

# THE CASE FOR ACTIVATING THE RULE OF LAW CONDITIONALITY REGULATION IN RESPECT OF POLAND

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# EXECUTIVE SUMMARY

- After several years of rule of law backsliding, Poland's rule of law crisis has mutated into breakdown mode.
- To mention but a few crucial aspects which will be further detailed in this study, the EU currently includes a Member State where each of the apex courts is irregularly composed; where the investigation and prosecution services have been instrumentalised following the entry into force of a law which the Venice Commission described as "unacceptable in a State governed by the rule of law"; where every single judicial appointment procedure is inherently defective due to the involvement of an unconstitutionally reconstituted body; and where core EU *and* ECHR binding requirements relating to effective judicial protection have been held "unconstitutional" resulting in national authorities no longer recognising as binding the rule of law related orders and judgments of both the European Court of Justice and the European Court of Human Rights.
- The EU has sought to rely on multiple instruments to address Poland's rule of law crisis ever since the Commission used, for the very first time, its Rule of Law Framework in January 2016, which is informally known as the EU's "pre-Article 7 TEU procedure".
- As of 1 September 2023, Poland is the only EU Member State which has been subject to both the pre-Article 7 TEU procedure (January 2016–December 2017) and Article 7(1) TEU procedure (December 2017–ongoing). In addition to the activation of these two exceptional procedures, other preventive tools of a cyclical nature which apply to all EU Member States have been used: In 2020, the Council used the European Semester mechanism to adopt a Country Specific Recommendation (CSR) concerning judicial independence in Poland. This subsequently led the Council in June 2022 to condition Poland's access to EU recovery funding to meeting a number of "rule of law milestones". The following month, the Commission adopted multiple CSRs as part of its Annual Rule of Law Report (ARoLR) cycle, all of which were reiterated in this year's edition of the ARoLR published in July 2023.
- When it comes to rule of law response tools, the European Commission has made an extremely parsimonious use of the infringement procedure (Article 258 TFEU) with a total of five infringement actions lodged with the Court of Justice (the most recent one was lodged in July 2023) since the end of 2015. The Commission did, however, make a bolder use of the horizontal enabling condition relating to the Charter in 2022.
- By contrast, the Commission has refused to activate Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget (informally known as the "Rule of Law Conditionality Regulation" or "Conditionality Regulation") after sending a request for information to Polish authorities on 17 November 2021 pursuant to Article 6(4) of this Regulation.

- In this request, the Commission mentioned four issues: (i) The rulings of Poland's Constitutional Tribunal with regard to the primacy of EU Law as they could put at risk the application of EU primary law and secondary legislation relevant to the protection of the EU's financial interests; (ii) Changes which may impact the effectiveness and impartiality of Poland's prosecution service that may be directly responsible for indictments for irregularities in cases related to the management of the EU funds which would create a risk as to the protection of the EU's financial interests because of potential recurrent wrongdoing and the absence of any deterrent effect of criminal sanctions; (iii) The ineffective investigation, prosecution or sanctioning of rule of law breaches linked to the protection of the EU's financial interests which create a risk to the protection of the EU's financial interests; and (iv) Changes affecting the independence of Polish courts as they could in turn impact the effectiveness and impartiality of the judicial proceedings on cases related to the irregularities in the management of the Union funds, creating another risk as regards the protection of the EU's financial interests.
- The case for activating the Conditionality Regulation was already compelling at the time of the Commission's request for information sent to Polish authorities on 17 November 2021. It is overwhelming in September 2023.
- The breaches of the principles of the rule of law as defined in the Conditionality Regulation (in particular, the principles of legality, legal certainty, prohibition of arbitrariness, effective judicial protection and separation of powers) and committed by Polish authorities over a long period of time concern *at the very least* five situations outlined in Article 4(2) of the Conditionality Regulation.
- In other words, current Polish authorities are responsible for rule of law breaches which have seriously undermined: (i) the proper functioning of the authorities carrying out financial control, monitoring and audit; (ii) the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of EU law relating to the implementation of the EU budget or the protection of the EU's financial interests; (iii) the effective judicial review by independent courts of actions or omissions by the authorities mentioned above; (iv) the effective and timely cooperation with the European Anti-Fraud Office (OLAF) and with the European Public Prosecutor's Office (EPPO) (notwithstanding Poland's decision not to join the EPPO) in their investigations or prosecutions pursuant to the applicable EU acts in accordance with the principle of sincere cooperation. By capturing the prosecution services and the courts via repeated laws and executive actions in violation of Poland's Constitution, EU law or the ECHR while making EU and ECHR effective judicial protection requirements "unconstitutional" via the captured "Constitutional Tribunal", one may in addition submit that Polish authorities have furthermore undermined the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of EU law relating to the implementation of the EU budget or the protection of the financial interests of the EU, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities.

- When it comes to making the case of activating the Conditionality Regulation, it is, however, sufficient to highlight how current Polish authorities' breaches of the rule of law have resulted in the systemic undermining of the proper functioning of three crucial institutions from the point of view of the sound financial management of the EU and the protection of EU's financial interests in Poland: (i) the Supreme Audit Office (SAO); (ii) prosecution services and (iii) the judiciary. These three institutions significantly impact both the sound financial management of the EU budget and the protection of the financial interests of the EU. This is because each of them is responsible for a different stage of safeguarding the EU budget and its financial interests: (i) The SAO examines and reports on actual or potential breaches of financial discipline, which may involve EU funds or the effective collection of Poland's contribution to the EU budget; (ii) The prosecution services are expected to investigate impartially and effectively potential irregularities and wrongdoings, for instance, in cases relating to the management of EU funds or cases of corruption, fraud and conflict of interest in relation to the implementation of EU funds, and must determine whether these irregularities and wrongdoings ought to be subject to criminal prosecution without undue interference and pressure from, inter alia, the country's executive; (iii) The courts deal with criminal, civil, or tax cases, and only lawfully established and independent courts can provide effective judicial review in cases relating, inter alia, to financial management of the EU budget or the protection of the EU's financial interests of the EU, and, where relevant, impose effective and dissuasive penalties.

- As will be detailed in this study, current Polish authorities' actions and omissions amount to repeated breaches of the principles of the rule of law which fall within the different categories provided for in the Conditionality Regulation. At a minimum, these actions and omissions *seriously risk* affecting the sound financial management of the EU budget or the protection of the EU's financial interests in a sufficiently direct way.

- As regards the SAO, its proper functioning has been recurrently undermined via Polish authorities' actions or inactions taking the following form:

- Adoption of measures weakening the independence of the SAO.
- Proceedings and smear campaigns against the SAO President.
- Criminal investigations against SAO auditors.
- Failure to ensure a swift appointment of the Members of the SAO College.
- Failure to ensure the appointment of the Director General of the SAO.
- Failure to increase the SAO's budget.
- Failure to follow up on the SAO's criminal notifications, including the systemic refusal of the prosecution services to initiate criminal proceedings following SAO's criminal notifications.
- Failure to intervene when the SAO's attempts to carry out audits in state-owned companies are being obstructed.
- Failure to effectively respond to breaches of financial discipline, including EU funds, established as a result of the SAO's audits.

- Failure to address the lack of sincere cooperation by audited bodies relying on public funds, including companies with shares owned by the State Treasury and foundations established by these companies.

• These practices are indicative of multiple breaches of the rule of law as indicated by Article 3(b) of the Conditionality Regulation (withholding financial and human resources affecting the proper functioning of the SAO and failing to ensure the absence of conflicts of interest as regards audited institutions) and 3(c) (limiting the effective investigation, prosecution and sanctioning of breaches of law). These breaches of the rule of law undermine the proper functioning of the SAO as well as the effective and transparent financial management and accountability systems. These breaches, which can be attributed directly to state bodies or individuals occupying managerial positions in these institutions, manifestly and at a minimum “seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way” considering the SAO’s central control over the spending of EU funds in Poland.

• With regard to prosecution services, current Polish authorities have committed repeated breaches of the principle of the rule of law starting with the adoption in 2016 of the Act on the Public Prosecutor’s office which the Venice Commission described as “unacceptable in a State governed by the rule of law as it could open the door to arbitrariness”. Since then, the proper functioning of the prosecution services has been systemically undermined via Polish authorities’ actions and inactions taking the following forms:

- Disguised harassment and sanctions of prosecutors via forced secondment and transfers to lower-level units in violation of the case law of both the ECJ and ECtHR, in particular regarding prosecutors who seek to comply and enforce domestic and European rule of law standards.

- Dismissals of multiple prosecutors from their managerial functions and the chilling effect created by the possibility to do so at will without any constraint, including as regards prosecutors handling cases relating to the management of EU funds.

- Instructions binding on all prosecutors ordering them to consider as non-binding the rule of law related judgments of the ECJ and of the ECtHR in all situations, including cases relating to the sound financial management of EU budget or the protection of the EU’s financial interests.

- Failure to follow up on the SAO’s requests while subjecting the SAO auditors to arbitrary criminal investigations.

- Failure to effectively investigate high-level corruption or potential misuse of EU funds by public authorities, including the Minister of Justice himself, as well as individuals and organisations associated or close to the ruling coalition while criminal proceedings are launched against individuals and organisations associated with the opposition.

- Failure to effectively cooperate with the EPPO – a legal obligation including for non-participating Member States – in a context where in the absence of Poland’s participation in the EPPO, the national prosecution services remain the only services with the power to conduct criminal investigations into crimes affecting the EU’s financial interests.

- The above actions or omissions have not therefore merely systemically undermined the effectiveness and impartiality of Poland's investigation and public prosecution services within the meaning of Article 4(2)(c) of the Conditionality Regulation; they have also undermined "the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union" (Article 4(2)(e) of the Conditionality Regulation) and prevented "effective and timely cooperation" with both OLAF and the EPPO (Article 4(2)(g) of the Conditionality Regulation).

- In the absence of any meaningful protection afforded to Polish public prosecutors, including those in charge of investigating potential irregularities and wrongdoings regarding EU's financial interests, against undue interference from the Minister of Justice, who is also simultaneously Poland's Prosecutor General and leader of a political party, the above breaches of the rule of law must again be viewed *at a minimum* as creating *serious risks* regarding the sound financial management of the EU budget or the protection of the EU's financial interests in a sufficiently direct way.

- As regards Poland's judiciary, one may first recall that according to the Conditionality Regulation, "endangering the independence of the judiciary" may be indicative of breaches of the principles of the rule of law. The Conditionality Regulation also explicitly mentions "limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law" as another situation indicative of breaches of the rule of law.

- These two situations may interconnect in practice and indeed characterise the situation in Poland. However, the systemic violation of EU principles of the rule of law leading to the absence of effective judicial review by independent courts does not, in and of itself, suffice to justify the activation of the Conditionality Regulation. As provided for by Article 4.2(d), breaches of the principles of the rule of law which concern "the effective judicial review by independent courts" must relate to the "actions or omissions" by (a) national authorities implementing the EU budget; (b) national authorities carrying out financial control, monitoring and audit; and (c) investigation and public prosecution services in relation to national breaches of EU law relating to the implementation of the EU budget or to the protection of the EU's financial interests.

- The situation in Poland satisfies this requirement as judicial independence has been repeatedly violated across the board, meaning that all national courts have been affected, including those with jurisdiction over actions and omissions by the national authorities mentioned in Article 4(2) of the Conditionality Regulation. When it comes to the repeated and multi-faceted rule of law breaches by Polish authorities relating to the judiciary, which have led to a situation where effective judicial review by independent courts of the actions/ omissions of the authorities mentioned in the Conditionality Regulation and beyond can no longer be guaranteed, one may mention the following key aspects:

- The capture of Poland's Constitutional Tribunal, which has resulted, inter alia, in a situation where all Polish judges, including those dealing with cases relating to the sound financial management of the EU budget or the protection of the EU's financial interests, are formally prohibited from assessing compliance with EU effective judicial requirements following two decisions of the captured Constitutional Tribunal which found several provisions of the EU Treaties incompatible with Poland's Constitution, including the second subparagraph Article 19(1) TEU which requires a system of effective and independent courts and remedies.

- The capture of Poland's National Council for the Judiciary, which has resulted, inter alia, in a situation where any Polish court composed of individuals appointed or promoted in a procedure involving this captured body ought to be considered systematically compromised.

- The capture of Poland's Supreme Court, which has resulted, inter alia, in a situation where more than half of the members of the Supreme Court cannot lawfully adjudicate;

- The capture of Poland's Supreme Administrative Court, which has resulted inter alia in a situation where each chamber of the Supreme Administrative Court is also currently irregularly composed as each includes members who cannot lawfully adjudicate.

- The instrumentalisation of the new disciplinary regime for judges, which has resulted, inter alia, in a situation where disciplinary proceedings have been repeatedly used as a system of political control of the content of judicial decisions and as an instrument of pressure and intimidation against judges across the board.

- Violation of an increasing number of rule of law related-orders and judgments from both the ECtHR and ECJ, including ECJ orders imposing daily penalty payments for non-compliance with previous orders on account of their alleged unconstitutionality, resulting, inter alia, in a situation, where an exponential number of applications are being lodged with the ECtHR concerning Poland's "neo-judges".

• It follows that current Polish authorities have created a situation where there is no longer any effective judicial review in Poland across the board due to a legal framework precluding compliance with EU effective judicial protection requirements *in all situations* while an increasing number of inherently defective judicial appointments continue to be made *at all court levels* in a broader context where *all of its top courts* are now composed of neo-judges who cannot lawfully adjudicate and where Polish authorities no longer recognise as binding the rule of law related orders and judgments of the ECJ while they continue to harass judges on the basis of provisions of national law found incompatible with EU law by the ECJ, most recently in a judgment of 5 June 2023 with respect of Poland's 'Muzzle Law'.

