of the judiciary", *VerfBlog,* 22 Dec. 2019, available at <verfassungsblog.de/discipline-and-punish> ("The provisions in the bill are all designed as an assault on judicial independence. They aim at crushing the opposition against previous illegal reforms among the judiciary. No need to discuss their details: *res ipsa loquitur*. The bill is blatantly unconstitutional but without a functioning Constitutional Court it does not matter much. It is also contrary to EU law. Not only does it infringe the judicial independence protected under Article 19(1)(2) TEU, but also the principle of primacy of EU law.").

22. An infringement action against the "muzzle law" was launched by the European Commission on 29 April 2020: "Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland", IP/20/772, 29 April 2020. On 30 Oct. 2020, the Commission adopted its reasoned opinion and gave the Polish government two months to take the necessary measures to comply with this reasoned opinion. For further analysis, see e.g. OSCE-ODHIR, 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 Dec. 2019), Opinion Nr: JUD-POL/365/2019 (14 Jan. 2020), para 12: "Several provisions reviewed are inherently incompatible with international standards and OSCE commitments on judicial independence."

23. Joined Cases C-558 & 563/18, *Miasto Łowicz and Prokurator Generalny*, para 25.

24. Ibid.

25. See Pech, "Dealing with 'fake judges' under EU Law: Poland as a case study in light of the Court of Justice's ruling of 26 March 2020 in Simpson and HG", RECONNECT Working Paper No. 8, May 2020, available at <reconnect-europe.eu/wp-content/uploads/2020/05/RECONNECT-WP8.pdf>.

considering its unlawful composition and role in preventing compliance with the case law of the ECJ; the ECPAC, "since its composition suffers from the same flaws" as the DC; and the new NCJ, considering its lack of independence which subsequently led to its suspension from the European Network of Councils for the Judiciary.[26]

3. The Court's Order

3.1. *The obligation for Member States to respect judicial independence covers national disciplinary regimes applicable to judges*

With reference to the line of case law developed since its seminal "*Portuguese Judges*" ruling,[27] the ECJ first made clear that the legal obligation for every Member State to respect and maintain the independence of their national courts or tribunals (which may apply or interpret EU law) *includes* an obligation to comply with the principle of judicial independence as far as disciplinary proceedings against judges are concerned.[28] This means *inter alia* that EU law *precludes* the setting up of disciplinary bodies which themselves fail to satisfy the guarantees inherent in effective judicial protection, including that of independence. This may be understood as a further and welcome deepening of the obligation for national authorities to respect and maintain judicial independence laid down in the *Portuguese judges* ruling.

In answer to the argument regularly raised by the Polish government that the Court lacks jurisdiction to review its judicial "reforms",[29] the ECJ adroitly referred to its ruling of 26 March 2020 in *Łowicz and Prokurator Generalny*. In this ruling, praised by Poland's Ministry of Justice as the two preliminary ruling requests were found inadmissible, the Court had yet again reiterated that:

26. European Parliament resolution of 17 Sept. 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)835 – 2017/0360R(NLE), paras. 15, 23 and 27.

27. Pech and Platon, "Judicial independence under threat: The Court of Justice to the rescue in the *ASJP* case", 55 CML Rev. (2018), 1827.

28. Order, para 35.

29. The ECJ continues to use, inappropriately, the word "reform" to refer to legal changes which patently violate the most basic tenets of the rule of law. As colourfully put by a Polish MP from an opposition party during a parliamentary debate: "When you say you are carrying out judicial reforms, it's as if a bandit beating someone mercilessly on the face with a knuckle-duster said they were carrying out plastic surgery", quoted in *Reuters*, "Poland pushes to replace Supreme Court judge who defied government", 20 July 2018, available at <reut.rs/2NxDbky>.

> "although the organization of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU".[30]

The Court's interpretation is as warranted as it is unescapable. Indeed, as the Court itself has often and eloquently stressed, the EU's legal structure amounts to

> "a structured network of principles, rules and mutually interdependent legal relations [based on] the fundamental premiss that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the EU that implements them will be respected."[31]

Preventing or sanctioning the undermining of judicial independence by national authorities is not akin to the EU exercising a general legislative power to harmonize the way national judiciaries are organized – a power the EU lacks. Rather, it amounts to the EU defending, *as mandated by Articles 2 TEU, 19(1) TEU and 47 of the Charter*, the principle of effective judicial protection of individuals' rights under EU law. More broadly, the Court's interpretation is "an inevitable consequence of the legal importance of the rule of law in the EU system, not only as a value and an objective that the EU has a mandate to enforce, but also as a functional necessity underpinning the legitimacy of EU decision-making (in which the Member States participate as members of the Council), vertical cooperation between Member States and the European Union (including the preliminary procedure) and horizontal cooperation between Member States, especially mutual recognition which is based on mutual trust".[32]

This means that the Court was entirely justified in finding itself competent to order interim measures suspending the application of the legal provisions governing a national body such as the DC.[33] Indeed, the obligation for EU Member States to ensure that national courts meet the requirement of effective judicial protection cannot merely mean an obligation for the legislature and

30. Joined Cases C-558 & 563/18, *Miasto Łowicz and Prokurator Generalny*, para 36.
31. Opinion 2/13, *ECHR Accession*, EU:C:2014:2454, paras. 167–168.
32. Pech and Platon, op. cit. *supra* note 27, 1841.
33. Order, para 29.

executive not to undermine their independence via legislative measures or executive actions. It also necessarily includes an obligation not to undermine the independence of judges via allegedly independent bodies. In other words, national authorities cannot be given the possibility to hide behind captured bodies they have set up and which lack independence themselves. This is why, for instance, a national government must not be allowed to hide behind a body

> "with exclusive jurisdiction for offences committed by members of the judiciary, if the creation of such a section is not justified by genuine and sufficiently weighty reasons made apparent to the public in an unambiguous and accessible manner, and if it is not accompanied by sufficient guarantees to dispel any risk of political influence on its functioning and composition".[34]

This not akin to the EU harmonizing the organization of national judiciaries, "including the institutional arrangements for the establishment of disciplinary bodies for judges and their procedure" which indeed "falls within the competences of the Member States pursuant to the default principle of institutional autonomy".[35] This is merely the EU preventing the deliberate and structural undermining of the minimum requirements relating to judicial independence via bodies controlled by a country's ruling party, in violation of Article 2 TEU, Article 47(2) of the Charter as well as the second subparagraph of Article 19(1) TEU. In doing so, the EU fulfils its obligation, as mandated by the EU Member States in their capacity as Masters of the Treaties, to ensure that national courts and their judges continue to meet the requirements essential to effective judicial protection; requirements which, one may recall, any candidate country must comply with to be allowed to join the EU in the first place.

