

**IN THE EUROPEAN COURT OF HUMAN RIGHTS
(GRAND CHAMBER)**

Re: *Grzęda v Poland* (Application no. 43572/18)

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

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

18 March 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 Grand Chamber on 9 March 2021 in the case of *Grzęda v Poland* (application no. 43572/18) pursuant to Rule 44(3) of the Rules of Court.

2. The case of *Grzęda v Poland* concerns legislative changes as a result of which the office of a Supreme Administrative Court judge elected to the National Council of the Judiciary (“NCJ”) was prematurely terminated before the end of his constitutionally guaranteed four-year term.

3. This third party intervention will focus on 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 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, the key findings made by these EU institutions as well as the European Network of Councils for the Judiciary (“the ENCJ”) as regards Poland’s NCJ following its unconstitutional re-establishment in 2018 will be summarised; Third, a brief overview of the most important judgments and orders of the European Court of Justice (“the ECJ”) will be offered, including its most recent and seminal judgment issued on 2 March 2021 in Case C-824/18 and which concerns the unlawful appointment of “judges” to Poland’s Supreme Court case. Indeed, while the case of *Grzęda v Poland* is one of the currently 27 applications pending before your Court which are raising issues relating to various aspects of the systemic changes made to Poland’s judicial system since the end of 2015, the ECJ has also faced an increasing number of cases bringing to the fore violations of the EU principle of judicial independence.³

4. Three main submissions are made: First, the existence of 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,

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 (Online first version).

² See most recently V-DEM Institute, Autocratization Turns Viral. Democracy Report 2021, March 2021, p. 9: “Poland takes a dubious “lead” as the country which declined the most during the last decade” and see also p. 19: “the countries among the top 10 [autocratizing countries] are the same identified by the analyses in last year’s Democracy Report. While Hungary’s ongoing autocratization is still conspicuous, Poland has taken over the dubious first position with a dramatic 34 percentage points decline on the [Liberal Democracy Index], most of which has occurred since 2015”.

³ To date, a total of 4 infringement actions have been launched by the European Commission regarding Poland’s rule of law crisis and a total 35 national requests for a preliminary ruling have been submitted to the ECJ by Polish courts in relation to different measures adopted by Polish authorities and their compatibility with EU requirements relating to judicial independence. 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.

most recently by 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-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 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 neo-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”.

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 ECHR judgments relating to judicial independence** via inter alia the active collusion of unlawfully appointed “judges” they have put in place,⁷ 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 2016⁸

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.

⁵ See most recently 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 See most recently “[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.

⁸ For a comprehensive overview, see L. Pech, P. Wachowiec and D. Mazur, “[Poland’s Rule of Law Breakdown](#)”, op. cit. ([online first version](#)).

6. With the exception of the findings made in relation to the neo-NCJ which are outlined in Section III due to its specific relevance, this Section will summarise 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 retirement regime of the Supreme Court judges, including the First President; (iii) Changes made to the structure of the Supreme Court; (iv) The introduction of a new so-called extraordinary appeal; (v) Changes made to the disciplinary regime; (vi) 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. As noted by the European Commission,⁹ following the persistent violation of a several rulings of the (pre-captured) Polish Constitutional Tribunal (“CT”) issued in December 2015 and March, August and November 2016, **some of which have still not been published**, Polish authorities were able to capture the CT in December 2016 on the back of 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**. 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 addition, **the “judgments” rendered by the unlawfully presided and composed CT under these circumstances can no longer be considered as providing effective constitutional review**. In this respect, it is worth stressing that the largest association of Polish judges no longer recognises as legitimate the currently unlawfully composed CT and has called on independent judges to assess whether its “rulings” may be considered “valid and final” when they are issued by panels which include unlawfully appointed individuals.¹¹