• In light of the above, Polish authorities' transversal and sustained violation of EU effective judicial protection requirements necessarily creates, *by definition and at a minimum*, serious risks for the sound financial management of the EU budget and the protection of the EU's financial interests.

- In addition to Article 4.2(d), the breaches of the rule of law repeatedly committed by Polish authorities since the end of 2015 also arguably concern “the imposition of effective and dissuasive penalties on recipients by national courts” (Article 4.2(e)) in cases involving recipients connected to Poland’s ruling coalition due, inter alia, to the adoption of disciplinary regime for judges incompatible with EU law and which has been illegally used as a system of political control of the content of judgments and punishment when the content of judgments is not to the Polish authorities’ liking.

- Following the capture of the Constitutional Tribunal and the decisions irregularly issued by the neo-CT which have organised the transversal violation of the EU right to effective judicial protection and the EU general principles of autonomy, primacy, effectiveness, uniform application of EU law as well as the binding effect of ECJ rulings, one may further argue that the activation of the Conditionality Regulation could also be justified on the basis of Article 4(2)(h): “other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union”. This situation may be understood as putting at serious risks the correct application of EU primary law and secondary legislation relevant to the implementation, sound financial management and protection of the Union budget as well as the protection of the financial interests of the EU, and compliance with ECJ judgments in that regard.

- More broadly speaking, one may also argue that by considering EU effective judicial protection requirements guaranteed under Article 19(1) TEU and connected ECJ orders judgments “unconstitutional”, Polish authorities have rendered compliance with EU law impossible across the board resulting *in a situation where breaches of the rule of law concern every single one of the situations laid down in Article 4.2 of the Conditionality Regulation.*

- The transversal nature of Polish authorities’ repeated breaches of EU rule of law principles regarding Poland’s judiciary also satisfies the requirement of a sufficiently direct link as the lack of effective judicial review concerns *all courts* with jurisdiction to adjudicate cases concerning actions or omissions by (a) national authorities implementing the EU budget; (b) national authorities carrying out financial control, monitoring and audit and (c) investigation and public prosecution services. In other words, there is at the very least a manifest, serious risk that the effectiveness and impartiality of judicial proceedings on cases related to the irregularities in the management of the EU budget may be affected, which creates, in turn, a serious risk to the protection of the EU’s financial interests in a sufficiently direct way.

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The independence and impartiality of the judiciary should always be guaranteed, and investigation and prosecution services should be able to properly execute their functions.  
Rule of Law Conditionality Regulation 2020/2092

Poland's obligation to ensure to everyone under its jurisdiction the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law is, at this stage, not fulfilled in Polish law.  
Marija Pejčinović Burić, Secretary General of the Council of Europe (2022)<sup>1</sup>

It is [the courts] that very frequently make a mockery of obvious facts. They mock precisely the rule of law.  
We will change this. This time, no one will stop us. We will change this.  
Jarosław Kaczyński (2023)<sup>2</sup>

[A]uthoritarian tendencies at national level have simply no room in the EU legal order.  
CJEU President Koen Lenaerts (2023)<sup>3</sup>

## INTRODUCTION

Poland's rule of law crisis began at the end of 2015.<sup>4</sup> Since then, as established by the European Court of Human Rights in a Grand Chamber judgment of 15 March 2022, the whole sequence of events in Poland have demonstrated:

that successive judicial reforms *were aimed at weakening judicial independence*, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the [National Council for the Judiciary] and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline [...] As a result of the successive reforms, *the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened*. The applicant's case is one exemplification of this general trend.<sup>5</sup> (emphasis added)

1 Council of Europe, Poland's implementation of the European Convention on Human Rights: Secretary General's Report, 23 November 2022: <https://www.coe.int/en/web/portal/-/poland-s-implementation-of-the-european-convention-on-human-rights-secretary-general-s-report>

2 M. Jałoszewski, "Kaczyński announces the takeover of the courts after the elections. He threatens: 'No one will stop us'", *Rule of Law in Poland*, 29 August 2023: <https://ruleoflaw.pl/kaczynski-takeover-of-the-courts-after-the-elections-poland/>

3 K. Lenaerts, "On Checks and Balances: The Rule of Law Within the EU" (2023) 29(2) *The Columbia Journal of European Law* 25, p. 33.

4 ECtHR judgment of 15 March 2022 in *Grzęda v. Poland* (app. no. 43572/18), CE:ECHR:2022:0315JUD004357218, para. 15: "The election of three judges (M.M., L.M. and H.C.) in December 2015 to seats that had been already filled (...) marked the beginning of what is widely referred to by analysts as the rule of law crisis in the country."

5 *Ibid.*, para. 348.

# 1. From Rule of Law crisis to breakdown mode

After several years of rule of law backsliding, Poland's rule of law crisis can be said to have mutated into breakdown mode. To mention but a few crucial aspects which will be further detailed in this study, the EU currently includes a Member State where each of the apex courts is irregularly composed and includes an increasing number of "neo-judges" who cannot lawfully adjudicate; where the investigation and prosecution services have been instrumentalised following the entry into force of a law which the Venice Commission described as "unacceptable in a State governed by the rule of law";<sup>6</sup> where every single judicial appointment procedure since 2018 is inherently defective due to the involvement of an unconstitutionally reconstituted body and where core EU and ECHR binding requirements relating to effective judicial protection have been held "unconstitutional" by the country's captured and irregularly composed "Constitutional Tribunal" resulting in national authorities no longer recognising as binding the rule of law related orders and judgments of both the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).

Poland's rule of law crisis is furthermore turning into a democracy crisis as well. Most recently, the country's ruling coalition rushed through concerning electoral changes and established a new ad hoc administrative committee with the power to bar individuals from public influence. This committee is expected to be used against opposition figures, which is why this law is informally known as *Lex Tusk* (Donald Tusk being the main opposition leader).<sup>7</sup> For the European Commission, and to solely focus on rule of law related aspects, this law violates the rights to effective judicial protection and ne bis in idem.<sup>8</sup> The Venice Commission has similarly recommended the repeal of this "incredibly dangerous"<sup>9</sup> law, including the components amended by a subsequent law. For the Venice Commission, both the original and amended version of *Lex Tusk* fundamentally violate, inter alia, the principle of legal certainty and could "lead to abuse of powers and arbitrariness, and make any judicial review of the decisions of the State Commission very difficult"<sup>10</sup> and even more dangerously, could "easily become a tool in the hands of the majority to eliminate political opponents".<sup>11</sup> In line with previous behaviour, the Polish President ignored these most serious concerns and signed the amended and manifestly unconstitutional *Lex Tusk* into law on 2 August 2023.

Poland's rule of law crisis/breakdown does not merely represent a clear and present threat for the future of Poland's democracy and the functioning of the EU legal order,<sup>12</sup> it has also created a threat to the functioning of the ECHR system according to the Secretary General

6 Venice Commission Opinion of 8-9 December 2017 on the Act on the Public Prosecutor's office, as amended, CDL-AD(2017)028, para. 97.

7 European Parliament, "New electoral rules and the "Lex Tusk": Poland's latest threat to EU values", Press release, 20230707IPR02416, 11 July 2023.

8 European Commission, "Rule of Law: Commission launches infringement procedure against POLAND for violating EU law with the new law establishing a special committee", Press release, IP/23/3134, 8 June 2023.

9 Venice Commission, *Poland. Urgent Opinion on the Law on the State Commission to investigate Russian influence on the internal security of Poland in the period of 2007-2022 and on the draft Law amending that Law*, CDL-PI(2023)021, 26 July 2023, para. 36.

10 Ibid., para. 35.

11 Ibid., para. 36.

12 See the unprecedented warnings made by the President of the CJEU as regards the similarly unprecedented "authoritarian tendencies" and "authoritarian drifts" one may increasingly identify at EU Member State level. See K. Lenaerts, "On Checks and Balances", op. cit., pp. 33, 52, 54 and 63.

of the Council of Europe in a rare report adopted under the special procedure laid down in Article 52 ECHR published on 9 November 2022.<sup>13</sup> In the same report, in an extraordinary and unprecedented finding for a Member State of the EU, the Secretary General was furthermore forced to conclude that the right to a fair trial by an independent and impartial tribunal established by law should be considered, in essence, systematically violated in Poland due to the actions of Poland's captured and irregularly composed "Constitutional Tribunal":

As a result of the findings of unconstitutionality in the judgments K 6/21 and K7/21 of the Constitutional Court, the European Court's competence as established in Article 32 of the Convention was challenged and the implementation of Article 6, paragraph 1 of the Convention – as interpreted by the European Court in the cases of *Xero Flor w Polsce sp. z o.o.*, *Broda and Bojara, Reczkowicz, Dolińska-Ficek and Ozimek and Advanced Pharma sp. z o.o.* – has so far not been carried out. **The ensuing obligation of Poland to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction is not, at this stage, fulfilled.**<sup>14</sup> (bold added)

## 2. Poland's rule of law crisis in caseload figures

In more practical terms, the steady worsening of Poland's rule of law crisis since the end of 2015 has led to an exponential number of complaints lodged with the ECtHR. As of 6 July 2023, 397 applications are pending before the ECtHR relating to Poland's rule of law crisis, with more to be expected as these applications mostly relate to changes made to the organisation of Poland's judiciary under laws that mainly entered into force in 2017 and 2018.<sup>15</sup> More than 100 of these applications have been communicated to the Polish government with the ECtHR having decided only about 10% of these applications on the merits (a total of 12 applications in nine judgments to date), with all of the judgments to date finding against Polish authorities.<sup>16</sup> In addition, in yet another unprecedented development, the Court has received a total of 60 requests for interim measures from Polish judges in 29 cases concerning the disciplinary and waiving of judicial immunity cases against them and granted these requests in 17 cases.<sup>17</sup>

The ECJ has also faced, albeit to a lesser extent, an increasing number of cases flowing from Poland's rule of law crisis. To begin with, the Court has received a total of 39 national requests for a preliminary ruling (Article 267 TFEU), raising questions directly related to the potential incompatibility of Polish national measures or actions with the principle of effective judicial protection, that have been lodged with the Court of Justice by Poland's *lawful* judges.<sup>18</sup> In a

<sup>13</sup> Council of Europe, Report by the Secretary General under Article 52 of the ECHR on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland, SG/Inf(2022)39, 9 November 2022.

<sup>14</sup> *Ibid.*, para. 29.

<sup>15</sup> ECtHR "Multiple violations in case concerning disciplinary regime for judges in Poland", Press release ECHR 212 (2023), 6 July 2023.

<sup>16</sup> As of 1 August 2023, the last judgment on the merits was issued in the Case of *Tuleya v. Poland* (applications nos 21181/19 and 51750/20) with the Court finding a violation of his right to a fair trial, a violation of his right to respect for private life and a violation of his right to freedom of expression.

<sup>17</sup> ECtHR, "Non-compliance with interim measure in Polish judiciary cases", Press release, ECHR 053 (2023), 16 February 2023.

<sup>18</sup> Data compiled by L. Pech. National requests for a preliminary ruling originating from individuals who are not lawful judges as per ECtHR case law due to the multiple and fundamental irregularities which characterised their judicial appointments are not included in this total notwithstanding the Court of Justice's failure to take due account of this aspect in a number of preliminary ruling cases to date. For further analysis and references, see L. Pech, *The European Court of Justice's jurisdiction over national judiciary-related measures*, Study requested by the AFCO Committee, PE 747.368, April 2023.

direct violation of EU law, these requests have resulted in most cases in unlawful reprisals against these judges, including in the form of disciplinary proceedings and sanctions.<sup>19</sup> The obvious aim underlying these unlawful reprisals was to create a chilling effect and deter Polish judges from submitting more requests to the ECJ. Indeed, and as with all the ECtHR rulings to date, all the ECJ preliminary rulings which make clear that Polish authorities' so-called "reforms" breach EU law have been openly violated without any infringement consequences to date.<sup>20</sup>

In addition to these 39 national requests for a preliminary ruling submitted by Polish (lawful) judges, one may mention a dozen of additional requests originating from judges in other EU Member States, and in particular the Netherlands, in respect of European Arrest Warrants issued by potentially or actually compromised Polish courts.<sup>21</sup> This, in turn, has recently resulted in the first attempt by individuals irregularly appointed to Poland's Supreme Court and who cannot therefore be considered lawful judges (hence the expression of "neo-judges" to refer to them) to interfere with the functioning of Dutch courts with a manifestly abusive request for information regarding Dutch judges' independence.<sup>22</sup>

Poland's rule of law crisis/breakdown is bound to worsen should the current ruling coalition be reconducted in office following the parliamentary elections due to be held on 15 October 2023 as the current leader of the Law and Justice (PiS) Party has recently committed to organising the "final takeover" of Poland's judiciary should PiS secure a third term:

"Well exactly Ladies and Gentlemen, if we win, all these things I was talking about, including our rule of law, which is very often trampled today. By whom? By the courts. By those courts which are being defended so strongly. It is they that very frequently make a mockery of obvious facts. They mock precisely the rule of law. We will change this. This time, no one will stop us. We will change this."<sup>23</sup>

In practical terms, PiS is expected to attempt a complete overhaul of Poland's judiciary by abolishing the current ordinary courts and replacing them with new "courts" which would allow PiS to replace all the regularly appointed judges.<sup>24</sup> This would, in effect, result in a widespread "purge" of Poland's judiciary while Polish authorities simultaneously seek to undermine the functioning of the CJEU by sending to the Luxembourg Court its "neo-judges".<sup>25</sup>

19 For a comprehensive overview and data, see L. Pech and J. Jaraczewski, "Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations", *CEU DI Working Paper 2023/02*: <https://democracyinstitute.ceu.edu/articles/laurent-pech-jakub-jaraczewski-systemic-threat-rule-law-poland-updated-and-new-article-71>

20 The violation of ECJ rule of law related preliminary ruling judgments has taken several forms with national authorities, including their irregularly appointed/promoted "neo-judges" (i) preventing national referring (lawful) judges to apply them; (ii) refusing to comply with national judgments applying them and (iii), nullifying specific preliminary ruling judgments or (iv) setting them aside as "unconstitutional". See Part II for a full list of all of the ECJ rule of law judgments currently violated by Polish authorities.