3.2. *Condition relating to the existence of fumus boni juris is met in a situation where previous binding rulings have been deliberately ignored*

At the beginning of its Order, the ECJ included highly unusual explanations outlining how its judgment in Joined Cases C-585, 624 & 625/18, *AK,* and subsequent judgments applying that preliminary ruling issued by the Polish

34. A.G. Bobek Opinion in Joined Cases C-83, 127 & 195/19, *Asociaţia 'Forumul Judecătorilor din România'* v. *Inspecţia Judiciară,* Case C-291/19, SO v. TP and Others and Case C-355/19, Asociaţia 'Forumul Judecătorilor din România' et al. v. Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie, EU:C:2020:746, para 322. See also A.G. Bobek Opinion in Case C-397/19, *AX* v. *Statul Român – Ministerul Finanţelor Publice*, EU:C:2020:747.

35. Opinion in Joined Cases C-83, 127 & 195/19 etc., ibid., para 227.

Supreme Court, were openly disregarded by Polish authorities as well as the DC itself,[36] which has since formally voided the *AK* judgment in a decision delivered on 23 September 2020.[37] In doing so, the ECJ implicitly but unmistakeably indicated its strong disapproval at this defiant and persistent refusal to obey binding rulings in breach of both EU *and* Polish law.

This was bound to be legally significant when the Court had to decide whether the Commission had correctly established that the granting of the requested interim measures satisfied the condition of the existence of *fumus boni juris*. Unsurprisingly, having first meticulously recalled what it had previously decided in *AK* as regards the importance and scope of the requirements of independence and impartiality and having regard to the facts brought to the Court's attention by the Commission, the Court concluded that the Commission's claim regarding the lack of a guarantee as to the independence and impartiality of the DC appears *prima facie* not unfounded.[38]

3.3. *Condition relating to urgency is met in a situation where the independence of a body competent to rule in disciplinary cases concerning judges might not be guaranteed*

As regards urgency, the Court, in line with its previous case law, strongly emphasized how the judicial changes pushed by Poland's ruling party threaten to damage the independence of Polish courts. As such, they simultaneously threaten to damage the decentralized and interconnected legal order organized by the EU Treaties. In this context, it may be worth pointing out that the Court also referred *inter alia* to the Commission's Article 7(1) reasoned proposal when responding to the Polish government's claim that the Commission reacted belatedly to the violations of EU Law it alleged in the present instance.[39] One may note, in passing, that this shows that the Article 7(1) procedure, while still ongoing, has already had an impact on the ECJ's case law.[40]

Be that as it may, in an unprecedented step (to the best of this author's knowledge), the Court went further than ever before. It held that a body such as the DC poses a threat of serious and irreparable harm to the EU legal order due to the scope of its disciplinary jurisdiction as regards Polish judges and the

36. Ibid., paras. 18–24.
37. II DO 52/20. For further discussion, see *infra* section 4.2.
38. Order, para 52 et seq.
39. Ibid., para 95.
40. Case C-216/18 PPU, *LM*, EU:C:2018:586. For further analysis, see Konstadinides, "Judicial independence and the rule of law in the context of non-execution of a European Arrest Warrant: *LM*", 56 CML Rev. (2019), 743.

fact that its lack of independence and impartiality cannot be, *prima facie*, ruled out. The Court's holistic approach, which looks at the broader and systemic impact the *prima facie* lack of independence of the DC could have on ordinary courts and the Supreme Court as a whole, may be viewed as both warranted and compelling. Particularly significant in this respect is the Court's accurate observation that the "mere prospect" for Polish judges to "face the risk of a disciplinary procedure",[41] which could bring them before a body whose independence is not guaranteed, is likely to affect their independence *regardless* of how many proceedings may have been initiated or the outcomes of these proceedings to date.[42] To give a single but striking concrete example, in August 2020 Polish authorities announced the launch of disciplinary investigations targeting more than 1,200 judges in one swoop – more than 10 per cent of all Polish judges – for adding their names to a letter demanding the holding of a presidential election in compliance with Poland's Constitution.[43]

3.4. *Weighing-up of the interests involved: Interest in suspending the processing of disciplinary cases by a body whose lack of independence cannot be ruled out outweighs any other competing interest*

For the first time, to the best of this author's knowledge, the ECJ has suspended the activity of a body which presents itself as a court and which the

41. Order, para 90.

42. The overall number of disciplinary investigations is breathtaking. See most recently, Council of Europe (PACE), "Report on the functioning of democratic institutions in Poland" (authors Ms Gustafsson and Mr Omtzigt), Doc. 15025, 6 Jan. 2020, para 100: "A key issue of concern is the fact that after prosecutors and judges have been informed by the Disciplinary Inspectors that a disciplinary investigation has been started against them, these investigations often continue indefinitely without formal disciplinary charges being brought before the relevant disciplinary chambers. This puts the judges and prosecutors concerned in a precarious limbo, being investigated but not being able to defend themselves against the alleged violations that led to these investigations. The Chairperson of the National Council of the Judiciary informed us that, in the last year and a half, 1174 disciplinary investigations were started. Only in 71 instances had disciplinary cases been opened . . . The very high number of disciplinary investigations started, combined with the very small number of disciplinary cases that result from them, raise serious questions about the underlying reasons for these investigations and the grounds and justification on which they are started. Irrespective of the small number of actual disciplinary cases opened, the large number of investigations started by disciplinary officers directly accountable to the Minster of Justice, and the time it takes to close these investigations, if at all, clearly has a chilling effect on the judiciary and affects their independence."