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

8. With respect to the retirement regime of Supreme Court judges, due to the repeated failure of Polish authorities to ensure that the law on the Supreme Court is amended so as (i) not to apply a lowered retirement age to the then sitting Supreme Court judges, including to the then First President of the Supreme Court **notwithstanding the fact that the Polish Constitution prohibited any premature termination of her term of office**, and (ii) to remove the discretionary power of the Polish President to prolong the active judicial mandate of the Supreme Court judges, the European Commission brought an infringement action on 2 October 2018. 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 will be shown in Section III, Polish authorities were able to prematurely terminate

⁹ See most recently 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 Position of the Polish Judges Association IUSTITIA over the status of the Constitutional Tribunal, 30 October 2020. See also Position of the Management Board of the Polish Society of Constitutional Law, 28 October 2020.

the mandate of the NCJ judges-members in 2018 in violation of the Polish Constitution which guaranteed them a four-year mandate.

9. 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 Extraordinary Control and Public Affairs Chamber ("ECPAC").¹² In line with the Venice Commission,¹³ the European Commission has strongly questioned the independence, or rather the lack thereof, of these two new chambers. **Three (then still independent) chambers of Poland's Supreme Court have since authoritatively established¹⁴ the flagrantly unconstitutional nature of the DC as well as its lack of compliance with EU Law.**¹⁵ 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 ECPAC "since its composition suffers from the same flaws" as the DC.¹⁶ The unlawful nature (as a matter of EU law) of the appointment procedure followed by the Polish President was made clear by the ECJ in Case C-824/18 and which will be briefly presented in Section IV *infra*.

(iii) Extraordinary appeal procedure

10. 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."¹⁷ As noted above, the composition and manner of appointment of the individuals appointed to the chamber in charge of hearing these "extraordinary appeals" (the ECPAC) 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.¹⁸ To date, Polish authorities have failed to do so.

(iv) Changes made to the disciplinary regime

11. In its fourth Recommendation of December 2017, the European Commission raised multiple concerns regarding inter alia the autonomy of the new DC, the removal of a set of procedural guarantees in disciplinary proceedings conducted against ordinary judges and

¹² At the time of finalising this article, the Polish President submitted yet another draft amendment to the Act on the Supreme Court this time to guarantee the total capture of the Supreme Court and prevent its judges inter alia from submitting questions to the ECJ: M. Jałoszewski, "President Duda wants new 'commissioners' in the Supreme Court", *Rule of Law in Poland*, 25 February 2021.

¹³ For the Venice Commission, some aspects the alleged judicial "reforms" targeting Poland's Supreme Court had "a striking resemblance with the institutions which existed in the Soviet Union and its satellites". See Opinion 904/2017, 11 December 2017, para. 89.

¹⁴ See resolution of 23 January 2020, Case BSA I-4110-1/20, 23 January 2020.

¹⁵ For references and further analysis, see L. Pech, Dealing with 'fake judges' under EU Law: Poland as a Case Study, RECONNECT Working Paper no. 8, May 2020.

¹⁶ European Parliament resolution of 17 September 2020, op. cit., para. 23.

¹⁷ 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.

¹⁸ PACE, The functioning of democratic institutions in Poland, Resolution 2316 (2020), para. 7.4.

Supreme Court judges and the influence of the Polish President and the Minister of Justice on the disciplinary officers. On 3 April 2019, the 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. This action is now pending before the ECJ (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 2020.¹⁹ For the Commission, **this new law broadens the notion of disciplinary offence and thereby increases the number of cases in which the content of judicial decisions can be qualified as a disciplinary offence. As a result, the disciplinary regime can and has been used as a system of political control of the content of judicial decisions.** Most recently, the European Parliament denounced the new provisions introduced by the "muzzle law" as "they pose a serious risk to judicial independence" stressing *inter alia* its **deep concerns as regards "the disciplinary proceedings initiated against judges and prosecutors in Poland in connection with their judicial decisions applying Union law or public statements in defence of judicial independence and the rule of law in Poland."**²⁰

(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.²¹ 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 findings made by the European Commission, the European Parliament and the ENCJ regarding Poland's neo-NCJ

13. 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

¹⁹ European Commission, Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland, IP/20/772, 29 April 2020.