21 See most recently P. Bárd et al, *The Judicialisation of the European Arrest Warrant, STREAM report, August 2023*: <https://www.ceps.eu/ceps-publications/the-judicialisation-of-the-european-arrest-warrant/>

22 "Poland's Supreme Court asks if Dutch court meets EU rule-of-law standards", *Notes from Poland*, 3 July 2023: <https://notesfrompoland.com/2023/07/03/polands-supreme-court-asks-if-dutch-court-meets-eu-rule-of-law-standards/>

23 M. Jałoszewski, "Kaczyński announces the takeover of the courts after the elections. He threatens: 'No one will stop us'", *Rule of Law in Poland*, 29 August 2023: <https://ruleoflaw.pl/kaczynski-takeover-of-the-courts-after-the-elections-poland/>

24 "The move to appoint new courts will enable purges to be conducted. It will be possible to send all independent judges into early retirement, or there will simply be no place for them in the new courts. And if there are still 'unruly' judges in the new courts, they will be silenced with repression", *ibid*.

25 See M. Jałoszewski, "PiS pisze czarno na białym: przejmujemy sądy, zlikwidujemy SN, idziemy po TSUE" (PiS writes in black and white: we will take over the courts, abolish the Supreme Court, we will go after the CJEU), *Oko.press*, 10 September 2023: <https://oko.press/pis-idzie-po-sady-wybory>

Be that as it may, and as this study will comprehensively detail, the EU has made use of multiple instruments to address Poland's rule of law crisis ever since the Commission used, for the very first time, its Rule of Law Framework in January 2016, which is informally known as the EU's "pre-Article 7 TEU procedure".

### **3. EU Rule of Law Toolbox: State of play as regards its use in respect of Poland**

As of 1 September 2023, Poland is the only EU Member State which has been subject to both the pre-Article 7 TEU procedure (January 2016–December 2017) and Article 7(1) TEU procedure (December 2017–ongoing). Current Polish authorities are also responsible for making Poland the first ever EU Member State (Hungary followed suit subsequently<sup>26</sup>) to be simultaneously subject to the EU's Article 7(1) TEU procedure and the special monitoring procedure of the Council of Europe in 2020. Both procedures are still ongoing.<sup>27</sup>

In addition to the activation of the pre-article 7 and Article 7 procedures – two procedures which are supposed to address exceptional situations in the form of systemic threats to the rule of law/the EU's foundational values at Member State level – other preventive tools of a cyclical nature but which apply to all EU Member States have also been used: In 2020, the Council used the European Semester mechanism to adopt a Country Specific Recommendation (CSR) concerning judicial independence in Poland. This subsequently led the Council in June 2022 to condition Poland's access to EU recovery funding to meeting three rule of law milestones. The following month, the Commission adopted multiple CSRs as part of its Annual Rule of Law Report (ARoLR) cycle, all of which were reiterated in this year's edition of the ARoLR published in July 2023.

When it comes to rule of law response tools, the European Commission has made an extremely parsimonious use of the infringement procedure with a total of five infringement actions lodged with the Court of Justice (the most recent one was lodged in July 2023) since Poland's rule of law crisis began at the end of 2015. The Commission did, however, make a bolder use of the horizontal enabling condition relating to the Charter in 2022. By contrast, the Commission has refused to activate Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget (informally known as the "Rule of Law Conditionality Regulation" or "Conditionality Regulation"). The Commission did send a request for information to Polish authorities on 17 November 2021 pursuant to Article 6(4) of this Regulation, but it did not follow through. In contrast, the European Commission agreed to activate the Rule of Law Conditionality Regulation in respect of Hungary in April 2022.

In its resolution of 5 May 2022 on ongoing hearings under Article 7(1) regarding Poland and Hungary, the European Parliament welcomed the (belated) activation of the Conditionality Regulation in respect of Hungary but regretted the Commission's failure to do so in respect of Poland:

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26 Council of Europe (PACE), "PACE votes to begin monitoring of Hungary over rule of law and democracy issues", news, 12 October 2022.

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

14. Notes with concern that the Commission has not started such proceedings with regard to Poland, and calls for further assessment and action from the Commission under the regulation; regrets, moreover, that the Commission applies *the narrowest interpretation* of the regulation when assessing breaches of the principles of the rule of law in a Member State, by *effectively excluding a serious risk* affecting the financial management of the Union and its financial interests as a condition under which the conditionality mechanism should be activated; reiterates that the regulation clearly establishes that endangering the independence of the judiciary constitutes a breach of the principles of the rule of law<sup>28</sup> (emphasis added)

In another resolution adopted shortly after this one, the European Parliament explicitly called for the Conditionality Regulation procedure to be swiftly initiated in respect of Poland:

57. [...] takes note of the fact that on 27 April 2022, the Commission finally started the formal procedure against Hungary under the Rule of Law Conditionality Regulation by sending a written notification; urges the Commission to launch the procedure enshrined in Article 6(1) of that Regulation also at least in the case of Poland.<sup>29</sup>

As this study commissioned by the Greens/EFA Group in the European Parliament will show, the current rule of law situation in Poland does indeed warrant the immediate activation of the Conditionality Regulation. In other words, the European Commission has reasonable grounds to consider that the conditions to activate the Conditionality Regulation are fulfilled. It follows that the Commission therefore ought to send a written notification to Poland in relation to the sustained and well-evidenced breaches of the rule of law set out in this study and which have resulted in:

- (i) The malfunctioning of Poland's Supreme Audit Office, the primary body which carries out financial control, monitoring and audit in Poland.
- (ii) The malfunctioning of Poland's investigation and public prosecution services.
- (iii) The lack of effective judicial review by independent courts of actions or omissions of all Polish authorities, including the authorities previously mentioned, and
- (iv) The lack of effective and timely cooperation with the European Anti-Fraud Office (OLAF) as well as Polish authorities' refusal to effectively and timely cooperate with the European Public Prosecutor's Office (EPPO) regarding criminal investigations of a cross-border nature.

Prior to further detailing how the rule of law situation in Poland may be said to plainly fall within the scope of the Conditionality Regulation (Part II), this study will outline how the Conditionality Regulation fits in the broader EU's rule of law toolbox and detail how this toolbox has been used to date in relation to Poland (Part I).

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28 P9\_TA(2022)0204.

29 European Parliament resolution of 19 May 2022 on the Commission's 2021 Rule of Law Report, P9\_TA(2022)0212.

# I. THE CONDITIONALITY REGULATION WITHIN THE BROADER EU'S RULE OF LAW TOOLBOX

After providing an overview of the EU's rule of law toolbox, including Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget ("Conditionality Regulation" hereinafter), this study will describe the main rule of law tools used to date in respect of Poland. As we shall see, the European Commission has so far only agreed to activate the Conditionality Regulation in respect of Hungary in April 2022 with the Council endorsing a suspension of €6.3bn on account of partial remedial action by Hungary in December 2022. By contrast, the Commission has refused to act after sending a request for information to Polish authorities on 17 November 2021 pursuant to Article 6(4) of Regulation 2020/2092.

## 1. The EU's Rule of Law Toolbox: Overview<sup>30</sup>

When it comes to the EU's rule of law toolbox, one may distinguish between preventive/promotion and response tools.

### 1.1 Preventive and promotion tools

The preventive and promotion tools covering all Member States (i.e., EU Justice Scoreboard; European Semester; Rule of Law Milestones in Recovery and Resilience Plans; Annual Rule of Law Dialogue; Annual Rule of Law Report) will be outlined before the preventive and promotion tools of an exceptional nature to be used on a case-by-case basis (i.e., the pre-Article 7 and Article 7(1) procedures) are presented.

#### 1.1.1 Preventive and promotion tools covering all Member States

Most of the EU's preventive and promotion tools are of a permanent and cyclical nature. Due to the close connection with the European Semester tool, the use of rule of law milestones in national Recovery and Resilience Plans has been included in this sub-section. One may, however, note that the Commission has not requested all Member States to include rule of law milestones in their Recovery and Resilience Plans. Furthermore, these milestones are based on the Recovery and Resilience Facility Regulation 2021/241 which is a *temporary* instrument.

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<sup>30</sup> This section builds on L. Pech and P. Bárd, *The European Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU values*, PE 727.551, February 2022.

## EU Justice Scoreboard

The Commission published its first annual Justice Scoreboard in 2013 and connected this new tool to the “European Semester”, i.e., the EU process of economic policy coordination the Commission introduced in 2010. This explains why the Justice Scoreboard was primarily justified on business/economic grounds to pursue the broad objective of helping identify best practices or major shortcomings which have macroeconomic consequences.<sup>31</sup> Eleven editions later, the EU Justice Scoreboard (EUJS) has moved beyond efficiency indicators to embrace an increasing number of indicators focusing on judicial independence and most recently, the fight against corruption.<sup>32</sup>

It may be worth stressing that the EUJS does *not* aim to provide an assessment or present quantitative data on the effectiveness of the national safeguards regarding judicial independence or help detect rule of law backsliding at Member State level.

When outlining how the EUJS connects with other rule of law instruments, the Commission explained that the EUJS has been developed and refined over the years to better feed into the Annual Rule of Law Report; the European Semester as well as the Recovery and Resilience Facility (these last two instruments being closely interconnected),<sup>33</sup> all of which will be discussed below.

## European Semester

First established in 2010 to help with the monitoring and coordination of fiscal, economic, employment and social policies, the European Semester is a yearly cyclical process which was not initially envisaged as a rule of law tool. For instance, when the European Commission adopted the pre-Article 7 procedure in 2014 with the view of preventing systemic rule of law crises from emerging (further details below), its 2014 Communication on the European Semester did not contain a single reference to the rule of law and no more than a single sentence on national justice systems:

The improvement of the quality, independence and efficiency of national justice systems is another important element in the modernisation of public administration, and it has a direct economic significance for starting businesses, contract enforcement, including employment contracts, debt recovery, property and social rights, as well as for all disputes with public administration on taxation and social security.<sup>34</sup>

Abroadening of the scope of the European Semester to cover national rule of law developments was first noticeable in 2018 when, for the first time, the Council adopted a Country Specific Recommendation (CSR) regarding judicial independence matters in respect of Slovakia.<sup>35</sup>

31 European Commission, *The EU Justice Scoreboard. A tool to promote effective justice and growth*, COM(2013) 160 final, 27 March 2013, p. 1.

32 European Commission, *The 2023 EU Justice Scoreboard*, COM(2023) 309, 8 June 2023.

33 *Ibid.*, p. 1 and p. 3.

34 European Commission Communication, 2014 European Semester: Country-specific recommendations. Building Growth. COM(2014) 400 final, 2 June 2014, p. 15.

35 See CSR recommendation no 3 in Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Slovakia and delivering a Council opinion on the 2018 Stability Programme of Slovakia, OJ 2021/C 320/24: “Improve the effectiveness of the justice system, in particular by safeguarding independence in judicial appointment procedures”.

Since then, each edition of the Commission's European Semester country reports have contained rule of law related developments in respect of countries where problems regarding the national judiciary were identified. This has usually led the Council to adopt CSRs relating to national justice systems.

As will be outlined below, the broadening scope given to the reports and recommendations adopted within the framework of the European Semester proved consequential in 2021 following the adoption of the Recovery and Resilience Facility Regulation 2021/241.<sup>36</sup>

## Rule of Law Milestones in National Recovery and Resilience Plans

Not unlike the European semester, the 2021 Recovery and Resilience Facility (RRF Regulation) was not designed as a rule of law instrument. As the main financial vehicle of the 2020 EU Recovery Instrument which aims to supplement the Multiannual Financial Framework (MFF) and help tackle the economic consequences of COVID-19,<sup>37</sup> the RRF Regulation's primary objective is "to promote the Union's economic, social and territorial cohesion" via financial support provided to Member States "with a view to achieving the milestones and targets of reforms and investments as set out in their recovery and resilience plans" (Article 4 of the RRF Regulation).

Notwithstanding the lack of explicit references to the rule of law in the RRF Regulation, the Commission has included it as one of the preventive/promotion tools of a financial nature which has become available to the EU. The rationale for doing so is that "reforms linked on the effectiveness of justice systems"<sup>38</sup> can be funded on this basis. And indeed, where countries have received European Semester CSRs relating to judicial independence, anti-corruption or anti-money laundering, the Commission has conditioned its endorsement of national Recovery and Resilience Plans (RRPs) to the inclusion of "rule of law milestones". These milestones amount to qualitative objectives which must be met before EU recovery money is disbursed.

This inclusion of rule of law milestones has been organised via the linkage made between the RRF Regulation and the European Semester mechanism. For instance, the RRF Regulation provides that national RRP's should be consistent with challenges and priorities within the framework of the European Semester mechanism. It also refers to the importance of reforms and investments that aim, *inter alia*, to improve the effectiveness of judicial systems, fraud prevention and anti-money laundering supervision, and the obligation for each Member State to provide an effective and efficient internal control system so as to prevent, detect and correct fraud, corruption and conflicts of interests.

