

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Re: *Biliński v Poland* (Application no. 13278/20)

**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 *Biliński v Poland* (application no. 13278/20) pursuant to Rule 44(3) of the Rules of Court.

2. The case of *Biliński v Poland* primarily concerns the proceedings concerning the applicant’s forced transfer, a Polish judge, from the Criminal to the Family and Juvenile Division which, according to the applicant, i.a. amounted to a disguised reprisal for his rulings; was unfair in many aspects; involved the “new” re-established National Council of the Judiciary (“NCJ”) which was no longer an impartial body and the absence of any possibility to contest the NCJ decision dismissing the applicant’s appeal before an independent and impartial tribunal in a broader context where judicial independence has been undermined with Polish authorities seeking to create a chilling effect on judges adjudicating in politically sensitive cases.

3. This third party intervention **will focus on the most recent case law of the ECJ** but will also briefly refer to 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 primarily in relation to Poland’s re-established NCJ before offering an overview of the most relevant aspects of the European Court of Justice’s (“ECJ”) infringement judgment of 15 July 2021 in Case C-791/19 which directly addresses multiple of aspects of Poland’s new disciplinary regime for judges, including its chilling effect on judges and the independence (or lack thereof) of the NCJ 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

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. 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.

ECJ and national courts such as the *Rechtbank* Amsterdam⁴ and the Irish Supreme Court,⁵ Second, the existence of systemic and generalised deficiencies as regards the rule of law in Poland has revealed a now well-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,⁶ 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” NCJ), due to multiple legislative changes which have enabled the executive to “interfere throughout the entire structure and output of the justice system”⁷ 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 Polish Minister for Justice is also the chief prosecutorial body whereas these two institutions should normally function separately, that **“the minimum guarantees necessary to ensure the indispensable separation of powers between the executive and the judiciary are no longer present” in Poland.**⁸

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 orders/judgments but also ECtHR judgments relating to judicial independence**⁹ via inter alia the active collusion of irregularly nominated/appointed “judges” they have put in place,¹⁰ in a broader context where the violation of the most fundamental legal principles underlying the EU legal order has been

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.

⁵ 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 stated at para. 59 that the “changes that have occurred in Poland concerning the rule of law are [...] 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”.

⁶ 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.

⁷ 2019 [European semester report for Poland](#), 27 February 2019, SWD(2019) 1020 final, p. 42.

⁸ 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.

⁹ Most recently, Polish authorities’ open non-compliance with ECJ orders has move beyond judicial independence issues to affect the application of EU environmental law (C-121/21 R). See 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. 4: “the Polish Government has openly defied the binding nature of an interim measures order issued by the Court of Justice on 21 May 2021 in a case lodged against Poland for breach of EU environmental law”.

¹⁰ 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.

“legalised” by Poland’s “muzzle law”.¹¹ 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 Poland’s “new” NCJ and new “alternative legal space”

6. This Section will offer a non-exhaustive overview of some of the findings made by the European Commission and/or the European Parliament primarily in relation to Poland’s “new” NCJ. Prior to this, and due to space constraints, other crucial rule of law issues will only be very briefly outlined.¹² When viewed as a whole, the overall picture which emerges is one of **“an alternative legal space [...] under which the ruling majority can enact unconstitutional laws, unlawfully appoint members of the Constitutional Tribunal, the National Council of the Judiciary, the Supreme Court, or discipline and prosecute at will those who articulate positions that do not meet its expectations”**.¹³ To create and consolidate this (unconstitutional and EU law incompatible) “alternative legal space”, Polish authorities and the courts they have captured (e.g. the Constitutional Tribunal) or the new bodies they have created (e.g. the Disciplinary Chamber) have been **actively colluding with the view of deliberately and systematically preventing compliance with national but also ECJ, and most recently ECtHR, rulings** relating to judicial independence.