43. Jałoszewski, "This is madness. Ziobro's disciplinary commissioner wants to prosecute 1,278 judges in Poland at once!", Rule of Law in Poland, 20 Aug. 2020, available at <rule oflaw.pl/this-is-madness-ziobros-disciplinary-commissioner-wants-to-prosecute-1278-judges-in-poland-at-once/>.

national government, unsurprisingly considering their paternity over it, also recognizes as a court. This led the Polish government to claim that the Commission was asking the Court to take measures which would violate the "fundamental structural principles of the Polish State",[44] having previously claimed a violation of the principle of irremovability of judges[45] which Polish authorities have already been found to have violated twice by the ECJ in two previous unprecedented rulings mentioned above: Case C-619/18, *Independence of the Supreme Court* and Case C-192/18, *Independence of the ordinary courts*.

Rather than outlining the Polish government's well-established track record when it comes to repeatedly violating the Polish Constitution and undermining judicial independence,[46] the ECJ skilfully answered the Polish government's claims. It patiently explained that its Order in the present case requires neither the dissolution of the disciplinary chamber nor the suspension of its administrative and financial services. Nor does it require the dismissal of the individuals appointed – unlawfully[47] – to this body, which was *already* held not to constitute a court by Poland's Supreme Court *prior* to the ECJ's Order.

The Court furthermore helpfully held that any eventual adverse budgetary consequences, as well as the limited practical consequences of the suspension of the cases pending before the DC, cannot in any event prevail over the general interest of the EU in the proper functioning of its legal order. As for the (alleged) harm resulting for the judges concerned from the suspension of those cases, the Court rightly emphasized that this alleged harm cannot outweigh the potential harm resulting from the continuing examination of those cases by a body whose lack of independence and impartiality cannot *prima facie* be ruled out.

Accordingly, and unsurprisingly, the Court granted the Commission's application for interim measures. A number of "weak spots", however, can be identified in this otherwise compellingly reasoned and, on all points, fully convincing Grand Chamber Order.

4. Comment: *Still* too little, *still* too late?

The Court's Order suffers from a number of limitations and shortcomings. These are, however, all connected to the belated and limited scope of the

44. Order, para 106.
45. Order, para 43.
46. See the overview and multiple findings of Poland's Supreme Court in its resolution cited *supra* note 1.
47. See Pech, op. cit. *supra* note 25.

Commission's application for interim relief, itself reflecting the limited scope of the Commission's main infringement action in Case C-791/19.

4.1. *A belated application for interim measures*

Considering the threat of political control over Polish judges alleged by the Commission in its third rule of law-related infringement action, launched on 3 April 2019, it is difficult to comprehend why the Commission did not simultaneously apply for interim measures when it decided to bring Poland before the ECJ in October 2019. Instead of applying for interim measures, the Commission requested the Court to expedite the proceedings. This later request was however subsequently denied by the Court in an unpublished Order, on the main ground that the legal issues raised by the present case were sensitive and complex; shortening the written phase, therefore, would not be appropriate.[48] By contrast, in the case relating to the independence of Poland's Supreme Court, the Commission requested interim measures and expedited proceedings simultaneously, and both were granted.[49]

In light of the pattern of systemic violation of judicial independence and multiple instances where rule of law-related rulings of the Court of Justice or national courts were preceded by threats of non-compliance or just openly ignored,[50] not to mention the multiple examples of targeted harassment of national judges seeking to apply Article 19(1) TEU or refer questions to the ECJ,[51] the Commission's failure to apply for interim measures straight away could leave one seriously perplexed. When this failure led to renewed public

48. Order, para 102.

49. Order of the Vice-President of the Court of 19 Oct. 2018 (interim measures), Case C-619/18 R, *Commission* v. *Poland*, EU:C:2018:852, not published; Order of the Court (Grand Chamber), 17 Dec. 2018 (interim measures), Case C-619/18 R, *Commission* v. *Poland,* EU:C:2018:1021; Order of the President of the Court, 16 Nov. 2018 (expedited procedure), Case C-619/18, *Commission* v. *Poland*, EU:C:2018:910. It should be recalled that the subject matter and the conditions triggering an application for interim relief and those triggering the expedited procedure are not identical. In this case, the Order indicated that "a response from the Court within a short time is such as, for the purposes of legal certainty, in the interest of both the European Union and the Member State concerned, to remove the uncertainties relating to fundamental questions of EU law and concerning in particular the existence of possible interference with certain fundamental rights safeguarded by EU law and the effects which the interpretation of that law is likely to have as regards the actual composition and working conditions of the supreme court of that Member State" (para 25).

50. See the long list of examples provided by Pech, and Wachowiec, "1460 Days Later: Rule of Law in Poland R.I.P. (Part II)", *VerfBlog,* 15 Jan. 2020, available at <verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-ii>.

51. See most recently, the exhaustive report compiled by Iustitia, *Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019*, 29 Feb. 2020, 208 pages, available at <www.iustitia.pl/en/activity/informations/3724-report-justice-under-pressure-years-2015-2019>.

criticism,[52] following the Polish authorities' defiant refusal to comply with the rulings issued on 5 December 2019,[53] the European Commission belatedly decided to apply for interim measuresin the present case, on 14 January 2020. As correctly noted by the Commission itself, "*despite the judgments*, the Disciplinary Chamber has continued to operate, creating a risk of irreparable damage for Polish judges and increasing the chilling effect on the Polish judiciary" (emphasis added).[54]

The Court's Order deals with this aspect, which was unsurprisingly raised by the Polish government during the examination of the urgency of the Commission's request. Instructively, the Court clarifies the Commission's rationale.[55] In a nutshell, the Commission decided not to apply for interim measures, because it expected the Court to deal with the issue of the DC decisively in its preliminary ruling in Joined Cases C-585, 624 & 625/18, *AK*. The Court politely found the Commission's rationale to be "reasonable".[56] Not doing so would have forced the Court to conclude that the urgency requirement was not met. The Commission's deliberate decision to delay the submission of an application for interim measures within the framework of an infringement action, so as to await the outcome of a preliminary case, fails to convince. Indeed, this approach ignored the Court's previous and unusual emphasis that its jurisdiction, when it comes to protecting judicial independence, is more extensive under Article 258 TFEU. This is how one may understand the Court's not so subliminal message to the Commission in Joined Cases C-558 & 563/18, in which it explicitly stated that "the task of the Court must be distinguished according to whether it is requested to give a preliminary ruling or to rule on an action for failure to fulfil obligations".[57] In

52. See e.g. Pech, Scheppele and Sadurski, "Open letter to the President of the European Commission", *VerfBlog,* 11 Dec. 2019, available at <verfassungsblog.de/open-letter-to-the-president-of-the-european-commission>.

