



SYSTEMIC THREAT TO THE RULE OF LAW IN POLAND: UPDATED AND NEW ARTICLE 7(1) TEU RECOMMENDATIONS

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ABSTRACT

Article 7(1) TEU empowers the EU to act preventively in a situation where there is a clear risk of a serious breach of the values laid down in Article 2 TEU.

In December 2017, Article 7(1) TEU was activated for the first time by the European Commission in respect of Poland. In September 2018, the European Parliament activated the same mechanism in respect of Hungary. To this day, the Council of the EU has however proved unable or unwilling to make meaningful progress in the ongoing Article 7(1) TEU procedures and address concrete recommendations to either Poland or Hungary.

This working paper, which forms part of broader research commissioned by Open Society Foundations on Article 7(1) TEU proceedings, is exclusively dedicated to the procedure in respect of Poland. It aims to offer updated as well as new recommendations which the Council of the EU may adopt. Each of the recommendations is preceded by a state of play overview up to date as of 1 January 2023.

KEYWORDS

European Union, Poland, Rule of Law, Article 7(1) TEU

INTRODUCTION*

Article 7(1) TEU empowers the EU to act preventively in a situation where there is a clear risk of a serious breach of the values laid down in Article 2 TEU¹ and “provides a means of sending a warning signal to an offending Member State before the risk materialises”.²

In December 2017, Article 7(1) TEU was activated for the first time by the European Commission in respect of Poland.³ In September 2018, the European Parliament activated the same mechanism in respect of Hungary.⁴ To this day, the Council of the EU has however proved unable or unwilling “to make meaningful progress in the ongoing Article 7(1) TEU procedures in line with its obligations under the Treaties” and address “concrete recommendations to the Member States in question”.⁵ Furthermore, one may argue we are long past the stage where there is a clear risk of a serious breach of Article 2 TEU values. Instead, in both Poland and Hungary, the serious breach has not only materialised, it has worsened and persisted for a considerable period of time. Yet only the “preventive arm” of Article 7 has, to date, been activated.

This working paper, which forms part of broader research commissioned by Open Society Foundations on Article 7(1) TEU proceedings, is exclusively dedicated to the procedure in respect of Poland and aims to offer updated as well as new recommendations which the Council of the EU may adopt. Each of the

* The authors gratefully acknowledge that this work was supported by Open Society Foundations. The authors are also grateful to Judge Dariusz Mazur for his helpful review and comments. Feedback welcome as a revised and final publication is planned for spring 2023.

¹ “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

² European Commission, Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15 October 2003.

³ European Commission, 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, 20 December 2017.

⁴ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8_TA(2018)0340.

⁵ European Parliament resolution of 5 May 2022 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary, P9_TA(2022)0204, paras 2 and 6.

recommendations is preceded by a brief state of play overview up to date as of 1 January 2023. As the overall legal and factual situation is complex, this introduction will offer a background summary before briefly outlining the key features of Article 7(1) TEU and what the Council has done (or rather not done) to date.

1. Background

On 20 December 2017, Article 7(1) TEU was activated for the first time by the European Commission in respect of Poland on account of the clear risk of a serious breach by Polish authorities of the rule of law, which is one of the values referred to in Article 2 TEU. This first ever activation of Article 7(1) TEU was preceded by the first ever activation by the Commission of its Rule of Law Framework⁶ (informally known as the “pre-Article 7 procedure”) on 13 January 2016.⁷ The Commission subsequently 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 2017.⁸

At the time it adopted its fourth Rule of Law Recommendation, the Commission simultaneously activated the procedure laid down in Article 7(1) TEU as its pre-Article 7 “concerns” remain *entirely* unaddressed. In 2020, Poland became the first ever EU Member State to be simultaneously subject to the EU’s exceptional Article 7(1) TEU procedure⁹ and the special monitoring procedure of the Council of Europe.¹⁰

⁶ European Commission Communication, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final, 11 March 2014.

⁷ 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.

⁸ 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 but may be explained by the Commission’s reluctance to activate Article 7(1) TEU. 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, 3rd edition, 2021), 307.

⁹ 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.

¹⁰ Council of Europe, PACE, The functioning of democratic institutions in Poland, Resolution 2316 (2020), para. 17.

In its Article 7(1) TEU proposal of 20 December 2017, the Commission put forward five recommendations to be adopted by the Council with the Commission also suggesting to the Council to give Polish authorities three months to implement them. The five recommendations concerned:

- (a) The composition of Poland's Constitutional Tribunal;
- (b) The publication and implementation of several judgments of the Constitutional Tribunal issued before December 2016;
- (c) The laws on the Supreme Court, Ordinary Courts Organization, the National Council for the Judiciary, and the National School of Judiciary;
- (d) The need to ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties;
- (e) The need for Polish authorities to refrain from actions and public statements which could undermine further the legitimacy of courts, judges, and the judiciary as a whole.

This study will offer updated recommendations in relation to each of the five areas identified by the Commission in December 2017. In addition, and to account for the sustained deterioration of the situation ever since, new recommendations will be offered in relation to:

- (f) The lack of compliance with rule of law related CJEU orders and judgments as well as all relevant ECtHR judgments and interim measures;
- (g) The composition and independence of the Supreme Court;
- (h) The composition and independence of the National Council for the Judiciary;
- (i) The need to restore the separation between the Public Prosecutor's Office and the Ministry of Justice;
- (j) The situation of individuals appointed to judicial offices in inherently deficient procedures;
- (k) Addressing the situation of any judge sanctioned or subject to investigations and proceedings of any nature for applying European law and/or defending the rule of law.

2. The Article 7(1) TEU procedure in a nutshell

Moving away from the misleading “nuclear option” label which has often but mistakenly been used to describe Article 7 TEU,¹¹ the Commission has since more accurately referred to this provision as providing for “the most prominent mechanism for protecting all common values”, even if it is meant to be “used only exceptionally”.¹² The plural form would nonetheless be more accurate as Article 7 TEU provides for *two* procedures which do *not* have to be used in sequence: a preventive one (Article 7(1) TEU), and a sanctioning one (Article 7(2), (3) and (4) TEU). Only the preventive arm of Article 7 TEU has been activated to date.

A key and unusual substantive feature of Article 7’s preventive and sanctioning procedures is that they may be used to monitor and assess the actions/inaction of national authorities *in any area*. The European Parliament emphasised this aspect in its resolution of 15 September 2022 when it correctly noted that “the scope of Article 7 TEU is not confined to the obligations under the Treaties”¹³ by contrast to Article 258 TFEU (infringement procedure). It follows that “the Union can assess the existence of a clear risk of a serious breach of the common values in areas falling under Member States’ competences.”¹⁴ This also explains and justifies the wide scope of the European Commission’s Annual Rule of Law Report, which looks at issues beyond the scope of application of EU law *stricto sensu*.¹⁵

Finally, one key procedural feature the Article 7’s preventive mechanism worth stressing is the possibility for the Council to address Article 7(1) recommendations to the Member State *after* hearing governmental representatives of this Member State. However, as will be outlined below, no recommendations have ever been adopted by the Council to date notwithstanding the organization of several formal hearings in relation to both Poland and Hungary.

¹¹ See generally, L. Pech, ‘Article 7 TEU: From ‘Nuclear Option’ to ‘Sisyphean Procedure?’ in U. Belavusau and A. Gliszczyńska-Grabias, (eds), *Constitutionalism under Stress: Essays in Honour of Wojciech Sadurski*, (Oxford University Press, 2020), 157.

¹² European Commission Communication, Further strengthening the Rule of Law within the Union. State of play and possible next steps, COM(2019) 163 final, 3 April 2019, p. 2.

¹³ Recital H.

¹⁴ *Ibid.*

¹⁵ See generally, L. Pech and P. Bárd, *The Commission 2021 Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values*, European Parliament Study PE 7227.551, 21 February 2022.

3. Council's Article 7 (in)action to date

As of 1 January 2023, a total of 10 hearings have been organized by the Council: 5 in relation to the rule of law situation in Poland and 5 in relation to the broader Article 2 TEU situation in Hungary. As regards Poland, the first hearing took place on 26 June 2018 and the last one on 22 February 2022.

These hearings suffer from several self-inflicted shortcomings¹⁶ and the European Parliament has regularly expressed its serious misgiving as regards the Council's unwillingness to organize structured, regular, and transparent Article 7(1) hearings. In its latest resolution to date on this topic, the Parliament stressed in particular the need for the Council to publish comprehensive minutes; to organize at least one hearing per presidency, and finally to address "concrete recommendations to the Member States in question" as provided for by Article 7(1) TEU.¹⁷

While the Council is yet to address the Parliament's criticism and adopt Article 7(1) recommendations, Polish and Hungarian authorities are increasingly the subject of EU recommendations which relate to some of the issues and concerns identified by the Commission and Parliament in their respective Article 7(1) reasoned proposals. However, these recommendations have been adopted under different EU instruments, and to further complicate matters, may also be known under different names such as "country specific recommendations", "milestones", or "remedial measures". As regards Poland, one may mention a rule of law related European semester country specific recommendation,¹⁸ most recently accompanied by three judicial "milestones" under the EU Recovery and Resilience Facility in June 2022¹⁹ and recommendations under the EU's Annual Rule of Law Report in July 2022.²⁰

This study will refer to relevant recommendations adopted under instruments other than Article 7(1) TEU where relevant.

¹⁶ Ibid, pp. 40-44.

¹⁷ European Parliament resolution of 5 May 2022 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary, P9_TA(2022)0204, para. 6.

¹⁸ OJEU [2022] C 334/171.

¹⁹ Council document no. 9728/22, 14 June 2022.

²⁰ SWD(2022) 521 final.

I. UPDATED ARTICLE 7(1) TEU RECOMMENDATIONS

(a) Restoration of the independence and legitimacy of the Constitutional Tribunal

20 December 2017 recommendation as set out in the Commission's 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:

"The Council recommends that the Republic of Poland [...] restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed, by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected"

State of play:

In violation of several rulings of the then still lawfully composed and independent Polish Constitutional Tribunal (hereinafter: CT) issued in December 2015 and March, August, and November 2016, Polish authorities proceeded with the irregular appointment of the current President of the CT as well as the irregular appointment of three individuals whose nomination by the Polish parliament was made without a valid legal basis. For the European Commission,²¹ as well as the European Parliament,²² the irregular appointment of the current CT president and the irregular composition of the CT mean *inter alia* that the constitutionality of Polish laws has not been effectively guaranteed since December 2016. It follows

²¹ European Commission, 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, 20 December 2017.

²² 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(2020)0225.

that the “judgments” rendered by the current CT can no longer be considered as providing effective constitutional review.

In October 2020, in the absence of any attempt to restore the independence and legitimacy of the CT, the largest association of Polish judges decided no longer to recognise as legitimate the current CT and called on independent judges to assess whether its “rulings” may be considered “valid and final” when they are issued by panels which include irregularly appointed individuals.²³

In a judgment of 7 May 2021, the European Court of Human Rights (ECtHR) established the irregular composition of the current CT in the case of *Xero Flor w Polsce sp. z o.o. v. Poland*.²⁴ As established by the ECtHR, the actions of the Polish legislature and executive amounted to unlawful external influence on the CT with the ECtHR also holding that the bench of the CT which heard the case was unlawful to the extent that it included an individual irregularly elected to the CT. As a result, the bench which decided the applicant company’s case was held *not* to be a tribunal established by law in violation of Article 6(1) ECHR. This did not prevent the same body, on 24 November 2021, in another irregularly composed bench and in manifest violation of Poland’s Constitution and the ECHR, from holding that Article 6(1) ECHR is incompatible with the Polish Constitution as far as it is interpreted to include the CT in its definition of a court.²⁵

The widely decried decision of 24 November 2021 followed another widely reported decision adopted on 7 October 2021, issued yet again by an irregularly composed bench and in manifest violation of Poland’s Constitution and the EU Treaties, in which the CT held that the second sub-paragraph of Article 19(1)

²³ 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 Board of the Polish Society of Constitutional Law, 28 October 2020: <http://konstytucyjny.pl/zarzad-polskiego-towarzystwa-prawa-konstytucyjnego-krytykuje-rozstrzygniecie-tk-w-sprawie-aborcji/>. For the proposition that the whole CT must be considered illegitimate from 8 February 2017, that its entire current membership must be replaced, and that all of its “judgments” since then must be considered invalid, see W. Sadurski, “Extinguishing the Court: Why there is no salvation for the current Polish Constitutional Tribunal”, *VerfBlog*, 14 August 2022: <https://verfassungsblog.de/extinguishing-the-court/>

²⁴ Application no. 4907/18, CE:ECHR:2021:0507JUD000490718.

²⁵ Case K 6/21. For a brief account, ‘Polish tribunal rules European rights court cannot question its judges’, *Reuters*, 24 November 2021: <https://www.reuters.com/world/europe/polish-tribunal-rules-european-rights-court-cannot-question-its-judges-2021-11-24/>

TEU, as interpreted by the Court of Justice, is similarly incompatible with Poland's Constitution. The operative part of this judgment essentially means that the entirety of the case law of the CJEU as regards the principle of effective judicial protection is no longer recognised as binding by Poland's irregularly composed and politically captured CT.

On 19 October 2021, the President of the European Commission emphasised before the European Parliament that the decision of 7 October 2021 is unprecedented and has been issued by a body which "under Article 7 we consider *not to be independent and legitimate* [emphasis added]."²⁶

On 7 December 2021, Poland's CT decision of 24 November 2021 was similarly described as unprecedented by the Secretary General of the Council of Europe²⁷ and led to the extremely rare activation of Article 52 ECHR.²⁸

On 22 December 2021, five years after the end of effective constitutional review in Poland according to the Commission itself, the Commission launched its first ever infringement action in relation to the CT's unlawful composition and its "rulings" of 14 July and 7 October 2021. For the Commission, these rulings are in breach of the general principles of autonomy, primacy, effectiveness, and uniform application of Union law and the binding effect of rulings of the CJEU and also are in breach of Article 19(1) TEU by giving it an unduly restrictive interpretation. Finally, the Commission reiterated its previous assessment that the current CT "no longer meets the requirements of a tribunal previously established by law, as required by Article 19(1) TEU".²⁹

²⁶ Speech by President von der Leyen at the European Parliament Plenary on the rule of law crisis in Poland and the primacy of EU law, Strasbourg, 19 October 2021, Speech/21/5361: https://ec.europa.eu/commission/presscorner/detail/en/speech_21_5361

²⁷ Council of Europe, Council of Europe Secretary General reacts to judgment from Poland's Constitutional Tribunal, 24 November 2021: <https://www.coe.int/en/web/portal/-/council-of-europe-secretary-general-reacts-to-today-s-judgment-from-poland-s-constitutional-tribun-1>

²⁸ Article 52 ECHR: "On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention". See also Council of Europe, Secretary General asks Poland how it intends to ensure the effective implementation of the European Convention on Human Rights, Press release, Ref. DC 235rev(2021), 7 December 2021.

²⁹ European Commission, Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal, Press release IP/21/7070, 22 December 2021: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070

On 10 March 2022, in another case yet again decided by an unlawful bench, the CT found that several aspects of Article 6(1) ECHR were allegedly unconstitutional while furthermore denying the jurisdiction of the ECtHR to review applications relating to Polish legislation on the judiciary, Polish courts, and the National Council of the Judiciary.³⁰

On 13 March 2022, more than 20 retired judges of the CT publicly denounced this ruling as “another scandalous example of jurisprudence violating” Poland’s Constitution as it aims to “eliminate external control of legislation that violates the constitutional right to a court (Article 45) and the principles of independence of courts (Article 173) and independence of judges (Article 178).”³¹ For the retired judges, the CT’s decision of 10 March 2022 must be considered non-existent both domestically and internationally.

On 9 November 2022, Marija Pejčinović Burić, the Secretary General of the Council of Europe, in her report issued on the basis of Article 52 ECHR, formally acknowledged that the “ensuing obligation of Poland to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction *is not, at this stage, fulfilled*” (emphasis added), and noted with concern the rising number of applications pending before the European Court in relation to Poland’s rule of law crisis due to deficient judicial appointments.³² According to our data, more than one hundred applications have been lodged with the ECtHR. The table below offers a list of all complaints communicated as of 1 January 2023 and shows a considerable acceleration in the number of communicated complaints with a total of 76 applications communicated in 2022 versus a total of 4 applications communicated in 2019.

³⁰ Case K 7/21.

³¹ Statement by retired judges of the Constitutional Tribunal on the Constitutional Tribunal judgment in case K 7/21, *Rule of Law in Poland*, 13 March 2022: <https://ruleoflaw.pl/statement-by-retired-judges-of-the-constitutional-tribunal-on-the-the-constitutional-tribunal-judgment-in-case-k-7-21/>

³² Council of Europe, Report by the Secretary General under Article 52 of the ECHR on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland, SG/Inf(2022)39, 9 November 2022, para. 29 and para 31.

TABLE 1: ECHR communicated applications regarding Poland's rule of law crisis as of 1 January 2023³³

Communicated in 2019 (total of 4)	3685/20 Sterkowicz (17 Nov 2021)	8076/22 Piekarska-Drązek (23 May 2022)	18422/21 Lubomska and Puzyna (4 July 2022)
10572/18 <i>Correia</i> (8 July 2019 & decided on 16 March 2022)	12730/21 Youssfi (17 Nov 2021)	8687/22 Niklas-Bibik (23 May 2022)	42443/21 Wojtielewicz (4 July 2022)
4007/18 <i>Xero Flor v. Poland</i> (16 May 2020 & decided on 7 May 2022)		9988/22 Hetnarowicz-Sikora (23 May 2022)	53725/21 Antoszewski (4 July 2022)
26561/18 <i>Świątek</i> (4 Sept 2019 & decided on 23 June 2022)	Communicated in 2022 (total of 76)	15928/22 Głowacka (23 May 2022)	54815/21 Bętkowski (4 July 2022)
10507/18 <i>Bogusz</i> (4 Sept 2019 & decided on 23 June 2022)	15656/20 Sokal (25 March 2022)	55273/21 Kocot (1 June 2022)	1181/22 Kamiński (4 July 2022)
	11000/21 Wójcik (25 March 2022)	55562/21 Kappes (1 June 2022)	28314/21 Szulc (4 July 2022)
Communicated in 2020 (total of 9)	41097/20 Dudek (31 March 2022)	46854/20 Hejzart (1 June 2022)	35535/21 Janik (4 July 2022)
11708/18 Hejzart et al (14 May 2020)	53778/20 Szczepaniak (31 March 2022)	54808/21 Nowakowski (1 June 2022)	32097/21 Dziegala (4 July 2022)
10550/19 <i>Dziuba v. Poland</i> (16 May 2020 & decided on 16 June 2022)	1412/21 Modzelewska (31 March 2022)	2809/22 Szulc (1 June 2022)	48534/20 Zielińska (4 July 2022)
51447/19 <i>Pachkiewicz</i> (5 June 2020 & decided on 24 June 2022)	8916/21 Bojarczyk (31 March 2022)	4763/22 Prolex (1 June 2022)	8050/21 Gacek (6 July 2022)
40546/19 <i>Domstka-Pieck</i> (8 June 2020 & decided on 8 Nov 2022)	21998/21 Fręckowiak-Mitura (31 March 2022)	7186/22 Rucińska (1 June 2022)	37483/20 Kiełtyka (6 July 2022)
57511/19 <i>Chłamek</i> (8 June 2020 & decided on 8 Nov 2022)	22918/21 Hetnarowicz-Sikora (31 March 2022)	17162/21 Czajkowski (1 June 2022)	42632/20 Kapiński (6 July 2022)
25226/18 Pajak (7 Sept 2020)	24398/21 Odelek (31 March 2022)	18696/21 Sajon (1 June 2022)	35463/21 Poręba (6 July 2022)
25805/18 Kuzak (7 Sept 2020)	25545/21 Zielenka (31 March 2022)	39887/21 Salwin (1 June 2022)	41335/21 D.C. (7 July 2022)
8378/19 Kabińska (7 Sept 2020)	26638/21 Elsmont (31 March 2022)	43727/21 Labudek (1 June 2022)	50991/21 Botor (7 July 2022)
105000 <i>Advance Pharma</i> (16 Dec 2020 & decided on 9 Feb 2022)	31053/21 Prokopow and Maciejko (31 March 2022)	45530/21 Szewczuk (1 June 2022)	32301/22 Chmielewski (7 July 2022)
	42668/21 I.G. (31 March 2022)	46220/21 Palak (1 June 2022)	32838/21 Rybska (30 Sept 2022)
Communicated in 2021 (total of 10)	50702/21 Piotrowicz (31 March 2022)	47767/21 Chrzanowski (1 June 2022)	41743/21 Chmielewski (30 Sept 2022)
13278/20 Bilirski (30 April 2021)	50708/21 Poremba (31 March 2022)	6026/22 Bujak (1 June 2022)	18001/22 Stępa (30 Sept 2022)
26004/20 Plonka (30 April 2021)	60827/21 Cholewicz (31 March 2022)	6514/22 Kowarowski (1 June 2022)	50849/21 Waleśa (12 October 2022)
28122/20 Brodowski (30 April 2021)	1210/22 Arydym Sp. z o.o. (31 March 2022)	4763/22 Prolex sp. z o.o. (1 June 2022)	22591/22 Ferek (7 November 2022)
105000 <i>Advance Pharma</i> (16 Dec 2020 & decided on 9 Feb 2022)	1470/22 Burchard (31 March 2022)	27444/22 Gęciarek (10 June 2022)	39471/22 Leszczyńska-Furtak (6 Dec 2022)
	1510/22 Michałek (31 March 2022)	18632/22 Zawilak (13 June 2022)	39477/22 Gregaliys (6 Dec 2022)
	6904/22 Wróbel (31 March 2022)	2415/21 Sarata (13 June 2022)	44068/22 Piekarska-Drązek (6 Dec 2022)
	18380/22 Rutkiewicz (19 April 2022)	46238/20 Morawiec (4 July 2022)	
48599/20 Dzus (30 April 2021)	48530/21 Kaszyński (23 May 2022)	51529/21 Nawrot (4 July 2022)	
43949/19 Jezierska (24 June 2021)	54461/21 Ludwiak (23 May 2022)	5685/22 Śliwa (4 July 2022)	
21181/19 Tuleya (16 July 2021)	46453/21 Synakiewicz (23 May 2022)	40001/21 Nalecz (4 July 2022)	
51751/20 Tuleya no. 2 (16 July 2021)			

In December 2022, as regards the unlawfully composed CT specifically, the Committee of Ministers of the Council of Europe formally noted Poland's failure to provide for any individual measures in the case of *Xero Flor* and urged Polish authorities, in order to avoid similar violations of the right to a tribunal established by law, to "take rapid remedial action [...] (i) to ensure that the Constitutional Court is composed of lawfully elected judges, and should therefore allow the three judges elected in October 2015 to be admitted to the bench and serve until the end of their nine-year mandate, while also excluding from the bench judges who were irregularly elected; (ii) to address the status of decisions already adopted in cases concerning constitutional complaints with the participation of irregularly appointed judge(s); and (iii) to propose measures to prevent external undue influence on the appointment of judges in the future".³⁴

However, this set of actions may not suffice to address the situation effectively. Indeed, in a judgment of 16 November 2022, a properly established by law three-member bench of Poland's Supreme Administrative Court held that "the presence of incorrectly appointed judges in the membership of the Constitutional Tribunal means that the whole of the Polish Constitutional Tribunal has been "infected"

³³ By date of notification with applications decided on the merits highlighted in green.

³⁴ Council of Europe (Committee of Ministers), H46-24 *Xero Flor w Polsce sp. z o.o. v. Poland* (Application No. 4907/18), 1451st meeting, 6-8 December 2022 (DH), para. 4.

with illegality, and has therefore lost, in a material sense, its ability to adjudicate in accordance with the law.”³⁵

Accordingly, one may advise that the entire membership of the body currently masquerading as Poland’s CT should be changed.

Updated Recommendation (a):

The Council recommends that the Republic of Poland take immediate steps to:

- restore the regular composition, independence, and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that the Constitutional Tribunal meets the requirements of a tribunal previously established by law and that its judges, its President, and its Vice-President are lawfully elected and appointed by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate;
- ensure that a procedure is established to reopen cases which have been irregularly decided by an unlawful bench of the Constitutional Tribunal, with the relevant decisions issued in these cases to be furthermore considered non-existent, and propose measures to prevent external undue influence on the appointment of judges in the future;
- reiterate by way of a declaration submitted to the Council that it recognises the principles of autonomy, primacy, effectiveness, and uniform application of Union law as well as the values laid down in Article 2 TEU, including in particular the rule of law; accepts the authority of the Court of Justice of the European Union, whose decisions are final and binding; acknowledges that the decisions of Poland’s Constitutional Tribunal of 14 July 2021 and 7 October 2021 are

³⁵ Case III OSK 2528/21. See also Ł. Woźnicki, “Supreme Administrative Court: The Constitutional Tribunal has been infected with illegality”, *Rule of Law in Poland*, 7 December 2022: <https://ruleoflaw.pl/supreme-administrative-court-the-constitutional-tribunal-has-been-infected-with-illegality/>

in breach of the general principles of autonomy, primacy, effectiveness, and uniform application of Union law and the binding effect of rulings of the Court of Justice and in breach of Article 19(1) TEU and were furthermore issued by unlawful benches rendering the rulings of 14 July 2021 and 7 October 2021 null and void; recognises that it fully respects its obligations under the European Convention of Human Rights and that the decisions of Poland's Constitutional Tribunal of 24 November 2021 and 10 March 2022 breach these obligations whereas fundamental rights guaranteed by the European Convention of Human Rights simultaneously constitute general principles of Union law which may therefore also be considered as being violated by these decisions.

