

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Re: *Juszczyszyn v Poland* (Application no. 35599/20)

**WRITTEN SUBMISSION ON BEHALF OF
THE THIRD PARTY INTERVENERS**

**Stichting Rechten voor Rechten
&
Professor Laurent Pech**

27 July 2021



I. Introduction

1. These submissions are made by *Rechters voor Rechters* (Judges for Judges Foundation) and Dr. Laurent Pech, Professor of European Law at Middlesex University London (together, “the Interveners”), pursuant to the leave to intervene jointly as a third party granted by the President of the First Section on 8 July 2021 in the case of *Juszczyszyn v Poland* (application no. 35599/20) pursuant to Rule 44(3) of the Rules of Court.

2. The case of *Juszczyszyn v Poland* concerns the proceedings for and following the suspension of the applicant, a judge, from his official duties by a body itself since suspended twice by the European Court of Justice (“ECJ”) and whose lack of independence has also been definitively established by the ECJ as a matter of EU law in a judgment of 15 July 2021 in C-791/19.

3. This third party intervention **will focus on the most recent case law of the ECJ** and more broadly, the **EU dimension of what is often referred to as Poland’s rule of law crisis**,¹ which started at the end of 2015 and has resulted in **Poland becoming the country which has autocratised the most in the world in the last decade**.² Accordingly, this third party intervention will first outline the most important and relevant findings made by the European Commission and the European Parliament since the European Commission activated its Rule of Law Framework in January 2016; Second, an overview of the most important judgments and orders of the ECJ will be offered, including its most recent order of 14 July 2021 in Case C-204/21 R and its infringement judgment of 15 July 2021 in Case C-791/19 which both directly address multiple of aspects of Poland’s new disciplinary regime for judges, including the independence (or lack thereof) of the so-called Disciplinary Chamber as a matter of EU law.³

4. Three main submissions are made: First, **the existence of worsening systemic and generalised deficiencies as regards the rule of law**, including the unlawful nature of the multiple legislative changes made by Polish authorities, **has been repeatedly and firmly established** by both the European Commission and the European Parliament but also by the ECJ and national courts such as the *Rechtbank* Amsterdam;⁴ Second, the existence of systemic and generalised deficiencies as regards the rule of law in Poland has revealed a now well-

¹ For further background, analysis and references, see L. Pech and K.L. Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU” (2017) 19 *CYELS* 3. For a five-year assessment of the state of the rule of law in Poland, see Poland’s Civil Development Forum (authors: M. Tatała, E. Rutynowka and P. Wachowiec), Rule of Law in Poland 2020: A Diagnosis of the Deterioration of the Rule of Law from a Comparative Perspective, August 2020 and L. Pech, P. Wachowiec and D. Mazur, “Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action” (2021) 13 *Hague Journal on the Rule of Law* 1-43.

² See most recently V-DEM Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021, p. 9.

³ Similarly to your Court, the ECJ has faced an unprecedented increasing number of cases bringing to the fore violations of the EU principle of judicial independence by current Polish authorities. To date, a total of 4 infringement actions have been launched by the European Commission and a total 37 national requests for a preliminary ruling have been submitted to the ECJ by Polish courts in relation to different measures adopted by Polish authorities. For further details, see L. Pech, P. Wachowiec and D. Mazur, “Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action”, op. cit.

⁴ See the interlocutory judgment from the Amsterdam District Court holding that Polish courts are no longer independent from the Polish government and parliament, 31 July 2020, NL:RBAMS:2020:3776 and see also NL:RBAMS:2021:420 in which the Dutch Court denied execution of an EAW issued by a Polish judicial authority by application of the ECJ judgment in Joined Cases C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033 having previously established i.a. that Polish authorities are violating the ECJ order of 8 April 2020 in Case C-791/19 R.