53. Case III PO 7/18.

54. "Rule of Law: European Commission asks the Court of Justice for interim measures regarding the Disciplinary Chamber of the Supreme Court in Poland", *Daily News*, 14 Jan. 2020, available at <ec.europa.eu/commission/presscorner/detail/en/mex_20_56>.

55. Order, paras. 97–98.

56. Ibid., para 97.

57. Joined Cases C-558 & 563/18, *Miasto Łowicz and Prokurator Generalny*, para 47: See annotation by 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"*, 57 CML Rev., 1843–1866. One may note that these two requests for a preliminary ruling, possibly for the first time ever, were in part motivated by the referring judges' "fear of retribution if they do not adjudicate in favour of the State, an apprehension which stems from abuse of the disciplinary process under the new regime." Opinion of A.G. Tanchev delivered on 24 Sept. 2019 in Joined Cases C-558 & 563/18, *Miasto Łowicz and Prokurator Generalny*, EU:C:2019:775, para 3. As will be shown *infra* in section 4.2, the referring judges' "fear of retribution" proved founded, with both Judge Tuleya and Judge Maciejewska still under

other words, the Commission was implicitly but unambiguously told not to abstain from launching infringement actions, including applying for interim measures, on the basis of similar issues being raised in the context of national requests for a preliminary ruling. The ECJ's reluctance to use the preliminary ruling procedure more boldly when it comes to national judges seeking protection may, however, also be criticized as it essentially means that these judges are left to the mercy of the Commission bringing infringement actions.[58]

Be that as it may, and speaking plainly, the Commission's deferment of the DC issue has meant months of additional harassment for Polish judges than would have been the case had the Commission applied for interim measures when it lodged its infringement application with the Court on 25 October 2019 and requested, at the same time, the use of the expedited procedure. The Court's subsequent rejection of the latter request may actually be understood as a sign of the Court's disapproval of the Commission's half-in, half-out approach. It required a response from the Court within a short time, considering the threat to the functioning to the EU legal order it had identified. Yet, it did not require the Court to do anything about it until a judgment on the merits was issued. By not acting promptly and forcefully, as will be shown below, individual Polish judges have faced disciplinary harassment, but also disciplinary sanctions such as suspension and pay cuts which have yet to be undone.

It is also difficult to understand why the Commission, when it finally decided to apply for interim measures, did not follow the same path as in the case relating to the independence of the Supreme Court: it could have requested, pursuant to Article 160(7) of the Rules of Procedure of the Court of Justice, that the Court *provisionally* grants the requested interim measures *before* the submission by Poland of its observations and until such time as an order is made closing the interim proceedings.[59]

investigation for alleged false statements in relation to their preliminary ruling requests, with Judge Tuleya also facing the waiving of his judicial immunity and disciplinary sanctions. For a comprehensive overview of the multiple formal and disguised disciplinary measures targeting Polish judges and prosecutors known for defending the rule of law or seeking to apply EU law, see report by Iustitia, cited *supra* note 51.

58. For further analysis of whether the preliminary procedure is an unfit avenue to protect the independence of national judges, see 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"*, 57 CML Rev. (2020), 1843–1866.

59. By Order of 19 Oct. 2018 in Case C-619/18 R, EU:C:2018:852, not published, the Vice-President of the Court provisionally granted the application for interim measures pending the making of an order closing the then pending interlocutory proceedings on the grounds that failing to do so would create an immediate risk of serious and irreparable damage in the light of the principle of effective judicial protection, see Order of 17 Dec. 2018, para 4.

4.2. *A belated application for interim measures seemingly oblivious to the pattern of past and present non-compliance with binding rulings*

Considering the *repeated threats* made by Polish authorities and their *actual record* of non-compliance with multiple national rulings as well as the ECJ's *AK* ruling,[60] the Commission's failure to ask the Court for conditional sanctions, that is, to order a conditional periodic penalty payment taking effect from the date of the Court's Order, is startling. Rather ironically, on the very day the Commission formally lodged its application for interim measures (i.e. 23 Jan. 2020), Polish authorities indicated that they would refuse to comply with the solemn and binding resolution issued by three chambers of the Supreme Court on this day, and which held *inter alia* that the DC had been established in violation of both Polish and EU law. In line with their previous behaviour, the Polish authorities did not merely publicly state that they would not recognize the solemn resolution (with the DC similarly refusing to recognize the validity of the resolution); they also decided to involve the (unlawfully composed) Constitutional Tribunal, which – unsurprisingly – obliged by (unlawfully) annulling the Supreme Court's resolution in two "decisions" announced on 20 and 21 April 2020. At the time of writing, these decisions had yet to be published.[61]

Considering the Polish authorities' track record of industrial-scale non-compliance with binding rulings, arguably the least the Commission could do was reserve the right to submit an additional request. It could ask for payment of a penalty payment to be ordered in case of non-compliance in full with the interim measures ordered by the Court.[62] Unsurprisingly, the Polish authorities understood the lack of any realistic prospects of immediate financial sanctions as a licence to ignore the Court's Order, and acted accordingly.

No degree in foresight studies was required to predict such an outcome. Non-compliance was indeed the only course of action available to the Polish authorities to save their DC considering the substance of the Court's Order, in a context where the Polish authorities had already bluntly organized the systematic violation of the Court's *AK* ruling, adopting the "muzzle law", and

60. A pattern which began early and initially concerned the Constitutional Tribunal (CT). As of today, Polish authorities have yet to fully implement two judgments issued by the CT in Dec. 2015, as well as to properly publish and comply with 3 judgments issued by the CT before the former President of the CT was unlawfully replaced in Dec. 2016. See Council of the EU, Rule of Law in Poland/Article 7(1) TEU reasoned proposal – European Commission contribution for the hearing of Poland on 11 Dec. 2018, 15197/18, 5 Dec. 2018.

61. For further references and analysis, see Pech, op. cit. *supra* note 25.

62. Order, para 2.

subjecting individual judges to flagrantly illegal sanctions, such as a suspension and a pay cut of 40 percent imposed on a Polish judge for the "crime" of seeking to apply the *AK* ruling.[63] While the Polish authorities have violated the present ECJ Order in a less direct and obvious manner,[64] the organization of disciplinary hearings, most controversially in the case of Judge Tuleya,[65] by the supposedly suspended DC – following the unconstitutional appointment of a new First President of the Supreme Court[66]

63. "Suspension and salary reduction for critical Polish judge Juszczyszyn", *Rechters voor Rechters*, 4 Feb. 2020, available at <www.rechtersvoorrechters.nl/suspension-and-salary-reduction-for-critical-polish-judge-juszczyszyn>.