(i) Poland’s alternative legal space: Selected aspects

7. **Lack of effective constitutional review**: For the European Commission¹⁴ as well as the European Parliament,¹⁵ the unlawful appointment of the current Constitutional Tribunal (“CT”) president and the unlawful composition of the CT mean that the “judgments” rendered by this body can no longer be considered as providing effective constitutional review. On 20 July 2021, the European Commission reiterated that its longstanding **“concerns over the**

¹¹ See e.g. the joint assessment of the Venice Commission and the DGI of the Council of Europe, *Poland. Joint Urgent Opinion on Amendments to the Law on the Common Courts, the Law on the Supreme Court, and some other laws*, Opinion 977/2019, 16 January 2020, para. 31.

¹² Further details are offered in our TPI submitted in the Case of *Juszczyszyn v Poland* (App. no. 35599/20).

¹³ Commissioner for Human Rights A. Bodnar, *Written comments of the Commissioner for Human Rights of the Republic of Poland in the Case of Grzęda v Poland* (App. no. 43572/18), 12 December 2019, para. 49.

¹⁴ 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.

¹⁵ 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.

independence and legitimacy of the Constitutional Tribunal ... have still not been resolved”.¹⁶

8. Structure and functioning 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”). In its 2021 Poland Rule of Law Report, the European Commission summarised the most recent “reforms” which have been adopted to regulate, in practice, control its functioning as these “reforms” aim to complete the capture of the Supreme Court via the manifestly irregularly nominated/appointed current “First President”.¹⁷ One may note in this respect that this individual has requested the CT “to shield newly appointed Supreme Court judges - *including herself* [our emphasis] - from having their status contested in cases pending before the Supreme Court”.¹⁸

9. Extraordinary appeal procedure: For the European Commission, **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.”¹⁹ Notwithstanding the Commission’s constant criticism, a new law was pushed by current Polish authorities in 2021 which i.a. prolonged “by 2 years the period to make extraordinary appeals against all rulings of all Polish courts that became final after 17 October 1997”.²⁰

10. Arbitrary dismissal of ordinary court presidents: Under the guise of a six-month transitional regime which gave the Minister of Justice the power to dismiss without any specific criteria, without justification and without judicial review any president and vice president of any ordinary court, over 70 presidents and 70 vice-presidents of courts arbitrarily lost their posts.²¹ No remedy has ever been provided for the judges who have been dismissed under this regime with your Court however recently finding against Poland regarding the premature removal by the Minister of Justice of two judges from their post as vice-presidents of ordinary courts.²²

(ii) Poland’s “new” NCJ’s lack of independence

12. In its fourth Recommendation of December 2017, the European Commission recommended that the Polish authorities ensure that the law on the NCJ is amended so that the mandates of its judges-members are not terminated and that the new appointment regime is removed to ensure election of judges-members by their peers, instead of by the legislative power. Polish

¹⁶ 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.

¹⁷ 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.

¹⁸ European Commission, *2021 Rule of Law Report. Country Chapter*, op. cit., p. 9.

¹⁹ 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.

²⁰ European Commission, *2021 Rule of Law Report. Country Chapter*, op. cit., p. 8.

²¹ 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.

²² *Broda and Bojara v. Poland* (applications nos 26691/18 and 27367/18).

authorities ignored the Commission’s concerns and openly violated the Commission’s fourth Recommendation when 15 new judges-members were elected on 6 March 2018 by the lower house of the Polish parliament on the basis of **the new unconstitutional regime organised by the new law on the NCJ (judges-members are no longer elected by judges), following the premature termination of the four-year mandates of the previous 15 judges-members, established in the constitution.**²³

13. The Commission’s assessment is shared inter alia by the European Parliament which recalled in September 2020 that while “it is up to the Member States to establish a council for the judiciary, but that, where such council is established, its independence must be guaranteed in line with European standards and the Member State’s constitution.”²⁴ In relation to the premature termination of the judges-members, the Parliament 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 participation in adjudicating may have on the validity and legality of proceedings”.²⁵ One may finally note that evidence emerged in February 2020 that the neo-NCJ was and is still **unlawfully composed**.²⁶