established pattern whereby Polish authorities and the courts they have captured or the new bodies they have created are **actively colluding with the view of deliberately and systematically organising the violation of national but also ECJ and most recently ECtHR rulings they do not approve of**; Third, due to systemic and generalised deficiencies regarding the independence of the Polish judiciary and the pattern of sustained, deliberate and flagrantly unlawful targeting of independent judges,⁵ it is submitted that the right of access to an independent tribunal and the right to an effective remedy must be considered as being no longer guaranteed for any of the judges, prosecutors or lawyers who are or have been targeted by national authorities or the bodies they have unlawfully established (e.g. the Disciplinary Chamber) or re-established (e.g. the “new” National Council of the Judiciary (NCJ)), due to multiple legislative changes which have enabled the executive to “interfere throughout the entire structure and output of the justice system”⁶ while, simultaneously, national remedies ensuring effective legal protection have been removed or weakened across the board in order to prevent any judicial challenge aimed at these so-called “judicial reforms”. This situation recently led EU Advocate General Bobek to observe in a context where the Minister for Justice is the chief prosecutorial body whereas these two institutions should normally function separately, **‘the minimum guarantees necessary to ensure the indispensable separation of powers between the executive and the judiciary are no longer present’** in Poland.⁷

5. Our key conclusion is as follows: Since the European Commission activated its pre-Article 7 TEU procedure in January 2016, the rule of law situation in Poland has gone from bad to worse to devastating as we have now reached a stage where Polish authorities **are actively organising a process of systemic non-compliance with ECJ but also ECtHR judgments relating to judicial independence** via inter alia the active collusion of unlawfully appointed “judges” they have put in place,⁸ in a broader context where the violation of the most fundamental legal principles underlying the EU legal order has been “legalised” by Poland’s “muzzle law”. It follows, in our opinion, that judicial independence must now be understood as having been structurally disabled by Polish authorities. This means inter alia that the individual right to an independent and impartial tribunal established by law is being systematically violated as Polish authorities can now and indeed have actively interfered with judicial output using the threat or actual disciplinary/criminal proceedings against judges and/or via their control of ordinary courts, the NCJ, Supreme Court and the Constitutional Tribunal, **the last three of which being currently unlawfully composed**. Considering the systemic undermining of judicial independence and the plethora of individual measures targeting Polish judges since January 2016, **their cumulative as well as their chilling effect**, it is also submitted that no Polish judge, as a defendant in any proceedings of any nature, has at his/her disposal any effective domestic remedy in any situation.

II. Key findings made by the European Commission and/or the European Parliament in relation to the multiple legislative changes made by Polish authorities since January 2016

⁵ See e.g. M. Jałoszewski, “The National Prosecutor’s Office strikes at the old Supreme Court with criminal charges”, *Rule of Law in Poland*, 17 March 2021.

⁶ 2019 European semester report for Poland, 27 February 2019, SWD(2019) 1020 final, p. 42.

⁷ Opinion of EU Advocate General Bobek delivered on 20 May 2021 in Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim et al*, EU:C:2021:403, para. 195.

⁸ See “First President of The Supreme Court Tries To Remove Judges Who Approached the CJEU”, *English Translation of Gazeta Wyborcza* article provided by *Rule of Law In Poland*, 15 February 2021.

6. This Section will offer a non-exhaustive overview of some of the findings made by the European Commission and/or the European Parliament in relation to the following issues: (i) Lack of effective constitutional review of legislation; (ii) Changes made to the NCJ; (iii) Changes made to the structure and retirement regime of the Supreme Court judges; (iv) Introduction of a new so-called extraordinary appeal; (v) Changes made to retirement regime of current ordinary court judges and the arbitrary dismissal of ordinary court presidents.

(i) Lack of effective constitutional review

7. The European Commission has repeatedly denounced the persistent violation of several rulings of the (pre-captured) Polish Constitutional Tribunal (“CT”) issued in December 2015 and March, August and November 2016, which paved the way to the effective capture of the CT in December 2016 following the **unlawful appointment of the current President of the CT and three individuals which were nominated by the Polish parliament without a valid legal basis**.⁹ For the European Commission as well as the European Parliament,¹⁰ the unlawful appointment of the current CT president and the unlawful composition of the CT mean inter alia that the constitutionality of Polish laws has not been effectively guaranteed since December 2016. In other words, **the “judgments” rendered by the unlawfully presided and composed CT under these circumstances are no longer considered by these two EU institutions as providing effective constitutional review**. Most recently, as further detailed in Section III *infra*, the unlawfully composed CT held your Court’s judgment in *Xero Flor* to be “non-existent” in addition to forbidding compliance with the ECJ order of 14 July 2021 which suspended the DC for the second time in two years on account of its alleged unconstitutionality. Unsurprisingly, therefore, the European Commission reiterated on 20 July 2021 that its longstanding **“concerns over the independence and legitimacy of the Constitutional Tribunal ... have still not been resolved”**.¹¹