(b) Publication and full implementation of the judgments of the pre-captured Constitutional Tribunal

20 Dec 2017 recommendation as set out in the Commission's 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:

"The Council recommends that the Republic of Poland [...] publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016"

State of play:

In 2016, the not-yet captured and still lawfully composed CT issued three judgments of paramount importance for the rule of law: judgment K 47/15 of 9 March 2016, judgment K 39/16 of 11 August 2016, and judgment K 44/16 of 7 November 2016. These three judgments concerned patently unconstitutional legislation targeting the CT. In judgment K 47/15, the CT held that the law on the CT adopted on 22 December 2015 was incompatible with the Polish Constitution. Judgment K 39/16 found the same regarding elements of a subsequent law on the CT adopted on 22 July 2016. Finally, in the K 44/16 judgment, the CT found additional elements of the 22 July 2016 law on the CT, namely the provisions regarding the selection of the President and the Vice-President of the Tribunal, incompatible with the Polish Constitution.

The three laws reviewed by the CT and held to be incompatible with the Constitution included provisions which aimed to undermine the effective and independent functioning of the Tribunal and paved the way to its capture by the new ruling coalition: the first law was intended to paralyze the Tribunal's work, providing, among other things, for the CT to rule in the order in which cases are received by a two-thirds majority and with at least 13 judges, and prohibiting the adjudication of cases before six months passed after their receipt. The second law required for the three unlawfully appointed judges (as subsequently established by the ECtHR in the *Xero Flor* judgment of 7 May 2021) to be allowed to adjudicate. The third sought to set up the vote in the Tribunal on nominations for the President of the Tribunal in such a way as to guarantee the capture of the CT by the ruling party.

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 also means that the judgments of the CT come into force from the moment of their publication in the Journal of Laws (*Dziennik Ustaw*), a mere administrative task formally entrusted to the government. However, the Polish government, then led by Prime Minister Beata Szydło, pretended that this was a discretionary executive power and refused to publish the three aforementioned judgments on account of the CT not delivering its judgments in the legally prescribed quorum, as provided by the law which the CT had declared unconstitutional! Szydło’s government continued to violate Poland’s Constitution by refusing to publish the three judgments mentioned above even after Poland’s ruling coalition took control of the CT following *inter alia* the irregular elections (as established by ECtHR in the *Xero Flor* judgment) to the CT of three individuals.

Szydło’s gross abuse of power led to a significant constitutional crisis and was highlighted as a manifest violation of the basic tenets of the rule of law not only by the European Parliament³⁶ but also by the Parliamentary Assembly of the Council of Europe:

The constitutional crisis that ensued over the composition of the [CT] remains of concern and should be resolved. No democratic government that respects the rule of law can selectively ignore court decisions it does not like, especially those of the [CT]. The full and unconditional implementation of all [CT] decisions by the authorities, including with regard to the composition of the [CT] itself, should be the cornerstone of the resolution of the crisis. The restoration of the legality of the composition of the [CT], in line with European standards, is essential and should be a priority.³⁷

The situation was further exacerbated by the newly-captured CT, under the new but similarly irregularly appointed CT President Julia Przyłębska, with the text of these three judgments being removed from its website and the official registry of the Tribunal’s case-law. This prompted Adam Bodnar, then Poland’s Commissioner for Human Rights, to publish these three judgments on the Commissioner’s website to ensure that their text remained publicly accessible on

³⁶ European Parliament Resolution of 17 September 2020, PA_TA(2020)0225, para. 15.

³⁷ PACE, ‘The functioning of democratic institutions in Poland’, Resolution 2316 (2020), para 6.

an official website.³⁸ The refusal to publish, and subsequently to implement, these three judgments was used as a pretext by the Government to claim that it could implement the amendments to the (unconstitutional) law on the CT. In practical terms, the new laws made it possible for the three individuals who were unlawfully appointed to the CT to take their seats at the Tribunal and (irregularly) participate in the (irregular) election of a new President and Vice-President. As subsequently established by the ECtHR in *Xero Flor*, the actions of the Polish executive and legislature, and in particular their failure to abide by the relevant judgments of the (then independent) CT, aimed to *usurp the CT's role* as the ultimate interpreter of Poland's Constitution and the constitutionality of Polish law.

In June 2018, the Polish government presented the belated publication of the aforementioned three rulings in the Journal of Laws³⁹ as evidence of compliance, yet the rulings have not been published as judgments but instead published as findings "delivered in violation of law" which "refer to laws which are no longer in force". The Polish government here implicitly referred to the fact that the unconstitutional laws from 2015 and July 2016 were replaced by new (similarly patently unconstitutional) laws from November and December 2016.

To this day, Polish authorities have refused to publish without any additional qualification as to their legality the judgments of the (regularly composed) CT of 9 March 2016, 11 August 2016, and 7 November 2016. Unsurprisingly, this means that there has been no attempt whatsoever to implement them either. More generally speaking, none of the recommended actions set out by the Commission in its Article 7(1) proposal have been implemented to date. Unlawfully appointed judges have continued to adjudicate, and following the death of two of them new individuals were appointed in their place by the Sejm without any attempt to allow any of the three judges elected in 2015 to take their lawful place in the CT. In a similar fashion, Julia Przyłębska continues to pretend to hold the position of the President of the CT notwithstanding her unconstitutional appointment to this

³⁸ Rzecznik Praw Obywatelskich, *RPO publikuje usunięte z serwisu Trybunału Konstytucyjnego jego wyroki: w sprawach K 47/15, K 39/16, K 44/16*, 2 June 2017: <https://bip.brpo.gov.pl/pl/content/rpo-publikuje-usuniete-z-serwisu-trybuna%C5%82u-konstytucyjnego-wyroki-w-sprawach-k-4715-k-3916-k-4416>

³⁹ Wyrok Trybunału Konstytucyjnego z dnia 9 marca 2016 r. sygn. akt K 47/15; Wyrok Trybunału Konstytucyjnego z dnia 11 sierpnia 2016 r. sygn. akt K 39/16; Wyrok Trybunału Konstytucyjnego z dnia 7 listopada 2016 r. sygn. akt K 44/16; all three were published in Dz.U. 2018 poz. 1079 on 5 June 2018.

position and refusal, by her and the Polish government, to acknowledge the fact that her (first irregular) term of office as the President of the Tribunal concluded on 20 December 2022 in line with findings of an expert panel assembled by the Stefan Batory Foundation⁴⁰ and several members, including irregular ones, of the CT itself.⁴¹ And for all practical purposes, the three judgments of the then lawfully composed CT continue to be treated by current Polish authorities and the neo-CT itself as purely historical events lacking any binding legal effect in manifest violation of the Polish Constitution.

In the face of this sustained pattern of unconstitutional behavior, manifest irregular membership, and subservience to Poland's current ruling coalition, the number of individual constitutional complaints has sharply decreased. Taking 2015 as a point of reference, the number of individual complaints received by the neo-CT has sharply declined by close to 58% in five years.⁴² Interviews carried out with civil society representatives, practicing lawyers and legal advisors indicate that, in a situation where an individual seeks professional assistance in lodging a constitutional complaint, the legal advice provided points to the dubious viability of such a route owing to the lack of independence of the CT, its irregular composition, and the likelihood of seeing the CT's "rulings" being challenged or found null and void at a later date.⁴³

This situation is particularly serious as the individual constitutional complaint is not merely a means of ensuring the compliance of the legal system with the

⁴⁰ Stefan Batory Foundation, "Stanowisko Zespołu Ekspertów Prawnych Fundacji im. Stefana Batorego w związku z upływem w dniu 20 grudnia 2022 r. kadencji Prezesa Trybunału Konstytucyjnego", 6 December 2022: <https://www.batory.org.pl/oswiadczenie/stanowisko-zespołu-ekspertów-prawnych-fundacji-im-stefana-batorego-w-związku-z-upływem-w-dniu-20-grudnia-2022-r-kadencji-prezesa-trybunału-konstytucyjnego/>

⁴¹ Szóstka sędziów TK nie uznaje Julii Przyłębskiej za prezesa i chce wyboru nowego", *Gazeta Prawna*, 4 January 2023: <https://www.rp.pl/sady-i-trybunały/art37729061-szostka-sedziow-tk-nie-uznaje-julii-przylebskiej-za-prezesa-i-chce-wyboru-nowego>

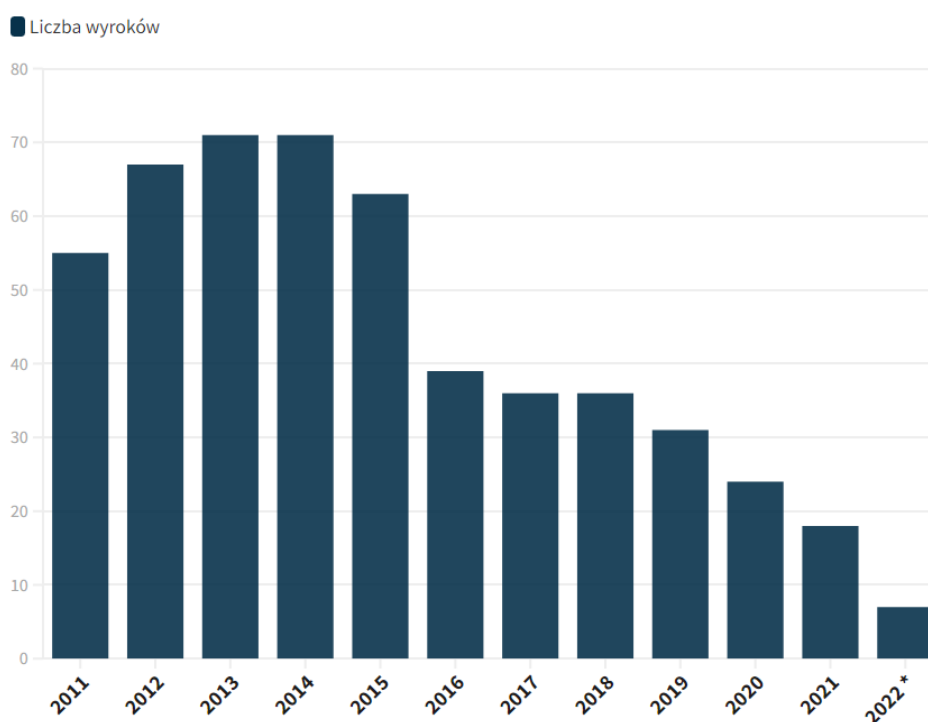
⁴² In 2020, the irregularly composed CT received 173 individual complaints versus a total of 408 in 2015. See Trybunał Konstytucyjny, *Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego w 2020 roku*, Warsaw 2021, p. 44: https://trybunal.gov.pl/fileadmin/content/dokumenty/publikacje/informacje_o_problemach/TK_1_informacja_2020.pdf. Fundacja Batorego, *Analiza działalności orzeczniczej trybunału konstytucyjnego w latach 2014-2017*, 15 March 2018, p. 4: <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Państwo/Raport%20ZEP%20o%20funkcjonowaniu%20TK.pdf>

⁴³ Interviews with attorneys (adwokat), legal advisors (radca prawny) and civil society representatives carried out under Chatham House Rules in Poznań, Warsaw, Berlin, and Brussels, June 2022.

Constitution but also a crucial element in the procedural guarantee of respect for human rights and freedoms in Poland, theoretically providing anyone with the means of challenging any laws that infringe on personal rights and freedoms provided for in the Polish Constitution and deriving from relevant ratified international treaties such as the European Convention on Human Rights (ECHR), the Charter of Fundamental Rights of the European Union (CFREU), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on Economic, Social and Cultural Rights (ICESCR).

TABLE 2: Number of CT judgments for the 2011-2021 period and first semester of 2022⁴⁴

Liczba wyroków TK w latach 2011-2021 oraz w I półroczu 2022



One may finally note that the abusive practice of delaying the publication of the judgments of the CT has also been used by the Polish government in relation to a “judgment” on 22 October 2020 that it secured from an irregularly composed bench of the CT which held the provisions of the 1993 Act on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy to

⁴⁴ M. Pach, “Jak nie pracował TK Przyłębskiej w pierwszym półroczu 2022”, *OKO.press*, 2 July 2022: <https://oko.press/jak-nie-pracowal-tk-przylebskiej-w-pierwszym-polroczu-2022/>

be unconstitutional.⁴⁵ The Polish government sought to justify its arbitrary refusal to publish this decision for over three months on account of the non-existing requirement that official publication should be delayed until the full opinion is made available by the CT⁴⁶ when it was obvious to anyone that the publication delay was manifestly connected to the demonstrations which were then taking place in relation to this “judgment”. Over 1,000 applications have since been lodged with the ECtHR regarding this specific CT decision with the applicants raising *inter alia* the irregular composition of the CT in support of their ECHR applications.⁴⁷

Updated Recommendation (b):

The Council recalls that no democratic government that respects the rule of law can selectively ignore court decisions it does not approve of and strongly deplores the overdue and qualified publication of the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016, and 7 November 2016, and recommends that the Republic of Poland immediately publish these judgments without any qualifications as to their legality and relevance, remove existing qualifications from Poland’s Official Journal, and fully implement these judgments, and as part of the process of restoring the independence and legitimacy of the Constitutional Tribunal in line with recommendation (a) above, take account of these judgments fully when revising existing legislative provisions regarding the Constitutional Tribunal before submitting the revised legislative provisions for constitutional review to a Constitutional Tribunal which meets the requirements of an independent and impartial tribunal established by law.

⁴⁵ European Parliament resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland, P9_TA(2020)0336.

⁴⁶ TVN24, “Niemal całkowity zakaz aborcji w Polsce. Wyrok Trybunału Konstytucyjnego opublikowany”, 27 January 2021: <https://tvn24.pl/polska/wyrok-trybunalu-konstytucyjnego-ws-aborcji-opublikowany-w-dzienniku-ustaw-5001168>

⁴⁷ ECtHR, Notification of 12 applications concerning abortion rights in Poland, Press release ECHR 217 (2021), 8 July 2021.

(c) Compliance of the law on the Supreme Court, the law on Ordinary Courts Organization, the law on the National Council for the Judiciary and the law on the National School of Judiciary with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty

20 Dec 2017 recommendation as set out in the Commission's proposal for a Council decision:

"The Council recommends that the Republic of Poland [...] ensure that the law on the Supreme Court, the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the National School of Judiciary are amended in order to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty"

State of play:

Since December 2017, the law on the Supreme Court has undergone repeated amendments and changes, which have generally been rushed, and several of which stand in clear violation of domestic, regional, and international legal standards.

In 2018, the law on the Supreme Court was amended no less than five times, with most of the changes occurring as a reaction to ongoing political and legal developments. Among key changes introduced that year were the revision of the new procedure of extraordinary review of existing lawful judgments through limiting the scope of entities empowered to submit such review to the Prosecutor General and the Commissioner for Human Rights, shifting the competence to appoint judges-in-training from the Minister of Justice to the President, and requiring the President to request an opinion of the National Council of Judiciary (NCJ) to allow a judge over 65 years old to continue serving on the Supreme Court.

As regards the possibility of a so-called extraordinary appeal against judgments that are already finalised and whose appeals process has been terminated in accordance with the law, this procedure has been widely denounced as it manifestly "violates the principle of legal certainty and *res judicata*".⁴⁸ To this day, there has been no meaningful changes made to this procedure, which has been

⁴⁸ PACE, The functioning of democratic institutions in Poland, Resolution 2316(2020), para. 7.4.

repeatedly abused for political reasons⁴⁹ and furthermore involves a body – the Chamber of Extraordinary Control and Public Affairs (CECPA) – which has been since held by the ECtHR not to constitute a court established by law.⁵⁰

2018 also saw Polish authorities attempting to capture Poland's Supreme Court with a retroactive – and grossly unconstitutional – lowering of the retirement age in respect of sitting judges as well as prematurely extinguishing the term of the Supreme Court president Małgorzata Gersdorf.⁵¹ The European Commission reacted by launching an infringement action, which was subsequently lodged with the CJEU resulting in a judgment finding against Poland on 24 June 2019 in Case C-619/18.⁵² In November 2018, the Polish parliament once again amended the law on the Supreme Court, this time to confirm that the term of Małgorzata Gersdorf would continue until its constitutional set end date of June 2020 (one may note that new disciplinary proceedings against Judge Gersdorf, now retired, were launched in November 2022⁵³) and that all the Supreme Court judges who had been previously considered by the government as having automatically retired by operation of the 2017 legislative changes were now considered to have resumed their term in office.

Prior to this, on 19 October 2018, the CJEU by order of the Vice-President of the Court had already provisionally ordered Polish authorities to suspend immediately the application of the provisions of the national legislation relating

⁴⁹ See e.g. the extraordinary appeal lodged by the current Prosecutor General as part of his harassment campaign against Judge Żurek and which concerned a final civil judgment relating to his divorce settlement: M. Jalszewski, "Prokurator Generalny bierze się za sędziego Żurka. Grzebie w jego prywatnych sprawach", *Osiatyński Archive*, 11 June 2020: <https://archiwumosiatsynskiego.pl/wpis-w-debacie/prokurator-generalny-bierze-sie-za-sedziego-zurka-grzebie-w-jego-prywatnych-sprawach/>. See also pending ECHR case of *Wałęsa v. Poland* (application no. 50849/21), communicated on 30 September 2022, which concerns a judgment in favor of Mr Wałęsa which was overturned by the CECPA following an extraordinary appeal by the Prosecutor General. In its questions to the parties, the Court asked, among other things, whether the operation of an extraordinary appeal in Poland discloses a systemic dysfunction justifying an application of the Court's pilot-judgment procedure. See ECtHR Press Release, ECRH 318 (2022), 12 October 2022.

⁵⁰ ECtHR judgment of 8 November 2021 in the cases of *Dolińska-Ficek* and *Ozimek v. Poland*, application nos. 49868/19 and 57511/19, CE:ECHR:2021:1108JUD004986819. As of September 2020, there were 45 "extraordinary appeals" pending before the unlawful CECPA. See European Commission, 2020 Rule of Law Report (Poland country chapter), SWD(2020) 320 final, p. 16.

⁵¹ For further references and analysis, see sections 3 and 4 of L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case* (SIEPS 2021:3).

⁵² Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2018:1021.

⁵³ See *infra* Recommendation (k) for further details.

to the lowering of the retirement age for Supreme Court judges.⁵⁴ On 17 December 2018, this order was granted on a permanent basis by the CJEU on the grounds *inter alia* that the application of the provisions of the national legislation at issue were likely to cause serious and irreparable damage to the EU legal order.⁵⁵ These orders, and the CJEU's judgment on the merits issued on 24 June 2019, did not however prevent the unlawful capture of the Supreme Court via multiple and grossly irregular appointments to the Supreme Court as subsequently established by the European Court of Human Rights in several rulings in 2021 and 2022, all of which remain violated by Polish authorities to this day.⁵⁶

2019 saw the law on the NCJ amended again in order to remove the possibility to appeal against the resolutions of the re-established NCJ – hence the label neo-NCJ used to describe the post-2017 NCJ – on appointments to the judicial profession, and to extinguish the existing procedures arising from such appeals. On 5 November 2019, the CJEU issued its second infringement ruling in Case C-192/18 on the back of an infringement procedure launched in 2017 by the Commission in relation to another piece of legislation which sought to establish compulsory retirement for sitting judges and prosecutors and a different retirement age for men and woman who are judges or public prosecutors. For the CJEU, these rules adopted in July 2017 are contrary to EU law.⁵⁷ Two weeks later, on 19 November 2019, the CJEU issued another judgment, but this time on the basis of a request for a preliminary ruling originating from the Supreme Court of Poland. In *A.K. and Others*, the CJEU held *inter alia* that Article 47 of the Charter of Fundamental Rights and Article 9(1) of Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal.⁵⁸ The CJEU, as is customary in a preliminary ruling case, left it to the referring court to establish whether the Disciplinary Chamber (hereinafter: DC) is

⁵⁴ Order of the Vice-President of the Court in Case C-619/18 R, EU:C:2018:852

⁵⁵ Order of the Court (Grand Chamber) in Case C-619/18 R, EU:C:2018:1021.

⁵⁶ ECtHR judgment of 22 July 2021 in *Reczkowicz v. Poland*, application no. 43447/19, CE:ECHR:2021:0722JUD004344719; ECtHR judgment of 8 November 2021 in *Dolińska-Ficek and Ozimek v. Poland*, application nos. 49868/19 and 57511/19, CE:ECHR:2021:1108JUD004986819; ECtHR judgment of 3 February 2022 in *Advance Pharma sp. z o.o. v. Poland* (application no. 1469/20), CE:ECHR:2022:0203JUD000146920.

⁵⁷ Case C-192/18, *Commission v. Poland (Independence of Ordinary Courts)*, EU:C:2019:924.

⁵⁸ Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982

independent and can therefore be considered to be a proper court. The CJEU, the ECtHR, and the Supreme Court of Poland have subsequently established in multiple rulings that the DC is not a court, with the lawful judges (i.e., pre neo-NCJ) of Poland's Supreme Court further holding in a resolution adopted on 23 January 2020 that any past and future decision of the DC must be considered null and void.⁵⁹ However, these rulings have been openly ignored by Polish authorities,⁶⁰ with the DC itself unlawfully "nullifying" the AK ruling of the CJEU on 23 September 2020.⁶¹

On 29 December 2019, the Sejm passed a major amendment to the Law on the organization of the ordinary courts, the Law on the Supreme Court, and certain other laws, which is commonly known as Poland's "Muzzle Law".⁶² The law introduced a sweeping expansion of the scope of disciplinary action against judges, providing for their liability over actions or omissions likely to prevent or materially impede the functioning of the judiciary, for actions that call into question *inter alia* the effectiveness of a judge's appointment and the status of the neo-NCJ, and for public activities regarded as incompatible with the principles of judicial independence and the independence of judges. The "Muzzle Law" also introduced a requirement for judges and prosecutors to disclose their membership in political parties and non-governmental organizations; expanded the scope of the competencies of the Disciplinary Officers; prohibited assemblies of judges from dealing with "political matters" and issuing resolutions "undermining the functioning of the authorities of the Republic of Poland and its constitutional bodies"; deprived the bodies of judicial self-government (assemblies of judges) of any significance, e.g. they have lost the right to issue opinions on candidates for the office of judge and candidates for senior judicial positions; altered the rules for the election of the President of the Supreme Court; and provided the Chamber of Extraordinary Control and Public Affairs (CECPA) with new competencies, including an exclusive competence to review the status

⁵⁹ For a detailed analysis of this Resolution, see L. 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*" (2020) *RECONNECT Working Paper 8*: <https://www.reconnect-europe.eu/publications/working-papers>

⁶⁰ See L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice*, op. cit.

⁶¹ II DO 52/20.

⁶² Ustawa z dnia 20 grudnia 2019 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw, Dz.U. z 2020 r. poz. 190. The Amending Law entered into force on 14 February 2020.

of a judge (leading to a Kafkaesque situation in which unlawfully appointed individuals can review the status of other unlawfully appointed individuals but also the status of lawful judges).

Poland's "Muzzle Law" was severely and widely criticised by civil society organizations, academia,⁶³ judicial associations,⁶⁴ PACE,⁶⁵ the Venice Commission,⁶⁶ and the European Parliament.⁶⁷ It also led to public protests, including an unprecedented "March of One Thousand Robes" which gathered judges and lawyers from 22 countries in Warsaw. However, it took the European Commission more than a year after the entry into force of the "Muzzle Law" to lodge an infringement action on 1 April 2021.⁶⁸ For the Commission, Poland's "Muzzle Law" undermines the independence of Polish judges and is incompatible with the primacy of EU law. It also violates EU law as it seeks to prevent Polish courts from directly applying certain provisions of EU law protecting judicial independence, and from submitting references for preliminary rulings on such questions to the CJEU. It furthermore violates EU law by allowing the DC to take decisions which have a direct impact on judges and the way they exercise their functions. Several orders were subsequently adopted by the CJEU, most recently on 27 October 2021 when the Vice-President of the Court ordered Poland to pay a daily penalty payment of €1m per day as Polish authorities had not suspended the application of relevant provisions of national legislation.⁶⁹

On 15 December 2022, Advocate General Collins advised the CJEU to find Poland's "Muzzle Law" incompatible with EU law to the extent that it deprives national courts of the possibility to ensure that EU law is applied by an independent and

⁶³ L. Pech, W. Sadurski, K.L. Scheppele, "Open Letter to the President of the European Commission regarding Poland's "Muzzle Law", *VerfBlog*, 9 Mar 2020: <https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission-regarding-polands-muzzle-law/>

⁶⁴ IUSTITIA, *Co zawiera tzw. ustawa kagańcowa*, 17 January 2020: <https://www.IUSTITIA.pl/3616-co-zawiera-ustawa-kagancowa>

⁶⁵ Parliamentary Assembly of Council of Europe, PACE rapporteurs deeply regret signing into law of controversial amendments to Common Courts and Supreme Court laws, 6 February 2020: <https://pace.coe.int/en/news/7790>

⁶⁶ Venice Commission, Poland: Joint urgent opinion on the amendments to the Law on organisation on the Common Courts, the Law on the Supreme Court and other Laws, Opinion no. 977/2020, 16 January 2020.