14. The European Parliament has furthermore formally denounced the participation of public officials to a smear campaign against Polish judges.²⁷ One particularly disturbing aspect of the sustained smear campaigns against Polish judges organised by Polish authorities was the secret establishment of a “troll farm” within the Ministry of Justice,²⁸ and which involving some members of the neo-NCJ.²⁹ For PACE, the existence of “a politically motivated smear campaign ... organised against members of the judiciary by, and with the involvement of, high ranking officials in the Ministry of Justice and [NCJ], is both deplorable and concerning”.³⁰ As of today, however, and notwithstanding the calls from Polish associations of judges³¹ and PACE, an effective investigation of these unlawful activities coordinated from within Poland’s Ministry of Justice is yet to be organised by Polish authorities which, on the contrary, appear

²³ 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.

²⁴ [European Parliament resolution of 17 September 2020](#), op. cit., para 24.

²⁵ [European Parliament resolution of 17 September 2020](#), op. cit., para 25. The ECJ confirmed the accuracy of the European Parliament’s concerns in Case C-824/18 in which it held that Article 19(1) TEU may preclude legislative changes which have the effect of removing effective judicial review of Poland’s National Council of the Judiciary’s decisions proposing to the Polish President candidates for the office of judge at the Supreme Court.

²⁶ This is due to the fact that one of the judges-members “was appointed without the required minimum of 25 signatures from judges” (ENCJ, [Position Paper on the Membership of the KRS](#), 27 May 2020, p. 6), a requirement to be found in the unconstitutional law establishing the new NCJ. To prevent this from being known, Polish authorities refused i.a. to comply with a judgment of 28 June 2019 of the Supreme Administrative Court, with a member of the new NCJ using the (captured) Personal Data Protection Office to further delay the publication of the lists of persons supporting the candidates to the new NCJ which were finally published on 14 February 2020.

²⁷ [European Parliament resolution of 17 September 2020](#), op. cit., para. 32.

²⁸ PACE, [The functioning of democratic institutions in Poland](#), report, op. cit., paras. 105-106 (Polish authorities have failed to establish an independent public inquiry into these smear campaigns and those responsible for them by 31 March 2020 as required by PACE).

²⁹ According to media reports, as many as four out of the fifteen judge-members of the neo-NCJ were part of the Ministry of Justice’s secret “troll farm”.

³⁰ PACE, [The functioning of democratic institutions in Poland](#), Resolution 2316 (2020), para. 11.

³¹ See e.g. [Appeal of the Themis Association of Judges regarding the so-called “Piebak scandal”](#), 26 August 2019.

to be actively seeking to preclude any investigation into these criminal matters by sanctioning any judge or prosecutor looking into these matters.³² Considering the unprecedented nature of these developments in the EU and considering the new NCJ's role in undermining judicial independence, the **European Parliament has called on the European Commission to launch an infringement action and request the ECJ to suspend the activities of the neo-NCJ by way of interim measures.**³³ PACE has furthermore recently reaffirmed that the neo-NCJ "can no longer be regarded as an autonomous body independent of the [Polish] legislature and the executive" and called on Polish authorities to "revert to the previous system of electing judicial members" of the NCJ "or adopt a reform of the justice which would effectively ensure its autonomy from the political power".³⁴

15. The assessment of the European Networks of Councils for the Judiciary ("ENCJ") must finally be outlined. **Having suspended the "new" NCJ on 17 September 2018, the ENCJ is now working on its expulsion** due inter alia to the fact that the Poland's "new" NCJ "is in blatant violation of the ENCJ rule to safeguard the independence of the Judiciary, to defend the Judiciary, as well as individual judges..."³⁵ As evidence of the new NCJ's proactive role in defending actions which flagrantly violated both the Polish Constitution and EU law, and which was highlighted inter alia by the European Commission, one may mention the adoption by the new NCJ, on its own initiative, of a resolution "stating that Mrs Gersdorf had retired and was no longer the First President of the Supreme Court and consequently no longer member of the National Council for the Judiciary."³⁶ Polish authorities' attempt to **prematurely end Mrs Gersdorf's constitutionally guaranteed mandate was subsequently held to violate EU law by the ECJ** in Case C-619/18.