²⁰ European Parliament resolution of 17 September 2020, op. cit., paras 31 and 32.

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.

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.**²²

14. 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.”²³ In relation to the premature termination of the judges-members, the Parliament denounced the “far-reaching politicisation” of the neo-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”²⁴ (the ECJ confirmed the accuracy of the European Parliament’s concerns in Case C-824/18 examined *infra*). One may finally note that evidence emerged in February 2020 that the neo-NCJ was and is still unlawfully composed with the Minister of Justice furthermore publicly confirming in January 2020 that the judges nominated to the new NCJ were selected by himself on the basis that they “were ready to work on the reforms of the judiciary”.²⁵

15. The European Parliament has furthermore formally denounced the participation of public officials to a smear campaign against Polish judges.²⁶ 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,²⁷ and which involving some members of the neo-NCJ.²⁸ 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”.²⁹ As of today, however, and notwithstanding the calls from Polish associations of judges³⁰ 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 to be actively seeking to preclude any investigation into these criminal matters by sanctioning

²² 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.

²³ European Parliament resolution of 17 September 2020, op. cit., para 24.

²⁴ European Parliament resolution of 17 September 2020, op. cit., para 25.

²⁵ M. Wilgocki, “Myśmy zgłosili”. Ziobro przypadkiem zdradził, kto poparł sędziów do KRS?”, *Wyborcza*, 15 January 2020.

²⁶ European Parliament resolution of 17 September 2020, op. cit., para. 32.

²⁷ 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).

²⁸ 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”.

²⁹ PACE, *The functioning of democratic institutions in Poland*, Resolution 2316 (2020), para. 11.

³⁰ See e.g. Appeal of the Themis Association of Judges regarding the so-called “Piebak scandal”, 26 August 2019.

any judge or prosecutor looking into these matters.³¹ Considering the unprecedented nature of these developments in the EU and considering the neo-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.**³² 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”.³³

16. The assessment of the ENCJ must finally be outlined. **Having suspended the neo-NCJ on 17 September 2018, the ENCJ is now working on its expulsion** due inter alia to the fact that the Polish 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...”³⁴ To give a single example of the neo-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 neo-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.”³⁵ The Polish authorities' attempt to prematurely end Mrs Gersdorf's constitutionally guaranteed mandate was subsequently held to violate EU law by the ECJ whose growing case law in relation to Poland's alleged judicial “reforms” will be briefly outlined below.

IV. Key ECJ judgments and order regarding Poland's legislative changes targeting Poland's judiciary and judges

17. In addition to the two infringement judgments finding Poland to have adopted and implemented legislative changes **violating the principles of judicial independence and of the irremovability of judges** (Case C-192/18 and Case C-619/18), 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 are however refusing to comply with**. Similarly, **Polish authorities are continuing to violate the ECJ order of 8 April 2020 regarding the Disciplinary Chamber (“DC”)** which forms part of pending infringement Case C-791/19³⁶ and are now furthermore seeking to arrest a Polish judge whose judicial immunity

³¹ 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. A criminal investigation into the organisation of this smear campaign is pending before the Lublin district prosecutor”. However, as previously noted, this investigation has since been transferred to another prosecutor.

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

³³ PACE, *Judges in Poland and in the Republic of Moldova must remain independent, Resolution*, 2359 (2021), paras 12 and 14.

³⁴ [Position Paper of the board of the ENCJ on the membership of the KRS \(expulsion\)](#), 27 May 2020.

³⁵ 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.