⁶⁷ European Parliament resolution of 17 September 2020, PA_TA(2020)0225.

⁶⁸ European Commission, Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of Polish judges and asks for interim measures, press release, IP/21/1524, 31 March 2021.

⁶⁹ Case C-204/21 R, EU:C:2021:878.

impartial tribunal in all cases, it confers on the DC of the Supreme Court jurisdiction over matters relating to the status of judges, and it violates the rights of judges to respect for private life and to the protection of personal data.⁷⁰ As for the CECPA, AG Collins did not deem it appropriate to assess its lack of independence as this issue was not seemingly raised “in a timely fashion” by the Commission. The AG did however recall the legal obligation for Polish authorities to abide by the ECtHR’s final judgment in *Dolińska-Ficek and Ozimek* and “comply swiftly” with it,⁷¹ but failed to take any explicit account of the finding of unconstitutionality against Article 6(1) ECHR by Poland’s CT and the subsequent activation of Article 52 ECHR in November 2021.

In addition, and to this day, Polish authorities not only have refused to suspend the application of the “Muzzle Law” but have also denied the CJEU’s authority to adopt orders and impose penalty payments when its own orders are violated.⁷² Polish authorities have similarly refused to comply with the CJEU judgment in Case C-791/19 regarding Poland’s new disciplinary regime for judges.⁷³ Instead of lodging an action under Article 260 TFEU with the CJEU,⁷⁴ the Commission instead decided to block access to EU recovery funds until Polish authorities complied with a number of rule of law milestones:

- Strengthening the independence and impartiality of courts primarily via the adoption of changes to comply with the CJEU judgment in Case C-791/19 by the end of June 2022;
- Reform to remedy the situation of judges affected by the decisions of the DC by offering them access to review proceedings of their cases by the end of June 2022;
- Improving the process of law-making to introduce a mandatory impact assessment and public consultation for draft laws proposed by deputies

⁷⁰ Opinion in Case C-204/21, *Commission v. Poland (Independence and private life of judges)*, EU:C:2022:991.

⁷¹ *Ibid.*, paras 86-92.

⁷² See Case K 8/21 currently pending before the CT which was lodged by the current Prosecutor General on 22 February 2022.

⁷³ Case C-791/19, *Commission v. Poland (Disciplinary regime for judges)*, EU:C:2021:596.

⁷⁴ In September 2021, the Commission did decide to send a letter of formal notice under Article 260(2) TFEU to Poland for not taking the necessary measures to comply fully with the judgment of the CJEU but has once more not brought the case before the CJEU. See European Commission, Independence of Polish judges: Commission asks European Court of Justice for financial penalties against Poland on the activity of the Disciplinary Chamber, IP/21/4587, 7 September 2021.

and senators and to limit the use of fast-track procedure by the end of September 2022.

In June 2022, a new set of amendments to the Law on the Supreme Court and other laws was adopted with the view of (allegedly) meeting these milestones by introducing changes such as the liquidation of the DC and the introduction of a new procedure providing for a formal test of judicial independence. It was also explicitly stated that the application of EU law by a judge cannot provide grounds for disciplinary action,⁷⁵ which is akin to providing that no judge may be punished for upholding the rule of law. However, this latest amending piece of legislation only offers a series of cosmetic changes as the DC is for instance replaced with a body – the Chamber of Professional Responsibility (CPR) – which, on its face, similarly cannot be to be considered a court established by law. Indeed, the CPR consists, in part, of individuals who cannot adjudicate without automatically violating the right to an independent tribunal established by law due to the grossly irregular nature of their appointments and the granting of decisive influence over its final composition to active politicians, i.e., the President and the Prime Minister.⁷⁶ Similarly, the application of the case law of the CJEU regarding the principle of effective judicial protection under Article 19(1) TEU remains unconstitutional following two “judgments” from Poland’s (irregularly composed) CT.⁷⁷

As for the Commission and Council’s endorsement of a review procedure for the judges who have previously been sanctioned by the unconstitutional DC, this has become the subject matter of a set of unprecedented annulment actions brought by several European organisations of judges.⁷⁸ One may also note that AG Collins, in an opinion delivered on 15 December 2022 regarding Poland’s “Muzzle Law”, found this review procedure to be incompatible with EU law as all of the acts adopted by the DC must be considered null and void. For the Advocate General, this means that the abolition of the DC cannot be deemed sufficient and the Polish government must also act “to nullify the effects of resolutions that chamber adopted without delay” while “the immediate and effective application of EU law

⁷⁵ Ustawa z dnia 9 czerwca 2022 r. o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw, Dz.U. 2022 poz. 1259.

⁷⁶ Several interim measures have been ordered by the ECtHR in relation to proceedings pending before the new CPR. See Recommendation (f) below.

⁷⁷ See Recommendation (a) above.

⁷⁸ See pending Joined Cases T-530/22 to T-533/22, *MEDEL et al v. Council*.

cannot be subject to a requirement to introduce an action before the Chamber of Professional Responsibility. Otherwise, the effectiveness of EU law is undermined in two ways. First, it would depend upon the initiative of the parties to introduce fresh proceedings. Secondly, Disciplinary Chamber resolutions would remain in force until those proceedings had been resolved.”⁷⁹

Having seemingly failed to learn from past debacles, the Polish government rushed through yet another amending law which appeared on the Parliament’s website just before midnight on 13 December 2022 and provided *inter alia* for the transfer of disciplinary proceedings from the Chamber of Professional Responsibility to the Supreme Administrative Court in apparent breach of Poland’s Constitution.⁸⁰ This bill was withdrawn two days later but one may expect disciplinary cases regarding judges to be subject to the jurisdiction of a third body in less than a year, which will not however solve the systemic problem relating to the neo-judges unlawfully sitting in the Supreme Court.

While the above developments focus on the Supreme Court, one must recall that the European Commission also mentioned the National School of the Judiciary and Public Prosecution (NSJPP) in its Article 7(1) TEU reasoned proposal. Similarly to what has been happening to every judicial body in Poland, the NSJPP has been subjected to an intense process of politicization with the 2009 law which established the NSJPP⁸¹ being amended 10 times since 2016.⁸² The common aim of all these amendments is to increase the influence of the Minister of Justice/Public Prosecutor General over the body’s functioning by granting him power *inter alia* to appoint the Director of the School without a contest, following a non-binding opinion of the unconstitutional neo-NCJ and a Prosecution Council subordinated to the Prosecutor General, and to appoint and dismiss all members of the Programme Council of the NSJPP. These systemic changes have been accompanied by numerous personnel changes. In 2016, Judge Małgorzata Manowska was appointed Director of the School before being subsequently irregularly appointed to the Supreme Court on the back of a procedure suffering

⁷⁹ Opinion in Case C-204/21, *Commission v. Poland (Independence and private life of judges)*, EU:C:2022:991, para. 86.

⁸⁰ M. Jałoszewski, “PiS is changing the Act on courts for billions for the National Recovery Plan. But it could breach the Constitution and incite chaos”, *Rule of Law in Poland*, 16 December 2022: <https://ruleoflaw.pl/pis-proposal-supreme-administrative-court-recovery-fund/>

⁸¹ Journal of Laws 2009 No. 26 item 157 as amended.

⁸² The most important amendments were introduced via two laws adopted on 28 January 2016 (no 178) and on 11 May 2017 (no 1139).

from fundamental irregularities.⁸³ In 2020, Judge Dariusz Pawłyszcz became the new director of the NSJPP after serving as Undersecretary of State at the Ministry of Justice. In this latter capacity, he became known for instructing court presidents promptly to report any judge who may have questioned the status of the neo-judges in their judgments or submitted a request for a preliminary ruling to the CJEU.⁸⁴

⁸³ ECtHR judgment of 3 February 2022 in *Advance Pharma sp. z o.o. v. Poland* (application no. 1469/20), CE:ECHR:2022:0203JUD000146920.

⁸⁴ See Themis report "Response of the Polish authorities to the CJEU judgment of 19 Nov 2019", p. 27 annex 11: http://themis-sedziowie.eu/wp-content/uploads/2021/01/wer_Response-of-Polish-authorities-to-CJEU-judgment_wer11_01_2020_FC_wer-1_RW_201220-2.pdf

(d) Close cooperation with the judiciary and all interested parties, including the Venice Commission, when it comes to any new future justice reform

20 Dec 2017 recommendation as set out in the Commission's proposal for a Council decision:

"The Council recommends that the Republic of Poland [...] ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties, including the Venice Commission"

State of play:

Not unlike many judiciaries in Europe, Poland's judiciary has experienced long-standing challenges such as excessive length of proceedings, a slow adaption to an increasingly digitalised environment, and an overt formalisation of proceedings. In the name of addressing these challenges and improving the functioning of the judiciary, Poland's ruling coalition began adopting multiple changes which they presented as "judicial reforms".⁸⁵ Additional issues were mentioned to justify these so-called "reforms" such as an alleged very low level of public trust, a lack of accountability within the judiciary, and a failure to account for the communist past of the country.

However, the evidence offered by Polish authorities to justify their "reforms" has never been able to survive closed scrutiny and has always been at best misleading or inaccurate.⁸⁶ For instance, with regard to the often advertised "decommunization" objective, 80% of Poland's Supreme Court judges were removed in 1990 with the average age of a Polish judge being approximately 42 in 2022, "which means on average, they were 12 years old when the Communist

⁸⁵ Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary, 7 March 2018: <https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chancellor-white-paper-3-18.pdf>

⁸⁶ See IUSTITIA's response to the Polish government's white paper published on 16 March 2018: <https://www.IUSTITIA.pl/informacje/2172-response-to-the-white-paper-compendium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission> and see also Judge Dariusz Mazur, "The real objective and the results of the so called 'great reform' of the Polish justice system", *Nederlands Juristenblad*, 20 November 2020, 3078: https://www.njb.nl/media/4021/njb40_praktijk_2.pdf

regime fell,”⁸⁷ and when sued in Luxembourg by the Commission in relation to their attempt to take control of Poland’s Supreme Court via a retroactive application of a lowered retirement age, Polish authorities were *unable to offer any evidence* of pursuing any legitimate objective with the CJEU questioning whether the real aim of the “reform” was in fact to side line “a certain group of judges of that court”.⁸⁸

After seven years of “reforms”, Poland has become one of the world’s top autocratizing countries.⁸⁹ Rather than improving the functioning of Poland’s judiciary, Poland’s ruling coalition has therefore only succeeded in breaking records when it comes to effectively removing constraints on government powers,⁹⁰ and making previous practical problems such as excessive length of proceedings worse.⁹¹

Notwithstanding the Commission’s recommendation to ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties, including the Venice Commission, Polish authorities have continued to fast-track legislative changes aimed at the judiciary. To do so, Poland’s ruling coalition has repeatedly relied on MPs submitting draft laws – including in the middle of the night⁹² – so as to bypass the statutory requirement for holding open public consultations when bills originate from the government.⁹³ This was the

⁸⁷ A.R. Gustafsson and P. Omtzigt, *The functioning of democratic institutions in Poland* (explanatory memorandum no. 15025), Council of Europe (PACE), 6 January 2020, paras 18 and 88. The rapporteurs furthermore observed at para. 88 that “the new retirement age reportedly only affected one judge that served in communist times, clearly raising questions about this stated objective.”

⁸⁸ Case C-619/18, op. cit., para. 82.

⁸⁹ See e.g. V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021, p. 38 (Poland is ranked as the country which has experienced the most abrupt process of autocratization in the world since 2010).

⁹⁰ See e.g. “Poland records EU’s largest rule-of-law decline in new ranking”, *Notes from Poland*, 14 October 2021: <https://notesfrompoland.com/2021/10/14/poland-records-eus-largest-rule-of-law-decline-in-new-ranking/>

⁹¹ See e.g. A. Wójcik, “Six arguments PiS uses to justify Poland’s judicial overhaul – and why they are wrong”, *Notes from Poland*, 20 January 2020: <https://notesfrompoland.com/2020/01/20/six-arguments-pis-uses-to-justify-polands-judicial-overhaul-and-why-they-are-wrong/>

⁹² M. Jałoszewski, “PiS’ night-time attack on the independence of the courts in Poland and on the CJEU judgment”, *Rule of Law in Poland*, 13 December 2019: <https://ruleoflaw.pl/pis-night-time-attack-on-the-independence-of-the-courts-in-poland-and-on-the-cjeu-judgment-the-new-bill-point-by-point/>

⁹³ G. Lesniak, “Rząd stosuje nowe triki na obejście konsultacji publicznych”, *Prawo.pl*, 30 January 2020:

case with the 2015 amendments to the Law on the Constitutional Tribunal, the 2018 amendments to the Law on the Supreme Court, and most recently the 2022 December amendments to the same Law which were however withdrawn within 48 hours following legal and political criticism, including from within the ruling coalition itself.⁹⁴ To give a particularly edifying example, in April 2019, Poland's ruling coalition "rushed through another round of changes to its contested judicial overhaul, prompting accusations that it is trying to stave off an adverse European ruling on its reforms. [...] During a bad-tempered parliamentary session *in the early hours of Friday morning, Law and Justice deputies forced through a change — that had not even been on the agenda on Thursday morning* — that cancels the right of failed candidates for the Supreme Court to appeal. It also voids any appeals already in progress⁹⁵ (emphasis added)".

Beyond avoiding the formal requirement for public consultation, Poland's ruling coalition has continued not to engage stakeholders and in particular the judiciary. This lack of interest in working with a broad range of stakeholders has been accompanied by open hostility towards some stakeholders such as the organisations representing judges and prosecutors (e.g., Themis, IUSTITIA, and Lex Supra Omnia) and Polish civil society organisations dedicated to the protection of the rule of law (e.g., the Helsinki Foundation of Human Rights, the Batory Foundation, and Watchdog Polska).

In addition, instead of seeking the assistance of the Venice Commission, the Polish government has taken an increasingly aggressive stance against it despite the latter's repeated offers of assistance. To give a single example, and following the request for an opinion submitted by the Speaker of the Polish Senate with respect of the "Muzzle Law", the then Foreign Minister, Mr Jacek Czaputowicz stated as follows: "This is not a body that was invited by the Polish state" and "we won't speak [with them] because it was not our proposal" for them to come.⁹⁶ The

<https://www.prawo.pl/kadry/unikanie-konsultacji-publicznych-przez-rzad-projekty-sa-skrywane,497519.html>

⁹⁴ M. Jałoszewski, "PiS is changing the Act on courts for billions for the National Recovery Plan", *Rule of Law in Poland*, 16 December 2022: <https://ruleoflaw.pl/pis-proposal-supreme-administrative-court-recovery-fund/>

⁹⁵ J. Shotter, "Poland's ruling party rushes through more judicial changes", *Financial Times*, 26 April 2019.

⁹⁶ M. Prończuk, "Polish government refuses to meet Council of Europe delegation assessing judicial reforms", *Notes from Poland*, 10 January 2020: <https://notesfrompoland.com/2020/01/10/polish-government-refuses-to-meet-council-of-europe-delegation-assessing-judicial-reforms/>

Venice Commission was also the target of unhinged attacks by several officials of Poland's Ministry of Justice, including by a deputy justice minister who was then also a member of the Venice Commission.⁹⁷ One may finally note that the Speaker of the Senate was threatened with no less than treason proceedings for inviting the Venice Commission to assess the "Muzzle Law",⁹⁸ and following the publication of the Venice Commission's opinion, which concluded that the "Muzzle Law" should not be implemented as it undermines judicial independence,⁹⁹ Justice Minister Zbigniew Ziobro described it *inter alia* as a "parody" of an opinion.¹⁰⁰ Not to be outdone, Polish President Andrzej Duda stated as follows on 17 January 2020:

I will say in the strongest terms, they will not impose on us in foreign languages the system that we are to have in Poland and how Polish affairs are to be conducted ... Despite the attacks on the current authorities, in Poland and from abroad, the foreign interventions... this repair of the justice system will be carried out. Black sheep among judges must be eliminated.¹⁰¹

Following the parliamentary elections of 13 October 2019, the Senate ceased to be controlled by Poland's ruling party.¹⁰² This led to a significant improvement in terms of collaboration with civil society, academia, expert bodies, and other stakeholders across the board, including in relation to bills concerning the

⁹⁷ "Incredible official position of the Ministry of Justice regarding the opinion of the Venice Commission", *Rule of Law in Poland*, 17 January 2020: <https://ruleoflaw.pl/incredible-official-position-of-the-ministry-of-justice-regarding-the-opinion-of-the-venice-commission/> (Translated by Roman Wojtasz)

⁹⁸ P. Kosminski, "Ziobro mówi o Trybunale Stanu dla Grodzkiego. I udowadnia, że nie zna konstytucji", 13 January 2020: <https://wyborcza.pl/7,75398,25593407,grodzki-zaprosil-do-polski-komisje-wenecka-ziobro-mowi-o-trybunale.html>

⁹⁹ Council of Europe, "Poland: New reform further undermines judicial independence, according to Venice Commission", Réf. DC 006(2020), 16 January 2020: <https://go.coe.int/fk8Lc>

¹⁰⁰ "Incredible official position of the Ministry of Justice", op. cit.

¹⁰¹ "Nobody 'will impose a system on us in foreign languages', says Polish president", *Notes from Poland*, 17 January 2020: <https://notesfrompoland.com/2020/01/17/nobody-using-foreign-languages-will-tell-poland-what-to-do-says-president/>

¹⁰² M. Matczak, "The Polish Senate under Opposition Control", *VerfBlog*, 18 October 2019: <https://verfassungsblog.de/the-polish-senate-under-opposition-control/>

judiciary.¹⁰³ Yet the Senate remains the weaker of the two houses of the Polish parliament. Any amendments it may introduce to a draft bill can be discarded by the Sejm, as happened most recently with the 2022 draft act amending the law on the Supreme Court introduced by President Duda and adopted on 9 June 2022 in order to unlock EU recovery funds notwithstanding the support for these amendments expressed by the EU Justice Commissioner.¹⁰⁴ And instead of consultation with the judiciary and other key stakeholders, it was reported that the Polish President decided instead to consult – outside of any formalised procedure – with individuals he irregularly appointed to the Supreme Court in “blatant defiance” of the rule of law, to borrow the language used by the ECtHR.¹⁰⁵

In light of the above, it is unsurprising that the European Commission has decided to condition the disbursement of EU recovery funding to the adoption *inter alia* of a milestone which requires “the adoption of an amendment to the Rules of Procedure of the Sejm, the Senate, and the Council of Ministers, which shall introduce a mandatory impact assessment and public consultation for draft laws proposed by deputies and senators” as well as “limit[ing] the use of fast-track procedures to well-specified and exceptional cases”.¹⁰⁶ Yet it was reported in December 2022 that the leadership of the European Commission secretly endorsed the bill and encouraged its swift adoption,¹⁰⁷ and indeed the bill made a sudden appearance on the Sejm’s website just before midnight on Tuesday 13 December 2022 before being quickly withdrawn due *inter alia* to the many legal shortcomings pointed out by experts and association of judges.¹⁰⁸ If this reporting is accurate, this would mean that the Commission has not only encouraged a

¹⁰³ One of the present authors was for instance one of the legal experts invited to attend a session of the parliamentary grouping for the defence of the rule of law on 14 January 2022 at the invitation of the Marshal of the Senate to offer a legal assessment of the Muzzle Law.

¹⁰⁴ J. Jaraczewski, “Just a Feint? President Duda’s bill on the Polish Supreme Court and the Brussels-Warsaw deal on the rule of law”, *VerfBlog*, 1 June 2022: <https://verfassungsblog.de/just-a-feint/>

¹⁰⁵ “Duda zetrze się z Ziobrą o Sąd Najwyższy. W styczniu ma złożyć swój projekt ustawy o SN”, *Oko.press*, 11 January 2022: <https://oko.press/andrzej-duda-zetrze-sie-z-ziobra-o-sad-najwyzszy/>

¹⁰⁶ Milestone F2.1 “Improving the process of law-making”, SWD(2022) 161 final.

¹⁰⁷ “Szykowski vel Sęk: Dysponuję pismem z gwarancją, że jest to projekt ustawy niezbędny do odblokowania KPO”, 16 December 2022: <http://300polityka.pl/live/2022/12/16/szykowski-vel-sek-dysponuje-pismem-z-gwarancja-ze-jest-to-projekt-ustawy-niezbledny-do-odblokowania-kpo/>

¹⁰⁸ See i.a. IUSTITIA, Polish Judges’ Association “IUSTITIA” opinion against the draft law amending the law on the Supreme Court and certain other laws (Sejm print no. 2870), 15 December 2022: <https://www.IUSTITIA.pl/en/activity/informations/4596-polish-judges-association-IUSTITIA-opinion-against-the-draft-law-amending-the-law-on-the-supreme-court-and-certain-other-laws-sejm-print-no-2870>

violation of one of its own milestones but also endorsed a bill with obvious and multiple legal shortcomings which leave intact all of the systemic problems identified by the CJEU, the ECtHR, and by the Commission itself.

Updated Recommendation (d):

The Council recommends that the Republic of Poland ensure that:

- All laws concerning the judiciary and courts are subject to an inclusive process of public stakeholder consultation prior to the drafting of legislative acts, during the drafting of these acts, and during the legislative process;
- The input of civil society, academia, and the legal professions as well as all associations of judges and prosecutors when preparing any justice reform is proactively sought;
- An opinion of the Venice Commission is requested as soon as any new legislative bill relating to the judiciary has been submitted to the Parliament.

(e) Refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole

20 Dec 2017 recommendation as set out in the Commission's proposal for a Council decision:

"The Council recommends that the Republic of Poland [...] refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole"

State of play:

Representatives of various Polish authorities, bodies, and state institutions controlled *de jure* or *de facto* by the current ruling coalition have never ceased to issue public statements and engage in actions undermining the legitimacy of Polish courts and judges, individually and collectively, or the judiciary as a whole. In addition, Polish officials have repeatedly undermined the authority of the CJEU and the ECtHR, as well as the Venice Commission as previously outlined.

To give a flavor of the type of attacks and the wide range of actors who have engaged in behavior violating the Commission's Article 7(1) recommendation quoted above, one may refer to statements from deputies to the Sejm (e.g. member of PiS and the Deputy Speaker of the Sejm Ryszard Terlecki: "I hope that judges suspended from work will not be reinstated"¹⁰⁹); senators (e.g. PiS senator Włodzimierz Bernacki: the "CJEU has become, just like the Venice Commission, a trade union for judges in Europe"¹¹⁰); the Prime Minister (e.g. Mateusz Morawiecki: "90% of cases heard by the Disciplinary Chamber concern common crimes by

¹⁰⁹ K. Romik, "Terlecki o zawieszonych sędziach: Mam nadzieję, że nie zostaną przywrócenii", *Gazeta.pl*, 20 May 2022: <https://wiadomosci.gazeta.pl/wiadomosci/7,114884,28476197,terlecki-o-zawieszonych-sedziach-mam-nadzieje-ze-nie-zostana.html>

¹¹⁰ "Zabezpiecza interesy jednej grupy". Senator PiS porównuje TSUE do związku zawodowego sędziów, *Polskie Radio*, 14 April 2020: <https://polskieradio24.pl/130/8356/Artykul/2491268,Zabezpiecza-interesy-jednej-grupy-Posel-PiS-porownuje-TSUE-do-zwiazku-zawodowego-sedziow>

judges: sexual assault, theft and driving under the influence”,¹¹¹ which one must stress is a downright falsehood) and the Polish President (e.g. Andrzej Duda who accused Polish and foreign judges of being unelected actors in search of power and “recognition of their absolute infallibility”¹¹²).