64. Both the Polish government and the DC rapidly proclaimed that they would implement the ECJ's Order, but only after publicly expressing their serious doubts about its compatibility with Poland's Constitution, an issue they both quickly indicated they would ask the CT to examine. In the end, only the DC followed through. See its press release, I DO 16/19, 10 April 2020 (the CT is asked to decide whether Art. 4(3) TEU read in conjunction with Art. 279 TFEU insofar it results in an interim order issued by the ECJ such as its Order of 8 April 2020 is compatible with the Polish Constitution). As acutely observed by Poland's Human Rights Commissioner, the aim of the DC's application to the CT "is not to protect the Constitution, but to obtain the protection of an unconstitutional state, violating at the same time the EU legal order". See "The suspended Disciplinary Chamber of the Supreme Court is to decide on the immunity of judges on 9 June. The Commissioner for Human Rights writes to the First President of the Supreme Court and to the Prime Minister", *Rule of Law in Poland*, 8 June 2020, available at <ruleoflaw.pl/the-suspended-disciplinary-chamber-of-the-supreme-court-is-to-decide-on-the-immunity-of-judges-on-9-june-the-commissioner-for-human-rights-writes-to-the-first-president-of-the-supreme-court-and-to-th/>. It may also be worth noting that according to the European Commission, the European Parliament, the Council of Europe's Parliamentary Assembly as well as Poland's Supreme Court (not-yet-captured chambers), the CT has been unlawfully composed and unable to provide effective constitutional review since Dec. 2016.

65. Jałoszewski, "The Disciplinary Chamber will examine the case of judge Igor Tuleya despite CJEU Order", *Rule of Law in Poland*, 27 May 2020, available at <ruleoflaw.pl/the-disciplinary-chamber-will-examine-the-case-of-judge-igor-tuleya-despite-cjeu-order/>.

66. When the (then) First President of the Supreme Court Małgorzata Gersdorf ordered the DC to stop adjudicating to comply with the Court's Order, she was subject of an intimidation attempt by a national prosecutor. Jałoszewski, "Prosecutor Bogdan Święczkowski attacks Małgorzata Gersdorf, head of the Supreme Court", *Rule of Law in Poland*, 27 April 2020, available at <ruleoflaw.pl/prosecutor-bogdan-swieczkowski-attacks-malgorzata-gersdorf-head-of-the-supreme-court/>. Małgorzata Gersdorf's instructions were subsequently revoked by her immediate "successor", an individual unlawfully appointed to the Supreme Court (he was appointed to the civil chamber in violation of a freezing order issued by the Supreme Administrative Court on 25 Sept. 2018) and subsequently unlawfully appointed First Acting President (the Polish Constitution does not provide for the position of acting First President). As for the new First President, she was appointed by the Polish President following a procedure similarly marred by multiple irregularities and has been described as an "unlawful judge". See "Statement by 50 Supreme Court judges regarding irregularities in the selection of candidates for the position of the First President of the Supreme Court", *Rule of Law in Poland*, 25 May 2020, available at <ruleoflaw.pl/statement-by-50-supreme-court-judges-regarding-irregularities-in-the-selection-of-candidates-for-the-position-of-the-first-president-of-the-supreme-court/>; Krajewski and Ziółkowski, "Can an unlawful judge be the First President of the Supreme

– finally pushed the Commission to react formally. On 5 June 2020, the Commission required the Polish government to respond to its concerns and provide "clarifications and further information" regarding the measures taken to fully implement the interim measures ordered by the Court.[67]

The Commission is yet to make public its analysis of the clarifications and information received from the Polish government by 24 June 2020. In the meantime, the DC has continued to process cases, organize hearings, and adopt *disciplinary sanctions* as regards judges, despite the ECJ Order and the fact that previous rulings and resolution of the Supreme Court have established the DC's unlawful nature and the nullity of its decisions irrespective of when they were issued, as they "deserve no protection".[68] The absence of any official and strong reaction from the EU might explain the latest bold, not to say unlawful, act of defiance by the DC. On 23 September 2020, it decided to formally void the ECJ's preliminary ruling in *AK* in the context of a request by a district prosecutor to resume previously closed disciplinary proceedings:

> "It should be added that the judgment of the Court of Justice of the European Union of 19 November 2019, referred to by W.P., the complainant, in Joined Cases C-585/18, C-624/18 and C-625/18, cannot be regarded as binding on the grounds of the Polish legal system, since in all proceedings before the Supreme Court Chamber of Labour and Social Security in which questions for a preliminary ruling were submitted to the CJEU (III PO 7/18, a question for a preliminary ruling registered by the CJEU with file no. C-585/18; III PO 8/18, a question for a preliminary ruling registered by the CJEU with file no. C-624/18; and III PO 9/18, a question for a preliminary ruling registered by the CJEU with file no. C-625/18), activities were carried out in the compositions contrary to legal regulations."[69]

In a particularly ironic passage, the DC held that the ECJ erroneously accepted the preliminary questions from the referring court in *AK,* due to the lack of independence of the Labour and Social Security Chamber. However, the DC

Court?", *VerfBlog,* 26 May 2020, available at <verfassungsblog.de/can-an-unlawful-judge-be-the-first-president-of-the-supreme-court>.

67. European Commission, Midday press briefing, 8 June 2020: "on the 5th of June, Justice Commissioner Reynders sent a letter to the Polish Minister of Justice regarding the measures taken by Poland to implement the interim measures ordered by the Court of Justice in 8 of April. The Commission is explaining its concerns and asking for clarifications and further information from Poland by the 24th of June."