³⁶ 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.

has been unlawfully waived by the ECJ suspended “DC” as both a matter of Polish and EU law.³⁷ Most recently, the special unit of the National Prosecutor’s Office, which is operating in flagrant breach of EU law, has applied to the unlawful DC to strip three Supreme Court judges of their judicial immunity on the back of far fetched criminal charges.³⁸

18. 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.** On 8 April 2020, in Case C-791/19 R, the ECJ furthermore ordered **the immediate suspension of the application of the national provisions on the powers of the DC with regard to disciplinary cases concerning judges.**

19. 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” which is currently the subject of an ongoing infringement procedure and is expected to be referred to the ECJ in the next few months.³⁹ **This “muzzle law”, as observed by the European Commission but also the Venice Commission, 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*.**⁴⁰ This *AK* judgment was furthermore, and in any event, 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.⁴¹

20. As regards the violation of ECJ order of 8 April 2020, it is worth stressing that a Dutch Court in a judgment issued on 10 February 2021 has formally established that the Polish DC continues to function in violation of the ECJ order.⁴² In the meantime, on 3 December 2020, due to the continuing functioning of the DC, the European Commission sent an additional letter of formal notice to Poland, which is a new grievance added to the pending action regarding Poland’s “muzzle law”. For the Commission, Poland continues to violate EU law by allowing the DC, the independence and impartiality of which is not guaranteed, “to decide on further matters which directly affect judges ... By giving the Disciplinary Chamber powers that directly affect the status of judges and the exercise of their judicial activities, **the Polish legislation jeopardises the ability of the respective courts to provide an effective remedy**

³⁷ See [Position of the Board of the Themis Judges Association of 13 March 2021 on the intention to unlawfully detain Judge Igor Tuleya](#), whose ECHR application (no 21181/19) is currently pending (see our TPI [here](#)).

³⁸ See [Statement of Supreme Court judges of 17 March 2021, Rule of Law in Poland](#) and M. Jałoszewski, “[The National Prosecutor’s Office strikes at the old Supreme Court with criminal charges](#)”, *Rule of Law in Poland*, 17 March 2021.

³⁹ See most recently European Commission, [press release IP/21/224](#), 27 January 2021.

⁴⁰ Venice Commission, [Opinion no. 977/2019](#), 16 January 2020, para. 31.

⁴¹ 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](#).

⁴² See Amsterdam Court, NL:RBAMS:2021:420, para. 5.3.5.

(our emphasis), as required by the second subparagraph of Article 19(1) TEU, read together with Article 47 of the Charter.”⁴³

21. Most recently, 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-824/18.⁴⁴ 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 neo-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.⁴⁵ The following conclusions and findings of the ECJ are particularly worth noting in this respect:

- (i) Member States must comply with EU law when adopting or revising national rules relating to the substantive conditions and procedural rules governing the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures;
- (ii) EU law (i.e., second subparagraph of Article 19(1) TEU) furthermore precludes legislative amendments, such as those made in 2018 in Poland, where it is apparent that they are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed to external factors;
- (iii) The degree of independence enjoyed by the neo-NCJ (KRS if one uses the Polish abbreviation) in respect of the Polish legislature and the executive may be relevant in order to ascertain whether the judges which it selects will be capable of meeting the EU requirements of independence and impartiality;
- (iv) Legislative amendments in dispute “are such as to suggest that, in this case, **the Polish legislature has acted with the specific intention of preventing any possibility of exercising judicial review** [our emphasis] of the appointments made on the basis of those resolutions of the KRS and likewise, moreover, of all other appointments made in the [Supreme Court] since the establishment of the KRS in its new composition”;
- (v) For the first time, the ECJ (implicitly) finds Polish authorities to have acted in a manner which violates the principle of sincere cooperation: “it is apparent from the information available to the Court that **the Polish authorities have recently stepped up initiatives to curb references to the Court** for a preliminary ruling on the question of the independence of the courts in Poland or **to call into question the decisions of the Polish courts** which have made such references” [our emphasis];
- (vi) For the first time, the ECJ refers to the violation of the Supreme Administrative Court’s freezing order by the Polish President and the doubts regarding the lawfulness of the appointment of the persons concerned: “**although the suspension of execution of the resolutions at issue in the main proceedings had thus been ordered, on 10 October 2018 the President of the Republic had nonetheless appointed** [our emphasis] to judicial posts at the Sąd Najwyższy (Supreme Court) eight new judges who had been put forward by the KRS in those resolutions”;
- (vii) For the Polish referring court to conclude whether Polish authorities have adopted a law which “has had the specific effects” of preventing the referring court from maintaining requests for a preliminary ruling and/or “precluding any possibility of a national court repeating in the future questions for preliminary rulings similar to those contained in the initial request for a preliminary ruling in the present case”. It will also be for the

⁴³ See most recently European Commission, [press release IP/21/224](#), 27 January 2021.