Even more inappropriate and arguably libelous statements have come from the Minister of Justice and Prosecutor General Zbigniew Ziobro, his deputies in both bodies, and members of his political party Solidarna Polska (United Poland), a junior partner in the current ruling coalition. Ziobro’s public statements have on multiple occasions implied illegal activity on the part of judges who are critical of the ruling coalition and Ziobro himself. In 2021, Judge Beata Morawiec, who was unlawfully dismissed in 2017 from the position of the President of the Regional Court in Kraków,¹¹³ won in the second instance a case against the State Treasury in relation to Ziobro’s remarks implying a link between judge Morawiec and an unrelated case of corruption in one of the nearby courts. Ziobro was ordered to issue an apology on the Ministry’s website but he refused to comply and publicly contradicted a final ruling by stating that it was the State Treasury, not him personally, who was sued by Morawiec and that he was therefore not obliged to comply with the judgment.¹¹⁴ Coincidentally or not, Judge Beata Morawiec saw her judicial immunity lifted on 12 October 2020 by the DC which resulted in her automatic suspension and her salary being reduced by 50%. Her suspension lasted 235 days.¹¹⁵

¹¹¹ E. Siedlecka, “Czy Morawiecki przeprosi sędziów? Bruksela ogląda ten spektakl”, *Polityka*, 23 May 2022: <https://www.polityka.pl/tygodnikpolityka/kraj/2166845,1,czy-morawiecki-przeprosi-sedziow-bruksela-oglada-ten-spektakl.read>

¹¹² M. Jalszewski, “President Duda attacks the judges again”, *Rule of Law in Poland*, 1 September 2022: <https://ruleoflaw.pl/president-duda-attacks-the-judges-again-they-want-power-nonsense-the-judges-are-defending-the-constitution-and-eu-law/>

¹¹³ See her pending complaint no. 46238/20 before the ECtHR which was communicated to the Polish authorities on 4 July 2022.

¹¹⁴ E. Ivanova, “Ministry of stupid press corrections. When Minister Ziobro prefers to be Mr. Zbyszek”, *Gazeta Wyborcza*, 20 February 2021, link to the English translation provided by THEMIS: <http://themis-sedziowie.eu/materials-in-english/ministry-of-stupid-press-corrections-when-minister-ziobro-prefers-to-be-mr-zbyszek-by-ewa-ivanova-gazeta-wyborcza-20-february-2021/>

¹¹⁵ See ECtHR, subject matter of the case regarding Judge Morawiec’s pending complaint no. 46238/20 which was published on 25 July 2022.

Criminal activities also took place within the Ministry of Justice via a secret “troll farm”. As reported by two members of the Council of Europe’s Parliamentary Assembly in January 2020:¹¹⁶

104. The issue of politically motivated smear campaigns and harassment of judges and prosecutors came to the foreground when a political scandal broke out on 19 August 2019. The scandal involved Deputy Justice Minister Lukasz Piebiak who was, until then, one of the main driving forces behind the reform of the judiciary. [...] According to these communications, which were widely distributed on the internet, Emelia executed a smear campaign against several judges at the behest of Mr Piebiak, who also allegedly orchestrated the campaign and provided her with personal information about these judges, including their private addresses, which would constitute a gross violation of privacy regulations. In addition to Mr Piebiak, two other judges seconded to the Ministry of Justice, alongside two members and an employee from the National Council of the Judiciary, were identified as being involved in this smear campaign that targeted, among others, the President of the IUSTITIA judges’ association.¹¹⁷ [...]

106. [...] Even if not organized by the Ministry [...] it is clear that the alleged smear campaign was organized from within the Ministry, with the involvement of high-ranking officials in the Ministry and National Council of Justice [...] This is both deplorable and of serious concern. As mentioned, the Minister of Justice has announced that the Prosecution Service has started an investigation into these allegations. However, given the tight control of the Minister of Justice over the Prosecution Service, the trust of

¹¹⁶ See Council of Europe (PACE), *The functioning of democratic institutions in Poland*, Report no 15025 by A.R. Gustafsson and P. Omtzigt, 6 January 2020.

¹¹⁷ The group coordinated its activities on a WhatsApp group called “Kasta” (meaning “caste”, a frequent term used by members of the ruling coalition and the government to refer to judges critical of post-2015 reforms). Members of this group are said to have included several high-ranking judges, prosecutors, and lawyers, such as Konrad Wytrykowski, a member of the (unlawful) Disciplinary Chamber, Disciplinary Spokesperson judge Przemysław Radzik, judges Jarosław Dudzicz and Maciej Mitera, both members of the unconstitutional neo-National Council of Judiciary. The existence of this group was confirmed in January 2022 by one of its former members, judge Arkadiusz Cichocki. See “Sędzia Cichocki: była afera hejterska, szukałem haków na sędzię Frackowiak”, *Rzeczpospolita*, 25 January 2022: <https://www.rp.pl/sady-i-trybunaly/art19321741-sedzia-cichocki-byla-afera-hejterska-szukalem-hakow-na-sedzie-frackowiak>

stakeholders and the public in the efficiency and impartiality of these investigations is very low, if not non-existent.

PACE has deplored the organization of these smear campaigns and called “upon the Polish authorities to establish, at the earliest opportunity, but no later than 31 March 2020, an independent public inquiry into these smear campaigns and those responsible for them” considering that any investigation “by the prosecution service under direct control of the Minister of Justice, which is also a potential party to the investigation, would lack the required independence and credibility”.¹¹⁸ To this date, no such independent public inquiry has been organized and the members of the “Kasta group” have faced no disciplinary and/or criminal consequences for their actions.

Irregularly appointed individuals of the irregularly composed CT have also recurrently engaged in unbecoming behavior violating the Commission’s recommendation of December 2017. One may for instance mention the op-eds penned by Mr Mariusz Muszyński – who was the subject-matter of the ECtHR’s *Xero Flor* judgment – in which he attacked other Polish judges, the CJEU and on at least one occasion, thought it appropriate to write in relation to CJEU judge Rosario Silva de Lapuerta that “perhaps someone should finally take the computer and the pen away from that woman”.¹¹⁹ Inappropriate statements have also been made during actual hearings of the CT, in particular during the hearings of cases relating to the application of the principle of effective judicial protection under EU and ECHR law, with members of the CT engaging in wide ranging attacks against critics of the government, representatives of the Commissioner for Human Rights, Polish judges, the CJEU, the ECtHR, and the European Commission.¹²⁰ This pattern of unbecoming if not unhinged behavior by members of the (captured) CT has unsurprisingly contributed to the undermining of its authority, with the governmental public polling service CBOS finding in January 2022 that 60% of adults polled expressed mistrust in the Tribunal (up from 36% in January 2016).¹²¹

¹¹⁸ PACE, Resolution 2316, op. cit., para. 11.

¹¹⁹ M. Muszyński, “Co oznacza orzeczenie TSUE”, *Rzeczpospolita*, 16 July 2021: <https://www.rp.pl/sady-i-trybunaly/art17911-mariusz-muszynski-co-oznacza-orzeczenie-tsue>

¹²⁰ See e.g. “Starcie Pawłowicz z przedstawicielami RPO. “Pani sędzia nie dała mi dokończyć””, *Onet Wiadomości*, 30 September 2021: <https://wiadomosci.onet.pl/kraj/pawlowicz-kontra-przedstawiciel-rpo-pani-sedzia-nie-dala-mi-dokonczyc/sv68r2k>

¹²¹ Centrum Badania Opinii Społecznej, *Komunikat z Badań. Zaufanie Społeczne* nr 37/2022, March 2022, p. 10.

To conclude, one may mention that in addition to repeated actions and public statements undermining the authority of national and European judges and courts, in yet another unprecedented development a criminal investigation in relation to all of the judges of the CJEU for potential abuse of competences was launched in December 2021.¹²²

Updated Recommendation (e):

The Council recommends that Poland ensure that:

- The representatives of executive, legislative, and judicial authorities refrain from actions and public statements which could undermine further the legitimacy of independent and impartial courts established by law, of judges, individually or collectively, or the judiciary as a whole. In particular, the Minister of Justice and Prosecutor General, including deputies and employees of both institutions, must refrain from actions and public statements which amount to attacks on judges, judicial associations, civil society groups, and other stakeholders;
- No disciplinary and/or criminal investigations and proceedings are initiated against judges and prosecutors who exercise their right to freedom of expression to address matters concerning the functioning of the justice system as judges and prosecutors have a duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat as is the case in Poland;
- An independent public inquiry into the smear campaigns which have targeted judges and those responsible for them is established without any further delay.

¹²² See Commission 2022 country chapter on the rule of law situation in Poland, op. cit., p. 10. On 11 December 2021, via the official Twitter account of Poland's Ministry of Justice, the Undersecretary of State Marcin Warchol publicly alleged that all of the CJEU judges are corrupt: "The dirty community of interests of the CJEU judges, who are linked to corrupt activities and trading in influence, is precisely what they are demanding. They call for the abolition of the Supreme Court's Disciplinary Chamber. We now know their motives" (Original: https://twitter.com/MS_GOV_PL/status/1469648480809504774)

II. NEW ARTICLE 7(1) TEU RECOMMENDATIONS

(f) Full and immediate compliance with all rule of law related CJEU orders and judgments as well as all relevant ECtHR judgments and interim measures

State of play:

In addition to organizing the *systemic* violation of the principle of effective judicial protection guaranteed under the second subparagraph of Article 19(1) TEU, as interpreted by the CJEU,¹²³ Polish authorities have used the unlawfully composed CT to similarly neutralize the application of Article 6(1) ECHR as interpreted by the ECtHR on account of its alleged unconstitutionality. This led the Secretary General of the Council of Europe to take the extremely rare formal step of activating Article 52 of the ECHR on 7 December 2021¹²⁴ following Poland's CT judgment of 24 November 2021 in Case K 6/21. In this instance, an irregularly composed bench of the CT held Article 6(1) ECHR incompatible with the Polish Constitution insofar as it is interpreted by the ECtHR to include the CT in its definition of a court. The CT furthermore held that the ECtHR judgment in *Xero Flor* was "inexistent".¹²⁵ This was followed in March 2022 by another decision holding Article 6(1) ECHR to be incompatible with the Polish Constitution in Case K 7/21 insofar as:

- (1) The concept of "civil rights and obligations" includes a subjective right for a judge to hold an administrative post in the judiciary;
- (2) It allows the ECtHR or national courts, on the basis of the requirement of a "tribunal established by law", to disregard the provisions of the Constitution, statutes, and judgments of the Polish Constitutional Tribunal and establish independent standards regarding the nomination procedure for judges of national courts;
- (3) It allows the ECtHR or national courts to assess the compatibility with the Polish Constitution and the ECHR of laws concerning the

¹²³ See Recommendation (a) above.

¹²⁴ Council of Europe, Secretary General asks Poland how it intends to ensure the effective implementation of the European Convention on Human Rights, Press release, Ref. DC 235rev(2021), 7 December 2021.

¹²⁵ R. Lawson, "'Non-Existent': The Polish Constitutional Tribunal in a state of denial of the ECtHR *Xero Flor* judgment", *VerfBlog*, 18 June 2021: <https://verfassungsblog.de/non-existent/>

organisation of the judiciary, the jurisdiction of courts, and the law specifying the framework, scope of activities, working methods, and rules governing the election of the members of the National Council of the Judiciary.

In July 2022, for the first time Poland's Ministry of Foreign Affairs (MFA) publicly confirmed that the Polish government had refused to pay compensation in relation to two applications decided by the ECtHR on the merits in 8 November 2021 in the cases of *Dolińska-Ficek* and *Ozimek* following the CT decision in Case no. K 7/21.¹²⁶ More broadly, the MFA statement confirms that the Polish government will refuse to implement any of the ECtHR judgments relating to Poland's judicial changes on account of their (alleged) unconstitutionality.

As of 1 January 2023, all of the eight judgments on the merits issued to date by the ECtHR in relation to Poland's rule of law crisis, an expression used by the Court itself,¹²⁷ have **not** been complied with by Poland (NB: six of these judgments result from eight applications lodged with the Court by Polish judges). These judgments are:

Judgment of 7 May 2021 in the case of *Xero Flor* (no. 4907/18): violation of Article 6(1) ECHR (right to a tribunal established by law)

Judgment of 29 June in the cases of *Broda* (no. 26691/18) & *Bojara* (no. 27367/18): violation of Article 6(1) ECHR (right of access to a court)

Judgment of 22 July 2021 in the case of *Reczkowicz* (no. 43447/19): violation of Article 6(1) ECHR (right to a tribunal established by law)

Judgment of 8 November 2021 in the cases of *Dolińska-Ficek* (no. 49868/19) and *Ozimek* (no. 57511/19): violation of Article 6(1) ECHR (right to a tribunal established by law)

¹²⁶ A. Gmiterek-Zabłocka, 'Lubelski sędzia miał otrzymać 15 tysięcy euro od państwa. Rząd płacić nie zamierza. "Zbliżamy się do Rosji"', 4 July 2022: <https://www.tokfm.pl/Tokfm/7,182251,28650980,sprawa-sedziego-z-lublina-ktory-wygral-przed-etpcz-msz-juz.html>. See also podcast from the same journalist which is available here: <https://audycje.tokfm.pl/podcast/125326,MSZ-po-raz-pierwszy-przyznaje-ze-swiadomie-nie-wykonuje-wyroku-ETPCz-w-sprawie-dwojga-sedziow-W-tle-walka-o-praworzadnosc>

¹²⁷ Judgment of 15 March 2022 in *Grzęda* (application no. 43572/18), para. 15: "The election of three judges (M.M., L.M. and H.C.) in December 2015 to seats that had been already filled in October sparked an intense legal controversy and marked the beginning of what is widely referred to by analysts as the rule of law crisis in the country."

Judgment of 3 February 2022 in the case of *Advance Pharma* (no. 1469/20): violation of Article 6(1) ECHR (right to a tribunal established by law)

Judgment of 15 March 2022 in the case of *Grzęda* (no. 43572/18): violation of Article 6(1) ECHR (right of access to a court)

Judgment of 16 June 2022 in the case of *Żurek* (no. 39650/18): violation of Article 6(1) ECHR (right of access to a court) and violation of Article 10 (freedom of expression)

Judgment of 6 October 2022 in the case of *Juszczyszyn* (no 3559/20): violation of Article 6(1) ECHR (right to a fair trial); violation of Article 8 (right to respect for private and family life); and, for the first time, violation of Article 18 (limitation on use of restriction of rights) taken in conjunction with Article 8

As noted above, the ECtHR judgment of 7 May 2021 in the case of *Xero Flor* was held null and void by Poland's CT, *sitting in an unlawful composition*, in Case K 6/21. The following four judgments of the ECtHR on the list above were (indirectly) held incompatible with the Polish Constitution by the same CT on 10 March 2022, *sitting again in an unlawful composition*, in Case K 7/21.

This pattern of sustained and open non-compliance left the Secretary General of the Council of Europe with no choice but to recall in a formal report adopted under the special procedure laid down in Article 52 ECHR in November 2022 that Poland is under a strict obligation to execute the judgments of the ECtHR.¹²⁸ The following month, the Council of Europe's Committee of Ministers deplored *inter alia* the Polish authorities' failure:

- to protect presidents and vice-presidents of courts from arbitrary dismissals;
- to take remedial action regarding the neo-NCJ whose continuing lack of independence continues to affect systemically the appointments of all judges to all types of courts;

¹²⁸ Council of Europe, Report by the Secretary General under Article 52 of the ECHR on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland, SG/Inf(2022)39, 9 November 2022.

- to provide for an adequate framework for addressing the status of judges appointed in deficient procedures and the examination of the legitimacy of judicial appointments;
- to remove all risks of disciplinary liability for judges who implement the requirements of Article 6 ECHR.¹²⁹

Prior to their open and repeated violation of ECtHR rulings, Polish authorities had been engaged in a similar pattern of systemic violation of CJEU rulings and orders which they subsequently justified in 2021 on account of the “case law” of the unlawfully composed CT regarding the (alleged) unconstitutionality of not only Article 19(1) TEU second subparagraph, but also Article 4(3) second subparagraph TEU read in connection with Article 279 TFEU.¹³⁰ One may mention the following CJEU orders and judgments, issued within the framework of infringement actions based on Article 258 TFEU, that are currently being violated by Polish authorities:

CJEU Vice President order of 14 July 2021 in Case C-204/21 R, *Commission v Poland (Muzzle Law)*, EU:C:2021:593: Poland must immediately suspend relevant provisions of the law adopted by Poland on 20 December 2019 and amending, in particular, national rules on the organization of ordinary courts and on the Supreme Court

CJEU judgment of 15 July 2021 in Case C-791/19, *Commission v Poland (Disciplinary regime for judges)*, EU:C:2021:596: Poland’s new disciplinary regime for judges held not compatible with EU Law. No compliance with launch of Article 260 TFEU action in September 2021.¹³¹

CJEU Vice President order of 27 October 2021 in Case C-204/21 R, *Commission v Poland (Muzzle Law)*, EU:C:2021:878: Poland ordered to pay a daily penalty payment of €1m following failure to suspend the application

¹²⁹ Council of Europe (Committee of Ministers), H46-25 Reczkowicz group (Application No. 43447/19), Broda and Bojara (Application No. 26691/18) v. Poland, CM/Del/Dec(2022)1451/H46-25, 1451st meeting, 6-8 December 2022 (DH).

¹³⁰ For further details, see European Commission, 2022 Rule of Law Report (Poland Country Chapter), op. cit., pp. 8-9.

¹³¹ European Commission, Independence of Polish judges: Commission asks European Court of Justice for financial penalties against Poland on the activity of the Disciplinary Chamber, IP/21/4587, 7 September 2021.

of relevant provisions of national law in violation of CJEU order of 14 July 2021.¹³²

Multiple preliminary rulings are also currently being violated by Polish authorities. The violation of the CJEU preliminary rulings has taken different forms, with lawful Polish judges for instance being dissuaded or prevented from applying the judgments via different means such as removal from referring chambers, disciplinary proceedings, and/or sanctions and/or forced transfers,¹³³ Polish authorities refusing to comply with national judgments applying the preliminary references in the name of upholding the supremacy of Poland's Constitution, and in at least one case, the formal nullification of a specific preliminary ruling judgment by the now disbanded DC. The preliminary references that are being violated are:

CJEU judgment of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, *AK (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982: Referring court to ascertain whether the DC offers sufficient guarantees of independence. Supreme court's judgments applying CJEU judgment ignored by Polish authorities with this CJEU judgment also formally nullified by Poland's DC on 23 September 2020.¹³⁴

CJEU judgment of 2 March 2021 in C-824/18, *AB and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153: Successive amendments to the Polish Law on the NCJ which have the effect of removing effective judicial review of the NCJ's decisions proposing to the Polish President candidates for the office of judge at the Supreme Court are liable to infringe EU law. Supreme Administrative Court's judgments applying CJEU judgment ignored by Polish authorities.

CJEU judgment of 6 October 2021 in Case C-487/19, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court-Appointment)*, EU:C:2021:798: Transfers without consent of a judge from one court to

¹³² As of 1 January 2023, Polish authorities have accumulated more than €420m in unpaid daily penalty payments ordered by the CJEU, an amount which is growing by €1m per day. On 8 April 2022, the Commission, for the very first time in the history of EU law, deducted €69m from EU funding allocated to Poland in light of the Polish authorities' continuing and unprecedented refusal to pay the daily penalty payment ordered by the CJEU.

¹³³ For further details, see Recommendation (k) *infra*.

¹³⁴ II DO 52/20.

another or between two divisions of the same court are liable to undermine the principle of irremovability of judges and judicial independence and decisions from Supreme Court judges who have been appointed in clear breach of fundamental rules concerning the establishment and functioning of the judicial system concerned must be declared null and void. Non-compliance with this judgment since organized by the judges whose appointment to the Supreme Court was marred by grave irregularities.¹³⁵

CJEU judgment of 16 November 2021 in Joined Cases C-748/19 to C-754/19, *Criminal proceedings against WB and Others*, EU:C:2021:931: Polish authorities have not amended their unlawful regime which permits the Minister for Justice, who is also the Public Prosecutor General, to second judges to higher criminal courts whereas these secondments may be arbitrarily terminated at any time without possibility of judicial review.

In addition to the specific CJEU orders and judgments listed above, following the decisions of Poland's CT of 14 July 2021 and 7 October 2021¹³⁶ current Polish authorities no longer recognize as valid and binding any of the CJEU judgments based on the second sub-paragraph of Article 19(1) TEU starting with the CJEU judgment of 27 February 2018 in Case C-64/16 (known as the *Portuguese Judges case*).¹³⁷

Most recently, and for the first time, the violation of interim measures ordered by the ECtHR on 6 December 2022 to prevent the forced transfer of three Court of Appeal judges¹³⁸ was formally justified on account of the (alleged)

¹³⁵ The current First President of the Supreme Court, herself one of the manifestly irregularly appointed individuals to the Supreme Court, has been preventing referring judges from adopting a judgment applying the CJEU judgment by refusing to allow the (independent and regularly appointed) judges of the Civil Chamber of the Supreme Court to hand over the files that had been returned from the CJEU following its judgment of 6 October 2021. Subsequently, the new President of the Civil Chamber, also a neo-judge, illegally changed the membership of the bench that was due to apply this CJEU judgment. For further details, see European Commission, 2022 Rule of Law Report (Poland Country Chapter), op. cit., p. 9.

¹³⁶ J. Jaraczewski, "Gazing into the Abyss", *VerfBlog*, 12 October 2021: <https://verfassungsblog.de/gazing-into-the-abyss/>

¹³⁷ For a comprehensive review, see THEMIS report dated 25 January 2022 prepared by Judge Dariusz Mazur, *Challenging the principles of primacy and direct applicability of EU law by the Polish authorities, 6 months after the CJEU's rulings of July 2021*: <http://themis-sedziowie.eu/materials-in-english/in-depth-report-challenging-the-principles-of-primacy-and-direct-applicability-of-eu-law-by-the-polish-authorities-6-months-after-the-cjeus-rulings-of-july-2021/>.

¹³⁸ For further details, see Recommendation (k) below.

unconstitutionality of these measures by the President of the Court of Appeal in Warsaw in a statement published on 13 December 2022.¹³⁹ It is worth stressing that the three Court of Appeal judges were forcibly transferred as a reprisal for their judicial decisions taken in application of the ECtHR and CJEU case law which led them to refuse to adjudicate in panels composed of “neo-judges”.

To protest against the forced transfer of the Court of Appeal judges, 49 current and 24 retired judges of the Warsaw Court of Appeal, and 30 sitting and/or retired judges of the Supreme Court, published a statement denouncing another violation of the constitutional principles of irremovability and independence of judges. This statement was subsequently “signed by over 1,000 Polish judges of all levels of jurisdiction”.¹⁴⁰

New Recommendation (f):

The Council recommends that Poland fully and immediately comply with the following judgments and orders of the Court of Justice:

- Judgment of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, *AK (Independence of the Disciplinary Chamber of the Supreme Court)*;
- Judgment of 2 March 2021 in C-824/18, *AB and Others (Appointment of judges to the Supreme Court – Actions)*;
- Order of 14 July 2021 in Case C-204/21 R, *Commission v. Poland (Independence and private life of judges)*;
- Judgment of 15 July 2021 in Case C-791/19, *Commission v. Poland (Disciplinary regime for judges)*;
- Judgment of 6 October 2021 in Case C-487/19, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court - Appointment)*;

¹³⁹ Full text of document is available at: <https://waw.sa.gov.pl/download/oswiadczenie-prezesa-sa-warszawie-z-13.12.2022-r.-1671005515.pdf>

¹⁴⁰ ECtHR, Interim measure in cases concerning transfers of Polish judges, press release ECHR 379 (2022), 7 December 2022.

- Order of 27 October 2021 in Case C-204/21 R, *Commission v Poland (Independence and private life of judges)*;

- Judgment of 16 November 2021 in Joined Cases C-748/19 to C-754/19, *Criminal proceedings against WB and Others*;

The Council furthermore recommends that Poland end the abusive practice of questioning the authority of the European Court of Justice and the European Court of Human Rights via artificial challenges brought before Poland's Constitutional Tribunal, a body which no longer meets the requirements of an independent and impartial tribunal previously established by law, and ensure without delay:

- Full compliance with all of the interim measures and judgments of the European Court of Human Rights issued to date starting with the judgment of 7 May 2021 in the case of *Xero Flor* (4907/18) and take all appropriate individual and general measures without delay;

- Full compliance with past and future rulings and orders of both the European Court of Justice and the European Court of Human Rights by formally and effectively restoring compliance with Article 19(1) TEU, Article 6(1) ECHR, and all other relevant provisions of the EU Treaties and the European Convention on Human Rights with regard to the judiciary.