The RRF Regulation therefore offers an additional avenue to give rule of law considerations a central place via the national RRP's which must be agreed by the Commission and

<sup>36</sup> Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

<sup>37</sup> Regulation 2020/2094 of the European Parliament and of the Council of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

<sup>38</sup> European Commission, *The EU's Rule of Law Toolbox – Factsheet 2023*, 5 July 2023, p. 2: [https://commission.europa.eu/system/files/2023-07/112\\_1\\_52675\\_rol\\_toolbox\\_factsheet\\_en.pdf](https://commission.europa.eu/system/files/2023-07/112_1_52675_rol_toolbox_factsheet_en.pdf)

subsequently approved by the Council. To illustrate the significant and widespread use of RRP to promote rule of law reforms, one may mention that the 2023 edition of Commission's ARoLR refers to national RRP *no fewer than 185 times* across the transversal and the 27 country chapters. One must, however, stress a number of significant limitations in relation to the use of rule of law milestones as only those Member States which have:

received country-specific recommendations on rule of law issues in 2019 or 2020 - as well as Bulgaria and Romania, which have received rule of law recommendations in the context of their Cooperation and Verification Mechanisms - have been requested to include milestones and targets on these issues to get their NRRPs approved. Except if the Member State requests to amend its plan, these milestones and targets cannot be modified. Thus, if, in the coming years, a Member State experiences a process of rule of law backsliding, the Commission cannot use this tool of its own accord to remedy this and impose new 'rule of law' milestones to this country. However, the Commission can suspend and - where relevant - recover RFF funding were the Member State to backtrack on previously met rule of law milestones<sup>39</sup>

Whether the RRF Regulation could be characterised as a preventive rather than a response tool may also be questioned. Indeed, as will be shown in the case of Poland, the agreed rule of law milestones only relate to one aspect (i.e., Poland's unlawful disciplinary regime for judges) of Poland's much broader rule of law crisis.

## Annual Rule of Law Dialogue

This instrument was adopted by the Council of the EU in 2014 a few months after the adoption of a new instrument informally known as the pre-Article 7 TEU procedure by the Commission. Unlike the latter (detailed below), the Council's annual rule of law dialogue is a cyclical monitoring tool of a political nature which covers all EU Member States and aims to promote and safeguard the rule of law.

Prior to 2019, a different topic used to be discussed by the Council on an annual basis. Following an evaluation of the mechanism's effectiveness (or lack thereof), a new "peer review" format of the annual dialogue was introduced during the German presidency of the Council in the second semester of 2020. This resulted in the introduction of two new types of annual discussions in the General Affairs Council (GAC):

- (i) An annual horizontal discussion covering general rule of law developments across the EU with the Commission's Annual Rule of Law Report (to be detailed below) used as the main source to guide the discussion within the GAC;
- (ii) Country-specific discussions addressing key developments in each selected Member State on a rotating basis with six Member States covered every six months. The last five Member States discussed in the first semester of 2023 were Finland; Slovakia; Belgium; Bulgaria and Czechia.<sup>40</sup>

The Council has convinced itself "that exchanges in this format have so far made possible fruitful discussions, in a positive atmosphere, making this a meaningful tool".<sup>41</sup> In reality, the Council's horizontal discussion amounts to a brief confidential discussion of about one

39 E. Rubio et al, *The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context*, Study requested by the BUDG committee, PE 747.469, April 2023, pp. 53-54.

40 Finland and Slovakia were the last two EU Member States not to have been subject to the Council's first round of country-specific discussions launched in October 2020.

41 Council of the EU, *Annual rule of law dialogue*, 6826/23, 28 February 2023, para. 5.

hour every year on the rule of law situation in the EU as a whole. As for the country-specific dialogue, it similarly amounts to another confidential discussion of rule of law developments in each Member State – to be conveniently selected by those who in the relevant Member State may be engaged in the systemic violation of rule of law principles – every three years for about 30 minutes with no transparency whatsoever regarding the information provided to the Council; the nature of the discussion within the Council; and any eventual follow up (or lack thereof as there is no follow up in practice).

The Spanish Presidency of the Council is due to re-evaluate “the experience acquired on the basis of this dialogue”<sup>42</sup> by the end of this year. A questionnaire – again not publicly available at first<sup>43</sup> – has been sent to each government for this purpose in July.

## Annual Rule of Law Report

Having first rejected the European Parliament’s 2016 proposal for a new monitoring “in the form of an interinstitutional agreement to more effectively monitor EU countries’ adherence to the values laid down in Article 2 TEU”,<sup>44</sup> the Commission changed its mind in 2019 and announced the launch of a new “Rule of Law Review Cycle” which would include the publication of a new Annual Rule of Law Report (ARoLR).

The first edition of the Commission’s ARoLR was published on 30 September 2020 (535 pages in total);<sup>45</sup> the second edition published on 20 July 2021 (666 pages);<sup>46</sup> the third edition on 13 July 2022 (913 pages);<sup>47</sup> and the fourth edition on 5 July 2023 (1,033 pages).<sup>48</sup>

In practice, the ARoLR consists of an introductory “umbrella” report covering the rule of law situation in the whole EU and 27 country chapters. As regards the scope of the ARoLR, there has been no change with respect to the initial “four pillars” selected by the Commission: (i) justice systems; (ii) the anti-corruption framework; (iii) media pluralism; (iv) other institutional checks and balances.

42 Council of the EU, *Presidency conclusions: evaluation of the annual rule of law dialogue, 14173/19, 19 November 2019, para. 16.*

43 Agence Europe, “Spain wants EU Council to continue its dialogue on Rule of Law”, 11 July 2023, <https://agenceurope.eu/en/bulletin/article/13219/3>. Following an access to document request lodged by one of the present authors, the questionnaire has since been made public: See Council of the EU, *Questionnaire for the Member States on the evaluation of the Council’s annual rule of law dialogue, 10905/23, 3 July 2023.*

44 See European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, P8\_TA(2016)0409, para. 1.

45 European Commission Communication, *2020 Rule of Law Report. The rule of law situation in the European Union, COM(2020) 580 final. For the individual country chapters, see [https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en).*

46 European Commission Communication, *2021 Rule of Law Report. The rule of law situation in the European Union, COM(2021) 700 final. For the individual country chapters, see [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en).*

47 European Commission Communication, *2022 Rule of Law Report. The rule of law situation in the European Union, COM(2022) 500 final. For the individual country chapters, see [https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters\\_en](https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en).*

48 European Commission Communication, *2023 Rule of Law Report. The rule of law situation in the European Union, COM(2023) 800 final. For the individual country chapters, see [https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters\\_en](https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en).*

The most important – but not necessarily effective – change since the first edition of the ARoLR has been the introduction of Country Specific Recommendations (CSRs) for each Member State in 2022. In this year’s edition, the Commission has provided its assessment of the progress (or lack thereof) made in relation to each recommendation made and where relevant, has adopted an updated set of CSRs. In this context, the Commission made the bold but unsubstantiated claim that “almost 65% of the specific recommendations” made in 2022 “have already been followed up”.<sup>49</sup> This is, however, a figure which must be taken with a large pinch of salt as it is not backed up by any evidence, nor is it accompanied by any methodological explanations regarding for instance how progress has been measured or what “some progress” means.

One final important legal point: The CSRs may reflect the Commission’s prior findings to be found in other EU instruments and do not prejudice (or indeed prevent) the use of other rule of law tools such the infringement procedure or the Conditionality Regulation.

### **1.1.2 Preventive and promotion tools of an exceptional nature to be used on a case-by-case basis**

Adopted in 2014 by the Commission and informally known as the “pre-Article 7 procedure”, the Rule of Law Framework was the Commission’s direct answer to the (questionable) diagnosis that developments in some Member States during the period 2010-2013 showed “that [existing] mechanisms are not always appropriate to quickly respond to threats to the rule of law in a Member State.”<sup>50</sup> By adopting this tool, the Commission aimed, inter alia, to give itself an option to address systemic threats to the rule of law at Member State level via dialogue with the relevant Member State without activating the more procedurally demanding Treaty based procedures laid down in Article 7 TEU.

While the Commission has described its pre-Article 7 procedure as a rule of law response tool,<sup>51</sup> strictly speaking, this procedure’s *raison d’être* is to *prevent* systemic threats to the rule of law *before* they materialise which is why it is presented here as a preventive tool. The problem, in practice and to be detailed in the next Section dedicated to Poland, is that the Commission has used its pre-Article 7 procedure to address actual systemic violations of the rule of law rather than systemic threats.

## **Pre-Article 7 TEU procedure**

The pre-Article 7 TEU procedure has been described as an “early-warning tool”.<sup>52</sup> In brief, this tool adopted by the European Commission foresees a three-stage “structured dialogue” process at the entire discretion of the Commission: Should the Commission be of the view that a systemic threat to the rule of law may materialise in a Member State, it may adopt a

49 Ibid., p. 1.

50 European Commission Communication, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, 19 March 2014, p. 5.

51 European Commission, *The EU’s Rule of Law Toolbox – Factsheet 2023*, 5 July 2023, p. 2: [https://commission.europa.eu/system/files/2023-07/112\\_1\\_52675\\_rol\\_toolbox\\_factsheet\\_en.pdf](https://commission.europa.eu/system/files/2023-07/112_1_52675_rol_toolbox_factsheet_en.pdf).

52 Ibid.

formal opinion following the activation of the Framework (stage 1); In the absence of any satisfactory answers from the relevant Member State, the Commission may then issue a formal rule of law recommendation which may include specific recommendations and a deadline to implement them (stage 2); In the last instance, the Commission may decide to activate one of the mechanisms set out in Article 7 TEU in case of non-compliance such as the preventive mechanism laid down in Article 7(1) TEU (stage 3).

## Article 7(1) TEU procedure

Article 7 TEU is often mistakenly referred to as the “nuclear option”, whereas it contains two procedures: a preventive one (Article 7(1) TEU) and a sanctioning one (Article 7(2) and (3) TEU). In its initial version (1997 Treaty of Amsterdam), Article 7 only consisted of a sanctioning mechanism to be activated in a situation where a Member State is responsible for a serious and persistent breach of the EU’s common values, including the rule of law. The “preventive arm” was subsequently added when the TEU was amended by the 2001 Nice Treaty. This provided the EU with the additional option to act *preventively* in a situation where there is “a clear risk of a serious breach by a Member State” of the values now laid down in Article 2 TEU.

A unique legal feature of the Article 7’s preventive and sanctioning mechanisms is worth stressing: They may be activated to monitor and assess actions/inactions of national authorities *in any area*, including in areas not connected to EU law. This explains and justifies the wide scope of the Commission’s ARoLR which looks at issues beyond the scope of application of EU law *stricto sensu*.

As will be detailed in Section 2 below, both the pre-Article 7 TEU procedure and the preventive arm of Article 7 TEU were activated for the first time ever in respect of Poland in January 2016 and December 2017 respectively. A number of “response tools” have also been used which whose key features will be briefly described below.

## 1.2 Response tools

Four key rule of law responses tools will be outlined below: Infringement procedure (Article 258 TFEU); Article 7(2)-(3) TEU procedure; the horizontal enabling condition on the Charter of Fundamental Rights and this study’s main focus: the Conditionality Regulation.

## Infringement procedure

Under the infringement procedure (Article 258 TFEU), the Court of Justice has jurisdiction to find that a Member State has failed to fulfil its obligations under the Treaties. In practice, most infringement actions are brought by the Commission and if the Court finds a Member State to be in breach of its EU law obligations, the Member State must bring the failure to an end without delay. Compliance with EU rule of law principles which impose legally binding obligations on Member States can therefore be reviewed by the Court via an action for failure to fulfil obligations more widely known under the label of infringement action.

From a rule of law backsliding point of view, the main problem with the infringement procedure has been the Commission's narrow understanding of its scope of application. As outlined by the Commission in 2014, while infringement actions have proven "to be an important instrument in addressing certain rule of law concerns", they can be launched "only where these concerns constitute, at the same time, a breach of a specific provision of EU law".<sup>53</sup> This narrow understanding proved particularly problematic as regards national measures or practices undermining judicial independence as the Commission's orthodox view was that infringement actions could only be launched in respect of national measures/practices falling within the scope of EU law.

The Court of Justice indirectly addressed the merits of the Commission's interpretation of Article 258 within the framework of a national request for a preliminary ruling (Article 267 TFEU) in 2018. In short, the Court disagreed with the Commission's approach when it confirmed that the notion of "fields covered by Union law" mentioned in Article 19(1) TEU is broader than the notion of scope of EU law, meaning that infringement actions are possible beyond national measures/practices falling within the scope of EU law and can address national measures/practices undermining, inter alia, the judicial independence of national courts which may be called upon to rule on questions concerning the application or interpretation of EU law as these courts come within the relevant Member State judicial system in the "fields covered by Union law".

To put it differently, in this case, the Court interpreted the second subparagraph Article 19(1) TEU as providing for a general and justiciable obligation for every Member State, not only to guarantee but also to maintain the independence of any national court and tribunal which may be called upon to rule on questions relating to the application or interpretation of EU law. Any such court or tribunal must meet the EU requirements of effective judicial protection such as judicial independence in accordance with the second subparagraph of Article 19(1) TEU.<sup>54</sup>

A recent and unprecedented legal development is worth mentioning in this context as it may more effectively allow the EU to address democratic and rule of law backsliding at Member State level: In December 2022 and for the first time, the Commission has directly relied upon Article 2 TEU as a stand-alone plea in law in an infringement case lodged with the Court of Justice against Hungary.<sup>55</sup> The Commission has since built on this approach in respect of Poland in respect of the law informally known as *Lex Tusk* and which the Commission considers inter alia as incompatible with the principles of democracy under Articles 2 and 10 TEU.<sup>56</sup>

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53 European Commission Communication, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, 19 March 2014, p. 5

54 For further analysis and references, see L. Pech, *The European Court of Justice's jurisdiction over national judiciary-related measures*, Study requested by the AFCO Committee, PE 747.368, April 2023.

55 Case C-769/22 (pending).

56 European Commission, "Rule of Law: Commission launches infringement procedure against POLAND for violating EU law with the new law establishing a special committee", Press release IP/23/3134, 8 June 2023. See Section 2 *infra* for further details.