68. Poland's Supreme Court resolution of 23 Jan. 2020, cited *supra* note 1, para 55.

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

generously accepted that the ECJ did not act in bad faith. At the time of writing, the Commission has yet to react to the DC's decision of 23 September 2020. By contrast, the Commission threatened Germany with an infringement action within a week following the German Constitutional Court's *PSPP* ruling which held *inter alia* the ECJ's judgment in *Weiss* to be ultra vires.[70]

4.3. *A belated application for interim measures which did not take into account and pre-empt potentially narrow and abusive interpretation of the notion of disciplinary matter*

The Commission's application for interim relief did not take into account the potential, and likely, (mis)use of possible motions to the DC requesting it to waive the judicial immunity of individual Polish judges, enabling the National Prosecution Office – in 2016 the office of Public Prosecutor General was merged with that of the Minister of Justice[71] – to launch (arbitrary) criminal proceedings against them. The case of Judge Tuleya is emblematic in this respect. In brief, in addition to multiple Kafkaesque disciplinary investigations, this vocal defender of judicial independence has been the target of proceedings initiated by the National Prosecution Office seeking to waive his judicial immunity in order to bring criminal charges against him. His crime? A judgment he issued on 18 December 2017 in which he "overruled a decision by the National Prosecution Office to discontinue an investigation into the potentially unlawful passing of the government's budget during a session in the lower chamber of parliament."[72] Following the unexpected dismissal of the request by the DC,[73] which one may however understand as merely an attempt by the DC to legitimize itself at a time of sustained and critical media coverage nationally and internationally, the National Prosecution Office appealed the DC's decision. This means that Judge Tuleya

70. Statement by President Von der Leyen, 10 May 2020, statement/20/846.

71. According to the Venice Commission, Opinion on the act on the public prosecutor's office as amended, Opinion 892/2017, CDL-AD(2017)028, 11 Dec. 2017, para 97: "Even if the current Public Prosecutor General (Minister of Justice) may not have misused his competencies, since the entry into force of the 2016 Act, a system with such wide and unchecked powers is unacceptable in a State governed by the rule of law as it could open the door to arbitrariness."

72. Bar Council of England and Wales and the BHRC of England and Wales, Letter to Polish authorities, 19 March 2020, available at <www.barhumanrights.org.uk/bar-council-and-bhrc-write-to-the-polish-authorities-regarding-attacks-on-the-rule-of-law-in-poland/>.

73. On 9 June 2020, the DC (consisting of a single individual who was formerly a prosecutor) rejected the waiving of immunity motion submitted by the National Prosecutor Office without once referring to the ECJ Order or EU law for that matter (No. I DO 8/20). The National Prosecutor Office appealed this decision on 22 June 2020, available at <www.iustitia.pl/en/new-krs/3893-position-of-iustitia-in-connection-with-the-disciplinary-chamber-of-the-supreme-court-s-recent-activities>.

has been required once more to attend another hearing before a body which the not-yet-captured chambers of Poland's Supreme Court have already held, in no less than four instances, not to constitute a lawful body. On 18 November 2020, the DC overturned its first instance decision, waived Judge Tuleya's immunity while also suspending him from professional duties and reducing his pay by 25 percent with immediate effect.[74]

To avoid such a manifestly abusive situation from emerging in the first place, the Commission should have alleged a violation of the "established by law" requirement as far as the DC is concerned. The violation of this requirement – the right to a tribunal established by law is an aspect of the right to a fair trial and is provided for in the first sentence of Article 47(2) of the Charter – has been raised in multiple pending preliminary requests now pending before the ECJ,[75] but never by the Commission itself within the framework of an infringement action.[76] In a nutshell, one could reasonably, if not compellingly, argue that the individuals appointed to the DC are not judges, *tout court*, as they have been appointed in flagrant breach of the fundamental rules forming an integral part of the establishment and functioning of Poland's judicial system, in violation of Article 47(2) of the Charter.[77] In other words, the irregularities committed during the appointment of the current members of the DC are of such gravity that these members cannot be considered lawfully appointed judges and the DC itself cannot be considered a court established by law to begin with. This is, in essence, what was already established by the independent chambers of Poland's Supreme Court in its resolution of 23 January 2020 in which it held *inter alia* that:

> "[the] Persons named in the lists of recommendations drawn up in a defective procedure of appointment for judicial positions cannot be considered to have been candidates for office duly presented to the President of the Republic of Poland whom the President of the Republic of Poland is competent to appoint to the office.[78] . . . [B]eing lawyers with an

74. Bar Council of England and Wales and the BHRC of England and Wales, Letter to Polish authorities, 7 Dec. 2020, available at www.barhumanrights.org.uk/bhrc-and-the-bar-council-write-a-further-letter-of-concern-to-polish-authorities-following-the-treatment-of-judge-tuleya.

75. See pending Case C-487/19, *W.Z.*, and Case C-508/19, *Prokurator Generalny*.

76. One may however note that for the very first time, a violation of the requirement that a court be established by law has been raised by the Commission in pending Case C-791/19, but only insofar as the discretionary power of the President of the DC to designate the competent disciplinary court of first instance in cases concerning judges of the ordinary courts is concerned. The Commission is yet to directly raise the issue that the DC is not itself a court established by law due to the arguably manifest and fundamental irregularities that affected the appointment of its current members.

77. See Pech, op. cit. *supra* note 25.

78. Poland's Supreme Court Resolution, cited *supra* note 1, para 35.

> understanding of the applicable law and the capability to interpret it, [they] must have been aware of the fundamental doubts concerning the new procedures for the appointment to the office of a judge of the Supreme Court and the status and membership of the National Council for the Judiciary as a body participating in the procedure of judicial appointment. Those persons were also aware that resolutions of the National Council for the Judiciary presenting them as candidates to the President of the Republic of Poland had been appealed by other participants of the competitions with the Supreme Administrative Court. Candidates for the Civil Chamber, the Criminal Chamber, and the Extraordinary Control and Public Affairs Chamber knew that the Supreme Administrative Court had suspended the effect of the resolutions of the National Council for the Judiciary concerning them, and yet they accepted appointment to the position of a judge of the Supreme Court. The circumstances of that process must be considered in the light of the fact that the competitions for positions of a judge of the Supreme Court . . . were carried out at the time when attempts were made to remove some judges of the Supreme Court from office, including the First President of the Supreme Court whose constitutional mandate was to be terminated. Those steps were taken in breach of the Constitution of the Republic of Poland."[79]