16. In its 2021 Rule of Law Report Country Chapter for Poland, the European Commission reiterated its concerns in relation to a body which "continues to be composed mainly of politically appointed members" who have systematically failed to fulfil their constitutional mission to safeguard the independence of courts and judges:

Despite the serious concerns also expressed by a number of other Polish courts pointing to its lack of independence, the NCJ continues to propose candidates for judicial appointments to the President of the Republic which are systematically appointed. Throughout 2020 and 2021, the NCJ has issued one resolution to protect the independence of a Polish judge, namely to express support to a member of the Disciplinary Chamber of the Supreme Court, while refusing to express similar support to judges targeted by criminal investigations carried out by the prosecution services in the same period. The NCJ also provided statements in support of certain aspects of the justice reforms criticised by the Commission.³⁷

³² See E. Siedlecka, "Prosecutor's office under a dictatorship", *Polityka*, 26 February 2021, [English translation made available by Themis](#): "The investigation regarding the hate group at the Ministry of Justice was transferred from Lublin to Świdnica." As previously reported by PACE rapporteur Mr Orlando, *Judges in Poland and in the Republic of Moldova must remain independent*, Dec. 15204, 5 January 2021, para. 67: Following the media revelations regarding the vast hate campaign orchestrated behind the scenes to discredit judges opposed to the reforms of the judiciary, only one official was forced to resign "but so far he has not been held to account for his actions."

³³ European Parliament resolution of 17 September 2020, op. cit., para 27.

³⁴ PACE, *Judges in Poland and in the Republic of Moldova must remain independent, Resolution*, 2359 (2021), paras 12 and 14.

³⁵ Position Paper of the board of the ENCJ on the membership of the KRS (expulsion), 27 May 2020.

³⁶ 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.

³⁷ European Commission, *2021 Rule of Law Report. Country Chapter*, op. cit., p. 8.

In other words, the unconstitutionally re-established and unlawfully composed NCJ has systematically lent its support to unconstitutional bodies such as the DC and/or irregularly nominated/appointed “judges” and instead of defending judicial independence, has repeatedly supported legislative changes and proceedings targeting independent judges in manifest breach of Poland’s Constitution but also EU law as will be shown below. This is not however surprising as the Minister of Justice publicly confirmed 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”.³⁸

III. ECJ’s infringement judgment in Case C-791/19 *Commission v Poland*

17. 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 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**. In addition, Polish authorities have also **disregarded, first indirectly and subsequently openly** on account of the alleged unconstitutionality of Article 279 TFEU,³⁹ **the two orders issued by the ECJ within the framework of infringement actions C-791/19 and (pending) C-204/21** suspending i.a. the DC twice. According to the (unlawfully nominated/appointed⁴⁰) First President of the Supreme Court, in a public statement issued on 16 July 2021, ECJ orders must be disregarded on account of their (alleged) unconstitutionality and accordingly, she decided to repeal “the instruction for the Disciplinary Chamber of the Supreme Court suspending its activity in disciplinary proceedings against judges.”⁴¹

18. This by now well-established pattern of systemic non-compliance with EU judicial independence requirements is now affecting EU environmental law⁴² but also the judgments issued by your Court with the (unlawfully composed) CT e.g. finding your judgment in *Xero Flor* “non-existent” and the (unlawfully appointed) President of the CT, in an extra-judicial statement, announcing that your Court, similarly to the ECJ, would allegedly lack the competence to issue judgments relating to the organisation and functioning of Poland’s legal order.⁴³ Polish authorities have since also challenged your Court’s judgment in *Broda* and *Bojara* on account of your Court’s alleged lack of authority to review their judicial “reforms”.⁴⁴

³⁸ M. Wilgocki, “Myśmy zgłosili”. Ziobro przypadkiem zdradził, kto poparł sędziów do KRS?”, *Wyborcza*, 15 January 2020.