## Article 7(2)-(3) TEU procedure

The part of Article 7 that is often presented as being “nuclear” is in fact the second procedure to be found in Article 7(2) which empowers a *unanimous* European Council to discretionarily determine that there is “a serious and persistent breach” by a Member State of the values referred to in Article 2 TEU. Prior to any such eventual determination, the European Council must be seized of a proposal by either one third of the Member States or by the Commission and must also obtain the consent of the European Parliament.

The sanctioning arm of Article 7 has never been activated and is unlikely to ever be so due to the unanimity requirement in a situation where the EU is furthermore currently faced with two EU countries simultaneously engaged in the systemic violation of Article 2 TEU values. This is why sanctions which the Council may theoretically adopt under Article 7(3) such as the suspension of the voting rights of the relevant Member State in the Council are unlikely to ever see the light of day.

As a final point, one may note that the activation of the “sanctioning arm” of Article 7 does not impose any obligation for the Council to adopt sanctions. Indeed, Article 7(3) only provides that the Council *may* decide to do so. Talk of a nuclear option is therefore misguided. As the Commission itself put it in its only Communication to date on Article 7 TEU, these features “underline the political nature of Article 7 of the Union Treaty, which leaves room for a diplomatic solution to the situation which would arise within the Union following identification of a serious and persistent breach of the common Values.”<sup>57</sup>

## Horizontal enabling condition relating to the Charter of Fundamental Rights

For the first time in 2023, the European Commission mentioned the “horizontal enabling condition on the Charter of Fundamental Rights” as one of the EU’s rule of law *response* tools.<sup>58</sup> As outlined by the Commission itself, this horizontal ex-ante condition “requires all Member States to put in place effective mechanisms to ensure that the programmes supported by the Common Provisions Regulation and their implementation complies with the Charter. This is a precondition for related expenditure to be reimbursed”.<sup>59</sup> In other words, in case of non-fulfilment of any of the horizontal enabling conditions – compliance with the Charter is one of four enabling conditions<sup>60</sup> – the relevant programme “will be adopted and the Member State will start implementing the actions but the Commission will not reimburse any cost until the condition is fulfilled, except for expenditures related to actions contributing to the fulfilment of the condition.”<sup>61</sup>

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

58 European Commission, *The EU’s Rule of Law Toolbox – Factsheet 2023, 5 July 2023, p. 2*: [https://commission.europa.eu/system/files/2023-07/112\\_1\\_52675\\_rol\\_toolbox\\_factsheet\\_en.pdf](https://commission.europa.eu/system/files/2023-07/112_1_52675_rol_toolbox_factsheet_en.pdf)

59 Ibid.

60 Alongside with effective monitoring mechanisms of the public procurement market; the tools and capacity for effective application of State aid rules and the implementation and application of the UNCRPD in accordance with Council Decision 2010/48.

61 Rubio et al., op. cit., p. 84.

Regarding the Charter, and considering the situation in Poland, one may stress that it guarantees, inter alia, the right to an effective remedy and the right to an independent and impartial tribunal previously established by law of any individual relying, in a given case, on a right which he/she derives from EU law (Article 47). The Charter also protects additional rights which are described as rule of law principles in the Conditionality Regulation: equality before the law (Article 20) and non-discrimination (Article 21).

In addition, it is important to note the new Common Provisions Regulation (CPR) of 24 June 2021. It covers the following EU funds: the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund, the European Maritime, Fisheries and Aquaculture Fund, the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

**Table 1:** Horizontal enabling condition relating to the EU Charter of Fundamental Rights in the new Common Provisions Regulation 2021/1060

<p><b>Recital 6:</b> “Horizontal principles as set out in Article 3 of the Treaty on European Union (TEU) and in Article 10 TFEU [...] should be respected in the implementation of the Funds, taking into account the Charter of Fundamental Rights of the European Union [...]</p>
<p><b>Article 9 Horizontal Principles:</b> “1. Member States and the Commission shall ensure respect for fundamental rights and compliance with the Charter of Fundamental Rights of the European Union in the implementation of the Funds.”</p>
<p><b>Article 15 Enabling conditions:</b> “1. For the specific objectives, enabling conditions are laid down in this Regulation. Annex III contains horizontal enabling conditions applicable to all specific objectives and the criteria necessary for the assessment of their fulfilment. [...]”</p>
<p><b>Annex III Horizontal enabling conditions - Article 15(1), Enabling condition relating to the effective application and implementation of the Charter of Fundamental Rights:</b> Effective mechanisms are in place to ensure compliance with the Charter of Fundamental Rights of the European Union (‘the Charter’) which include:</p> <ol style="list-style-type: none"> <li>1. Arrangements to ensure compliance of the programmes supported by the Funds and their implementation with the relevant provisions of the Charter.</li> <li>2. Reporting arrangements to the monitoring committee regarding cases of non-compliance of operations supported by the Funds with the Charter and complaints regarding the Charter submitted in accordance with the arrangements made pursuant to Article 69(7).</li> </ol>

Under the new CPR, therefore, not only are Member States required to establish effective mechanisms to ensure compliance with the Charter, including a national procedure allowing the effective reporting of non-compliance, they also face significant financial consequences (in the form of non-reimbursement of costs or the suspension of the approval of a programme

or the amendments of a programme<sup>62</sup>) in a situation where the Commission considers that the horizontal enabling condition relating to the Charter is not fulfilled or no longer fulfilled.

While the Commission made no mention of the Charter as a horizontal enabling condition relating as a rule of law tool before 2023, a number of experts have long suggested to make use of the CPR to address rule of law backsliding.<sup>63</sup> Unfortunately, the Commission adopted a very narrow interpretation of its powers under the previous CPR and understood it as precluding any ex-ante suspensions.<sup>64</sup>

Following the entry into force of the new MFF and the new CPR, the Commission has become bolder and “at least €100 billion have been withheld from Poland without the Conditionality Regulation ever being invoked”.<sup>65</sup> This aspect will be further detailed after the Conditionality Regulation’s key features are outlined below.

## The Conditionality Regulation

Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget is informally known as the “Rule of Law Conditionality Regulation” or the “Conditionality Regulation”. It was adopted on 16 December 2020 following protracted negotiations and a legally suspect “compromise” agreed by the European Council.<sup>66</sup> It formally applies from 1 January 2021.

In a nutshell, Regulation 2020/2092 provides for a new financial conditionality mechanism to protect the EU budget which applies to all EU funds, including funds available via the new EU Recovery instrument/“Next Generation EU” (Regulation 2020/2094),<sup>67</sup> in cases of breaches of the principle of the rule of law as defined in the Regulation (Article 2(a)):

‘the rule of law’ [...] includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law

62 See E. Rubio et al, *The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context*, Study requested by the BUDG committee, PE 747.469, April 2023, pp. 41-45. One may also note that the new CAP Strategic Regulation 2021/2115 imposes on Member States an obligation to “design the interventions of their CAP Strategic Plans and GAEC standards [...] in accordance with the Charter of Fundamental Rights of the European Union and the general principles of Union law”. As noted in the same study at p. 50, “this procedure is a novelty introduced in the post-2020 CAP” and “has not been used so far as the Commission has approved all 27 national CAP Strategic Plans without any suspension”.

63 See R.D. Kelemen and K.L. Scheppele, “How to Stop Funding Autocracy in the EU”, *VerfBlog*, 10 September 2018: <https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>

64 For further details, see K.L. Scheppele and J. Morijn, “What Price Rule of Law” in A. Södersten and E. Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions*, SIEPS, April 2023:1, 29, p. 30.

65 Ibid., p. 31.

66 K.L. Scheppele, L. Pech, S. Platon, “Compromising the Rule of Law while Compromising on the Rule of Law”, *VerfBlog*, 13 December 2020: <https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/>.

67 European Commission Guidelines on the application of the Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, C(2022) 1382 final, 2 March 2022, para. 25 (“2022 Commission’s Conditionality Regulation Guidelines” hereinafter)

In order to facilitate the application of Regulation 2020/2092, a *non-exhaustive* list of situations that may be indicative of breaches of the principles of the rule of law has been included (Article 3):

- (a) endangering the independence of the judiciary.
- (b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest.
- (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

Unlike the Recovery Instrument Regulation, the Conditionality Regulation is a *permanent* tool applying beyond the limits of any given seven-year MFF.

While the Commission initially presented the Conditionality Regulation as a preventive tool,<sup>68</sup> this arguably constituted, at least in part, a mischaracterisation. Indeed, the Conditionality Regulation provides for appropriate measures to be adopted where it is established that “breaches of the principles of the rule of law *affect* (emphasis added) or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way” (Article 4(1)). This means that the mechanism has both a preventive and a reactive dimension in relation to actual breaches of the rule of law.

In 2023, the Commission has more appropriately characterised the Conditionality Regulation as a rule of law *response* tool.<sup>69</sup> This is not to say that this tool is not linked to *preventive* tools. For instance, Recital 16 of Regulation 2020/2092 explicitly lists the ARoLR in the non-exhaustive list of available sources and recognised institutions it offers. The Commission has since stressed that while the Conditionality Regulation and the ARoLR “have different objectives and should remain separate”, the ARoLR’s findings “may feed the Commission’s assessment under the Regulation, and references to adopted measures under the Regulation may be included in the annual Rule of Law Report.”<sup>70</sup>

Last, but not least, the Commission has indicated that it would activate the Conditionality Regulation when it has “reasonable grounds” – this is to be assessed on a case-by-case basis<sup>71</sup> – to consider that the following conditions are met:<sup>72</sup>

- (i) At least one of the rule of law principles referred to in the Conditionality Regulation has been breached in a Member State;

68 *Ibid.*, para 56: “Given that one of the key aims of the Conditionality Regulation is to be used as a preventive tool to protect the Union budget and the financial interests of the Union, the Commission endeavours to ensure a sincere dialogue and cooperation with the Member State concerned, while keeping the procedure at the right pace”.

69 European Commission, *The EU’s Rule of Law Toolbox – Factsheet 2023*, 5 July 2023, p. 2: [https://commission.europa.eu/system/files/2023-07/112\\_1\\_52675\\_rol\\_toolbox\\_factsheet\\_en.pdf](https://commission.europa.eu/system/files/2023-07/112_1_52675_rol_toolbox_factsheet_en.pdf)

70 European Commission, Follow up to the European Parliament non-legislative resolution on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092, SP(2021)570, 3 November 2021.

71 The Conditionality Regulation is, however, “more than a one-off procedure that is launched on an *ad hoc* basis” as it also entails “a continuous exercise where all 27 Member States are constantly monitored and assessed by Commission services”. See E. Rubio *et al*, *The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context*, Study requested by the BUDG committee, PE 747.469, April 2023, p. 17.

72 2022 Commission’s Conditionality Regulation Guidelines, para. 8.

- (ii) The said breach concerns at least one of the situations or conducts attributable to an authority of a Member State (i.e., authorities implementing the EU budget and carrying out financial control, monitoring and audit; investigation and public prosecution services; national courts or administrative authorities; authorities implementing the Recovery and Resilience Plans; or those collecting the sources of revenue to the EU budget) in so far as those situations or that conduct is relevant to the sound financial management of the Union budget or for the protection of the Union's financial interests;
- (iii) The said breach affects or risks seriously affecting that sound financial management or those financial interests, in a sufficiently direct way, with a genuine or real link between those breaches and that effect or serious risk of effect.

The Commission has committed itself to activate the Conditionality Regulation if the above conditions are met subject to one additional and broadly phrased "complementarity test":

- (iv) "the Commission will initiate the procedure *unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively*" (emphasis added).<sup>73</sup>

For instance, the Conditionality Regulation may be more effective to protect the rule of law than the use of the Charter as an enabling condition under the CPR "insofar as it also provides for the possibility to suspend the approval or amendment of a programme".<sup>74</sup> The Commission has helpfully indicated that this should not be understood as meaning that the Conditionality Regulation cannot be used "alongside or following the adoption of sector-specific or financial measures that it may be bound to take".<sup>75</sup> Furthermore, the complementarity test does not exclude the parallel application of procedures set out in EU primary law such as the Article 7 TEU procedure and/or the infringement procedure (Article 258 TFEU) and/or the use of tools set out in EU secondary law which does not primarily aim to protect the EU budget/financial interests such as the use of rule of law milestones as part of the EU Recovery and Resilience Facility.

To date, the Commission has only accepted that the situation existing in Hungary warrants the activation of the Conditionality Regulation in April 2022. The Council subsequently agreed and in December 2022, the Council suspended 55% of three programmes under the EU Cohesion Funds.<sup>76</sup> As will be further detailed below, the Commission has thus far refused to activate the Conditionality Regulation in respect of Poland with the Commission instead relying on all of the aforementioned tools.

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73 Ibid.

74 Ibid.

75 Ibid., para. 40.

76 On 15 December 2022, the Council adopted the Commission's proposal but reduced the amount of Cohesion funding to be suspended to 55% from 65% as proposed by the Commission in relation to three programmes (Environmental and Energy Efficiency Operational Programme Plus; Integrated Transport Operational Programme Plus; Territorial and Settlement Development Operational Programme Plus). For further analysis and references, K.L. Scheppele and J. Morijn, "What Price Rule of Law" in A. Södersten and E. Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions*, SIEPS, April 2023:1, 29.

## 2. Main rule of law tools used to date in respect of the situation in Poland

As of 1 September 2023, Poland is the only EU Member State which has been subject to both the pre-Article 7 TEU procedure (January 2016–December 2017) and Article 7(1) TEU procedure (December 2017–ongoing). In addition to the use of these two EU preventive procedures which are supposed to address exceptional situations in the form of systemic threats to the rule of law at Member State level, other preventive tools of a cyclical nature and which apply to all EU Member States have been used: In 2020, the Council used the European Semester mechanism to adopt a Country Specific Recommendation (CSR) concerning judicial independence in Poland. This subsequently led the Council in June 2022 to condition Poland’s access to EU recovery funding to meeting three rule of law milestones. The following month, the Commission adopted multiple CSRs as part of its ARoLR cycle, all of which were reiterated in this year’s edition of the ARoLR published in July 2023. When it comes to response tools, the European Commission has made an extremely parsimonious use of the infringement procedure since 2017 before making a bolder use of the horizontal enabling condition relating to the Charter in 2022. The Commission has, however, refused to activate the Conditionality Regulation notwithstanding a request for information sent to Polish authorities on 17 November 2021 pursuant to Article 6(4) of this Regulation.