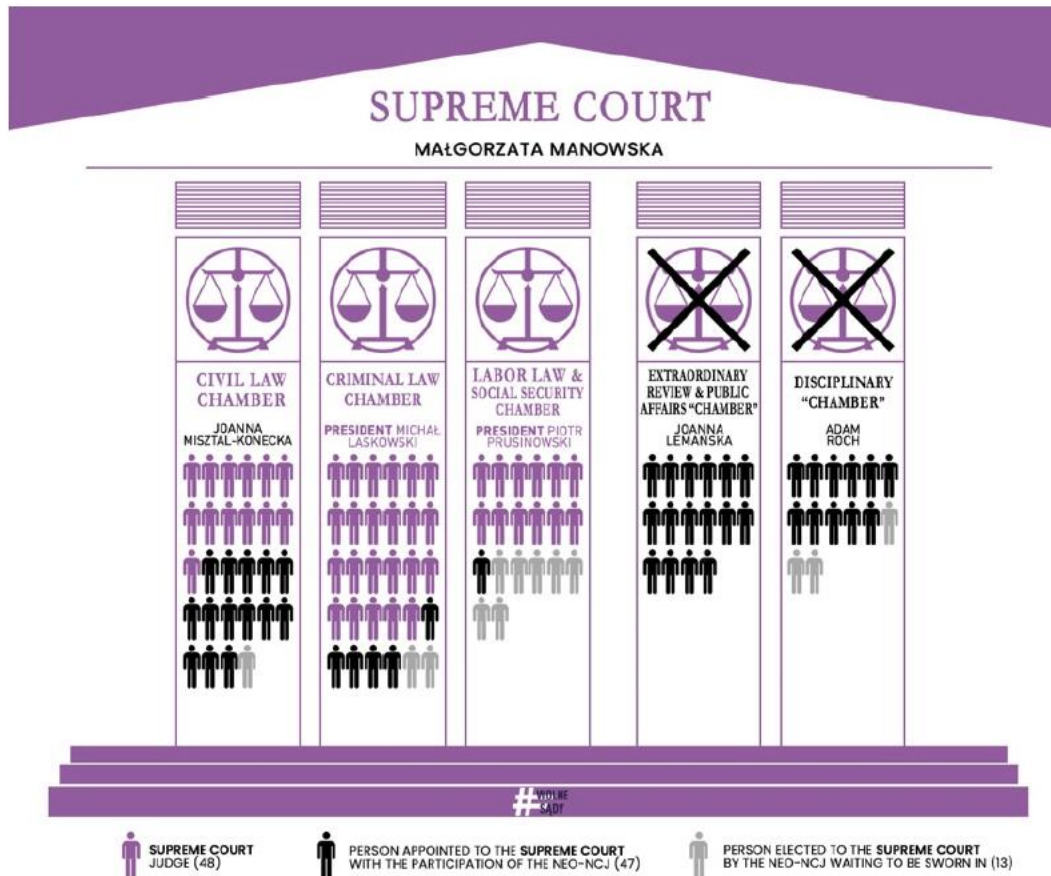
(g) Restoration of the independence and legitimacy of the Supreme Court

State of play:

As previously outlined under Recommendation (c), Poland's Supreme Court has been subject to relentless changes to its composition, leadership, and mandate over the last five years. As a result, and similarly to what happened to the Constitutional Tribunal, the Supreme Court is no longer a body meeting the requirements of an independent and impartial tribunal previously established by law.

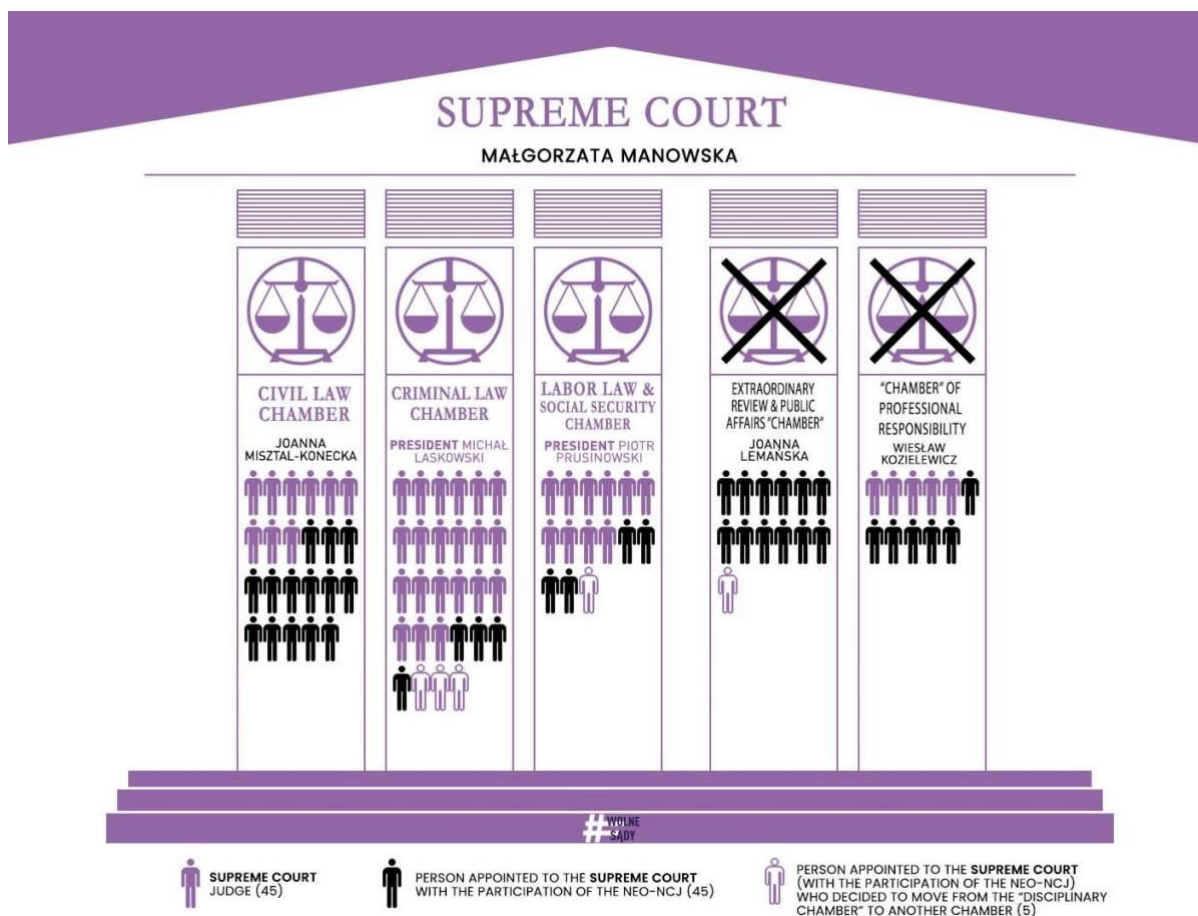
The most important issues to address with the view of restoring the independence and legitimacy of the Supreme Court revolve around three core elements: the presence of individuals appointed to all of its chambers in manifest breach of domestic law on the back of a procedure marred by grave irregularities; the composition, competencies, and activities of the "new" Chambers established since 2018; and the activities of the current (also manifestly irregularly appointed) First President of the Court.

Table 3: Structure and composition of the Supreme Court as of 23 June 2022 before the Disciplinary Chamber was replaced by the Chamber of Professional Responsibility¹⁴¹



¹⁴¹ Free Courts, 2000 Days of Lawlessness, June 2022, p. 45.

Table 4: Structure and composition of the Supreme Court as of 5 November 2022¹⁴²



Regarding the Supreme Court's "neo-judges", i.e., individuals appointed post 2018 in a procedure involving the unconstitutional body formally known as the National Council for the Judiciary ("neo-NCJ" hereinafter), the grossly irregular nature of these appointments was made clear by the CJEU in Case C-824/18 and Case C-487/19.

These two judgments, however, continue to be violated by Polish authorities, including by the Supreme Court's neo-judges, which is not surprising as Poland's Supreme Administrative Court has ruled that the nominations at issue in Case C-824/18 were manifestly invalid. The Supreme Administrative Court's judgments¹⁴³ have been described as opening "the door to declaring the new Supreme Court

¹⁴² Free Courts, 2500 Days of Lawlessness, November 2022, p. 49.

¹⁴³ II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18 and II GOK 7/18.

judges illegal”,¹⁴⁴ or to put it differently, holding them not to be Supreme Court judges at all. Furthermore, the inescapable conclusion one must draw from the CJEU judgment of 6 October 2021 in C-487/19 is that the order by which a Supreme Court neo-judge dismissed the action of a (lawful) judge who was transferred against his will must be declared null and void. Indeed, the ECtHR has, in parallel to the CJEU, repeatedly established that the Supreme Court’s neo-judges were all appointed in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system starting with its judgment of 22 July 2021 in *Reczkowicz* in which the ECtHR found that the procedure for appointing judges to the DC had been unduly influenced by the legislative and executive powers. This undue influence amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the DC. Poland’s DC was not therefore a tribunal established by law within the meaning of the ECHR. In this context, one may note that the ECtHR has also characterized the actions of the Polish President as amounting to a blatant defiance of the rule of law:

The Court concludes that both the legislature’s interference with the pending judicial review of the legality of NCJ resolution no. 330/2018 and the President of Poland’s appointment of seven judges to the Civil Chamber upon the contested resolution, notwithstanding that its implementation had been stayed pending appeals contesting its legality, amounted to a manifest breach of the domestic law. Conduct of the State’s highest executive authority which, by deliberate actions disregarding a binding judicial decision and through *faits accomplis*, interferes with the course of justice, in order to vitiate and render meaningless a pending judicial review of the appointment of judges, can only be characterised as blatant defiance of the rule of law.¹⁴⁵

As of 1 September 2022, the ECtHR has established that (i) the deficiencies of the judicial appointment procedure involving the neo-NCJ have already adversely affected existing appointments and are capable of *systematically* affecting the

¹⁴⁴ M. Jałoszewski, “After the judgment of the Supreme Administrative Court. The nominations for the new Supreme Court judges, including President Manowska, are invalid”, *Rule of Law in Poland*, 10 May 2021: <https://ruleoflaw.pl/supreme-administrative-court-rules-nominations-supreme-court-invalid/>.

¹⁴⁵ Judgment of 3 February 2022, *Advance Pharma*, op. cit., para. 344.

future appointments of judges, not only to the other chambers of the Supreme Court but also to the ordinary, military, and administrative courts; (ii) the legitimacy of any court composed of judges appointed in a procedure involving the neo-NCJ is *systematically* compromised. The ECtHR has furthermore demanded rapid remedial action on the part of the Polish State as the continued operation of the neo-NCJ and its involvement in judicial appointments perpetuate the *systemic dysfunction* established by the Court. The ECtHR has also warned that any failure to take remedial action may in the future result in potentially multiple violations of the right to an independent and impartial tribunal established by law and thus lead to further aggravation of the rule of law crisis in Poland.

Polish authorities, including the Supreme Court's neo-judges, have colluded to prevent the application of relevant ECtHR rulings but also the CJEU rulings mentioned above. As noted by the Commission itself in July 2022, the new President of the Civil Chamber – also an irregularly appointed individual – changed the composition of the referring court responsible for the implementation of the CJEU preliminary ruling in Case C-487/19.¹⁴⁶

Notwithstanding the threats and arbitrary proceedings initiated against some of them, the lawful judges of the Supreme Court have sought to apply the case law of both the ECtHR and the CJEU. On 2 June 2022, seven judges of the Criminal Chamber of the Supreme Court held in Case I KZP 2/22 that the neo-NCJ is a new body that is “not identical” to the one laid down in the Polish Constitution. Any judicial appointment made by this unconstitutional body is therefore irregular but this does not mean that every action of the neo-judges automatically infringes the requirements relating to judicial impartiality. An exception to this finding concerns all individuals appointed to the Supreme Court by the neo-NCJ. According to the Criminal Chamber, following the case law of the ECtHR, their appointments are grossly irregular and the Supreme Court “neo-judges” cannot therefore lawfully adjudicate.

On 17 October 2022, 30 Supreme Court judges issued a statement in which they made clear that they would refuse from then onwards to sit on panels with neo-judges due to the defects which have marred their appointments with reference *inter alia* to Article 19(1) TEU:

¹⁴⁶ European Commission, 2022 Rule of Law Report (Poland Country Chapter), op. cit., p. 9.

Judicial decisions issued with the participation of a defectively appointed judge breach the right to a trial guaranteed by Article 45(1) of the Constitution of the Republic of Poland, the second paragraph of Article 19(1) of the Treaty on European Union, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the Convention on Human Rights [...] These defects were not fixed by the Act amending the Act on the Supreme Court of 9 June 2022 (Journal of Laws 2022, item 1259). Given the rationale presented, we declare that *we do not see any possibility of adjudicating together with people appointed in a defective procedure*.¹⁴⁷ (emphasis added)

In a ruling of 19 October 2022, the Supreme Court overturned the judgment of the Court of Appeal in cassation proceedings as the Court of Appeal sat in a bench formation which included neo-judge Piotr Schab,¹⁴⁸ the President of the Court of Appeal of Warsaw who subsequently justified the violation of interim measures ordered by the ECtHR on 6 December 2022 in relation to Court of Appeal judges who had been forcibly transferred from the Criminal Division to the Labour and Social Security Division on account of their application of ECtHR and CJEU's case law.

In a ruling of 26 October 2022, with reference to the case law of both the ECtHR and the CJEU judgment in Case C-487/19, the Supreme Court declared the decision of a neo-judge to be non-existent in the context of a dispute relating to a bank loan agreement. The Court's reasoning is worth quoting extensively:

The European Court of Human Rights accepted that the Supreme Court - Extraordinary Control and Public Affairs Chamber and the Supreme Court - Civil Chamber, adjudicating in formations composed of judges thus appointed, were deprived of the attribute of a court established by law within the meaning of Article 6(1) of the Convention, resulting in a violation of this provision by the Republic of Poland. The European Court of Human Rights also found that the defects in the nomination proceedings

¹⁴⁷ Statement by 30 legitimate Supreme judges to refuse to sit on panels with neo-judges translated by THEMIS, 18 October 2022: http://themis-sedziowie.eu/wp-content/uploads/2022/10/O%C5%9Bwiadczenie-30-SSN_eng.pdf. See also, M. Jałoszewski, "30 legal judges of the Supreme Court refuse to adjudicate with neo-judges", *Rule of Law in Poland*, 27 October 2022: <https://ruleoflaw.pl/30-legal-judges-of-the-supreme-court-refuse-to-adjudicate-with-neo-judges-we-want-to-faithfully-serve-poland/>

¹⁴⁸ Decision of 19 October 2022, Case II KS 32/21.

conducted for appointment to the office of a judge of the Supreme Court are systemic in nature and will affect the examination of similar complaints filed or referred to the Court in the future. The effects of the faults in these proceedings are not abolished by the possibility for the parties to the proceedings to use this measure (the so-called judge impartiality test) provided for in Article 29 § 4-25 of the Act on the Supreme Court, as amended by the Act of 9 June 2022 (Journal of Laws, item 1259). [...]

In its judgment of 6 October 2021. (C 487/19), the CJEU determined that an appointment to the office of a judge of the Supreme Court in flagrant breach of the fundamental norms forming an integral part of the system and functioning of the judicial system under consideration may constitute grounds for declaring an order issued by such a person sitting as a single judge null and void if the further conditions referred to in that judgment are met. In the present case, an assessment to that effect was all the more necessary because the subject matter of the proceedings relates directly to the application of European Union law. The dispute is between a consumer and a bank in connection with a bank credit agreement. [...]

The very issuance of this order (on the exclusion of the judge) under conditions of invalidity of the proceedings, which could also have been obvious to the parties to the proceedings in view of the content of the resolution of the Three Chambers of the Supreme Court of 23.01.20, justifies the statement that in the conviction of the individuals a doubt could have arisen as to whether the composition of the adjudicating court, shaped by the order of 26.04.22, constitutes an impartial and independent court in the constitutional and convention sense. Indeed, the reasons for the invalidity of the proceedings are related to the most serious violations of procedural or constitutional rules. For this reason, there is a principle in civil proceedings that the invalidity of proceedings must be taken into account *ex officio*. This imposes an obligation on every court to take steps to prevent the invalidity of proceedings. [...]¹⁴⁹

¹⁴⁹ II CSKP 556/22. See also IUSTITIA, "The neo-judge ruling does not exist. The Supreme Court fully implements the judgments of the CJEU and the ECtHR", 23 November 2022: <https://www.IUSTITIA.pl/en/4562-the-neo-judge-ruling-does-not-exist-the-supreme-court-fully-implements-the-judgments-of-the-cjeu-and-the-ecthr>

To date, Polish authorities have refused to take any remedial action in relation to the irregularly appointed neo-judges of the Supreme Court and prevent multiple violations of the right to an independent and impartial tribunal established by law from continuing to take place.

As regards the new chambers of the Supreme Court established in 2018 – the DC and the CECPA – Polish authorities agreed to formally dismantle the DC last June in order to unlock the release of EU recovery funding, only to replace it with a new Chamber of Professional Responsibility (CPR). The CPR however suffers from the same flaws due *inter alia* to its membership comprising a majority of “neo-judges” and the undue influence of the Polish President and Prime Minister when it comes to selecting members of the new Chamber.¹⁵⁰ Seemingly with the view of pre-empting a formal finding that the new Chamber is not a court established by law, and assuaging the Commission’s persistent concerns, the Polish government has since proposed the transfer of the disciplinary jurisdiction of the CPR as far as judges are concerned to the Supreme Administrative Court.¹⁵¹ Meanwhile, the CECPA continues to exercise its exclusive jurisdiction to examine complaints alleging lack of independence of a judge or a court in violation of the CJEU order of 14 July 2021, while it also continues to exclusively consist of individuals who cannot adjudicate without automatically violating Article 6(1) ECHR due to the grave irregularities which marred their appointments.¹⁵²

Finally, the issue of the Supreme Court’s new leadership must be mentioned as the office of First President is currently occupied by an individual who was first irregularly appointed to the Supreme Court (as established by the ECtHR) before being irregularly selected for the post of First President due *inter alia* to her election by other irregularly appointed individuals via a new procedure provided for by yet another (*prima facie* unconstitutional) law amending the law on the Supreme Court which entered into force on 1 April 2021.¹⁵³ Ample evidence of the

¹⁵⁰ See J. Jaraczewski, “Just a Feint? President Duda’s bill on the Polish Supreme Court and the Brussels-Warsaw deal on the rule of law”, *VerfBlog*, 1 June 2022: <https://verfassungsblog.de/just-a-feint/>

¹⁵¹ M. Jałoszewski, “PiS is changing the Act on courts for billions for the National Recovery Plan. But it could breach the Constitution and incite chaos”, *Rule of Law in Poland*, 16 December 2022: <https://ruleoflaw.pl/pis-proposal-supreme-administrative-court-recovery-fund/>

¹⁵² ECtHR judgment of 8 November 2021 in *Dolińska-Ficek and Ozimek*, op. cit.

¹⁵³ See Position of the Board of the “Themis” Judges’ Association of 28 May 2020 regarding the appointment of the First President of the Supreme Court: <http://themis-sedziowie.eu/materials-in-english/position-of-the-board-of-the-themis-judges-association-of-28-may-2020-regarding-the-appointment-of-the-first-president-of-the-supreme-court/>.

current First President's lack of independence and actions "giving rise to concerns" can be found in the Commission's annual rule of law country reports for Poland.¹⁵⁴ One may refer for instance to her public statements claiming that the implementation of CJEU rulings concerning the judiciary would allegedly constitute a breach of Polish law and her request "that a disciplinary investigation be opened against Supreme Court judges in view of the content of a judicial decision they took, of the composition of the bench, and of doubts as to their impartiality".¹⁵⁵ Most recently, Małgorzata Manowska deemed it appropriate to question the lack of legal education of the European Commission President and denounced the EU's rule of law "bullying".¹⁵⁶

¹⁵⁴ See also European Commission 2021 Rule of Law Report (Poland country chapter), SWD(2021) 722 final, 20 July 2021, p. 9: "The current First President of the Supreme Court, appointed as reported last year following a contested procedure, has taken decisions giving rise to concerns, in particular seizing the Constitutional Tribunal on controversial issues, including to limit the right to access to documents and requesting to shield newly appointed Supreme Court judges - including herself - from having their status contested in cases pending before the Supreme Court. The First President also seized the Chamber of Extraordinary Control and Public Affairs to recuse certain Supreme Court judges from cases in which they had already made a preliminary ruling request to the Court of Justice. On 16 July 2021, the First President of the Supreme Court issued a statement which refers to the judgment of the Constitutional Court of 14 July 2021 and [...] informs about the repeal of the instruction for the Disciplinary Chamber of the Supreme Court suspending its activity in disciplinary proceedings against judges."

¹⁵⁵ European Commission 2022 Rule of Law Report (Poland country chapter), op. cit. pp. 9-10.

¹⁵⁶ A. Ptak, 'Supreme Court chief calls on EU to stop "bullying" Poland', *Notes from Poland*, 9 August 2022: <https://notesfrompoland.com/2022/08/09/supreme-court-chief-calls-on-eu-to-stop-bullying-poland/>

New recommendation (g):

The Council recommends that Poland immediately restore the independence and legitimacy of the Supreme Court of Poland by:

- Providing for the removal of all of the individuals appointed to the Supreme Court since the National Council of the Judiciary was reconstituted under the Amending Act of 8 December 2017 due to the fundamental irregularities which adversely affected their appointments as established by the European Court of Human Rights in multiple judgments;
- Organising the prompt election of a new First President of the Supreme Court in a procedure which is not unduly influenced by the legislative and executive powers;
- Abolishing the Chamber of Extraordinary Control and Public Affairs as it is not an independent and impartial tribunal established by law;
- Ensuring that the Chamber of Professional Responsibility – or any new chamber to be created in the future – exclusively consists of properly appointed judges.

(h) Restoration of the independence and legitimacy of the National Council for the Judiciary

State of play:

In open disregard of Poland's Constitution and in defiance of the Commission's recommendation to revise the law on the National Council for the Judiciary (NCJ) in order to retain the election of judges-members by their peers – and despite the Commission's warning not to prematurely terminate the mandates of the NCJ's judges-members – the lower house of the Polish parliament elected 15 new judge-members on 6 March 2018. In doing so, the four-year mandates of the previous 15 judge-members *guaranteed by the Constitution* were prematurely ended via a manifestly unconstitutional amending statute.¹⁵⁷

Furthermore, it was subsequently shown that the process of collecting signatures of support by those wishing to be appointed to the neo-NCJ was unlawful due to at least one new judge-member having failed to submit the required number of supporting letters.¹⁵⁸ It has also been established that the vast majority of people who supported 11 out of the 15 candidates received benefits in return in the form of promotions and various types of additional financial benefits. This means that the new judge-members of the 2018 neo-NCJ represented 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 receiving 88% of his "promoters" from within the Ministry of Justice.¹⁵⁹

In light of the proactive role played by the neo-NCJ when it comes to undermining and violating judicial independence in Poland, the European Networks of Councils

¹⁵⁷ For a comprehensive factual account, see the Grand Chamber judgment of the ECtHR of 15 March 2022, in the case of *Grzęda v Poland* (application no. 43572/18).

¹⁵⁸ 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>

¹⁵⁹ 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>

for the Judiciary (hereinafter: ENCJ) suspended the neo-NCJ on 17 September 2018¹⁶⁰ before – in an unprecedented move – expelling it on 28 October 2021.¹⁶¹

These unparalleled 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 neo-NCJ and request in due course the suspension of its activities by way of interim measures to be obtained from the CJEU. 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.”¹⁶² To this day, the European Commission is yet to answer the Parliament’s request notwithstanding the fact that the neo-NCJ’s lack of independence has been established by the CJEU, the ECtHR as well as by the (lawfully appointed) judges of Poland’s Supreme Court and Supreme Administrative Court,¹⁶³ and most recently, lower Polish courts.

To give two recent examples in the field of criminal law, on 2 June 2022, and in response to a question of law from the Court of Appeal in Warsaw, seven (lawfully appointed) judges of the Criminal Chamber of the Supreme Court held that the neo-NCJ is a body which is “not identical” to the one laid down in the Polish Constitution, i.e., it is a body which is usurping the functions of the NCJ as provided by the Polish Constitution and which must formally protect judicial independence and take action when judicial independence is threatened and/or violated.¹⁶⁴

In a judgment of 13 July 2022, the Court of Appeal of Warsaw overturned the judgment of a district court to sentence a defendant to 16 years in prison.¹⁶⁵ With

¹⁶⁰ ENCJ, ENCJ suspends Polish National Judicial Council – KRS, 17 September 2018, <https://www.encj.eu/node/495>

¹⁶¹ ENCJ, ENCJ votes to expel Polish Council for the Judiciary (KRS), 28 October 2021: <https://www.encj.eu/node/605>

¹⁶² European Parliament resolution of 17 September 2020, op. cit., para. 24.

¹⁶³ See in particular the judgments of the Poland’s Supreme Court of 5 December 2019 in Case III PO 7/18 and of 15 January 2020 in Case III PO 8/18; the Resolution of the joint Chambers of the Poland’s Supreme Court of 23 January 2020, BSA I-4110-1/2; the judgments of Poland’s Supreme Administrative Court of 11 October 2021 in Case II GOK 9/18 and of 21 September 2021 in cases II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18, II GOK 14/18.

¹⁶⁴ Case I KZP 2/22. See also “Poland’s judicial council no longer consistent with constitution, finds Supreme Court”, *Notes from Poland*, 2 June 2022: <https://notesfrompoland.com/2022/06/02/polands-judicial-council-is-no-longer-consistent-with-the-constitution-finds-supreme-court/>

¹⁶⁵ Case II Aka 173/21. See also M. Kryszkiewicz, “Sąd Apelacyjny: Wystarczy sama obawa społeczna, by sąd utracił wiarygodność”, *Gazeta Prawna*, 28 December 2022:

reference to the case law of the CJEU, the ECtHR, and prior decisions of Polish courts, including the Supreme Court's Resolution of 23 January 2020, the Court of Appeal of Warsaw found the first instance judgment to have been issued by an improperly composed bench in violation of *inter alia* Article 6(1) ECHR due to the participation of a neo-judge whose irregular nomination via the neo-NCJ cannot be regularized *a posteriori* by the presidential decision formalizing the neo-judge's appointment. One may note that the rapporteur in this case – Judge Marzanna Piekarska-Drażek – was subject to a forced transfer to the Labor and Social Security Division the following month with the ECtHR demanding on 6 December 2022 the suspension of the effects of the decision to transfer the judge as well as two other judges working in the criminal division of the Warsaw Court of Appeal.¹⁶⁶ As of 1 January 2023, this interim measure continues to be violated.