If the Commission had submitted to the ECJ that the individuals appointed to the DC were appointed in breach of the EU right to be judged by a tribunal established by law, and the Court had accepted that this argument was prima facie not unfounded, the DC would have been provisionally disabled in its entirety. This approach would have prevented the Polish authorities, and the individuals they (irregularly) appointed to the Supreme Court, from arguing that the Order of the ECJ only applies to judges in relation to disciplinary matters understood in a narrow sense.[80]

79. Ibid., para 45.

80. The Commission's main infringement action is exclusively concerned with the new disciplinary regime for judges on the basis of Art. 19(1) TEU and 267 TFEU and does not cover prosecutors, lawyers, and other legal professionals such as notaries and bailiffs who are also subject to the jurisdiction of the DC. One may however possibly argue that the Commission could also have raised a violation of Art. 47 of the Charter which would have made it possible to ask the Court to suspend all disciplinary proceedings falling within the scope of EU law. For instance, when a disciplinary procedure relates to a prosecutor in a case relating to EU criminal law or when a disciplinary procedure relates to a lawyer in connection to a dispute governed by EU law. The pending preliminary ruling in Case C-55/20, *Ministerstwo Sprawiedliwości*, should in any event provide the ECJ with an opportunity to make clear the extent to which EU law can be relied on by lawyers to set aside the jurisdiction of a body such as Poland's DC.

That said, the claim that the ECJ Order of 8 April 2020 does not cover proceedings relating to the waiving of the immunity of judges, on the grounds that these are allegedly proceedings of a criminal nature, is – to put it bluntly – ludicrous.[81] The competence to decide judicial immunity cases is a subcomponent of the broader competence to decide disciplinary cases concerning judges. As a matter of fact, before the (unconstitutional) establishment of the DC in 2017, cases related to the waiving of judicial immunity fell within the jurisdiction of disciplinary courts, formed within the courts of appeal. To argue that these now constitute cases of a criminal nature is therefore absurd. In any event, the notion of "disciplinary cases" must be given a broad and autonomous meaning in EU law, while the notion of judicial independence in EU law is, and must be understood as, indivisible. Since the ECJ has established that the arguments concerning the lack of a guarantee as to the DC's independence do not appear *prima facie* unfounded, it would be absurd to allow the DC to continue exercising *any* adjudicatory activity. And indeed, the Court's Order suspends the application of the provision (i.e. Art. 27) of the Supreme Court Act of 8 December 2017 which constitutes the very basis for the jurisdiction of the DC, in both first and second instance, in all cases concerning the disciplinary liability of judges, including waiving of judicial immunity cases. This means, as explicitly stated by the Court of Justice, that all members of the DC must stop exercising their adjudicatory functions and that the DC as a whole must suspend its "*activity* pending delivery of the final judgment" (emphasis added).[82] The Court's Order also demands the suspension of the processing of all the cases pending before the DC, to prevent the referral of any case pending before the DC before any adjudicating panel whose composition does not meet the requirements of independence defined, in particular, in *AK*.[83] The ECJ could arguably have been more explicit at times, so as to avoid leaving any room for misinterpretation (or abusive interpretation) of the scope of its Order. As a matter of judicial policy, the Court would be well advised to apply informally an "Orbán/Kaczyński test". In other words, the Court should always ask itself how legalistic autocrats could abuse any potential textual ambiguity to continue undermining judicial independence while publicly denying that they are violating the Court's orders and/or judgments.[84]

In any event, it would seem illogical to claim that the DC, whose *prima facie* lack of independence has been established, cannot process disciplinary cases

81. Jabłoński, "Stępkowski: The case of the Judge Tuleya's immunity is not covered by the CJEU's decision", 28 May 2020, available at <ruleoflaw.pl/stepkowski-the-case-of-the-judge-tuleyas-immunity-is-not-covered-by-the-cjeus-decision>.

82. Order, paras. 44 and 100.

83. Ibid., paras. 111 and 114.

84. For further discussion, see Pech, op. cit. *supra* note 25, 14–15.

(narrowly understood), but *can* process cases which may lead to the adoption of immediate sanctions of a disciplinary nature in addition to the initiation of criminal proceedings for acts of a judicial nature carried out in a judicial capacity. Indeed, proceedings aiming to strip a judge of his/her immunity from criminal proceedings entail "far-reaching consequences in the sphere of judicial service, as the court adjudicating it may suspend such a judge and reduce his remuneration by 25 to 50%. Therefore, all arguments for preventing the adjudication in disciplinary cases of judges are therefore even more justified in cases for waiver of immunity".[85] In any case, even if one understands the notion of "disciplinary matters" narrowly, how can one reasonably argue that the DC has not continued to exercise its disciplinary jurisdiction when it has imposed disciplinary sanctions when deciding judicial immunity cases?[86] This led the European Association of Judges to write yet another open letter to the President of the European Commission on 27 October 2020. In the letter it denounced, *inter alia*, the Polish government's "flagrant disregard" and "blatant disobedience" of the ECJ's Order of 8 April 2020 and the "failure of the Commission to take steps to secure compliance".[87] On 30 October 2020, rather than returning to the ECJ to request the imposition of a daily penalty payment until the Polish authorities fully comply with the Court's Order, the European Commission, for the second time, decided instead to "seek clarifications" from the Polish authorities regarding the "recent cases involving the lifting of immunity of judges" and which "creates a chilling effect on the judiciary".[88] At the time of

85. Iustitia, position adopted on 27 May 2020, available at <www.iustitia.pl/en/activity/informations/3861-polish-judges-association-iustitia-s-position-27-of-may-2020>.

86. See decision of 25 May 2020, Case I DO 21/2 in which the DC agrees not only to waive the judicial immunity of a judge suspected of rape, but also imposed disciplinary sanctions in the form of a suspension and a reduction of salary. To do so, the DC relied on a provision of the Law on the Organization of Ordinary Court which is contained in a chapter entitled "*disciplinary* responsibility of judges and assessors" (emphasis added). On 12 Oct. 2020, the same DC waived the immunity of Judge Beata Morawiec and adopted disciplinary sanctions in the form of a suspension and a 50% salary cut. In addition to what amounts in our opinion to a blatant violation of the Order of the ECJ, as noted by the Polish Association of Judges Themis, this decision was adopted by a person who was not lawfully appointed to the Supreme Court and who is therefore "not a judge". See "Position of the Board of the Association of Judges 'Themis' on the actions of the illegal Disciplinary Chamber of the Supreme Court against Regional Court Judge Beata Morawiec", 13 Oct. 2020, available at <themis-sedziowie.eu/materials-in-english/position-of-the-board-of-the-association-of-judges-themis-of-13-october-2020-on-the-actions-of-the-illegal-disciplinary-chamber-of-the-supreme-court-against-regional-court-judge-beat/>.