### 2.1 Preventive and promotion tools

The use of preventive and promotion tools in relation to Poland will be outlined below in a chronological order for ease of understanding.

#### Activation of the pre-Article 7 TEU procedure in January 2016

While refusing to do so in respect of Hungary notwithstanding repeated requests from the European Parliament to do so, the Commission decided to activate its new pre-Article 7 TEU procedure in respect of Poland in January 2016 on two main rule of law grounds: the lack of compliance with binding rulings of Poland’s (then still independent) Constitutional Tribunal and the adoption of measures by the Polish legislature to undermine its functioning.<sup>77</sup>

One formal Rule of Law Opinion (1 June 2016) and four Rule of Law Recommendations later (27 July 2016; 21 December 2016; 26 July 2017 and 20 December 2017<sup>78</sup>), the Commission was forced to admit that Polish authorities have continued to plainly disregard its concerns regarding the *systemic risk* to the rule of law identified by the Commission. They have continued to adopt (unconstitutional) laws, allowing the executive and legislative branches to systematically “interfere in the composition, powers, administration and functioning of the judicial branch”.<sup>79</sup>

<sup>77</sup> European Commission, Readout by the First Vice-President Timmermans of the College Meeting of 13 January 2016, Speech/16/71.

<sup>78</sup> See Rule of Law Recommendation no 2016/1374; 2017/146; 2017/1520 and 2018/103.

<sup>79</sup> European Commission, *Rule of Law: European Commission acts to defend judicial independence in Poland*, IP/17/5367, 20 December 2017.

At the time it adopted its fourth Rule of Law Recommendation on 20 December 2017, the Commission simultaneously activated the procedure laid down in Article 7(1) TEU as its pre-Article 7 “concerns” remained entirely unaddressed.<sup>80</sup> As will be detailed below, the recommendations adopted by the Commission under the pre-Article 7 procedure and the ones proposed to the Council by the Commission are essentially the same albeit presented (rather unhelpfully) in a different order in addition to being sometimes phrased in a different manner.

### Activation of the Article 7(1) TEU procedure in December 2017

As of 1 September 2023, a total six hearings have been organised by the Council in relation to the rule of law situation in Poland under Article 7(1) TEU:

- Three hearings took place in 2018 (on 26 June, 18 September and 11 December).
- One hearing took place in 2021 (on 22 June).
- One hearing took place in 2022 (on 22 February).
- One hearing took place in 2023 (on 30 May 2023).

Almost *six years* following the activation of Article 7(1) TEU, the Council is yet to adopt the Commission’s proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, including the recommendations it contains.

In its resolution of 5 May 2022 on ongoing hearings under Article 7(1) regarding Poland and Hungary, the European Parliament was forced to deplore “that the hearings have not led to an improvement in the rule of law, democracy and fundamental rights in Poland and Hungary, and that the situation in both countries has continued to deteriorate since the procedure under Article 7(1) TEU was triggered”.<sup>81</sup>

The Parliament further criticised the Council’s failure to address “concrete recommendations” to Poland and Hungary and stressed the need to “swiftly adopt such recommendations and to stipulate clear deadlines for their implementation”.<sup>82</sup> To date, the Council has proved unable or rather unwilling to do so.

<sup>80</sup> European Commission, *Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, COM(2017) 835 final, 20 December 2017.

<sup>81</sup> P9\_TA(2022)0204, para. 1.

<sup>82</sup> *Ibid.*, para. 6.

**Table 2:** Pre-Article 7 TEU procedure recommendations compared to Article 7(1) TEU procedure recommendations

Pre-Article 7 TEU procedure recommendations	Article 7(1) TEU procedure recommendations
<p>The Commission recommends that Polish authorities within three months of receipt of Recommendation 2018/103 of 20 December 2017:</p>	<p>The Commission proposed to the Council to recommend Polish authorities, within three months following the adoption of a Council decision under Article 7(1) TEU, to:</p>
<p>(a) ensure that the law on the Supreme Court is amended so as to:</p> <ul style="list-style-type: none"> <li>- not apply a lowered retirement age to the current Supreme Court judges.</li> <li>- remove the discretionary power of the President of the Republic to prolong the active judicial mandate of the Supreme Court judges.</li> <li>- remove the extraordinary appeal procedure.</li> </ul>	<p>(a) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed, by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected.</p> <p><i>[equivalent to pre-Article 7 recommendation (d)]</i></p>
<p>(b) ensure that the law on the National Council for the Judiciary is amended so that the mandate of judges-members of the National Council for the Judiciary is not terminated and the new appointment regime is removed in order to ensure election of judges-members by their peers.</p>	<p>(b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016.</p> <p><i>[equivalent to pre-Article 7 recommendation (e)]</i></p>
<p>(c) refrain from actions and public statements which could further undermine the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.</p>	<p>(c) ensure that the law on the Supreme Court, the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the National School of Judiciary are amended in order to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty.</p> <p><i>[equivalent to pre-Article 7 recommendations (a); (b) and (f)]</i></p>
<p>(d) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed and by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected;</p>	<p>(d) ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties, including the Venice Commission.</p> <p><i>[equivalent to pre-Article 7 recommendation (g)]</i></p>

<p>(e) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016.</p>	<p>(e) refrain from actions and public statements which could further undermine the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.</p> <p><i>[equivalent to pre-Article 7 recommendation (c)]</i></p>
<p>(f) ensure that the law on Ordinary Courts Organisation and on the National School of Judiciary is withdrawn or amended in order to ensure its compliance with the Constitution and European standards on judicial independence. Concretely, the Commission recommends in particular to:</p> <ul style="list-style-type: none"> <li>- remove the new retirement regime for judges of ordinary courts, including the discretionary power of the Minister of Justice to prolong their mandate.</li> <li>- remove the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts and remedy decisions already taken.</li> </ul>	
<p>(g) ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence and is prepared in close cooperation with the judiciary and all interested parties.</p>	

While the Council is yet to adopt Article 7(1) recommendations, Polish and Hungarian authorities are increasingly the subject of EU recommendations which relate to some of the issues and concerns identified by the Commission and Parliament in their respective Article 7(1) reasoned proposals. However, these recommendations have been adopted under different EU instruments of a preventive nature. To further complicate matters, these recommendations may also be known under different names such as “country specific recommendations” or “milestones”.

As regards Poland, one may mention a rule-of-law-related, European semester country specific recommendation first adopted in July 2020 accompanied by several rule of law “milestones” under the EU Recovery and Resilience Facility in June 2022 and multiple recommendations under the EU’s Annual Rule of Law Report in July 2022. These will be detailed below.

### **Use of European Semester Country-Specific Recommendation in 2020**

For the first time in 2019, the Commission’s European Semester country reports in respect of Poland and Hungary contained unprecedentedly detailed assessment and criticism of the rule of law situation in both countries. For Poland, however, it was not until 2020 that the Council

adopted a CSR which directly recommended that Polish authorities take action to “enhance the investment climate, in particular by safeguarding judicial independence”.<sup>83</sup>

In its last European Semester recommendation to date adopted in July 2023, the Council has reiterated its “serious concern” – an arguably inappropriate phrasing when referring to *multiple violations* established by domestic courts as well as the ECJ and the ECtHR whose rulings remain ignored – regarding the rule of law situation in Poland, especially as far as judicial independence is concerned.<sup>84</sup> The Council did, however, refer to “violations of EU law” in relation to the Commission’s referral of Poland to the ECJ as regards the actions of Poland’s captured “Constitutional Tribunal”.<sup>85</sup>

Notwithstanding the continuing deterioration of the situation in Poland, the Council has not adjusted the phrasing of the CSR dealing with judicial independence. This means that the Council merely repeated itself and once again urged Polish authorities to “take action” in 2023 and 2024 to “enhance the investment climate, including by safeguarding judicial independence”.<sup>86</sup> The Council could have added something as basic as demanding immediate and full compliance with every rule of law related judgment of the Court of Justice but it did not do so. The Council did, however, indirectly refer to the rule of law milestones included in Poland’s Recovery and Resilience Plan via another CSR in which Polish authorities are asked to take urgent action to “fulfil the required milestones and targets related to the protection of the financial interests of the Union with a view to allow for a swift and steady implementation of its recovery and resilience plan”.<sup>87</sup>

Poland’s rule of law milestones as well as data from the EUJS and findings from the ARoLR had been previously mentioned by the Commission in its European Semester country report on Poland. This report offers a good example of how the Commission is positively seeking to use different preventive tools in the EU’s rule of law toolbox in a mutually reinforcing way (original in bold):

**The judicial system faces challenges to its independence.** The overall performance of ordinary and administrative courts remains stable [...] The overall quality of the justice system is good, and the level of digitalisation is advanced. Gaps remain in online access to published judgments and in the availability of electronic communication tools in the prosecution service. Serious concerns regarding judicial independence persist as underlined in the Commission’s Rule of Law Reports. Poland also committed to milestones related to the independence of the judiciary in its recovery and resilience plan.<sup>88</sup>

These (controversial) rule of law milestones will be further detailed below.

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83 Council recommendation of 20 July 2020 on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland [2020] OJ C287/135, 141, CSR no 4.

84 Council recommendation on the 2023 National Reform Programme of Poland and delivering a Council opinion on the 2023 Convergence Programme of Poland, Recital 32.

85 Ibid.

86 Ibid., CSR no 3.

87 Ibid., CSR no 2.

88 European Commission Staff Working Document, 2023 Country Report – Poland accompanying the document Recommendation for a Council Recommendation on the 2023 National Reform Programme of Poland and delivering a Council opinion on the 2023 Convergence Programme of Poland, SWD(2023) 621 final, 24 May 2023, pp. 56-57.

## Use of EU Recovery funding related rule of law milestones in 2022

As previously explained, the adoption of judicial independence related Country Specific Recommendations (CSRs) within the framework of the European Semester proved consequential in 2021 following the adoption of the RRF Regulation 2021/241 as the EU was able to condition the endorsement of national Recovery and Resilience Plans (RRPs) to their consistency with, *inter alia*, the European Semester CSRs. In turn, this led to the disbursement of EU recovery funding being linked to the implementation of rule of law milestones, later informally dubbed “super milestones” when they take the form of pre-conditions to satisfy in order to receive the first RFF payment.<sup>89</sup> However, there is no obligation to solely use rule of law milestones as super milestones. In other words, rule of law milestones “can be imposed in successive payments, as both intermediary and final milestones to assess the adoption and successful implementation of certain reforms”.<sup>90</sup> As regards judicial independence related milestones, they do not merely concern Poland, as a total of six EU Member States have committed to adopting reforms in this area as part of their national RRFs: (i) Czechia; (ii) Hungary; (iii) Malta; (iv) Poland; (v) Romania; and (vi) Slovakia.<sup>91</sup>

In the case of Poland, a total of three rule of law milestones can be found in the Council Implementing Decision of 17 June 2022 approving Poland’s Recovery and Resilience Plan (RPP hereinafter).<sup>92</sup> These milestones were previously endorsed by the Commission on 1 June 2022 following protracted negotiations between the President of the European Commission and current Polish authorities. They have proved particularly controversial, including within the Commission itself. Indeed, no fewer than five Commissioners, including the ones with direct responsibilities over rule of law matters, held the view that they are either incompatible with the Court of Justice’s case law (Timmermans, Vestager, Reynders) or less damagingly, that they must be strictly interpreted when compliance with them is due to be assessed (Johansson, Jourová).<sup>93</sup>

89 The label “super milestones” was used by the Commission to refer to the 27 milestones relating not only to judicial independence but also corruption, public procurement and decision-making to be found in Hungary’s RPP. They have been informally described as “super milestones” – itself not a legal notion – as they “must be fully and correctly implemented before any payment under the RRF can be made to Hungary”. See European Commission, “Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds”, IP/22/7273, 30 November 2022. To complicate matters further, these “super milestones” reproduce in part the remedial measures adopted under the Conditionality Regulation.

90 Rubio et al, op. cit., p. 52.

91 Ibid., p. 53. The authors note that at the time of finalising their study, three of these six Member States “have already submitted RRF payment requests conditioned to the fulfilment of such milestones. In all cases (Czechia, Malta and Slovakia) these were reforms enacted before the adoption of the NRRPs and thus not imposed by the Commission. The big test will be countries having systemic problems of judicial independence and to which milestones on judicial independence have been imposed, i.e., Poland and Hungary. At the moment of writing, neither of these two countries has presented an RRF payment request.”

92 Council Implementing Decision of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland, Council document no. 9728/22, 14 June 2022.