(ii) Changes made to the NCJ

8. In violation of the European Commission’s fourth Rule of Law Recommendation of December 2017 but also Poland’s Constitution, Polish authorities organised the election of 15 new judges-members on 6 March 2018 by the lower house of the Polish parliament **following the premature termination of the four-year mandates of the previous 15 judges-members previously elected by judges, established in the Polish Constitution**.¹² The Commission’s assessment is shared inter alia by the European Parliament which, in relation to the premature termination of the judges-members, denounced the “far-reaching politicisation” of the “new” NCJ which ensued and expressed its concerns in relation to the “legal status of the judges appointed or promoted by the new [NCJ] in its current composition and about the impact their

⁹ See e.g. Commission contribution to the Council on the rule of law in Poland/Article 7(1) TEU Reasoned Proposal. Hearing of Poland, 11 December 2018, Council document 15197/18.

¹⁰ See European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, PA_TA-PROV(2020)0225.

¹¹ European Commission, *2021 Rule of Law Report. Country Chapter on the rule of law situation in Poland*, 20 July 2021, SWD(2021) 722 final, p. 6.

¹² For the most recent official assessment of the situation by the Commission stressing again the premature termination of the four-year mandates of the previous 15 judges-members established in the Polish Constitution, see Commission contribution to the Council on the rule of law in Poland/Article 7(1) TEU Reasoned Proposal. Hearing of Poland, 11 December 2018, Council document 15197/18.

participation in adjudicating may have on the validity and legality of proceedings”.¹³ The ECJ confirmed the accuracy of the European Parliament’s concerns in Case C-824/18 which is examined *infra*. One may finally note that evidence emerged in February 2020 that the “new” NCJ was and is still **unlawfully composed** with the Minister of Justice furthermore publicly confirming in January 2020 that the judges nominated to the new NCJ **were selected by himself on the basis that they “were ready to work on the reforms of the judiciary”**.¹⁴

(iii) Changes made to the structure and retirement regime of the Supreme Court judges

9. With respect to the retirement regime of Supreme Court judges, the Court of Justice confirmed the accuracy of the Commission’s assessment in Case C-619/18 in which the **Court held that the Polish legislation concerning the retroactive lowering of the retirement age of judges of the Supreme Court is contrary to the EU principle of judicial independence, including the principle of irremovability of judges**. However, as outlined above, Polish authorities were able to prematurely terminate the mandate of the NCJ judges-members in 2018 in violation of the Polish Constitution which guaranteed them a four-year mandate.

10. With respect to the changes made to the structure of the Supreme Court, Polish authorities have continued to disregard the EU’s concerns most notably by continuing to make appointments to two new bodies known as the Disciplinary Chamber (“DC”) and the Chamber of Extraordinary Control and Public Affairs Chamber (“CECPA”). They have also continued adopting regulations with the view of completing their capture of the Supreme Court via the manifestly irregularly appointed current “First President”.¹⁵ In line with the Venice Commission,¹⁶ the European Commission has strongly questioned the independence of these two new chambers. On 3 April 2019, the European Commission launched an infringement action regarding the new disciplinary regime for judges on the main ground that it undermines the judicial independence of Polish judges by not offering necessary guarantees to protect them from political control (see Case C-791/19). Following the adoption of what is informally known as Poland’s “muzzle (or gag) law”, a new infringement action was launched on 29 April 2020 (see Case C-204/21). This action, as will be shown in Section III *infra*, **has resulted in the provisional suspension of some of the competences currently allocated to both the DC and CECPA**. Most recently, the European Parliament reiterated that the DC cannot be considered a court and called on the Commission to urgently start infringement proceedings in relations to the CECPA “since its composition suffers from the same flaws” as the DC.¹⁷ The inherently defective nature (as a matter of EU law) of the appointment procedure which resulted in the manifest irregular appointments of multiple individuals to the DC, CECPA but also other chambers of the Supreme Court **in breach of several Supreme Administrative**

¹³ European Parliament resolution of 17 September 2020, op. cit., para 25.

¹⁴ M. Wilgocki, “Myśmy zgłosili”. Ziobro przypadkiem zdradził, kto poparł sędziów do KRS?”, *Wyborcza*, 15 January 2020.