³⁹ on 14 July 2021, following the issuance of an interim measures order by the Vice-President of the ECJ in Case C-204/21 R, the CT held “that Article 4(3) second subparagraph TEU read in connection with Article 279 TFEU are unconstitutional to the extent that they oblige Poland to abide by interim measures orders issued by the Court of Justice that affect the organisation and functioning of Polish courts and the procedure before such courts.”

⁴⁰ As reported by the European Commission, the resolution of the NCJ “giving rise to the appointment of the First President to the Supreme Court, in her capacity of judge, was invalidated by the Supreme Administrative Court in its judgment of 6 May 2021 in case II GOK 2/18 (see the operative part and the second paragraph of the statement of reasons), implementing the Court of Justice judgment of 2 March 2021 in case C-824/18 *AB et al.*” See European Commission, *2021 Rule of Law Report*, op. cit., p. 9.

⁴¹ *Ibid.*, p. 9.

⁴² *Ibid.*, p. 4: “the Polish Government has openly defied the binding nature of an interim measures order issued by the Court of Justice on 21 May 2021 in a case lodged against Poland for breach of EU environmental law”.

⁴³ *Ibid.*, p. 5.

⁴⁴ See letter of the Council of Europe’s Secretary General to Poland’s Minister of Justice dated 30 June 2021.

19. Rather than detailing how Polish authorities have organised the systemic disregard of EU and ECHR rule of law requirements by threatening i.a. Polish judges with disciplinary proceedings if they do so,⁴⁵ and relied on their captured bodies such as the now unlawfully composed CT to organise systemic non-compliance with ECJ judgements and orders as well as the national judgments seeking to apply these ECJ judgments and orders,⁴⁶ this TPI will instead briefly outline how EU law governs the forced transfer of a national judge as well as the ECJ's most recent assessment of the NCJ, Poland's new disciplinary regime and the chilling effect of some of its provisions.

20. Forced transfer/de facto demotion of a judge: In his Opinion of 15 April 2021 in Cases C-487/19 and C-508/19, AG Tanchev argued that the two newly-created chambers of the Polish Supreme Court (the DC and the CECPA) are liable to fail the EU law requirements of “established by law” and “independence” in a situation where the judges' appointments to these two chambers were made in flagrant breach of the national law applicable to judicial appointments. In this context, AG Tanchev observed in relation to Case C-487/19 that a court transfer can amount to a de facto demotion which, like a dismissal, is not immune to the application of EU law since national judges fall under the scope of the protection afforded in the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter:

20. Secondly, the applicant in the main proceedings (W.Ż.) – who, in his position as a judge, may rule on questions related to the application and interpretation of EU law – is directly seeking the protection deriving from EU law in so far as the administrative measures taken against him (what appears to be a de facto demotion) may have a negative impact on his independence. The appeal brought by W.Ż. – which seeks the protection of his professional status – must also comply with EU law: in particular, with the requirement that only a judge or court complying with the requirements of Article 19 TEU and Article 47 of the Charter may rule on such an action.

48. [...] the national proceedings which led to the submission of the question referred for a preliminary ruling concern an interference in the professional career of a national judge carrying out his functions in a court which forms part of the system of Polish ordinary courts. That judge may, therefore, be called on to rule on questions of application or interpretation of EU law and is also a ‘court’ within the meaning of Article 267 TFEU, and forms part of the Polish system of legal remedies ‘in the fields covered by Union law’ under the second subparagraph of Article 19(1) TEU. However, that provision obliges the Member State concerned to guarantee that such a judge satisfies the requirements inherent in effective judicial protection and, in particular, the requirement of independence and impartiality. That necessitates that W.Ż. is protected against transfers, which should, like dismissals, be subject to guarantees that are sufficient to rule out any reasonable doubt, in the minds of the subjects of the law as to the imperviousness of the judges concerned to external factors.