93 Statements on file with authors.

**Table 3:** Statements from five European Commissioners regarding the “Rule of Law Milestones” agreed by the President of the Commission and the Polish government

<p>Written statement by Executive Vice-President Frans Timmermans in charge of the European Green Deal (former Vice-President in charge inter alia of the Rule of Law) for the minutes of the College of 31 May 2022</p>	<p>“Having acknowledged the fact that the Recovery and Resilience Plan cannot redress all outstanding issues, EVP TIMMERMANS insists that it then becomes even more pertinent that what is set down in the milestones is unambiguous and fully in line with the ECJ’s judgements and orders.</p> <p>Unfortunately, The Milestone F2G now proposed falls short of that requirement. [...] The Court has declared in its Interim Order of 14 July 2021 that the Polish authorities must suspend immediately decisions of the Disciplinary Chamber regarding the lifting of judicial immunity of judges. It therefore requires an immediate response.</p> <p>Milestone F2G, in contrast, does not require such an automatic and immediate response, but instead describes a review proceeding that can take up to 15 months after a new judicial review procedure is put in place. In short, this Milestone deviates from the Interim Order of the ECJ.</p> <p>EVP TIMMERMANS disagrees with the fact that the legal order is being adjusted to the political reality, instead of the other way around.”</p>
<p>Declaration of Executive Vice-President Margrethe Vestager and European Commissioner for Competition to the Minutes of the College of 31 May 2022</p>	<p>“EVP VESTAGER has expressed substantial concerns with regards to the overall ambition of the rule of law chapter. Notably, she finds that the approach on the reinstatement of judges should have been different so that the burden of proof does not fall with the victims of the Disciplinary Chamber. As per the European Court of Justice judgement, all decisions of the Disciplinary Chamber should have been annulled immediately and all judges temporarily reinstated until the new chamber would have ruled in each case the decision on the permanent reinstatement, based on a new law compliant with the Recovery and Resilience Facility Plan milestones and the European Court of Justice interpretation.</p> <p>The current approach puts the Commission at odds with the European Court of Justice ruling, which is a fundamental concern, as the Commission is the guardian of the EU Treaties and of the EU acquis. EVP Vestager also finds that more would be necessary to ensure the full independence of the new chamber. This should imply that no judge that has been member of the Disciplinary Chamber should be eligible to take part in the new chamber. [...]”</p>
<p>Letter from Didier Reynders (Commissioner for Justice) to the Commission President and Commissioners in respect of the College meeting of 31 May 2022</p>	<p>“I still have substantial doubts on certain aspects of these milestones, notably as regards the reinstatement of suspended judges. As regards the implementation of these milestones, Polish authorities will enjoy a certain room for manoeuvre. I want to call for vigilance when the Commission will assess whether these milestones are fulfilled in a manner that is fully compliant with the EU law requirements of judicial independence, as interpreted by the European Court of Justice. This assessment must also be a collegial exercise. [...]”</p> <p>The approval of the Polish Recovery and Resilience Plan takes place in a situation where in Poland the supremacy of EU law continues to be undermined by the Constitutional Tribunal, while at the same time the concerns relating to the lack of independence of the National Council for the Judiciary – as confirmed in a number of rulings of the Court of Justice and the European Court of Human Rights – continue to persist, contaminating the process of judicial appointments in Poland.”</p>
<p>Letter from Ylva Johansson (Commissioner for Home Affairs) to the Commission President and Commissioners in respect of the College meeting of 31 May 2022</p>	<p>“I would like to share my concerns on the implementation of the milestones to ensure judicial independence. The Polish authorities will enjoy a certain marge of manoeuvre in implementing them. It is essential that the Commission in its assessment, which must be a collegial exercise, ensures that the milestones are fulfilled in a way which is fully compliant with EU law requirements of judicial independence, as interpreted by the European Court of Justice.”</p>

<p>Letter by Věra Jourová (Vice-President in charge of Values and Transparency) to the Commission President dated 31 May 2022</p>	<p>“Whilst I fully support the adoption of the Plan with the strong Rule of Law milestones included, I wanted to stress that I expect us to be very diligent when it comes to assessing in the next steps whether these valuable milestones are indeed met. Otherwise, I see our credibility in this exercise at risk.</p> <p>[...] We should stay out of the internal political debates in Poland, but we need to be clear about our red lines, i.e. no disbursement of any money unless the reform law coming out of the parliamentary process in Poland fully complies with the milestone.</p>
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Four organisations representing European judges have subsequently lodged annulment actions with the EU General Court in respect of (i) the Council Decision of 17 June 2022<sup>94</sup> and (ii) the Commission’s Financial and Loan Agreements with Poland of 24 August 2022.<sup>95</sup> Before briefly outlining their claims,<sup>96</sup> Poland’s three rule of law milestones (known as milestones F1G, F2G and F3G) may be summarised as follows:

Milestones F1G and F2G may be considered “super milestones” as they are preconditions which must be fulfilled in order to receive the first RFF payment. Their main aim, as explained by the Commission itself, is to “raise the standard of judicial protection” and address the European Semester CSR relating to Poland’s investment climate and enhance it via reforms which “shall result in a strengthening of the independence and impartiality of courts and judges established by law in accordance with Article 19 of the TEU and the relevant EU acquis.”<sup>97</sup>

Milestone F1G specifically concerns the strengthening of the independence and impartiality of Polish courts and requires the entry into force – but not necessarily the implementation which is a serious shortcoming – of a reform containing the elements identified in the RPP (see table below). In short, this milestone requires compliance with the infringement judgment of the Court of Justice in Case C-791/19 which found Poland’s new disciplinary regime for judges to be wholly incompatible with EU law.<sup>98</sup>

Milestones F2G and F3G concern “the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court in disciplinary cases and judicial immunity cases”. Here, a distinction is made between the entry into force of legislation setting up a review procedure (milestone F2G) by the second quarter of 2022, and the completion of adjudications launched in accordance with that review procedure (milestone F3G), which is set to be completed in all review cases by the last quarter of 2023, subject to “duly justified exceptional circumstances”.<sup>99</sup>

Milestone F4G, while not exclusively about judicial independence, may also be mentioned as it aims to prevent Polish authorities from continuing with their regular practice of rushing the adoption of new laws undermining the rule of law by requiring the adoption of an amendment

94 Joined Cases T-530/22 to T-533/22, *MEDEL and others v Council* (pending).

95 Cases T-116/23, *MEDEL and Others v Commission* (pending).

96 Disclosure: two of the present authors are providing pro bono legal assistance to the plaintiffs in these cases.

97 European Commission, Annexes to the Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, COM(2022) 268 final, ANNEX, 1 June 2023, p. 200.

98 Judgment of 15 July 2021, EU:C:2021:596.

99 European Commission, Annexes to the Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, COM(2022) 268 final, ANNEX, 1 June 2023, p. 205.

to the rules of procedure of Poland’s Parliament and Council of Ministers by the third quarter of 2022. This milestone implicitly aims to address a key procedural issue *previously* identified by the Commission in its Article 7(1) reasoned proposal of December 2017.

**Table 4:** Poland’s Rule of Law Milestones<sup>100</sup>

<b>Milestone F1G</b>	<p>Entry into force of a reform strengthening the independence and impartiality of courts which shall:</p> <p>a) in all cases relating to the judges, including the disciplinary and waiver of judicial immunity, determine the scope of jurisdiction of the Supreme Court Chamber, other than the existing Disciplinary Chamber, meeting the requirements ensuing from Article 19 paragraph 1 of the TEU. This shall ensure that the above-mentioned cases shall be examined by an independent and impartial court established by law, while the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of ordinary courts shall be circumscribed,</p> <p>b) clarify the scope of disciplinary liability of judges, by ensuring that the right of Polish courts to submit requests for preliminary rulings to the CJEU is not restricted. Such request shall not be grounds to initiate disciplinary proceedings against a judge,</p> <p>c) while the judges may still be held liable for professional misconduct, including obvious and gross violations of the law, determine that the content of judicial decisions is not classified as a disciplinary offence,</p> <p>d) ensure that initiation of the verification, within the court proceedings, whether a judge meets the requirements of being independent, impartial and ‘being established by law’, according to Article 19 of the TEU is possible for a competent court where a serious doubt arises on that point and that such verification is not classified as a disciplinary offence,</p> <p>e) strengthen procedural guarantees and powers of parties in disciplinary proceedings concerning judges, through</p> <p>(i) assuring that the disciplinary cases against judges of the ordinary courts are examined within a reasonable time,</p> <p>(ii) making more precise regulations on territorial jurisdiction of the courts examining the disciplinary cases to ensure that the relevant court can be directly determined in accordance with the legislative act; and</p> <p>(iii) ensuring that the appointment of a defence counsel in disciplinary proceedings concerning a judge is done within a reasonable timeframe, as well as providing time for substantive preparation of the defence counsel to perform their functions in the given proceedings. Simultaneously, the court shall suspend the course of proceedings in case of a duly justified absence of the accused judge or his or her defence counsel.</p>
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<sup>100</sup> European Commission, Annexes to the Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, COM(2022) 268 final, ANNEX, 1 June 2023, F.2 Table, pp. 203-207.

<b>Milestone F2G</b>	<p>Entry into force of a reform to remedy the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court in disciplinary cases and judicial immunity cases, which shall ensure that judges affected by the decisions of the Disciplinary Chamber of the Supreme Court have access to review proceedings of their cases.</p> <p>Such cases already decided by the Disciplinary Chamber shall be reviewed by a court that meets the requirements of Article 19 paragraph 1 of the TEU, in accordance with the rules to be adopted on the basis of Milestone F1G.</p> <p>The legislative act shall set out that the first hearing of the court to adjudicate those cases shall take place within three months from receipt of the motion of the judge asking for a review, and that the cases shall be adjudicated within 12 months from receipt of such motion.</p> <p>The cases which are currently still pending before the Disciplinary Chamber shall be referred for further consideration to the court and in accordance with the rules determined within the above-mentioned proceedings.</p>
<b>Milestone F3G</b>	<p>Reform to remedy the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court in disciplinary cases and judicial immunity cases, with all review cases launched in accordance with Milestone F2G to be adjudicated, unless in duly justified exceptional circumstances.</p>
<b>Milestone F4G</b>	<p>Entry into force of amendments to the Rules of the Procedure of the Sejm, the Senate and the Council of Ministers that shall:</p> <p>(i) introduce the mandatory impact assessment and public consultation for draft laws proposed by deputies and senators, in order to ensure a more structural involvement of stakeholders and experts in law-making;</p> <p>(ii) limit the use of fast-track procedures to well-specified and exceptional cases.</p>

According to four organisations of European Judges, the above rule of law milestones, in particular milestones F2G and F3G, deviate from and are inconsistent with the case-law of the Court of Justice concerning Poland’s infamous Disciplinary Chamber (see Part II of this study for further details).

To put it briefly, they submit that both the Commission and Council have violated EU law by (i) attaching legal effects to the decisions of the Disciplinary Chamber rather than considering them null and void; (ii) imposing additional procedural burdens, uncertainty and delays on judges affected by unlawful decisions of the Disciplinary Chamber by requiring the judges in question to commence a new set of proceedings before a newly constituted chamber in the Supreme Court to clear their name; and (iii) by not even providing for the relevant judges to be at least temporarily reinstated pending the outcome of any review proceedings.<sup>101</sup>

As regards milestone F1G, it is argued that it does not ensure the re-establishment of effective judicial protection in Poland by only making partial compliance with a single infringement judgment of the Court of Justice whereas Polish authorities are engaged in the systemic violation of EU requirements relating to effective judicial protection, *including*

<sup>101</sup> For further analysis from authors directly involved in these actions, see D. Sessa, F. Marques, J. Morijn, “The Action Brought by European Organisations of Judges against the Council of the European Union over the release of EU Recovery and Resilience Funds to Poland” (2023) 45/1 *Giornale di Storia Costituzionale* 103.

*all of the Court's judgments and orders based on Article 19(1) TEU* on account of their alleged unconstitutionality.<sup>102</sup> By disregarding this fundamental and systemic aspect and agreeing a milestone which manifestly cannot suffice to re-establish effective judicial protection in Poland, which is a prerequisite for the functioning of an internal control system, the Commission and the Council have violated EU law, including the RRF Regulation and Article 325 TFEU which both require effective and efficient internal controls, as well as adequate arrangements for the prevention, detection and correction of corruption in Poland.

As of 1 September 2023, EU requirements relating to effective judicial protection are still deemed “unconstitutional” by current Polish authorities and the rule of law milestones (no matter how inadequate they are) have yet to be complied with. The Commission has, however, publicly welcomed a bill which Polish authorities presented as meeting these milestones in December 2022. The Commission did so even though the bill was adopted in January 2023 in *obvious breach* of milestone F4G, in addition to being *manifestly deficient and unconstitutional*. These flagrant defects explain why the European Parliament was once again forced to express its serious misgivings in July 2023 by reiterating inter alia “its call on the Polish authorities to fulfil the milestones and targets linked to the Recovery and Resilience Facility and implement all relevant judgments of the CJEU and the European Court of Human Rights, so that EU funds reach people in Poland”.<sup>103</sup> In addition, Poland’s lawful judges continue to be subject to unlawful measures and practices. Indeed, while Polish authorities have ceased to formally suspend judges for applying EU but also ECHR effective judicial protection requirements, they continue to subject them to never-ending disciplinary proceedings and disguised sanctions such as illegal forced transfers on the basis of legal provisions already held incompatible with EU law by the Court of Justice.

These systemic rule of law violations will be detailed when examining the lack of effective judicial review by independent courts within the meaning of the Conditionality Regulation in Part II of this study. At this stage, it is important to stress that Polish authorities’ continuing widespread violation of EU judicial independence requirements has been recently acknowledged, albeit euphemistically at times, by the Commission in the last edition of its ARoLR published in July 2023.

## **Use of Country-Specific Recommendations in the ARoLR in 2022-23**

July 2022 marked the first time the Commission included country-specific recommendations (CSRs) in its ARoLR country chapters. These recommendations have been modelled on the European Semester CSRs. As regards Poland, the Commission adopted a total of seven recommendations,<sup>104</sup> two of which are of relevance from an Article 7(1) TEU point of view as the Commission had previously highlighted the need to remedy the problems created by

<sup>102</sup> See Part II *infra* for more details.

<sup>103</sup> European Parliament Resolution of 11 July 2023 on the electoral law, the investigative committee and the rule of law in Poland (2023/2747(RSP)), P9\_TA(2023)0268, para. 9.