¹⁵ See M. Jałoszewski, “President Duda wants new ‘commissioners’ in the Supreme Court”, *Rule of Law in Poland*, 25 February 2021; “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; “New regulation to annihilate the ‘old’ Supreme Court and silence judges”, *Rule of Law in Poland*, 21 June 2021.

¹⁶ For the Venice Commission, some aspects of the alleged judicial “reforms” targeting Poland’s Supreme Court had “a striking resemblance with the institutions which existed in the Soviet Union and its satellites”. See Opinion 904/2017, 11 December 2017, para. 89.

¹⁷ European Parliament resolution of 17 September 2020, op. cit., para. 23.

Court's freezing orders has since been made clear by the ECJ in Case C-824/18 and your Court in *Reczkowicz v Poland* (application no. 43447/19).

(iv) Extraordinary appeal procedure

11. The European Commission has repeatedly recommended that the Polish authorities ensure that the law on the Supreme Court is amended to remove the extraordinary appeal procedure. Due to the cosmetic nature of the amendments made in May 2018, the European Commission has remained of the view that **this procedure is not compatible with the rule of law** due inter alia to the fact that this procedure could justify “the repeal of final judgments by Polish courts applying EU law as interpreted by the case-law of the Court of Justice of the EU.”¹⁸ As noted above, the composition and manner of appointment of the individuals appointed to the chamber in charge of hearing these “extraordinary appeals” (the CECPA) has been extensively decried, with the Parliamentary Assembly of the Council of Europe (“PACE”) questioning for instance “their independence” and demanding from Polish authorities that these issues are addressed as a matter of urgency.¹⁹ **To date, Polish authorities have failed to do so. On 14 July 2021, the ECJ suspended the CECPA in part** (see Section III *infra*).

(v) Changes made to retirement regime of current ordinary court judges and the arbitrary dismissal of ordinary court presidents

12. In its fourth Recommendation of December 2017, the Commission recommended that the law on Ordinary Courts Organisation be amended to (i) remove the new retirement regime for judges of ordinary courts, including the discretionary power of the MoJ to prolong their mandate and (ii) address the situation of the ordinary court judges who have already been forced to retire because they were affected by the lowered retirement age. On 5 November 2019, in Case C-192/18, **the ECJ upheld the action brought by the Commission and held that Poland had failed to fulfil its obligations under EU law**. As regards the arbitrary dismissal of ordinary court presidents, the Commission also recommended that the law on Ordinary Courts Organisation be amended to remedy decisions on dismissal of court presidents which took place under a six-month transitional regime and which saw over 70 presidents and 70 vice-presidents of courts arbitrarily lose their posts.²⁰ Indeed, this transitional regime **gave the Minister for Justice the power to dismiss without any specific criteria, without justification and without judicial review any president and vice president of any ordinary court**. No remedy has ever been provided for the judges who have been dismissed under this regime.

III. Key ECJ judgments and orders regarding Poland's legislative changes targeting Poland's judiciary and judges

13. In addition to the three infringement judgments to date finding Polish authorities to have adopted and implemented legislative changes **violating inter alia the principle of judicial independence, the principle of irremovability of judges and/or the right to a tribunal**

¹⁸ Commission contribution to the Council on the rule of law in Poland/Article 7(1) TEU Reasoned Proposal. Hearing of Poland, 11 December 2018, op. cit., 13-14.

¹⁹ PACE, The functioning of democratic institutions in Poland, Resolution 2316 (2020), para. 7.4.

²⁰ See Commission contribution to the Council on the rule of law in Poland/Article 7(1) TEU Reasoned Proposal. Hearing of Poland, 11 December 2018, Council document 15197/18.

established by law (Case C-192/18; Case C-619/18 and Case C-791/19), the ECJ has issued two seminal judgments in preliminary rulings cases (Joined Cases C-585/18, C-624/18 and C-625/18, *AK*; Case C-824/18, *AB*) which **Polish authorities have however refused to accept and comply with**.