49. Given that W.Ż. comes under the scope of the protection afforded in the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, he has a right under those provisions – flowing directly from EU law – to effective judicial protection which implies that his action must be examined by a body which has the status of a ‘court or tribunal’ as defined by EU law, that is, a body

⁴⁵ Polish government has admitted that Polish judges who apply EU requirements relating to Article 19(1) TEU/Article 47 CFR to assess the lawfulness of judicial appointments made by the current authorities could face disciplinary proceedings as a result. See Order of 14 July 2021 in Case C-204/21 R, para. 185. More broadly speaking, Poland's muzzle law also prohibits judges, in breach of both EU and ECHR law, to assess the lawfulness of the composition of the hearing bench. As reported by the European Commission, Polish judges have already been subjected to disciplinary proceedings when they challenged the legality of the rulings delivered by the (unlawfully composed) CT and the (unconstitutional and twice suspended by the ECJ) DC. See 2021 Rule of Law Report, op. cit., p. 11.

⁴⁶ See our TPI submitted in the Case of *Juszczyszyn v Poland* (App. no. 35599/20).

which is independent, impartial and established by law. In this case, as the KRS is not a court or a tribunal, the only judicial body which could respect the above requirements is the Supreme Court as the only and final judicial instance called on to verify whether the interference in W.Ż.'s professional status did not undermine the guarantees which he has under those same provisions, read in conjunction with Article 6 of the ECHR, which requires the resolution of the question whether the judge concerned (A.S.) satisfied those requirements.

21. Lack of independence of the NCJ: In its most recent Poland related judicial independence judgment to date (Case C-791/19), the ECJ also dealt extensively with the NCJ (KRS in Polish) and concluded that one may have “legitimate doubts as to the independence of the KRS” and that the “independence of this body “from the political authorities is questionable” on account of the following factors:

(i) “whereas the 15 members of the KRS selected from among the judges were previously selected by their peers, the Law on the KRS has recently been amended, so that [...] those 15 members are now appointed by a branch of the Polish legislature, with the result that 23 of the 25 members of the KRS in that new composition have been appointed by the Polish executive or legislature or are members thereof. Such changes are liable to create a risk, hitherto absent from the selection procedure previously in force, of the legislature and the executive having a greater influence over the KRS and of the independence of that body being undermined” (para. 104);

(ii) the “newly constituted KRS was established through the shortening of the existing four-year term of office, provided for in Article 187(3) of the Constitution, of the members which had, until that point, made up that body” (para. 105);

(iii) the re-establishment of the KRS “ took place at the same time as the adoption of the new Law on the Supreme Court” which resulted inter alia in “the creation, within that court, of two new chambers, one being the Disciplinary Chamber, and the introduction of the mechanism, since held to be contrary to the second subparagraph of Article 19(1) TEU [...] providing for a lowering of the retirement age for judges of the Sąd Najwyższy (Supreme Court) and the application of that measure to serving judges of that court” (para. 106);

(iv) “the premature termination of the terms of office of certain then-serving members of the KRS and the reorganisation of the KRS in its new composition took place in a context in which it was expected that numerous posts would be soon be vacant within the Sąd Najwyższy (Supreme Court), and in particular within the Disciplinary Chamber” (para 107).