As regards the lack of legal remedies available to the judges sitting on the NCJ prior to the unconstitutional termination of their mandates, two of them subsequently lodged a complaint with the ECtHR. On 15 March and 16 June 2022 respectively, the ECtHR held that the effective dismissals of judges Grzęda and Żurek from the NCJ, coupled with the lack of legal recourse against such dismissals, amounted to a violation of Article 6 (1) ECHR in each instance.¹⁶⁷ The ECtHR has more generally established that:

- (i) The deficiencies of the judicial appointment procedure involving the neo-NCJ have already adversely affected existing appointments and are capable of *systematically affecting* the future appointments of all judges in Poland;
- (ii) The legitimacy of any court composed of judges appointed in a procedure involving the neo-NCJ is *systematically compromised*;
- (iii) The continued operation of the neo-NCJ and its involvement in the judicial appointments procedure perpetuates the *systemic dysfunction* established by the Court and any failure on the part of the Polish State to take rapid remedial action may in the future result in potentially

<https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8618629,wyroki-sa-obawa-spoleczna-wiarygodnosc-sedzia-powolanie.html>

¹⁶⁶ Judge Marzanna Piekarska-Drażek's ECHR complaint (application no. 44068/22) was communicated to Polish authorities on 6 December 2022.

¹⁶⁷ Judgment of 15 March 2022, *Grzęda v Poland* (application no. 43572/18); Judgment of 16 June 2022, *Żurek v Poland* (application no. 39650/18).

multiple violations of the right to an independent and impartial tribunal established by law.

In December 2022, the Committee of Ministers of the Council of Europe regretted the continuing lack of any remedial action as regards the neo-NCJ, highlighting *inter alia* that the Polish authorities disregarded the case law of the ECtHR when they elected “a new NCJ in May 2022 under the 2017 framework” which does not guarantee the independence of this body.¹⁶⁸

As regards the amendments of 9 June 2022, officially adopted to comply with the EU's recovery judicial milestones, the Committee of Ministers explicitly stated that they do “not constitute adequate remedial action, *inter alia* because they: failed to introduce rules for judicial members of the NCJ to be elected by their peers; did not address the status of judges appointed in deficient procedures and of the decisions adopted with their participation; did not introduce an adequate framework for examining the legitimacy of judicial appointments and did not remove all risks of disciplinary liability for judges who implement the requirements of Article 6”.¹⁶⁹

¹⁶⁸ Council of Europe (Committee of Ministers), H46-24 *Xero Flor w Polsce sp. z o.o. v. Poland* (Application No. 4907/18), 1451st meeting, 6-8 December 2022 (DH), para. 6.

¹⁶⁹ *Ibid.*, para. 7.

New Recommendation (h):

The Council recommends that the Republic of Poland immediately restore the independence and legitimacy of the National Council of Judiciary by restoring its constitutional composition which *inter alia* requires the election of its 15 judge-members by judges on the basis of a procedure which provides sufficient guarantees to prevent any undue influence by the legislative and executive powers.

The Council further recommends that in order to strengthen the quality of appointment and promotion procedures to be overseen by a regularly composed and independent National Council of Judiciary, an advisory committee is to be established within the National Council of Judiciary with its membership opened to retired judges and the President (or delegate) of the European Networks of Councils for the Judiciary as well as academics, lawyers, and civil society representatives.

(i) Restoration of the separation between the Public Prosecutor's Office and the Ministry of Justice

State of play:

In 1990, as part of a slew of reforms aimed at breaking with the legal and political setup of the communist era, Poland reintroduced the concept of having the offices of the Prosecutor General and the Minister of Justice held by the same person. At the same time, Polish authorities continued to strengthen the autonomy and independence of individual prosecutors so as to ensure that this “double-hatting” merging of posts did not result in the office-holder being able to impede individual prosecutors’ ability to function without undue influence.¹⁷⁰ These safeguards were nevertheless deemed insufficient and potentially problematic by experts and in 2009 a new law established a separate, independent Prosecutor General to be appointed for a fixed six-year term by the President of Poland out of two candidates, with one proposed by the National Council of the Judiciary and the second one by the National Council of the Prosecution. The new law provided for adequate guarantees of independence of the Prosecutor General from the executive and was positively received.¹⁷¹

In 2016, Poland’s current ruling coalition decided to backslide by providing for the “re-merger” of the office of Public Prosecutor General (PPG hereinafter) with that of the Minister of Justice (Moj hereinafter) while also vastly increasing the powers of both the PPG and Moj. The law doing so was described by the Venice Commission as “unacceptable in a State governed by the rule of law as it could open the door to arbitrariness”.¹⁷² PACE similarly considered that “the *ad personam* merger of the posts of Minister of Justice and Prosecutor General, and the extensive discretionary powers over the prosecution service and the actual prosecution of individual cases itself given to the Minister of Justice, undermine the impartiality and independence of the Prosecution Service and make it vulnerable to politicisation and abuse”.¹⁷³ Subsequently, in a CJEU opinion

¹⁷⁰ See generally Venice Commission, Poland. Opinion on the Act on The Public Prosecutor’s Office as amended, Opinion 892/2017, 11 December 2017.

¹⁷¹ Venice Commission, Report on European Standards as regards the independence of the Judicial System: Part II – the Prosecution Service, Study no. 494/2008, 3 January 2011, p. 6.

¹⁷² Venice Commission, Opinion on the Act on the Public Persecutor’s Office as amended, op. cit., para. 97.

¹⁷³ PACE, Resolution 2316 (20220), op. cit., para. 7.1.

delivered on 20 May 2021, AG Bobek spoke of an “unholy” alliance between two institutional bodies that should normally function separately.¹⁷⁴

The broad legal competencies of both offices, coupled with them being all vested in one person, must also be viewed through a political lens as the current MoJ and PPG, Zbigniew Ziobro, is the chairman of the Solidarna Polska (United Poland) party, a junior coalition partner of the ruling party Prawo i Sprawiedliwość (Law and Justice). In his capacity as MoJ since November 2015, he has played a key role in respect of the relentless flow of laws, most of which have since been found by national and/or European courts to be incompatible with Poland’s Constitution, and EU and/or ECHR requirements relating to the rule of law.¹⁷⁵

Manifest and multiple abuses of power quickly followed Ziobro’s appointment to the merged posts of MoJ and PPG.¹⁷⁶ In addition to criminal activities organized within the MoJ itself with the view to intimidating judges and prosecutors¹⁷⁷ and the actions undertaken by the special unit established in 2016 within the national prosecutor’s office,¹⁷⁸ one may for instance refer to the 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 courts¹⁷⁹ lose their posts. This transitional regime gave the MoJ the power to dismiss any president and vice-president of any ordinary court *without* any specific criteria, *without* justification

¹⁷⁴ AG Bobek Opinion of 20 May 2021 in Joined Cases C-748/19 to C-754/19, EU:C:2021:403, para. 188.

¹⁷⁵ Mr Ziobro, in his capacity as PPG, also lodged cases such as Case K 3/21 on the primacy of EU law and cases K 6/21 and K 7/21 on the “unconstitutionality” of Article 6 (1) ECHR.

¹⁷⁶ See Open Dialogue and THEMIS, *Polish Public Prosecutor’s Office: Selected Cases of Malicious Prosecution and Dereliction of Duties since 2015*, February 2022: <https://en.odfoundation.eu/a/190999,polish-public-prosecutors-office-selected-cases-of-malicious-prosecution-and-dereliction-of-duties/>. See also Helsinki Foundation for Human Rights, *Stan Oskarżenia. Prokuratura w latach 2016-2022*, February 2022, pp. 13-16: <https://www.hfhr.pl/wp-content/uploads/2022/03/Stan-oskarzenia-FIN.pdf>.

¹⁷⁷ See Recommendation (e) *supra* regarding the MoJ’s secret “troll farm”.

¹⁷⁸ 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/>

¹⁷⁹ 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/>

and *without* judicial review.¹⁸⁰ No remedy has ever been provided for the presidents and vice-presidents who were prematurely dismissed under this regime.

On 29 June 2021, in its first ruling regarding this manifestly arbitrary transitional regime, the ECtHR held that the removal by the MoJ of the two applicants – both vice-presidents of Kielce Regional Court before their removal – had infringed the very essence of their right of access to a court.¹⁸¹ In its judgment, the ECtHR noted *inter alia* that the applicants' removal had been based on a legislative provision the compatibility of which with the requirements of the rule of law appeared doubtful and, secondly, that the measure was not accompanied by any of the fundamental safeguards of procedural fairness. In December 2022, the Committee of Ministers invited Polish authorities "to present their reflection on the measures still necessary to protect presidents and vice-presidents of courts from arbitrary dismissals, including through introducing judicial review of the decision on their dismissal, and to consider the possibility to provide for retrospective effect as regards the period between 12 August 2017 and 12 February 2018 when more than 150 presidents and vice-presidents were dismissed based on temporary legislation."¹⁸²

One may note in passing that, for reasons that are difficult to understand, the European Commission never launched an infringement action in relation to this appalling episode of widespread abuse of power by Poland's MoJ and which progressively enabled the ruling collation to interfere with the functioning of most ordinary courts when required via the new "leadership". Notwithstanding the Commission's inaction, the CJEU was able to assess the rules which permit the MoJ to second judges to higher criminal courts and found them incompatible with EU law in a judgment of 16 November 2021 answering questions referred to it by the Regional Court in Warsaw.¹⁸³ For the CJEU, seconded judges in Poland are not provided with the guarantees and the independence which judges should

¹⁸⁰ 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.

¹⁸¹ ECtHR, Judgment of 29 June 2021, *Broda and Bojara v. Poland*, (applications no. 26691/18 and 27367/18).

¹⁸² Council of Europe (Committee of Ministers), H46-25 Reczkowicz group (Application No. 43447/19), *Broda and Bojara* (Application No. 26691/18) v. Poland, CM/Del/Dec(2022)1451/H46-25, 6-8 December 2022 (DH), para. 10.

¹⁸³ Joined Cases C-748/19 to C-754/19, *WB et al*, EU:C:2021:931.

normally enjoy in a State governed by the rule of law. In practice, there have been many examples of the abusive use of the rules relating to the secondment of judges. Prosecutors deemed to be too critical by the ruling coalition have also been targeted with secondment rules used by superior prosecutors to demote and discriminate against prosecutors, with some prosecutors being for instance ordered to relocate to another town hundreds of kilometers away from their residence in a matter of days following their sudden secondment to a different office. This, coupled with the practice of superior prosecutors giving only oral instructions to subordinates, thus leaving no paper trail of interference in the content of the case, have led to a situation where prosecutors in Poland are under a persistent threat of harassment or infringement of their independence.¹⁸⁴

For a non-exhaustive list of recent unlawful practices and abuses of powers committed by officials controlled by the MoJ/PPG, one may finally refer to the latest edition of the European Commission's rule of law country report for Poland which notes, *inter alia*, that "the instrumentalisation of the prosecution service is further exemplified in cases in which a preliminary ruling request was made and by the opening of a criminal investigation in a case concerning judges of the Court of Justice" with the National Prosecutor's Office also issuing "instructions binding on all prosecutors recalling the allegedly non-binding force of judgments of the European Court of Justice and of the ECtHR".¹⁸⁵

To remedy this pattern of abusive instrumentalization finally, the risk of which the Commission first stressed in December 2017,¹⁸⁶ the Commission adopted two country specific recommendations in July 2022 via the Annual Rule of Law Report mechanism:

- Separate the function of the Minister of Justice from that of the Prosecutor-General and ensure functional independence of the prosecution service from the Government;

¹⁸⁴ See Open Dialogue and THEMIS, *Polish Public Prosecutor's Office*, op. cit.

¹⁸⁵ European Commission, 2022 Rule of Law Report (Poland Country Chapter), op. cit., pp. 10-11.

¹⁸⁶ Strangely enough, while correctly noting that several aspects of these laws have had "direct negative consequences for the independence of the prosecutorial system from [the] political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland" (para. 170 of the Commission's Article 7(1) TEU Reasoned Proposal's explanatory memorandum), the Commission did not include a concrete recommendation specifically dealing with Poland's prosecution services.

- Ensure independent and effective investigations and prosecutions, address the broad scope of immunities for top executives and abstain from introducing impunity clauses in legislation in order to enable a robust track record of high-level corruption cases.¹⁸⁷

To date, Polish authorities have taken no steps whatsoever to address these two recommendations.

¹⁸⁷ European Commission, 2022 Rule of Law Report (Poland Country Chapter), op. cit., p. 2.

New Recommendation (i):

The Council recommends that the Republic of Poland take all appropriate steps to:

- Restore the situation existing prior to the *ad personam* merger of the posts of Minister of Justice and Prosecutor General, organize the appointment of a new Prosecutor General who is suitably qualified for the post in a procedure which is inclusive and transparent, introduce sufficient safeguards against abuse and politicization of the prosecution service, and reduce the extensive discretionary powers over the prosecution service and the actual prosecution of individual cases itself given to the Minister of Justice as the existing legal regime undermines the impartiality and independence of the Prosecution Service and makes it vulnerable to politicisation and abuse;
- Abolish the special unit established in 2016 within the national prosecutor's office to investigate judges and prosecutors and reiterate the legal imperative to revise immediately the regime in force in Poland which permits the Minister for Justice to second judges so as to make this system compatible with EU law in light of the Court of Justice of the European Union's judgment of 16 November 2021 in Joined Cases C-748/19 to C-754/19;
- Provide every ordinary court president or vice president who has been irregularly dismissed by the Minister for Justice on the basis of the six-month transitional regime which lacked any of the fundamental safeguards of procedural fairness and violated the very essence of the relevant judges' right of access to a court as established by the European Court of Human Rights in its judgment of 29 June 2021 in *Broda and Bojara v. Poland* with compensation at a current salary level of the post they were unlawfully dismissed from and the possibility to ask for a reinstatement in their previous positions on the basis of a request to be made before a newly reconstituted and independent National Council for the Judiciary.

(j) Address the situation of all individuals appointed to judicial offices in inherently deficient procedures

State of play:

Poland's "neo-judges" represent a substantial and growing number of the approximately 11,000 sitting judges in the country. As of 1 January 2023, there are over 2,000 "neo-judges" and "neo-judges-in-training" whose appointments went through the *unconstitutional* body presenting itself as Poland's NCJ while it is instead commonly described as the "neo-NCJ".¹⁸⁸

In its resolution of 23 January 2020, Poland's Supreme Court held that any court formation which includes neo-judges appointed through the procedure involving the neo-NCJ is *unduly* composed:¹⁸⁹

1. A court formation is unduly composed within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure, or a court formation is inconsistent with the provisions of law within the meaning of Article 379 § 4 of the Code of Civil Procedure, also where the court includes a person appointed to the office of judge of the Supreme Court on the recommendation of the National Council of the Judiciary in accordance with the [2017 Amending Act].
2. A court formation is unduly composed within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure, or a court formation is inconsistent with the provisions of law within the meaning of Article 379 § 4 of the Code of Civil Procedure, also where the court includes a person appointed to the office of judge of an ordinary or military court on the recommendation of the National Council of the Judiciary formed in accordance with the [2017 Amending Act], if the deficiency of the appointment process leads, in specific circumstances, to a violation of the guarantees of independence and impartiality within the meaning of Article 45 § 1 of the Constitution of the Republic of Poland, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 § 1 of the [Convention].

¹⁸⁸ See Recommendation (h) *supra*.

¹⁸⁹ Case BSA I-4110-1/20, translated by ECtHR in the judgment of 22 July 2021 in *Reczkowicz v. Poland*, application no. 43447/19, CE:ECHR:2021:0722JUD004344719.

3. The interpretation of Article 439 § 1 (2) of the Code of Criminal Procedure and Article 379 § 4 of the Code of Civil Procedure provided in points 1 and 2 above shall not apply to judgments given by courts before the date hereof and judgments to be given in proceedings pending at the date [of the present resolution] under the Code of Criminal Procedure before a given court formation.

4. Point 1 [above] shall apply to judgments issued with the participation of judges appointed to the Disciplinary Chamber of the Supreme Court under [the 2017 Act on the Supreme Court] irrespective of the date of such judgments.

It is important to stress that this solemn resolution did not seek to address the issue of whether “neo-judges” can be recognized as lawful judges and indicated that this matter should not be dealt with until after two of the then pending CJEU cases were decided.¹⁹⁰ However, the lawful judges of Poland’s Supreme Court did decide to exclude “neo-judges” from resolving the legal dispute which was the subject matter of this resolution as they were deemed to have been appointed on the basis of a manifestly defective procedure the legal effect of which was to be examined in the resolution.¹⁹¹

As previously detailed, lawful judges of the Criminal Chamber of Poland’s Supreme Court have since held that the neo-NCJ is an unconstitutional body which is “not identical” to the one laid down in the Polish Constitution.¹⁹² This means that any judicial appointment made by this unconstitutional body is inherently irregular. According to the Criminal Chamber, this does not mean, however, that every action of the neo-judges may be said to automatically infringe requirements relating to judicial impartiality and independence. The one exception concerns all

¹⁹⁰ Cases C-487/19, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, and C-508/19, *Prokurator Generalny (Disciplinary Chamber of the Supreme Court – Appointment)* were mentioned. In the first case, in a judgment of 6 October 2021, the CJEU held *inter alia* that decisions from Supreme Court judges who have been appointed in clear breach of fundamental rules concerning the establishment and functioning of the judicial system concerned must be declared null and void. In the second case, in a judgment of 22 March 2022, the CJEU found the request for a preliminary ruling inadmissible and did not therefore address the issue of whether a judge of the Disciplinary Chamber may be considered a judge and the eventual conditions one may meet in EU law in order to obtain, in essence, a form of *erga omnes* invalidation of individuals appointed to the office of judge in clear breach of fundamental rules concerning the establishment and functioning of the judicial system concerned.

¹⁹¹ Resolution in Case BSA I-4110-1/20, para. 3.

¹⁹² See Recommendation (h) *supra*.

of the individuals irregularly appointed to the Supreme Court due to the grave and fundamental nature of the irregularities which marred their appointments. According to the Criminal Chamber, with reference to the judgments of the ECtHR, it follows that the Supreme Court's "neo-judges" cannot lawfully adjudicate and any bench they participate in cannot be considered a court established by law.

As regards neo-judges who are irregularly appointed to ordinary courts, the Criminal Chamber reiterated, in accordance with the Supreme Court's Resolution of 23 January 2020, that any appeal court is required to examine *ex officio* whether a lower court is established by law; that appeal courts must undertake this examination without the involvement of neo-judges on account of the *nemo iudex in causa sua* principle; and that every member of a bench may apply for a recusal of a neo-judge. However, as we shall see in the state of play section relating to this study's next recommendation, any (regularly appointed) appeal judge doing so faces *inter alia* (unlawful) one-month summary suspensions and (unlawful) disciplinary proceedings on the basis of the "Muzzle Law" and the CT's decisions finding Article 19(1) TEU And Article 6(1) ECHR, as interpreted by the CJEU and the ECtHR respectively, to be unconstitutional.

The ECtHR has already firmly established that the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs are not courts established by law (these two chambers consist exclusively of individuals irregularly appointed in a procedure involving the neo-NCJ) and that the Civil Chamber is similarly not a court established by law when it includes neo-judges due to the *inherently deficient* judicial appointment procedure involving the neo-NCJ as constituted by the 2017 Amending Act. On the basis of these ECtHR judgments, it is obvious that all of the Supreme Court's neo-judges must be considered "usurpers",¹⁹³ i.e., judges who cannot lawfully adjudicate without automatically violating the parties' right to a tribunal established by law and whose decisions, we would argue, ought to be automatically invalidated as they have been issued by persons sitting in the Supreme Court with full knowledge that they lack the authority to do so due to the flagrant defects which have marred their patently irregular appointments.

As regards other judicial appointments, the ECtHR has also indicated that the legitimacy of *any* court composed of judges appointed in a procedure involving

¹⁹³ On the English law concept of usurpers, see L. 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" (2020) *RECONNECT Working Paper 8*: <https://www.reconnect-europe.eu/publications/working-papers>

the neo-NCJ is *systematically compromised*. This means that all past and future appointments involving the neo-NCJ suffer from *systemic deficiencies*. The ECtHR further warned that any failure on the part of the Polish State to take rapid remedial action may in the future result in potentially multiple violations of the right to an independent and impartial tribunal established by law, thus leading to further aggravation of the rule of law crisis in Poland.

While the ECtHR is yet to address directly the situation of “neo-judges” appointed to ordinary courts, it is submitted that the Court’s case law to date makes it already plain that the mere fact that a neo-judge was appointed in a procedure involving the unconstitutional neo-NCJ “is sufficient to establish a violation” of Article 6(1) ECHR¹⁹⁴ as they cannot constitute courts established by law due to the *systemic dysfunction* in Poland’s judicial appointment procedure already established by the ECtHR. Be that as it may, it is only a matter of time before this issue is directly addressed by the ECtHR as multiple ECHR applications concerning *administrative, civil and criminal cases examined by ordinary courts* which included neo-judges were notified to the Polish authorities in July 2022.¹⁹⁵

To address this situation, it has been suggested that all “neo-judges” should be removed due to the irregular nature of their appointment on account of the involvement of an unconstitutional and politically captured body. It has been similarly suggested to annul all promotions given out by the neo-NCJ. At the same time, it has been recommended to give all the individuals defectively appointed to judicial positions (with the exception of the Supreme Court neo-judges due to the additional and gross irregularities which have marred their appointments) the possibility to “stand for re-recruitment before a new, legitimate NCJ”.¹⁹⁶

¹⁹⁴ M. Szwed, “Hundreds of judges appointed in violation of the ECHR? The ECtHR’s *Reczkowicz v. Poland* ruling and its consequences”, *VerfBlog*, 29 July 2021: <https://verfassungsblog.de/hundreds-of-judges-appointed-in-violation-of-the-echr/>

¹⁹⁵ See *Zielińska v. Poland* (no. 48534/20); *Lubomirska and Puzyra v. Poland* (no. 18422/21); *Szulc v. Poland* (no. 28314/21); *Dzięgała v. Poland* (no. 32097/21); *Janik v. Poland* (no. 35535/21); *Nałęcz v. Poland* (no. 40001/21); *Wojtkielewicz v. Poland* (no. 42443/21); *Nawrot v. Poland* (no. 51529/21); *Antoszewski v. Poland* (no. 53725/21); *Bętkowski v. Poland* (no. 54815/21); *Kamieński v. Poland* (no. 1181/22); *Śliwa v. Poland* (no. 5685/22); *D.C. v. Poland* (no. 41335/21). In all of these pending cases, the parties were asked to submit their observations in relation to the following question: was the court which dealt with the applicants’ cases an “independent and impartial tribunal established by law” as required by Article 6 § 1 of the Convention?

¹⁹⁶ “10 Commandments for Restoring the Rule of Law in Poland [Free Courts Initiative]”, *Wyborcza.pl*, 4 October 2021: <https://wyborcza.pl/7,173236,27646392,10-commandments-for-restoring-the-rule-of-law-in-poland-free.html>

We support this course of action as regards “neo-judges” at the level of ordinary courts and would recommend: (i) that they are not suspended from adjudicating duties as a group so as to avoid damaging practical consequences on litigants; (ii) that they are individually allowed to regularize their situation by putting themselves forward before a reconstituted and independent NCJ, with a failure to do so within a specific deadline resulting in an immediate suspension from adjudicating duties and (iii) that any lawful judge or “neo-judge” who has received a promotion via the unconstitutional neo-NCJ must be allowed to justify their promotion before a reconstituted and independent NCJ.

In a situation where a “neo-judge” is found to lack the required qualifications and/or to have engaged in activities that are incompatible with the profession of judge, for instance by calling for sanctions against judges applying CJEU and/or ECtHR judgments, he/she should be dismissed from the judiciary.

In a situation where a properly appointed judge is found to have been promoted for reasons of political connivance and/or has been engaged in activities incompatible with the profession of judge following this promotion (such as e.g. participation in the MoJ’s secret “troll farm”), his/her promotion must be annulled and proceedings of a disciplinary and/or criminal nature initiated.

In any situation, a procedure guaranteeing effective judicial protection must be organized and a system implemented whereby the decisions of the new NCJ may be challenged before an independent and impartial court established by law.