(i) Non-compliance with *AK*

14. In *AK*, the ECJ held that the Polish referring court (i.e., the Labour and Social Insurance Chamber of Supreme Court) must ascertain whether the DC satisfies judicial independence requirements in order to determine whether that chamber has jurisdiction to rule on cases where judges of the Supreme Court have been retired, or in order to determine whether such cases must be examined by another court which meets the requirement that courts must be independent. **Applying the *AK* judgment, several chambers of Poland's Supreme Court found the DC to be a body established in breach of both Polish and EU law in several judgments adopted on 5 December 2019 and 15 January 2020, and in a solemn and binding resolution adopted on 23 January 2020.**

15. To prevent compliance with EU rule of law requirements, including their application by national judges on the basis of the ECJ judgment in *AK*, Polish authorities have adopted the "muzzle law". As observed by the European Commission but also the Venice Commission, **this "muzzle law" has "legalised" the systemic violation of EU and ECHR rule of law requirements and provided for sanctions against any judge who would attempt, in particular, to apply the ECJ judgment in *AK*.**²¹ This *AK* judgment was furthermore unlawfully voided by the DC on 23 September 2020, notwithstanding the fact that the ECJ ordered it to suspend its functioning as regards disciplinary cases and the flagrant lack of authority of the DC to void any ECJ judgment.²²

(ii) Non-compliance with *AB*

16. In March 2021, **Poland's Ministry of Justice as well as the unlawfully appointed "President" of the unlawfully composed CT have publicly refused to recognise the validity of the ECJ judgment in Case C-824/18.**²³ In this preliminary ruling case, the ECJ made a number of unprecedented findings before concluding that the **successive amendments to the Polish Law on the re-established NCJ**, which have the effect of removing effective judicial review of that council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court, **are liable to infringe EU law**. While this is, formally speaking, a matter for the referring court to establish based on the ECJ's interpretation of EU law, the ECJ's judgment leaves no doubt that the relevant provisions in dispute flagrantly violate EU law.²⁴ And indeed, on 6 May 2021, **Poland's SAC quashed the relevant**

²¹ Venice Commission, Opinion no. 977/2019, 16 January 2020, para. 31.

²² II DO 52/20. English translation of this (unlawful) decision by a body already established at the time not to be a court has been made available by Rule of Law in Poland.

²³ Kancelaria Prezesa Rady Ministrów, Wniosek do Trybunału Konstytucyjnego w zakresie nadrzędności Konstytucji RP nad prawem europejskim, 3 March 2021; Najpierw dyspozycja kierownictwa PiS, następnie pilne posiedzenie rządu. Będzie wniosek do Trybunału Konstytucyjnego w sprawie orzeczenia TSUE, Onet, 3 March 2021.

²⁴ For further analysis, see L. Pech, Polish ruling party's "fake judges" before the European Court of Justice: Some comments on (decided) Case C-824/18 AB and (pending) Case C-132/20 Getin Noble Bank, EU Law Analysis, 7 March 2021.

resolutions of the NCJ holding i.a. that the President Duda's announcement of vacancies at the Supreme Court was not valid and that the new NCJ does not offer guarantees of independence from the legislative and executive branches of power in the process of appointment of the judges.²⁵ To this date, Polish authorities continue to refuse to accept that the concerned individuals appointed in a deficient procedure which breached i.a. Article 144(2) of the Polish Constitution cannot be considered lawful SC judges on account of the argument that the quashing of NCJ recommendations by the SAC do not invalidate the final appointments decisions made by the Polish President regardless of the fundamental, systemic and deliberate irregularities that affected the whole judicial appointment procedure. As a matter of EU law, however, any judgment involving these individuals appointed in these conditions cannot be considered to be issued by a tribunal established by law.

(iii) Non-compliance with infringement orders and judgment

17. Similarly to the pattern of deliberate and sustained non-compliance outlined above, **Polish authorities have disregarded the ECJ order of 8 April 2020 regarding the Disciplinary Chamber ("DC")** which forms part of recently decided infringement Case C-791/19.²⁶ In this order, the ECJ imposed **the immediate suspension of the application of the national provisions on the powers of the DC with regard to disciplinary cases concerning judges.** This ECJ order has never been fully complied with as established, for instance, by a Dutch Court in a judgment of 10 February 2021,²⁷ with the DC continuing to adopt disciplinary sanctions (i.e. temporary suspension from office and the reduction of their salary) against judges in cases relating to the lifting of immunity of judges with a view to bringing criminal proceedings against them.