22. New disciplinary regime as an instrument of political control *and* reprisals: In its judgment in Case C-791/19, the ECJ also held that Poland’s disciplinary regime allows the content of judicial decisions adopted by judges of the ordinary courts to be classified as a disciplinary offence and could therefore be used in order to exert political control over judicial decisions or to exert pressure on judges with a view to influencing their decisions. In this respect, it is worth stressing that the ECJ found that “the disciplinary regime applicable to judges of the Polish ordinary courts is characterised, in particular, by the fact that the courts involved in disciplinary proceedings *do not meet the requirement of independence and impartiality or the requirement of being established by law* [our emphasis], and by the fact that the forms of conduct constituting a disciplinary offence are not defined by Polish legislation in a way that is sufficiently clear and precise” (para. 188). With respect to the national procedural rules which according to the Commission infringe the principle of respect for the rights of the defence of the accused judges, the ECJ observed that they

increase still further the risk [our emphasis] of the disciplinary regime applicable to those whose task is to adjudicate being used as a system of political control of the content of judicial decisions. The judges concerned *may be led to fear, if they rule in a particular way in the cases before them* [our emphasis],

that disciplinary proceedings will be brought against them which thus fail to provide guarantees capable of meeting the requirements of a fair trial and, in particular, the requirement relating to respect for the rights of the defence. In this way, the restrictions on the rights of the defence arising from those procedural rules undermine the independence of judges of the Polish ordinary courts and thus do not meet the requirements derived from the second subparagraph of Article 19(1) TEU.” (para. 213)

The fear of reprisals in the form of disciplinary proceedings mentioned by the ECJ is anything but abstract as there is ample evidence of reprisals against independent judges and prosecutors with Iustitia releasing e.g. in 2020 a report evidencing the reprisals dozens of Polish judges have faced in 2015-19 as a result of criticism of the government and/or their judicial actions or judgments with those reprisals not merely including (arbitrary) disciplinary proceedings but also state-led campaigns of intimidation, pay cuts and, most recently, criminal charges.⁴⁷

23. Chilling effect: For the first time, in the same judgment, the ECJ has directly and extensively dealt with the notion of ‘deterrent effect’ to establish a violation of the principle of judicial independence in an infringement case.⁴⁸ In agreement with the Member States which intervened in support of the Commission (para. 130), the Court held that Polish authorities have created a disciplinary regime which is “being used in order to create, with regard to those judges who are called upon to interpret and apply EU law, *pressure and a deterrent effect* [our emphasis], which are likely to influence the content of their decisions” (para. 157). In this context, the ECJ also found a violation of the EU 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 requirements of clarity and precision and increase the risk that they “will be the subject of an interpretation which will thus permit the disciplinary regime to be used in order to influence judicial decisions” (para. 148). In relation to Article 267 TFEU, the Court also relied on the concept of deterrent effect (para. 233) before holding that the mere “opening of investigations concerning decisions whereby Polish ordinary courts have submitted requests for a preliminary ruling” to the ECJ is not compatible with EU law.

24. In light of the above, it was not surprising to see EU Advocate General Bobek recently warning against the danger of seeing “**legal black holes**” potentially emerging in the EU⁴⁹ 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.⁵⁰ Indeed, to quote AG Bobek again, we have now reached a stage where **‘the minimum guarantees necessary to ensure the indispensable separation of powers between the executive and the judiciary are no longer present’** in Poland.⁵¹

⁴⁷ Iustitia, *Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland*. Regarding prosecutors, see most recently LEX Super Omnia, *The Stick Method. The ‘Good Change System of Persecuting Independent Prosecutors*, 2021.

⁴⁸ As advocated by L. Pech, *The Concept of Chilling Effect. Its untapped potential to better protect democracy, the rule of law, and fundamental rights in the EU*, Open Society European Policy Institute, March 2021.

⁴⁹ 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. 138.

⁵⁰ Judgment of 23 July 2021 in *Orłowski*, S:AP:IE:2021:000018 and *Lyszkiewicz*, S:AP:IE:2021:000020, para. 55.

⁵¹ Opinion of EU Advocate General Bobek in Joined Cases C-748/19 to C-754/19, op. cit., para. 195.