New Recommendation (j):

The Council recommends that the Republic of Poland take all appropriate steps to:

- Remedy without delay, in full compliance with all relevant national and European judgments and standards when taking such remedial action, the systemic deficiencies in the judicial appointment procedures established by national and European courts to prevent further and multiple violations of the right to an independent and impartial tribunal established by law;
- Repeal or modify all provisions prohibiting the review of compliance of a judicial appointment with the right to a tribunal established by law;
- Provide for an effective review of the resolutions of the National Council of the Judiciary proposing judicial appointments to the President of Poland, including Supreme Court judges, and an effective procedure to review the legality of judicial appointments, and the independence and impartiality of judges without any restrictions or sanctions for applying legal requirements relating to the right to a tribunal established by law;
- Provide for an effective procedure whereby individuals that were irregularly appointed to ordinary courts due to the involvement of the National Council of the Judiciary as established under the Amending Act on the National Council of the Judiciary of 8 December 2017, a body which has been found to be unconstitutional and lacking independence, must apply for a regularisation of their appointment;
- Provide for an effective procedure whereby all promotions granted by the body established under the Amending Act on the National Council of the Judiciary of 8 December 2017 are reviewed by a reconstituted and independent National Council of the Judiciary.

(k) Address the situation of any judge sanctioned or subject to investigations and proceedings of any nature for applying European law and/or defending the rule of law

State of Play:

For many years, numerous Polish judges have been subjected to threats of and/or actual disciplinary investigations, disciplinary and/or criminal proceedings, and/or have been suspended for seeking to uphold the rule of law, including for the “offence” of applying ECtHR and CJEU rulings relating to the right to an independent tribunal established by law.¹⁹⁷

In the past year, the repression against Polish judges has evolved. Seemingly to avoid the scrutiny of the ECtHR and to make the violations of relevant rulings of the ECtHR and CJEU less manifest, the past few months have seen an increasing number of one-month unlawful suspensions as well as a new type of administrative repression in the form of forced transfers.

This would seem to explain why, for the very first time, in 2022 the ECtHR adopted multiple interim measures (see Table 5 below) to prevent Polish judges from being suspended or having their judicial immunity lifted by the unlawful DC and its replacement, the new Chamber of Professional Responsibility (CPR). The first interim measure was issued by the ECtHR on 8 February 2022 in the case of Judge Wróbel, a sitting judge of the Criminal Chamber of Poland’s Supreme Court. These multiple interim measures have all since been amended so as to take account of the dismantlement of the DC and to cover any body competent under Polish law to deal with cases of judges at risk of imminent suspension from their judicial functions for applying ECHR and EU case law in their rulings.¹⁹⁸ In addition, the ECtHR has requested to be informed systematically of the composition of the panel which will examine the judges’ cases and, one must stress, the manner in which members of that panel were appointed to judicial office. Most recently, also for the first time ever, the ECtHR ordered the suspension of the forced transfer of

¹⁹⁷ For a comprehensive report, see THEMIS (Polish Association of Judges), *In-depth report: 'Internal Affairs Department of the State Prosecution Service as a politicized tool of oppression of Polish judges and prosecutors' prepared by Dariusz Mazur*, 12 December 2021: <http://themis-sedziowie.eu/materials-in-english/in-depth-report-internal-affairs-department-of-the-state-prosecution-service-as-a-politicized-tool-of-oppression-of-polish-judges-and-prosecutors-prepared-by-dariusz-mazur-press-o/>

¹⁹⁸ ECHR Press release, Interim measures amended in cases concerning judges’ immunity, ECHR 254 (2022), 17 August 2022.

three Court of Appeal judges on 6 December 2022. However, Piotr Schab, the President of the Court of Appeal in Warsaw, has formally refused to comply on account of the (alleged) unconstitutionality of these measures in an official statement published on 13 December 2022.¹⁹⁹ He had previously made clear that the forced transfers were connected to the three judges' rulings taken in application of the ECtHR and CJEU's case law.²⁰⁰

To provide a transversal and concise overview of the extent of the Polish authorities' harassment campaign against judges via unlawful proceedings and sanctions, we will offer four tables in Annex 2 below the main body of this paper listing (i) Polish judges who have secured interim measures from the ECtHR as regards disciplinary and/or lifting of judicial immunity proceedings taken against them; (ii) Polish judges who have been suspended indefinitely until relevant proceedings are concluded primarily on account of applying CJEU/ECtHR rule of law related judgments; (iii) Polish judges who have been suspended for one month for applying CJEU and/or ECtHR rule of law related rulings; (iv) Polish judges who have faced disguised sanctions in the form of unlawful forced transfers following application of CJEU/ECtHR rulings and/or defending the rule of law in extra-judicial interventions.

Due to the sheer volume, we will not attempt to present a table of the judges who have been subject to "mere" arbitrary investigation and disciplinary proceedings. It is however important to keep in mind, as stressed by the CJEU in its judgment of 15 July 2021 regarding Poland's new disciplinary regime for judges, that in a situation where a "judge has been the subject of an investigation and disciplinary proceedings which have been closed by a final ruling, that *judge may once again be subject to such investigations and proceedings in the same case, such that that judge will permanently remain under the potential threat of such investigations and*

¹⁹⁹ Full text of the statement is available at: <https://waw.sa.gov.pl/download/oswiadczenie-prezesa-sa-w-warszawie-z-13.12.2022-r.-1671005515.pdf>

²⁰⁰ M. Jałoszewski, "Schab, Ziobro's 'enforcer', confirms: the repressions in the court of appeal are for applying EU law", *Rule of Law in Poland*, 24 August 2022: <https://ruleoflaw.pl/schab-ziobros-enforcer-confirms-the-repressions-in-the-court-of-appeal-are-for-applying-eu-law/> ("The decision constitutes an official reprisal for the fact that the judges are applying the judgments of the ECtHR and the CJEU, in which the legality of the neo-NCJ and the neo-judges it nominated was questioned. Furthermore, the judges were transferred even though there is a shortage of judges in the criminal division")

proceedings, notwithstanding the fact that such a ruling has taken place (emphasis added)".²⁰¹

As there are so many more Polish judges who have faced threats of disciplinary proceedings and are facing actual disciplinary proceedings for defending the rule of law, upholding Poland's Constitution and/or "implementing the CJEU and ECtHR rulings",²⁰² let us merely give a "flavor" of what is still happening in Poland by mentioning some recent examples which show inter alia that the seemingly more conciliatory posture adopted in 2022 by Polish authorities is just that: a posture to unlock access to EU recovery funding. The proved however enough to push the Commission into adopting a more lenient – in our view excessively so – approach both when it comes to EU recovery judicial milestones and the (non-application) of the EU's Rule of Law Conditionality Regulation.²⁰³

Be that as it may, to mention but a few recent examples, Judge Dariusz Mazur, vice president of Themis is subject of disciplinary proceedings on account of his public criticism of Małgorzata Manowska – who is acting as the First President of Poland's Supreme Court notwithstanding the grossly irregular nature of her appointment to this court as established by the ECtHR in *Advanced Pharma* – for failing to implement CJEU rulings.²⁰⁴

Judge Rafał Lisak and Judge Wojciech Maczuga, both of the Regional Court in Kraków, are also facing suspension for implementing CJEU and ECtHR rulings with their cases now pending before the new Chamber of Professional Responsibility.²⁰⁵

²⁰¹ Case C-791/19, op. cit., para. 197.

²⁰² M. Jałoszewski, "Schab, Ziobro's 'enforcer', confirms: the repressions in the court of appeal are for applying EU law", *Rule of Law in Poland*, 24 August 2022: <https://ruleoflaw.pl/schab-ziobros-enforcer-confirms-the-repressions-in-the-court-of-appeal-are-for-applying-eu-law/>

²⁰³ L. Pech, "Covering Up and Rewarding the Destruction of the Rule of Law One Milestone at a Time", *VerfBlog*, 21 June 2022: <https://verfassungsblog.de/covering-up-and-rewarding-the-destruction-of-the-rule-of-law-one-milestone-at-a-time/>; J. Jaraczewski, "Unexpected Complications: The impact of the Russian invasion of Ukraine on the rule of law crisis in the EU", *VerfBlog*, 23 December 2022: <https://verfassungsblog.de/unexpected-complications-the-impact-of-the-russian-invasion-of-ukraine-on-the-rule-of-law-crisis-in-the-eu/>

²⁰⁴ M. Jałoszewski, "Repression against Judge Mazur for criticizing Manowska. He is being prosecuted by an anonymous disciplinary commissioner", *OKO.press*, 7 September 2022: <https://oko.press/represje-wobec-sedziego-mazura-zakrytyke-manowskiej-sciga-go-anonimowy-rzecznik-dyscyplinarny/>

²⁰⁵ IUSTITIA, „IOZ zajmie się wnioskami rzeczników dyscyplinarnych o zawieszenie 5 sędziów: Rafała Lisaka, Wojciecha Maczugi, Anny Bator-Ciesielskiej, Adama Synakiewicza i Marty Piłśnik”, 14 September 2022, <https://www.IUSTITIA.pl/dzialalnosc/kalendarium/ioz-zajmie-sie-wnioskami->

Disciplinary proceedings were also initiated last October against Judge Dorota Tyrała of the Court of Appeal in Warsaw (in manifest breach of the CJEU order of 14 July 2021) for issuing three rulings challenging rulings that were delivered with the involvement of neo-judges and for one ruling not recognizing the legality of the DC in a case relating to the unlawful suspension of Judge Tuleya.²⁰⁶

Most recently, disciplinary charges were brought against retired Judge Małgorzata Gersdorf on 29 November 2022 in her capacity as former First President of Poland's Supreme Court when the Supreme Court adopted on 23 January 2020 a resolution which held that the DC is not a court within the meaning of Polish constitutional law, ECHR law, and EU law.²⁰⁷

One should not therefore view the replacement of the DC with the CPR as anything but a cosmetic change primarily motivated by political concerns to unlock access to EU recovery funds. While the new CPR, when consisting of lawful judges, has acted appropriately by, for instance, confirming the illegality of Judge Piekarska-Drażek's one-month suspension in September 2022 and stating the obvious (the Moj "cannot remove judges for a month [...] for issuing rulings he does not like"),²⁰⁸ and by dismissing on procedural grounds the case of Judge Adam Synakiewicz, another judge unlawfully suspended for a month for applying EU law,²⁰⁹ the CPR remains a body which cannot be viewed as a court established by law. Indeed, it currently consists of a majority of individuals irregularly appointed to the Supreme Court who cannot lawfully adjudicate as per the case law of the ECtHR. It follows that every single decision issued by a bench consisting, in full or in part, of Supreme Court "neo-judges" violates Article 6(1) ECHR.

[rzecznikow-dyscyplinarnych-o-zawieszenie-5-sedziow-rafala-lisaka-wojciecha-maczugi-anny-bator-ciesielskiej-adama-synakiewicza-i-marty-pilsnik](#)

²⁰⁶ M. Jałoszewski, "Ziobro's man strikes at the Court of Appeal in Warsaw. He is prosecuting a judge for the ruling in Tuleya's case and EU law", *Rule of Law in Poland*, 27 October 2022: <https://ruleoflaw.pl/ziobros-man-strikes-at-the-court-of-appeal-in-warsaw-he-is-prosecuting-a-judge-for-the-ruling-in-tuleyas-case-and-eu-law/>

²⁰⁷ M. Jałoszewski, "Scandalous repression of former Supreme Court President Gersdorf", *Rule of Law in Poland*, 8 December 2022: <https://ruleoflaw.pl/repression-gersdorf-supreme-court/>

²⁰⁸ M. Jałoszewski, "New Supreme Court chamber strikes at Zbigniew Ziobro: the minister cannot suspend judges for judgments passed", *Rule of Law in Poland*, 26 September 2022: <https://ruleoflaw.pl/new-supreme-court-chamber-strikes-at-zbigniew-ziobro-the-minister-cannot-suspend-judges-for-judgments-passed/>

²⁰⁹ Order of 14 September 2022, Case I ZZ 6/22.

New Recommendation (k):

The Council recommends that the Republic of Poland take urgent steps to:

- Acknowledge that all of the Disciplinary Chamber's resolutions are to be considered null and void;
- Reinstate every judge suspended for applying ECHR and EU case law in their rulings;
- Reinstate every judge transferred without their consent for applying ECHR and EU case law in their rulings;
- End the practice of disguised sanctions in the form of imposed transfers, periods of annual leave and any other administrative measure pursuing the aim of creating a "chilling effect" on judges;
- End disciplinary or criminal investigations or proceedings, including waiving of judicial immunity proceedings, against judges on account of their application of ECHR and EU case law in their rulings and/or the exercise of their duty to speak out in defence of the rule of law and judicial independence when those values come under threat;
- End disciplinary or criminal investigations or proceedings concerning prosecutors on account of their defence of the rule of law or refusal to comply with instructions such as the ones recalling the allegedly non-binding force of judgments of the Court of Justice of the European Union and of the European Court of Human Rights or the manifestly abusive activities such as investigations of judges for submitting requests for a preliminary ruling to the Court of Justice of the European Union;
- End manifestly abusive criminal investigations such as the one launched on 15 December 2021 by the Regional Prosecutor's Office in Warsaw in respect of all the judges of the Court of Justice of the EU.

ANNEX 1

I. Updated Article 7(1) TEU recommendations

(a) Restoration of the independence and legitimacy of the Constitutional Tribunal

(b) Publication and full implementation of the judgments of the pre-captured Constitutional Tribunal

(c) Compliance of the law on the Supreme Court, the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the National School of Judiciary with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty

(d) Close cooperation with the judiciary and all interested parties, including the Venice Commission, when it comes to any new future justice reform

(e) Refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole

II. New Article 7(1) TUE recommendations

(f) Full and immediate compliance with all rule of law related CJEU orders and judgments as well as all relevant ECtHR judgments and interim measures

(g) Restoration of the independence and legitimacy of the Supreme Court

(h) Restoration of the independence and legitimacy of the National Council for the Judiciary

(i) Restoration of the separation between the Public Prosecutor's Office and the Ministry of Justice

(j) Address the situation of individuals appointed to judicial offices in inherently deficient procedures

(k) Address the situation of any judge sanctioned or subject to investigations and proceedings of any nature for applying European law and/or defending the rule of law

FULL TEXT OF THE UPDATED AND NEW ARTICLE 7(1) TEU RECOMMENDATIONS

I – UPDATED RECOMMENDATIONS

Recommendation (a)

The Council recommends that the Republic of Poland take immediate steps to:

- Restore the regular composition, independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that the Constitutional Tribunal meets the requirements of a tribunal previously established by law and that its judges, its President and its Vice-President are lawfully elected and appointed, by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate;
- Ensure that a procedure is established to reopen cases which have been irregularly decided by an unlawful bench of the Constitutional Tribunal, with the relevant decisions issued in these cases to be furthermore considered non-existent, and propose measures to prevent external undue influence on the appointment of judges in the future;
- Reiterate by way of a declaration submitted to the Council that it recognises the principles of autonomy, primacy, effectiveness and uniform application of Union law as well as the values laid down in Article 2 TEU, including in particular the rule of law; accepts the authority of the Court of Justice of the European Union, whose decisions are final and binding; acknowledges that the decisions of Poland's Constitutional Tribunal of 14 July 2021 and 7 October 2021 are in breach of the general principles of autonomy, primacy, effectiveness and uniform application of Union law and the binding effect of rulings of the Court of Justice and in breach of Article 19(1) TEU and were furthermore issued by unlawful benches rendering the rulings of 14 July 2021 and 7 October 2021 null and void; recognises that it fully respects its obligations under the European Convention of Human Rights and that

the decisions of Poland's Constitutional Tribunal of 24 November 2021 and 10 March 2022 breach these obligations whereas fundamental rights guaranteed by the European Convention of Human Rights simultaneously constitute general principles of Union law which may therefore also be considered violated by these decisions.

Recommendation (b)

The Council recalls that no democratic government that respects the rule of law can selectively ignore court decisions it does not approve of and strongly deplores the overdue and qualified publication of the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016, and 7 November 2016, and recommends that the Republic of Poland immediately publish these judgments without any qualifications as to their legality and relevance, remove existing qualifications from Poland's Official Journal, and fully implement these judgments, and as part of the process of restoring the independence and legitimacy of the Constitutional Tribunal in line with recommendation (a) above, take fully account of these judgments fully when revising existing legislative provisions regarding the Constitutional Tribunal before submitting the revised legislative provisions for constitutional review to a Constitutional Tribunal which meets the requirements of an independent and impartial tribunal established by law.

Recommendation (c)

The Council recommends that the Republic of Poland ensure that:

- The law on the Supreme Court, the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary, the law on the National School of the Judiciary and Public Prosecution, and every other single law relating to the judiciary adopted post December 2016 are reviewed and amended in order to ensure their compliance with the requirements relating to – non-exclusively – the independence of the judiciary, the separation of powers, legal certainty, freedom of expression, respect for private life, and protection of personal data, with every new piece of legislation relating to the judiciary to be submitted for constitutional review to a Constitutional Tribunal meeting the requirements of an independent and impartial tribunal established by law;

- The extraordinary appeal procedure, which introduced a new form of judicial review of final and binding judgments, is repealed without delay;
- The Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain others which entered into force on 14 February 2020 is repealed in its entirety without delay due to its manifest incompatibility with the right to an effective remedy before an independent and impartial tribunal previously established by law in addition to undermining the independence of Polish judges as well as their rights to respect for private life and to the protection of personal data.

Recommendation (d)

The Council recommends that the Republic of Poland ensure that:

- All laws concerning the judiciary, and courts are subject to an inclusive process of public stakeholder consultation prior to the drafting of legislative acts, during the drafting of these acts and during the legislative process;
- The input of civil society, academia and the legal professions as well as all associations of judges and prosecutors when preparing any justice reform is proactively sought;
- An opinion of the Venice Commission is requested as soon as any new legislative bill relating to the judiciary has been submitted to the Parliament.\

Recommendation (e)

The Council recommends that Poland ensure that:

- The representatives of executive, legislative and judicial authorities refrain from actions and public statements which could undermine further the legitimacy of independent and impartial courts established by law, of judges, individually or collectively, or the judiciary as a whole. In particular, the Minister of Justice and Prosecutor General, including deputies and employees of both institutions, must refrain from actions and public statements which amount to attacks on judges, judicial associations, civil society groups, and other stakeholders;
- No disciplinary and/or criminal investigations and proceedings are initiated against judges and prosecutors who exercise their right to freedom of expression

to address matters concerning the functioning of the justice system as judges and prosecutors have a duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat as is the case in Poland;

- An independent public inquiry into the smear campaigns which have targeted judges and those responsible for them is established without any further delay.

II – NEW RECOMMENDATIONS

Recommendation (f)

The Council recommends that Poland fully and immediately comply with the following judgments and orders of the Court of Justice:

- Judgment of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, *AK (Independence of the Disciplinary Chamber of the Supreme Court)*;
- Judgment of 2 March 2021 in C-824/18, *AB and Others (Appointment of judges to the Supreme Court – Actions)*;
- Order of 14 July 2021 in Case C-204/21 R, *Commission v. Poland (Independence and private life of judges)*;
- Judgment of 15 July 2021 in Case C-791/19, *Commission v. Poland (Disciplinary regime for judges)*;
- Judgment of 6 October 2021 in Case C-487/19, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court - Appointment)*;
- Order of 27 October 2021 in Case C-204/21 R, *Commission v Poland (Independence and private life of judges)*;
- Judgment of 16 November 2021 in Joined Cases C-748/19 to C-754/19, *Criminal proceedings against WB and Others*;

The Council furthermore recommends that Poland end the abusive practice of questioning the authority of the European Court of Justice and the European Court of Human Rights via artificial challenges brought before Poland's Constitutional Tribunal, a body which no longer meets the requirements of an independent and impartial tribunal previously established by law, and ensure without delay:

- full compliance with all of the interim measures and judgments of the European Court of Human Rights issued to date starting with the judgment of 7 May 2021 in the case of *Xero Flor* (4907/18) and take all appropriate individual and general measures without delay;
- full compliance with past and future rulings and orders of both the European Court of Justice and the European Court of Human Rights by formally and effectively restoring compliance with Article 19(1) TEU, Article 6(1) ECHR, and all other relevant provisions of the EU Treaties and the European Convention on Human Rights with regard to the judiciary.

New recommendation (g)

The Council recommends that Poland immediately restore the independence and legitimacy of the Supreme Court of Poland by:

- Providing for the removal of all of the individuals appointed to the Supreme Court since the National Council of the Judiciary was reconstituted under the Amending Act of 8 December 2017 due to the fundamental irregularities which adversely affected their appointments as established by the European Court of Human Rights in multiple judgments;
- Organising the prompt election of a new First President of the Supreme Court in a procedure which is not unduly influenced by the legislative and executive powers;
- Abolishing the Chamber of Extraordinary Control and Public Affairs as it is not an independent and impartial tribunal established by law;
- Ensuring that the Chamber of Professional Responsibility – or any new chamber to be created in the future – exclusively consists of properly appointed judges.

Recommendation (h)

The Council recommends that the Republic of Poland immediately restore the independence and legitimacy of the National Council of Judiciary by restoring its constitutional composition which inter alia requires the election of its 15 judges-members by judges on the basis of a procedure which provides sufficient

guarantees to prevent any undue influence by the legislative and executive powers;

The Council further recommends that in order to strengthen the quality of appointment and promotion procedures to be overseen by a regularly composed and independent National Council of Judiciary, an advisory committee is to be established within the National Council of Judiciary with its membership opened to retired judges and the President (or delegate) of the European Networks of Councils for the Judiciary as well as academics, lawyers and civil society representatives.

Recommendation (i)

The Council recommends that the Republic of Poland take all appropriate steps to:

- Restore the situation existing prior to the *ad personam* merger of the posts of Minister of Justice and Prosecutor General, organize the appointment of a new Prosecutor General who is suitably qualified for the post in a procedure which is inclusive and transparent, introduce sufficient safeguards against abuse and politicization of the prosecution service, and reduce the extensive discretionary powers over the prosecution service and the actual prosecution of individual cases itself given to the Minister of Justice as the existing legal regime undermines the impartiality and independence of the Prosecution Service and makes it vulnerable to politicisation and abuse;
- Abolish the special unit established in 2016 within the national prosecutor's office to investigate judges and prosecutors and reiterate the legal imperative to revise immediately the regime in force in Poland which permits the Minister for Justice to second judges so as to make this system compatible with EU law in light of the Court of Justice of the European Union's judgment of 16 November 2021 in Joined Cases C-748/19 to C-754/19;
- Provide every ordinary court president or vice president who has been irregularly dismissed by the Minister for Justice on the basis of the six-month transitional regime which lacked any of the fundamental safeguards of procedural fairness and violated the very essence of the relevant judges' right of access to a court as established by the European Court of Human Rights in its judgment of 29 June 2021 in *Broda and Bojara v. Poland* with compensation at a current salary

level of the post they were unlawfully dismissed from and the possibility to ask for a reinstatement in their previous positions on the basis of a request to be made before a newly reconstituted and independent National Council for the Judiciary.

Recommendation (j)

The Council recommends that the Republic of Poland take all appropriate steps to:

- Remedy without delay, in full compliance with all relevant national and European judgments and standards when taking such remedial action, the systemic deficiencies in the judicial appointment procedures established by national and European courts to prevent further and multiple violations of the right to an independent and impartial tribunal established by law;
- Repeal or modify all provisions prohibiting the review of compliance of a judicial appointment with the right to a tribunal established by law;
- Provide for an effective review of the resolutions of the National Council of the Judiciary proposing judicial appointments to the President of Poland, including Supreme Court judges, and an effective procedure to review the legality of judicial appointments, and the independence and impartiality of judges without any restrictions or sanctions for applying legal requirements relating to the right to a tribunal established by law;
- Provide for an effective procedure whereby individuals that were irregularly appointed to ordinary courts due to the involvement of the National Council of the Judiciary as established under the Amending Act on the National Council of the Judiciary of 8 December 2017, a body which has been found to be unconstitutional and lacking independence, must apply for a regularisation of their appointment;
- Provide for an effective procedure whereby all promotions granted by the body established under the Amending Act on the National Council of the Judiciary of 8 December 2017 are reviewed by a reconstituted and independent National Council of the Judiciary.

Recommendation (k)

The Council recommends that the Republic of Poland take urgent steps to:

- Acknowledge that all of the Disciplinary Chamber's resolutions are to be considered null and void;
- Reinstate every judge suspended for applying ECHR and EU case law in their rulings;
- Reinstate every judge transferred without their consent for applying ECHR and EU case law in their rulings;
- End the practice of disguised sanctions in the form of imposed transfers, periods of annual leave and any other administrative measure pursuing the aim of creating a "chilling effect" on judges;
- End disciplinary or criminal investigations or proceedings, including waiving of judicial immunity proceedings, against judges on account of their application of ECHR and EU case law in their rulings and/or the exercise of their duty to speak out in defence of the rule of law and judicial independence when those values come under threat;
- End disciplinary or criminal investigations or proceedings concerning prosecutors on account of their defence of the rule of law or refusal to comply with instructions such as the ones recalling the allegedly non-binding force of judgments of the Court of Justice of the European Union and of the European Court of Human Rights or the manifestly abusive activities such as investigations of judges for submitting requests for a preliminary ruling to the Court of Justice of the European Union;
- End manifestly abusive criminal investigations such as the one launched on 15 December 2021 by the Regional Prosecutor's Office in Warsaw in respect of all the judges of the Court of Justice of the EU.