18. The **continuing, deliberate and systemic violations of the ECJ judgment in *AK* and the ECJ order regarding the DC** have been denounced i.a. by PACE which called on Polish authorities "to comply fully and as soon as possible with the other two judgments [in C-192/18, *Commission v Poland* and *AK*] handed down by the CJEU and with its order of 8 April 2020".²⁸

19. This practice of systemic violation of EU rule of law requirements and ECJ judgments, with Polish authorities now publicly claiming that the ECJ would have acted *ultra vires*,²⁹ and that the EU would lack the competence to define and enforce EU rule of law requirements against Member States violating those requirements when they make changes to the organisation of their national judiciaries,³⁰ has gone a step further in July 2021 with an unlawfully composed bench of the CT³¹ essentially accepting these two governmental claims on the same day the ECJ suspended the DC for the second time in Case C-204/21 R which will

²⁵ See 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.

²⁶ For further analysis, see L. Pech, "Protecting Polish judges from Poland's Disciplinary "Star Chamber": *Commission v Poland* (Interim proceedings)", (2020) 58 *Common Market Law Review* 137.

²⁷ See Amsterdam Court, NL:RBAMS:2021:420, para. 5.3.5.

²⁸ PACE, *Judges in Poland and in the Republic of Moldova must remain independent, Resolution*, 2359 (2021), para. 15.

²⁹ *Ibid.*

³⁰ See Kancelaria Prezesa Rady Ministrów, *Skarga do Trybunału Sprawiedliwości UE*, 11 March 2021.

³¹ J. Jaraczewski, "Polexit or judicial dialogue? CJEU and Polish Constitutional Tribunal in July 2021", *VerfBlog*, 19 July 2021.

be briefly outlined below³² before evidence of systemic non-compliance by Polish authorities, including the bodies (e.g. new NCJ) or “judges” (e.g. the First President of the Supreme Court) they de facto control,³³ is given.

20. In its judgment of 15 July 2021 in Case C-791/19, the Court upheld all the complaints made by the Commission and found i.a. that the DC does not provide all the guarantees and impartiality and independence; that the new NCJ lacks independence; that the new disciplinary regime allows the content of judicial decisions to be classified as a disciplinary offence and can be used in order to exert political control over judicial decisions; that the new disciplinary regime fails to guarantee that disciplinary cases against judges will be examined within a reasonable time and guarantee respect for the rights of defence of accused judges; that national judges are exposed to disciplinary proceedings as a result of the fact that they have decided to make a reference for a preliminary ruling to the ECJ.

21. Particularly worth stressing considering the grounds raised by the applicant in the present complaint, are the ECJ’s following findings: For the first time, the ECJ has established in an infringement judgment on the merits that the Poland has violated the second subparagraph of Article 19(1) by failing to guarantee the independence and impartiality of the DC. In this context, and for the first time too, the ECJ has found a twofold violation of the principle of non-regression in relation to the DC (paras 112-113) and the new definitions of disciplinary offence (paras 152 and 157). For the first time as well, the ECJ has directly and extensively dealt with the notion of ‘deterrent effect’ (also known as chilling effect) to establish a violation of the principle of judicial independence in an infringement case.

22. One may also note that the situation of Judge Juszczyszyn has been directly raised by the Commission with the ECJ referring to his situation at paras 126-127 and para 149 when it reviewed the foreseeability of disciplinary provisions which include expressions such as ‘obvious and gross violations of the law’ and ‘finding of error’ entailing an ‘obvious violation of the law’:

126 For its part, the Disciplinary Chamber [...] has, as is apparent from a decision of 4 February 2020 (II DO 1/20) produced by the Commission, suspended a judge of the Sąd Rejonowy w Olsztynie (District Court, Olsztyn, Poland) in respect of whom disciplinary proceedings had been initiated from office, on the ground, inter alia [...] that, when examining an appeal, the actions of that judge ‘had led to the adoption of a decision with no legal basis’ ordering the Sejm to produce the lists of citizens and judges who had supported applications for the posts of members of the KRS in its new composition.

149 The existence of a risk that the disciplinary regime will in fact be used in order to influence judicial decisions is, moreover, confirmed by the decision of the Disciplinary Chamber of 4 February 2020 referred to in paragraphs 126 and 127 of the present judgment.

³² For further details, see L. Pech, “[Protecting Polish Judges from Political Control: A brief analysis of the ECJ’s infringement ruling in Case C-791/19 \(disciplinary regime for judges\) and order in Case C-204/21 R \(muzzle law\)](#)”, *VerfBlog*, 20 July 2021.