⁴⁴ Najpierw dyspozycja kierownictwa PiS, następnie pilne posiedzenie rządu. Będzie wniosek do Trybunału Konstytucyjnego w sprawie orzeczenia TSUE, *Onet*, 3 March 2021.

⁴⁵ 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.

referring court to establish whether the “**retrograde impact of those national provisions on the effectiveness of the judicial remedy** [our emphasis] available against the resolutions of the KRS proposing the appointment of judges in the Sąd Najwyższy (Supreme Court) infringes the second subparagraph of Article 19(1) TEU”. It is to the best of our knowledge, the first time the ECJ has referred to the “retrograde impact” of Poland’s alleged “reforms”.

22. The **continuing, deliberate and systemic violations of the ECJ judgment in AK and the ECJ order regarding the DC**, which have been recently denounced by PACE which called on Polish authorities “to comply fully and as soon as possible with the other two judgments handed down by the CJEU and with its order of 8 April 2020”,⁴⁶ **means that one may expect the ECJ judgment in C-824/18 to be similarly violated**, either directly or indirectly, formally or informally, so as to prevent the Polish referring court and other courts to find inter alia that the neo-NCJ does not offer sufficient guarantees of independence and that the individuals appointed to the Supreme Court by the current Polish President were unlawfully appointed and are therefore not judges or at the very least, are judges lacking independence and impartiality.

23. As a matter of fact, Polish authorities have already publicly indicated that they are going to continue to systematically ignore ECJ rule of law related judgments and national judgments applying these ECJ judgments, including the most recent judgment issued to date by the ECJ in Case C-824/18 so as to prevent the Polish referring court from concluding inter alia that the appointments made by the neo-NCJ to the Supreme Court were made in violation of EU law. To justify their systemic violation of EU law and ECJ judgments, Polish authorities are now openly claiming that the ECJ would have acted ultra vires,⁴⁷ and that the EU would lack the competence to define and enforce EU rule of law requirements against Member States violating those requirements,⁴⁸ a claim which fundamentally violates Poland’s undertaking when it applied for EU membership.

24. This current sustained process of deliberate non-compliance with ECJ rule of law related judgments is multifaceted. While independent judges and prosecutors 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,⁴⁹ captured unlawfully composed bodies such as the CT are simultaneously being used to undermine compliance with EU law/ECJ judgments. For instance, the unlawfully composed CT has already organised the violation of the ECJ AK judgment.⁵⁰ In this respect, and as our last point, we would like to draw your Court’s attention to the expected nullification of the effects of your Court’s judgment in *Ástráðsson v. Iceland*, following an application submitted to the unlawfully appointed “President” of the CT⁵¹ by the unlawfully appointed “First President” of the Supreme Court.⁵²

⁴⁶ PACE, *Judges in Poland and in the Republic of Moldova must remain independent. Resolution*, 2359 (2021), para. 15.

⁴⁷ See in particular Kancelaria Prezesa Rady Ministrów, *Wniosek do Trybunału Konstytucyjnego w zakresie nadrzędności Konstytucji RP nad prawem europejskim*, 3 March 2021.

⁴⁸ See Kancelaria Prezesa Rady Ministrów, *Skarga do Trybunału Sprawiedliwości UE*, 11 March 2021.

⁴⁹ For a recent account, see E. Siedlecka, “Prosecutor’s office under a dictatorship”, *Polityka*, 26 February 2021, English translation made available by Themis.

⁵⁰ 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.

⁵¹ See pending Case K 24/20.

⁵² M. Krajewski and M. Ziółkowski, “Can An Unlawful Judge Be The First President Of The Supreme Court?”, *Verfblog*, 26 May 2020.