ANNEX 2

TABLE 5: Polish judges who have secured interim measures from the ECtHR as regards disciplinary and/or lifting of judicial immunity proceedings taken against them (listed by date of adoption of the interim measures as of 1 January 2023)

<p>Judge Wróbel</p> <p>8 February 2022</p> <p>Pending ECHR application no. 6904/22 communicated on 31 March 2022</p>	<p>Polish government to ensure that the proceedings concerning the lifting of Judge Wróbel's judicial immunity comply with the requirements of a fair trial as guaranteed by Article 6(1) ECHR and that no decision in respect of his immunity be taken by the Disciplinary Chamber (DC) until the final determination of his complaints by the ECtHR.</p>
<p>Judge Piekarska-Drażek</p> <p>23 February 2022</p> <p>Pending ECHR application 8076/22 communicated on 23 May 2022</p>	<p>Polish government to ensure that no decision in respect of the applicant's suspension is taken by the DC until further notice and to provide information on the practice of the DC in respect of suspension of judges ordered by the Minister of Justice.</p>
<p>Judge Synakiewicz Judge Niklas-Bibik Judge Hetnarowicz-Sikora</p> <p>22 March 2022</p> <p>Pending ECHR applications nos. 46453/21; 8687/22 and 9988/22 all communicated on 23 May 2022</p>	<p>Polish government to give the ECtHR and the applicants 72 hours' notice of the date of any hearing or in camera session scheduled in the applicants' cases before the DC.</p>
<p>Judge Głowacka</p> <p>30 March 2022</p> <p>Pending ECHR application no. 15928/22 communicated on 23 May 2022</p>	<p>Polish government to give the ECtHR and the applicants 72 hours' notice of the date of any hearing or in camera session scheduled in the applicants' cases before the DC.</p>
<p>Judge Stępka</p> <p>14 April 2022</p> <p>Pending ECHR application no. 18001/22 communicated on 30 September 2022</p>	<p>Polish government to ensure that the proceedings concerning the lifting of this Supreme Court judge's judicial immunity comply with the requirements of a fair trial and that no decision in respect of his immunity be taken by the DC until the final determination of his complaints by the ECtHR.</p>

<p>Judge Zawiślak</p> <p>26 April 2022</p> <p>Pending ECHR application no 18632/22 communicated on 13 June 2022</p>	<p>Following a provisional interim measure adopted on 14 April 2022 and ordering that no decision regarding the applicant's judicial immunity is taken by the DC until 4 May 2022, the ECtHR adopted a new interim measure ordering that no decision in respect of the applicant's immunity is taken by the DC until the final determination of the applicant's complaints by the ECtHR.</p>
<p>Judge Raczkowski</p> <p>8 July 2022</p> <p>Pending ECHR application no 33082/22</p>	<p>Polish Government to ensure that the proceedings concerning the lifting of Judge Raczkowski's judicial immunity comply with the requirements of a fair trial and that no decision be taken until the final determination of his complaints by the ECtHR.</p>
<p>Judge Synakiewicz</p> <p>22 July 2022</p> <p>Pending ECHR application no. 46453/21</p>	<p><i>Previous</i> interim measure of 22 March 2022 amended to apply to the renamed Disciplinary Chamber (the new Professional Responsibility Chamber), with ECtHR also demanding information on panel composition and manner in which members of panel have been appointed to judicial office.</p>
<p>Judge Niklas-Bibik Judge Piekarska-Drażek</p> <p>5 August 2022</p> <p>Pending ECHR applications no. 8687/22 and no. 8076/22</p>	<p>Same as above in relation to <i>previous</i> interim measures of 22 March 2022</p>
<p>Judge Wróbel</p> <p>9 August 2022</p> <p>Pending ECHR application no. 6904/22</p>	<p>Idem in relation to <i>previous</i> interim measure of 8 February 2022.</p>
<p>Judge Zawiślak Judge Głowacka Judge Hetnarowicz-Sikora</p> <p>15 August 2022</p> <p>Pending ECHR application nos 18632/22; 15928/22 and 9988/22</p>	<p>Idem in relation to <i>previous</i> interim measures of 26 April 2022, 30 March 2022 and 22 March 2022 respectively.</p>
<p>Judge Hetnarowicz-Sikora</p>	<p><i>Previous</i> interim measure adopted on 22 March 2022, last revised on 15 August 2022,</p>

<p>13 September 2022</p> <p>Pending ECHR application no. 9988/22</p>	<p>amended again to demand that the disciplinary body which may decide on the judge's suspension is lawfully composed.</p>
<p>Judge Irena Piotrowska Judge Aleksandra Janas Judge Andrzej Sterkowicz</p> <p>19 September 2022</p> <p>Pending ECHR applications nos. 44015/22; 44016/22 and 3685/20 all communicated on 17 November 2021</p>	<p>Polish government to ensure that the disciplinary proceedings concerning these judges comply with the requirements of a fair trial.</p>
<p>Judge Żurek</p> <p>18 October 2022</p> <p>Pending ECHR applications nos. 36137/22 and 41885/22</p>	<p>Polish government to ensure that extraordinary appeals comply with requirements of a fair trial and no decision as to the merits of the cases regarding Judge Żurek be taken by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which composed of judges appointed in breach of Article 6 § 1 ECHR, until the final determination of the applicant's complaints by the ECtHR.</p>
<p>Judge Leszczyńska-Furtak Judge Gregajtys Judge Piekarska-Drażek</p> <p>6 December 2022</p> <p>Pending ECHR applications nos. 39471/22; 39477/22 and 44068/22²¹⁰ all communicated on the same day</p>	<p>Polish authorities to suspend the effects of decisions to transfer the applicants from the Criminal Division to the Labour and Social Security Division of the Warsaw Court of Appeal and ensure that no decision to transfer the applicants to another division of the Warsaw Court of Appeal against their will is taken until the final determination of the applicants' complaints by the ECtHR.</p> <p>NB: The president of the Court of Appeal has officially indicated on 13 December 2022 that he will not comply with this interim measure.</p>

²¹⁰ This is the second complaint lodged with the ECtHR by Judge Piekarska-Drażek.

TABLE 6: Polish judges suspended until relevant proceedings are concluded²¹¹ for judgments finding against the ruling coalition and/or applying CJEU/ECtHR rule of law case law

<p>Judge Paweł Juszczyszyn (Olsztyn District Court)</p> <p><i>ECHR application no. 35599/20 communicated on 30 April 2021 and second pending ECHR application no. 48037/22 lodged with ECtHR following his forced transfer in July 2022</i></p> <p><i>ECHR application no. 35599/20 decided on 6 October 2022 with the ECtHR finding a violation of Article 6(1), a violation of Article 8 and, for the first time in the context of Poland's rule of law crisis, a violation of Article 18 ECHR on account of the predominant purpose of the disciplinary measures taken against Judge Juszczyszyn, which was to sanction and dissuade him from assessing the judicial status of individuals appointed in a procedure involving the neo-NCJ</i></p>	<p>Formally suspended indefinitely on 4 February 2020 by the DC for implementing the CJEU Judgment of 19 November 2019 in A.K. and demanding access to the letters of support to the neo-NCJ to investigate the legality of its composition. Judge Juszczyszyn was Poland's first and the longest suspended judge until his reinstatement on 23 May 2022 after a period of 839 days of (unlawful) suspension. However, he was then sent on compulsory leave until 19 July 2022 and subject to a forced transfer on the day of his reinstatement (see TABLE 8 below).</p>
<p>Judge Maciej Ferek (Kraków Regional Court)</p> <p><i>Pending ECHR application no 22591/22 communicated on 7 November 2022</i></p>	<p>Suspended on 16 November 2021 by the Disciplinary Chamber (DC) on account of his rulings in which, with reference to inter alia ECHR and CJEU judgments, he inter alia set aside a decision given by a neo-judge and refuse to append an enforcement clause to a judgment of a court of appeal which included a neo-judge.</p>
<p>Judge Igor Tuleya (Warsaw Regional Court)</p> <p><i>Pending ECHR application no. 21181/19 communicated on 1 September 2020; pending application no. 51751/20 communicated on 16 July 2021; third complaint lodged on 8 November 2022</i></p>	<p>Suspended on 18 November 2020 by the DC which at the same time lifted Judge Tuleya's immunity following the launch of criminal proceedings by the National Prosecutor's Office for allowing journalists to attend the announcement of his ruling ordering that prosecutors continue with the investigation into alleged parliamentary irregularities which</p>

²¹¹ This table refers to situations where a judge is formally suspended until disciplinary and/or criminal proceedings are concluded and a judgment becomes final (which usually takes place after the court of the second instance decides), unless the relevant court decides to unsuspend a judge in the course of the disciplinary or criminal proceedings. NB: A suspension *automatically* results in a 25-50% reduction of the relevant judge's salary.

	<p>had prevented parliamentarians from having a vote on the budget bill in December 2016.</p> <p>On 21 March 2022, the District Court for Warszawa-Praga issued an injunction by which it obliged the Regional Court in Warsaw to allow Judge Tuleya to resume his judicial functions. However, former prosecutor Przemysław Radzik, nominated by the Minister of Justice Zbigniew Ziobro to the office of vice-president of the Regional Court in Warsaw, who is also the deputy disciplinary commissioner for judges, refused to comply with the final court decision ordering the reinstatement of Judge Tuleya.</p> <p>In August 2022, Judge Tuleya's reinstatement was again prevented by Mr Radzik acting on behalf of Piotr Schab, the President of the Warsaw Court of Appeal. Both individuals are disciplinary officers appointed by the Minister of Justice Zbigniew Ziobro.</p> <p>On 29 November 2022, the new Chamber of Professional Responsibility (CPR) reinstated Judge Tuleya and closed the waiving of immunity proceedings against him while indicating that immunity proceedings could be reopened leaving Judge Tuleya under the permanent threat of new arbitrary proceedings and suspension.</p>
<p>Judge Piotr Gąciarek (Warsaw Regional Court)</p> <p><i>Pending ECHR application no. 27444/22 communicated on 10 June 2022</i></p>	<p>Suspended on 21 November 2021 by the DC for applying ECtHR and CJEU rulings relating to the right to an independent tribunal established by law.</p> <p>On 14 October 2022, Judge Gąciarek's reinstatement ordered by a district court in a final judgment of 10 October 2022 was blocked by the neo-judge currently acting the President of the court Judge Gąciarek is affiliated to.</p>
<p>Judge Maciej Rutkiewicz (Elbląg District Court)</p> <p><i>Pending ECHR application no. 18380/22 communicated on 19 April 2022</i></p>	<p>Suspended on 15 December 2021 by the DC until the disciplinary proceedings against him are decided. Judge Rutkiewicz was initially suspended for thirty days on 9 November 2021 for applying EU requirements relating to judicial independence as interpreted by the CJEU and Poland's Supreme Court resolution of 23 January 2020 by decision of the President</p>

	<p>of the Elbląg Court and another appointee of the current Minister of Justice Zbigniew Ziobro.</p> <p>On 15 September 2022, Judge Rutkiewicz was reinstated by the new CPR.</p>
<p>Judge Krzysztof Chmielewski (Warsaw Regional Court)</p> <p><i>Pending ECHR application no. 323017/22 communicated on 7 July 2022</i></p>	<p>Suspended on 5 January 2022 by the DC until the disciplinary proceedings against him are decided. Judge Chmielewski was initially suspended for thirty days on 15 December 2021 for applying EU law as interpreted by the CJEU in relation to a ‘neo-judge’ following a request from a party that the “neo-judge” be excluded on account that this person is not a lawful judge.</p> <p>On 17 November 2022, Judge Chmielewski was <i>provisionally</i> reinstated when a lawful judge of the new CPR suspended the execution of a previous decision of the DC to suspend him due to the lack of any progress in the processing of the disciplinary complaint made against him. The reinstatement is however provisional as the disciplinary proceedings against Judge Chmielewski are still ongoing.</p>

TABLE 7: Thirty-day suspensions²¹² following the initiation of disciplinary proceedings²¹³ for applying CJEU and/or ECtHR rule of law case law

<p>Judge Adam Synakiewicz (Częstochowa Regional Court)</p> <p><i>Pending ECHR application no. 46453/21 communicated on 23 May 2022 with interim measures adopted by the ECtHR on 22 March 2022 and 22 July 2022</i></p>	<p>Unlawfully removed from adjudication for a month on 8 September 2021 in manifest violation i.a. of the CJEU order of 14 July 2021 in Case C-204/21 R for having questioned the status of “neo-judges” on the basis of ECtHR rulings.</p> <p>On 14 September 2022, the new Chamber of Professional Responsibility (CPR) refused the indefinite suspension of Judge Synakiewicz for implementing CJEU and ECtHR rulings.</p>
<p>Judge Marta Piłńnik (Warsaw-Śródmieście District Court)</p>	<p>Unlawfully removed from adjudication for a month on 15 September 2021 for complying with the CJEU’s order of 14 July 2021 in Case C-204/21 and applying the CJEU of judgment of 15 July 2021 in Case C-791/19.</p> <p>On 14 September 2022, the new CPR refused the indefinite suspension of Judge Piłńnik for implementing CJEU and ECtHR rulings.</p>
<p>Judge Agnieszka Niklas-Bibik (Słupsk Regional Court)</p> <p><i>Pending ECHR application no. 8687/22 communicated on 23 May 2022 with interim measures adopted by the ECtHR on 22 March 2022 and 5 August 2022</i></p>	<p>Unlawfully removed from adjudication for a month on 29 October 2021 for seeking to apply the case law of the CJEU and submitting (judicial independence related) preliminary questions to the CJEU (pending Cases C-647/21 and C-648/21)</p> <p>On 15 December 2022, following an annulment action lodged with the Regional Administrative Court in Gdansk, in a precedent-setting judgment, the Court held that it has jurisdiction over measures such as the one-month suspension from adjudication adopted against Judge Niklas-Bibik as it amounts to an administrative act, with the Court also holding the suspension unlawful on</p>

²¹² Orders for an “immediate break” in the judges’ judicial functions (natychmiastowa przerwa w czynnościach służbowych) may be issued for a period of one month on the basis of the Act on the Organisation of Ordinary Courts.

²¹³ Similar to the Disciplinary Chamber, the Chamber of Professional Responsibility may, at any time, issue a resolution suspending the judges’ judicial functions for an indefinite duration, i.e., until the final ruling in their cases have been given. As previously noted, suspension of a judge’s judicial functions “automatically” results in a 25-50% reduction of his/her salary.

	the ground i.a. that a judge cannot be subject to disciplinary proceedings for the content of their rulings. This did not however end the disciplinary proceedings against Judge Niklas-Bibik which are now pending before the CPR.
<p>Judge Marzanna Piekarska-Drażek (Court of Appeal in Warsaw)</p> <p><i>Pending ECHR applications nos. 8076/22 and 44068/22 with interim measures adopted by the ECtHR on 23 February 2022, 22 March 2022, 5 August 2022, 6 December 2022</i></p>	<p>Unlawfully removed from adjudication for a month on 24 January 2022 for questioning the status of a neo-judge on the basis of the ECtHR and CJEU's case law.</p> <p>On 20 September 2022, the one-month suspension of Judge Piekarska-Drażek was held unlawful by the new CPR sitting in a temporary bench formation consisting exclusively of lawful judges and a lay judge.</p> <p>NB: See Table 4 for details on the ECtHR interim measures relating to her forced transfer.</p>
<p>Judge Joanna Hetnarowicz-Sikora (Słupsk District Court)</p> <p><i>Pending ECHR applications no. 22918/21 communicated on 31 March 2022 and no. 9988/22 communicated on 23 May 2022 with interim measures adopted by the ECtHR on 22 March 2022, 15 August 2022, 13 September 2022</i></p>	<p>Unlawfully removed from adjudication for a month on 8 February 2022 for her decision to exclude a neo-judge from hearing a criminal case on account of ECtHR rulings.</p>
<p>Judge Anna Głowacka (Kraków Regional Court)</p> <p><i>Pending ECHR application no. 15928/22 communicated on 23 May 2022 with interim measures adopted by the ECtHR on 30 March 2022 and 15 August 2022</i></p>	<p>Unlawfully removed from adjudication for a month on 25 February 2022 following her refusal to grant an enforceability clause to a judgment on account that it was "inexistent" since it had been delivered by a judicial formation that could not be considered a "court" as it consisted of a neo-judge.</p>

TABLE 8: Disguised sanctions in the form of forced transfers following application of CJEU/ECtHR rulings and/or defending the rule of law in extra-judicial interventions (*non-exhaustive list*)

<p>Judge Waldemar Żurek (Krakow Regional Court)</p> <p><i>ECHR application no. 39650/18 on 14 May 2020 and decided by the ECtHR on 16 June 2022 (ECtHR held that Poland violated Articles 6(1) and Article 10 ECHR in this case)</i></p> <p><i>NB. Judge Waldemar Żurek was also the applicant in the dispute which led to the CJEU judgment in Case C-487/19 in which the CJEU held i.a. that transfers without consent of a judge are liable to undermine the principles of the irremovability of judges and judicial independence</i></p> <p><i>Pending ECHR application no. 36137/22 [Żurek no 4] and pending application no. 41885/22 [Żurek no 5] with interim measures adopted by the ECtHR on 18 October 2022</i></p>	<p>In July 2018, Judge Waldemar Żurek was transferred from the 2nd Civil Appeal Division to the 1st Civil Division (1st instance).</p> <p>In its judgment of 16 June 2022, the ECtHR held that “the accumulation of measures taken by the authorities [...] could be characterised as a strategy aimed at intimidating (or even silencing) the applicant in connection with the views that he had expressed in defence of the rule of law and judicial independence. On the material before it, the Court finds that no other plausible motive for the impugned measures has been advanced or can be discerned” (para. 227).</p> <p>As of 1 January 2023, Judge Żurek has two more applications pending before the ECtHR and has secured an interim measure from the ECtHR with respect of the cases pending before the body known as the Chamber of Extraordinary Review and Public Affairs which the ECtHR has already held not to be a court established by law.</p>
<p>Judge Łukasz Biliński (Warsaw District Court)</p> <p><i>Pending ECHR application no. 13278/20 communicated on 30 April 2021</i></p>	<p>Between 2018 and June 2019, Judge Biliński adjudicated a few hundred cases of administrative offences relating to the exercise of freedom of assembly and expression, including cases relating to demonstrations against the government’s “judicial reforms”. Judge Biliński was then attacked on account of his rulings by politicians of the ruling party and denigrated on social media by the KastaWatch Twitter account which had used data originating from the Ministry of Justice.</p> <p>He was then transferred without his consent from the Criminal to the Family Division of the Warsaw District Court. This transfer without consent was maintained notwithstanding the subsequent quashing of the Judge’s transfer to the Family and Juvenile Division by the</p>

	President of the Warsaw Regional Court on 26 July 2019.
<p>Judge Piotr Gąciarek (Warsaw Regional Court)</p> <p><i>Pending ECHR application no. 27444/22 communicated on 10 June 2022</i></p>	<p>On 28 May 2021, prior to his unlawful suspension by the DC on 21 November 2021, the President of the Warsaw Regional Court (who is also the chief disciplinary representative for ordinary court judges) transferred Judge Gąciarek (an active member of the IUSTITIA Judges' Association) from the Criminal Division of that court to its Execution Division, on account of issuing a statement whereby Judge Gąciarek indicated that he would not adjudicate with a neo-judge in order to comply with relevant rulings of the CJEU and ECtHR.</p> <p>On 14 October 2022, Judge Gąciarek's reinstatement ordered by a district court in a final judgment of 10 October 2022 was unlawfully blocked by the neo-judge then presiding the Warsaw Regional Court.</p>
<p>Judge Agnieszka Niklas-Bibik (Słupsk Regional Court)</p> <p><i>Pending ECHR application no. 8687/22 communicated on 23 May 2022 with interim measures adopted by the ECtHR on 22 March 2022 and 5 August 2022</i></p>	<p>On 18 October 2021, prior to this judge's unlawful removal from adjudication for a month on 29 October 2021, the President of the Słupsk Regional Court transferred Judge Niklas-Bibik from the Appellate Criminal Division to the Criminal Division of that court to hear only first-instance criminal cases. This followed Judge Niklas-Bibik's ruling quashing a judgment delivered by the Słupsk District Court as the latter court had been composed of a neo-judge.</p> <p>On 20 October 2021, the Słupsk Regional Court composed of Judge Niklas-Bibik submitted two requests for preliminary rulings to the CJEU, seeking to clarify whether such transfer of a judge – without his/her consent – is compatible with EU law.</p>
<p>Judge Maciej Czajka Judge Beata Morawiec Judge Wojciech Maczuga Judge Katarzyna Wierzbicka (Krakow Regional Court)</p> <p><i>Pending ECHR application no. 46238/20 for Judge Morawiec communicated on 4 July 2022</i></p>	<p>In October 2021, all four judges were transferred without their consent for issuing a statement that they would challenge the status of neo-judges by application of the CJEU and ECtHR rulings. In November 2021, Judge Czajka was transferred back to the criminal division, although not to the one in which he had worked for many years.</p>

<p>Judge Anna Ptaszek (Warsaw Regional Court)</p>	<p>On 11 March 2022, Judge Anna Ptaszek, who was then already the subject of multiple disciplinary charges for applying inter alia the judgments of the ECtHR and the CJEU and refusing to adjudicate with a neo-judge on this basis, was transferred from a criminal division to another division dealing with enforcement of judgments without her consent. Mr Radzik justified her transfer without consent with reference to the COVID19 situation.</p>
<p>Judge Paweł Juszczyzyn (Olsztyn District Court)</p> <p><i>ECHR application no. 35599/20 communicated on 30 April 2021 and decided on 6 October 2022 (See TABLE 6 for more information)</i></p> <p><i>Second pending ECHR application no. 48037/22 regarding forced transfer</i></p>	<p>Formally suspended on 4 February 2020 (see TABLE 6 above for more information), Judge Juszczyzyn was reinstated on 23 May 2022. However, he was immediately sent on compulsory leave until 19 July 2022 by a MoJ nominee acting as President of the District Court in Olsztyn and then also a member of the neo-NCJ. In addition, Judge Juszczyzyn was simultaneously transferred from the civil division to the family division without his consent.</p>
<p>Judge Ewa Gregajtys and Judge Ewa Leszczyńska-Furtak (Warsaw Court of Appeal)</p> <p><i>Pending ECHR application no 39477/22 and application no 39471/22 respectively both communicated on 6 December 2022 with interim measures adopted by the ECtHR on 6 December 2022 in respect of both judges</i></p>	<p>On 5 August 2022, Vice President of the Court of Appeal in Warsaw Przemysław Radzik, acting on behalf of the President of the Court of Appeal Piotr Schab, informed two judges of the Second Criminal Department of the Court of Appeal in Warsaw about their transfer without their consent to the Third Department of Labour and Social Insurance.</p> <p>On 19 August 2022, Piotr Schab confirmed in writing that Judge Gregajtys and Judge Leszczyńska-Furtak were transferred on account of their application of the judgments of the ECtHR and the CJEU in respect of the neo-NCJ and neo-judges.</p> <p>On 13 December 2022, the President of the Court of Appeal Piotr Schab formally refused to comply with the interim measures ordered by the ECtHR on 6 December 2022 on account of their alleged unconstitutionality.</p>
<p>Judge Marzanna Piekarska-Drażek (Warsaw Court of Appeal)</p> <p><i>Pending ECHR application no. 8076/22 and application no 44068/22</i></p>	<p>On 9 August 2022, Judge Piekarska-Drażek was transferred from the criminal division to the labour and social insurance division by Piotr Schab and Przemysław Radzik on account of the judge's application of the case law of the ECtHR. Prior to this, Judge Piekarska-Drażek</p>

<p><i>with interim measures also adopted by the ECtHR on 23 February 2022, 22 March 2022, 5 August 2022 and 6 December 2022</i></p>	<p>was unlawfully removed from adjudication for a month on 24 January 2022.</p> <p>On 13 December 2022, the President of the Court of Appeal Piotr Schab officially refused to comply with the interim measure ordered by the ECtHR on 6 December 2022 on account of its alleged unconstitutionality.</p>
<p>Judge Dorota Lutostańska (Olsztyn Regional Court)</p>	<p>On 22 December 2022, Judge Dorota Lutostańska was transferred from the appellate criminal division to the criminal division of that court to hear only first-instance cases. The transfer was decided by the President of the Olsztyn Regional Court, Michał Lasota, who is at the same time the Deputy Disciplinary Officer for Judges of the Ordinary Courts. In 2018, Judge Lutostańska was the subject of two disciplinary proceedings. The first concerned wearing a t-shirt featuring the word “Konstytucja” (“Constitution”), that became a symbol of protests against the ruling majority for violating the rule of law. The second was initiated for failing to recuse herself in a criminal case of placing the said t-shirt on a monument. These disciplinary proceedings were also instituted by Mr Lasota.</p>

LAURENT PECH AND JAKUB JARACZEWSKI

**SYSTEMIC THREAT TO THE RULE OF
LAW IN POLAND: UPDATED AND NEW
ARTICLE 7(1) TEU RECOMMENDATIONS**

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