³³ In an interview, the irregularly appointed “First President” of the Supreme Court, having previously formally indicated her refusal to comply with the ECJ order in Case C-204/21 R on account of its alleged unconstitutionality has now publicly explained she may act differently depending on the information she may receive from the Polish Prime Minister: Rzeczpospolita: [Małgorzata Manowska: brak reformy systemu sprawiedliwości może być jedną z okoliczności mojego odejścia ze służby](#), 21 July 2021.

In this context, and as noted above, the ECJ found that Polish authorities committed a violation of the principle of non-regression while also holding that the national measures relating to the disciplinary liability of judges, “having regard to their wording alone”, violate the EU requirements of clarity and precision (para. 141).

23. In its order of 14 July 2021 in Case C-204/21 R, the Vice-President of the ECJ ordered the second suspension of the DC. Conceptually, the most significant aspect of the Court’s order is the first explicit clarification that decisions regarding the lifting of judicial immunity are directly connected to the status and conditions of exercise of judicial functions. As such, this type of decisions cannot fall within the jurisdiction of a body such as the DC which itself lacks independence. Practically, the most significant aspect of the ECJ order is the suspension of the DC for any case regarding any judge as well as the first ever suspension (albeit to a limited extent) of the CECPA. Particularly worth emphasising is that the Polish government has admitted that Polish judges complying with their EU law obligations by applying EU requirements relating to Article 19(1) TEU/Article 47 CFR could face disciplinary proceedings as a result. This obviously amounts to a manifest breach of Poland’s obligation to ensure effective legal protection in the fields covered by EU law:

185 [...] À cet égard, il convient de relever que [...] la République de Pologne a admis que le fait pour un juge de procéder à l’examen de la régularité de la nomination d’un juge pourrait être constitutif de l’infraction prévue à l’article 107, paragraphe 1, point 3, de la loi modifiée relative aux juridictions de droit commun ainsi qu’à l’article 72, paragraphe 1, point 3, de la loi modifiée sur la Cour suprême.

24. Another key but not unprecedented aspect of the Court’s order (see previously C-619/18 R which ordered Poland to ensure that the situation preceding the entry into force of the relevant provisions of domestic law *is restored*) is that it suspends the effects of decisions *already* taken by the DC on the lifting of judicial immunity. This means for instance that well-known Judge Igor Tuleya ought to be able to immediately return to work. Previous and grossly *unlawful* refusals to comply with ECJ but also national rulings ordering judges *unlawfully* suspended by the DC to be reinstated suggests this aspect of the ECJ order will also not be complied with.³⁴

25. More generally speaking, it is submitted that after several years of judicial alleged “reforms”, Polish authorities have now been able to organise the **systemic violation of both EU and ECHR rule of law requirements**.³⁵ While independent judges and prosecutors³⁶ seeking to apply EU judicial independence requirements/ECJ judgments are subject inter alia to smear campaigns, arbitrary removals from “judicial reform”-related cases, disciplinary investigations and/or sanctions,³⁷ captured unlawfully composed bodies such as the CT have been increasingly used to undermine compliance with EU law/ECJ judgments. For instance,

³⁴ I. Görke, “[Judge Suspended for Implementing a CJEU Ruling Won a Case That Lets Him Return to the Bench. His Superior Refuses to Comply](#)”, *Wyborcza.pl*, 26 April 2021; M. Jalszewski, “[Sędziowie z Olsztyna domagają się karnego ścigania Nawackiego. Za blokowanie Juszczyszyna](#)”, 27 April 2021; “[Pełnomocnik Tuleyi wnioskuję o przywrócenie go do pracy. To bezprawne uniemożliwianie wykonania zawodu](#)”, *WP*, 3 August 2021.

³⁵ See e.g. AEAJ, EAJ, and MEDEL letter to the European Commission, European Council and European Parliament, 20 July 2021: “These reactions of the Polish authorities regarding the ECJ rulings violate the most fundamental legal principles underlying the EU legal order and show a process of systemic non-compliance with the ECJ rulings related to judicial independence and the impartiality of judges.”

³⁶ See most recently, LEX Super Omnia, *The Stick Method. The ‘Good Change System of Persecuting Independent Prosecutors*, 2021.