87. International Association of Judges, "Poland: EAJ letter to the President of the European Commission", 27 Oct. 2020, available at <www.iaj-uim.org/news/eaj-letter-to-the-president-of-the-european-commission/>.

88. Jourová, 30 Oct. 2020, available at <twitter.com/VeraJourova/status/1322179696394670080>.

writing, the Commission had yet to publicly react to the DC's decision of 23 September 2020 voiding the Court's preliminary ruling in *AK*. The Commission was however forced to react following the waiving of Judge Tuleya's judicial immunity and the imposition of disciplinary measures against him and the highly unusual but warranted public intervention by Judge Safjan, who publicly denounced the violation of the ECJ Order of 8 April 2020.[89] Yet instead of immediately returning to the ECJ to request the imposition of a daily penalty payment within the framework of the current Case 791/19, the Commission opted for the least possibly effective course of action: it decided to send an additional letter of formal notice regarding the continued functioning of the DC in the context of the infringement action it launched against Poland's "muzzle law" at the end of April 2020.[90] In this additional letter, the Commission finally makes clear what had been obvious for a long while: Poland violates EU law by allowing the DC "to decide on further matters which directly affect judges. These matters include cases for the lifting of immunity with a view to holding judges criminally responsible or possibly detaining them as well as cases concerning labour law and social security for Supreme Court judges and cases concerning the retirement of a Supreme Court judge."[91] While action is always better than inaction when it comes to preserving the rule of law, the *additional* letter means *additional* time for the DC to continue persecuting critical Polish judges via judicial immunity proceedings which are themselves due to prosecution services which have been brought under the complete control of the Ministry of Justice since 2016 on the basis of law described by the Venice Commission as "unacceptable in a state governed by the rule of law".[92]

5. Conclusion: The forthcoming "quarantine" of Poland's legal system?

According to the former First President of Poland's Supreme Court, herself one of the targets of the law which sought retroactively to lower the retirement

89. Wójcik, "Sędzia TSUE: Izba Dyscyplinarna nie ma prawa orzekać takich sankcji jak wobec Tulei i Morawiec", *OKO.press*, 25 Nov. 2020, available at <oko.press/izba-dyscyd plinarna-nie-ma-prawa-orzekac>.

90. European Commission, Rule of Law: Commission follows up on infringement procedure to protect judicial independence of Polish judges, INF/20/2142, 3 Dec. 2020.

91. Ibid.

92. See Venice Commission, *Poland: Opinion on the Act on the Public Prosecutor's Office as Amended*, Opinion 892/2017, 11 Dec. 2017, paras 97 and 111: the 2016 merger of the offices of the Public Prosecutor General and the Minister of Justice in Poland has created a system with "wide and unchecked powers" which makes it "unacceptable in a state governed by the rule of law" as it "creates a potential for misuse and political manipulation of the prosecutorial service".

age of Supreme Court judges in breach of Article 19(1) TEU, the EU is faced with a situation where Member States "no longer have independent courts or a third branch of government, independent of the executive".[93]

Sadly, this extraordinary diagnosis is entirely warranted. In the absence of infringement actions targeting the Constitutional Tribunal and the NCJ, coupled with a narrow focus on the lack of independence and impartiality of the DC when the Commission ought to have challenged the very status of the individuals arguably unlawfully appointed to the Supreme Court, the Guardian of the Treaties has failed to prevent the progressive emergence of a situation where the independence of the Polish judicial system as a whole has been structurally compromised. Following the adoption of the (unconstitutional) "muzzle law" and the seemingly inexorably increasing number of legally tainted judicial appointments made by the (unconstitutional) NCJ, one must conclude that the independence of the Polish judicial system has been legally disabled.[94]

This is also, in essence, the diagnosis of the Amsterdam District Court. In a recent judgment, it not only held that Polish authorities have yet to demonstrate their full compliance with the ECJ Order of 8 April 2020, but also offered the unprecedented judicial finding that *all* Polish courts must now be considered as lacking independence, due to a number of "structural and fundamental weaknesses" outlined in the judgment.[95] This led the Dutch court, in a case relating to the execution of a European Arrest Warrant issued by a Polish court, to refer a number of questions to the ECJ essentially asking it to overrule the (ill-advised) rule of law test it devised in Case C-216/18 PPU, *LM*.[96] Should the ECJ do so,[97] the spillover effect of a judgment confirming the diagnosis of the Amsterdam District Court would be significant as regards mutual trust and mutual recognition. This would indeed essentially mean that

93. Małgorzata Gersdorf quoted in "Elections in May 'illegal and unfair': Interview with Poland's chief justice as her term ends", *Notes from Poland*, 3 April 2020, available at <notesfrompoland.com/2020/04/03/elections-in-may-illegal-and-unfair-interview-with-polands-chief-justice-as-her-term-ends>.

94. See Matczak, "Burning the last bridge to Europe"*, VerfBlog,* 12 Dec. 2019, available at <verfassungsblog.de/burning-the-last-bridge-to-europe> ("the neoKRS is an illegally constituted body that illegally appoints judges who deliver invalid judgments. The more illegally appointed judges, the greater the number of invalid judgments. Any government that valued the integrity of the nation's legal system would set about healing such a sick system without delay").

95. Amsterdam Court (International Legal Aid Chamber), 31 July 2020, NL:RBAMS:2020:3776.

96. Bárd and Morijn, "Luxembourg's unworkable test to protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part I)", *VerfBlog,* 18 April 2020, available at <verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/>.

97. See Case C-354/20 PPU, *Openbaar Ministerie* (pending at the time of writing).

Polish courts could no longer be trusted, and their rulings no longer recognized by their counterparts in the EU27. Should the ECJ not do so, one cannot exclude bottom-up resistance emerging, in the form of national courts setting aside EU case law and disapplying mutual trust mechanisms directly, so as to protect their own constitutional orders and prevent generalized violations of the right to a fair trial, which includes the right the right to a tribunal established by law and the right to an independent and impartial tribunal.

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