³⁷ For a recent account, see E. Siedlecka, “Prosecutor’s office under a dictatorship”, *Polityka*, 26 February 2021, [English translation made available by Themis](#).

the unlawfully composed CT organised the violation of the ECJ *AK* judgment in April 2020.³⁸ This process of deliberate and organised non-compliance is now also affecting your Court's rulings with Polish authorities, including the CT which, on the basis of an application submitted by the unlawfully appointed "First President" of the Supreme Court³⁹ to the unlawfully appointed "President" of the CT,⁴⁰ held your Court's judgment of 7 May 2021 in *Xero Flor* to be "non-existent" due to your Court's alleged "lack of knowledge of the Polish legal system, including the fundamental principles governing the position, system and role of the Polish Constitutional Tribunal. In this respect, the judgment was issued without a legal basis, exceeds the competence of the ECHR and constitutes an unlawful interference with the national legal order, especially in matters which are outside the competence of the ECHR."⁴¹ Most recently, the same CT, in an unlawfully composed formation denied the ECJ any authority to suspend the DC on the ground that it would have allegedly acted *ultra vires* when it did so in Case C-791/19 R in alleged breach of the Polish Constitution. This was followed by an official public statement issued by the (irregularly appointed) First President of Poland's Supreme Court in which she indicated her refusal to comply with ECJ order in C-204/21 R on account of its alleged unconstitutionality and declared i.a. that she "firmly believes" that the DC is "fully independent".⁴² One may finally mention the multiple public statements from government officials which all make clear that Polish authorities have no intention to comply with the EU legal obligations with e.g. Poland's justice minister declaring that the ECJ ruling in Case C-791/19 and order in C-204/21 R CJEU rulings were a "political judgment ordered by the European Commission" which exhibit "colonial thinking".⁴³ With reference to Poland's Constitution and the principle of legalism, Poland's justice minister stated that "there is no possibility of implementation of the rulings by the court in Luxembourg".⁴⁴

26. In light of the above, it was not surprising to see EU Advocate General Bobek recently warning against the potential emergence of legal black holes in the EU and the Irish Supreme Court asking the ECJ to yet again review its case law regarding EAW surrenders to Poland considering Poland's systemic rule of law deficiencies which "are now even more troubling and of deeper concern following the introduction" of new laws since the ECJ first established a new rule of law test in the *LM* case.⁴⁵

³⁸ A. Bień-Kacała, "Polexit Is Coming or Is It Already Here? Comments on The Judicial Independence Decisions of The Polish Constitutional Tribunal", *Int'l J. Const. L. Blog*, 28 April 2020.

³⁹ M. Krajewski and M. Ziółkowski, "Can An Unlawful Judge Be The First President Of The Supreme Court?", *VerfBlog*, 26 May 2020.

⁴⁰ See pending Case K 24/20.

⁴¹ Lawson, Rick: "Non-Existent": The Polish Constitutional Tribunal in a state of denial of the ECtHR Xero Flor judgment, *VerfBlog*, 18 June 2021.

⁴² Statement by the First President of the Polish Supreme Court (Małgorzata Manowska), Warsaw, 16 July 2021. This statement has been denounced as unlawful by nine judges of Poland's Supreme Court and a criminal complaint has been lodged against her: See RW, "Disputed Disciplinary Chamber Continues to Adjudicate Despite CJEU Ruling", *Wyborcza.pl*, 21 July 2021; M. Jałoszewski, "Jest zawiadomienie do prokuratury na I prezesa SN Manowską za niewykonanie orzeczeń TSUE", 23 July 2021".

⁴³ D. Tilles, "Polish government "not planning" to implement EU court rulings", *Notes from Poland*, 16 July 2021.

⁴⁴ "Polish justice minister says Warsaw cannot comply with EU's court ruling", *Euractiv.com*, 22 July 2021.

⁴⁵ Judgment of 23 July 2021 in *Orłowski*, S:AP:IE:2021:000018 and *Lyszkiewicz*, S:AP:IE:2021:000020, para. 55. The Irish Supreme Court also observed at para. 59 that the "changes that have occurred in Poland concerning the rule of law are, as previously observed, even more troubling and grave than they were at the time when *LM* was decided by the CJEU. It now appears that there are significant issues with regard to the validity of the appointment process for judges in Poland".