<sup>104</sup> European Commission recommendation of 13 July 2022 set out in the Country Chapter on the rule of law situation in Poland, SWD(2022) 521 final.

laws on the Public Prosecution Office adopted in 2016 in its Article 7(1) reasoned proposal of December 2017:<sup>105</sup>

- Separate the function of the Minister of Justice from that of the Prosecutor-General and ensure functional independence of the prosecution service from the Government.
- Ensure independent and effective investigations and prosecutions, address the broad scope of immunities for top executives and abstain from introducing impunity clauses in legislation in order to enable a robust track record of high-level corruption cases.

In the same July 2022 ARoLR country chapter for Poland, the Commission recalled the need for Polish authorities:

“to address the serious concerns relating to judicial independence, in particular those set out in the Article 7 TEU procedure [...] as well as the obligation to comply with the rule of law related rulings of the ECJ and the rule of law related infringement procedures referred to in the country chapter, the commitments made under the National Recovery and Resilience Plan relating to certain aspects of the justice system and the checks and balances, and recalling the relevant country-specific recommendations under the European Semester”.<sup>106</sup>

Strictly speaking, these aspects are not listed by the Commission as specific ARoLR recommendations to be addressed by Polish authorities. This approach may seem peculiar, but one may reasonably contend that general obligations under EU law such as the obligation to comply with ECJ rulings should not be transformed into mere recommendations as they are indeed basic legal obligations to be complied with in any situation.

Be that as it may, the Commission was forced to repeat itself in July 2023 regarding the “need to address the remaining serious concerns relating to judicial independence” as well as “the obligation to comply with the rule of law related rulings of the ECJ”.<sup>107</sup> In addition, the Commission had no choice but to acknowledge a total lack of progress in July 2023 as regards the July 2022 ARoLR judicial independence related recommendations with one exception: The Commission noted “some progress on ensuring functional independence of the prosecution service from the Government”. As will be further detailed in Part II, the Commission, however, utterly misinterpreted the changes made in this respect. To put it briefly, the “progress” identified by the Commission instead reflects the current Minister of Justice/Prosecutor General’s strategy to consolidate a power base within the National Prosecutor’s Office ahead of the next elections which could see him losing his double-hatted position.<sup>108</sup>

A similar misunderstanding of the situation may be noted in relation to Poland’s Ombudsperson. While there may have been some *theoretical* “progress on improving the framework in which the Ombudsperson operates”, the current office holder has all but ceased to defend judicial independence in the real world. Instead, the current Ombudsperson has sought to defend

<sup>105</sup> For reasons difficult to comprehend, while correctly noting that several aspects of the laws on the Public Prosecution Office have had “direct negative consequences for the independence of the prosecutorial system from political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland” (para. 170 of the Reasoned Proposal’s explanatory memorandum), the Commission did not include a concrete recommendation to remedy the situation as regards Poland’s (captured) prosecution services.

<sup>106</sup> SWD(2022) 521 final, p. 2.

<sup>107</sup> European Commission, 2023 Rule of Law Report. Country Chapter on the rule of law situation in Poland, SWD(2023) 821 final, 5 July 2023, p. 2.

<sup>108</sup> D. Sitnicka, “Polska nie wykonała prawie żadnych zaleceń KE dotyczących praworządności”, *OKO.press*, 7 July 2023: <https://oko.press/raport-o-praworzadnosci-komisja-2023>.

the current ruling coalition’s “judicial reforms”, including the so-called “extraordinary appeal” procedure and the body masquerading as a court known as the Chamber of Extraordinary Control and Public Affairs, in third party interventions before the European Court of Human Rights which furthermore misrepresent the Court of Justice’s case law.<sup>109</sup> One may recall in this respect that the Commission itself views the “extraordinary appeal” procedure as wholly incompatible with the rule of law and this new Chamber as a body which is not established by law and therefore not a proper court.<sup>110</sup>

**Table 5:** ARoLR Recommendations of 2022 and 2023 in respect of Poland

ARoLR recommendations of 13 July 2022	ARoLR progress assessment of 5 July 2023	ARoLR recommendations of 5 July 2023
1/ Separate the function of the Minister of Justice from that of the Prosecutor-General and ensure functional independence of the prosecution service from the Government.	1/ No progress on separating the function of the Minister of Justice from that of the Prosecutor-General and some progress on ensuring functional independence of the prosecution service from the Government.	1/ Separate the function of the Minister of Justice from that of the Prosecutor-General and continue efforts to ensure functional independence of the prosecution service from the Government.
2/ Strengthen the existing integrity rules by introducing lobbying rules and a standardised online system for asset declarations of public officials and Members of Parliament.	2/ No progress on strengthening the existing integrity rules by introducing lobbying rules and a standardised online system for asset declarations of public officials and Members of Parliament.	2/ Strengthen the existing integrity rules by introducing lobbying rules and a standardised online system for asset declarations of public officials and Members of Parliament.
3/ Ensure independent and effective investigations and prosecutions, address the broad scope of immunities for top executives and abstain from introducing impunity clauses in legislation in order to enable a robust track record of high-level corruption cases.	3/ No progress on ensuring independent and effective investigations and prosecutions, address the broad scope of immunities for top executives and abstain from introducing impunity clauses in legislation in order to enable a robust track record of high-level corruption cases.	3/ Ensure independent and effective investigations and prosecutions, address the broad scope of immunities for top executives and abstain from introducing impunity clauses in legislation in order to enable a robust track record of high-level corruption cases.
4/ Ensure that fair, transparent and non-discriminatory procedures are adhered to for the granting of operating licences to media outlets.	4/ No progress on ensuring that fair, transparent and non-discriminatory procedures are adhered to for the granting of operating licences to media outlets.	4/ Ensure that fair, transparent and non-discriminatory procedures are adhered to for the granting of operating licences to media outlets.

<sup>109</sup> See Written observations of the Commissioner for Human Rights of the Republic of Poland in the ECtHR Case of *Waleśa v. Poland* (app. no 50849/21), 20 February 2023: <https://bip.brpo.gov.pl/pl/content/rpo-walesa-etpc-opinia-przyjacielsadu>.

<sup>110</sup> For further references, see 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.

ARoLR recommendations of 13 July 2022	ARoLR progress assessment of 5 July 2023	ARoLR recommendations of 5 July 2023
5/ Strengthen the rules and mechanisms to enhance the independent governance and editorial independence of public service media taking into account European standards on public service media.	5/ No progress on strengthening the rules and mechanisms to enhance the independent governance and editorial independence of public service media taking into account European standards on public service media.	5/ Strengthen the rules and mechanisms to enhance the independent governance and editorial independence of public service media taking into account European standards on public service media.
6/ Ensure a more systematic follow-up to findings by the Supreme Audit Office and ensure a swift appointment of the College Members of the Supreme Audit Office.	6/ No progress on ensuring a more systematic follow-up to findings by the Supreme Audit Office and ensure a swift appointment of the College Members of the Supreme Audit Office.	6/ Ensure a more systematic follow-up to findings by the Supreme Audit Office and ensure, as a matter of urgency, the appointment of the College Members of the Supreme Audit Office in order to ensure its effective functioning.
7/ Improve the framework in which civil society and the Ombudsperson operate, taking into account European standards on civil society and Ombuds-institutions.	7/ Some progress on improving the framework in which the Ombudsperson operates, taking into account European standards on Ombuds-institutions, and no progress on improving the framework in which civil society operates, taking into account European standards on civil society.	7/ Improve the framework in which civil society operates and continue such efforts regarding the Ombudsperson, taking into account European standards on civil society and Ombuds-institutions.

Notwithstanding the repeated references to, inter alia, (i) the lack of progress on ensuring independent and effective investigations and prosecutions; (ii) impunity clauses which prevent an effective fight against high-level corruption; (iii) the lack of progress on ensuring the effective functioning the Supreme Audit Office and following up with its findings, the Commission has refused to activate the Conditionality Regulation. It has also made a parsimonious use of its infringement powers since the start of Poland’s rule of law crisis at the end of 2015 before more making a much bolder use of the horizontal enabling condition relating to the Charter in 2022.

## 2.2 Response tools

Two main rule of law response tools have been used by the Commission to address Poland’s rule of law crisis. To begin with, the Commission has launched a total of 5 infringement actions to address some but not all of the manifest and systemic violations of EU rule of law requirements committed by Polish authorities since the end of 2015. This gives us less than one infringement action per year on average. In December 2022, the Commission also confirmed that Poland does not comply with the EU Charter of Fundamental Rights as a horizontal enabling condition within the meaning of the Common Provisions Regulation

2021/1060. This has seemingly led the Commission to withhold “about €75 billion in Cohesion Funds”.<sup>111</sup>

## Infringement actions since 2017

Following the Court of Justice’s first momentous albeit indirect answer in February 2018 to the worsening process of rule of law backsliding in a preliminary ruling judgment in a case informally known as *Portuguese Judges*,<sup>112</sup> the Commission got the Court’s message and lodged two infringement actions on 15 March 2018 (Case C-192/18) and 2 October 2018 (Case C-619/19) with the primary aim to defend the independence and irremovability of Polish ordinary and Supreme Court judges. This led to the Commission’s first infringement successes on the basis of the second subparagraph of Article 19(1) TEU (effective judicial protection in the fields covered by EU law) with the Court finding every single aspect of Polish authorities’ “reforms” referred to it in Case C-619/18 and Case C-192/18 incompatible with EU law.

In light of the continuing deterioration of the rule of law situation, and again primarily but not exclusively on the basis of Article 19(1) TEU, the Commission launched three additional infringement actions on 3 April 2019; 29 April 2020; and 22 December 2021 respectively. These actions were subsequently lodged with the Court of Justice albeit at an incomprehensibly leisurely pace for the last two actions:

- Case C-791/19, *Commission v Poland (Disciplinary regime for judges)* was lodged on 25 October 2019.
- Case C-204/21, *Commission v Poland (‘Muzzle Law’)* was lodged on 1 April 2021.
- Case C-448/23, *Commission v Poland (Captured Constitutional Tribunal)* was lodged on 17 July 2023.

Case C-791/19 was decided on the merits on 15 July 2021 with Case C-204/21 decided on the merits on 5 June 2023. The Court found Poland’s new disciplinary regime for judges (C-791/19) and Poland’s ‘Muzzle Law’ (C-204/21) wholly incompatible with EU law and in particular, but not only, the second subparagraph of Article 19(1) TEU. These two infringement judgments continue to this day to be violated by Polish authorities.

In the face of the deliberate and continuing violation of the judgment of 15 July 2021, the Commission did launch another infringement action based on Article 260 TFEU in September 2021.<sup>113</sup> Two years later we are still waiting for the Commission to refer the matter back to the ECJ for financial sanctions on this basis. Instead, the Commission has ostensibly decided to make compliance with this ECJ judgment (but in an inadequate way as previously outlined) one

<sup>111</sup> K.L. Scheppelle and J. Morijn, “What Price Rule of Law” in A. Södersten and E. Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions*, SIEPS, April 2023:1, 29, p. 34.

<sup>112</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

<sup>113</sup> European Commission, “Independence of Polish judges: Commission asks European Court of Justice for financial penalties against Poland on the activity of the Disciplinary Chamber”, Press release, IP/21/4587, 7 September 2021.

of Poland's RRP milestones in June 2022. One may add that multiple preliminary judgments of the ECJ are also openly violated without any formal enforcement consequences to date.<sup>114</sup>

As regards the last and most important infringement action lodged with the ECJ in respect of Poland's rule of law crisis (Case C-448/23), it is important to stress that the action is directly motivated by two decisions issued in July and October 2021 by Poland's (captured) "Constitutional Tribunal". The decisions issued by irregularly composed benches grossly violate "the general principles of autonomy, primacy, effectiveness, uniform application of Union law and the binding effect" of ECJ rulings<sup>115</sup> as well as violate Article 19(1) TEU by giving this Treaty provision "an unduly restrictive interpretation."<sup>116</sup>

In addition, the Commission considers that Polish authorities must also be found in violation of Article 19(1) TEU due to their actions which have resulted in the Constitutional Tribunal no longer meeting the requirements of an independent and impartial tribunal previously established by law. This is due, inter alia, to the multiple irregularities and deficiencies which marred the appointment and selection procedures of a number of "judges", including the person presenting herself as the President of this body. This amounts, according to the Commission, to an additional breach of Article 19(1) TEU as Poland's Constitutional Tribunal is no longer able to provide effective judicial protection in the fields covered by EU law.

As observed by one of the present authors in a previous study (bold in original),

**This is the first time the Commission has launched an infringement action on account of a national court of law resort having stopped being a court due to its irregular composition and the irregular appointment of its president and vice-president.** It is however an action which responds to an unprecedented situation. Indeed, no court of last resort had ever denied the legal effects of the Court of Justice's rulings interpreting a Treaty provision which guarantees the right to effective judicial protection on account of the alleged unconstitutionality of the Court's interpretation. In doing so, Poland's (irregularly composed and presided) Constitutional Tribunal deprived all "individuals before Polish courts from the full guarantees set out in the provision" before doing the same in relation to the full guarantees set out in Article 6(1) ECHR.<sup>117</sup>

One may add that Polish authorities, including the members of the captured "Constitutional Tribunal", continue to deny the binding nature of the ECJ and ECtHR's rule of law related orders and judgments.<sup>118</sup> This denial is usually accompanied, however, by bellicose rhetoric

114 The violation of ECJ rule of law related preliminary ruling judgments has taken several forms with national authorities, including their irregularly appointed/promoted "neo-judges" (i) preventing national referring (lawful) judges to apply them; (ii) refusing to comply with national judgments applying them and (iii), nullifying specific preliminary ruling judgments or (iv) setting them aside as "unconstitutional". See Part II for a full list of all of the ECJ rule of law judgments (infringement and preliminary rulings) currently violated by Polish authorities.

115 European Commission, "The European Commission decides to refer POLAND to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal", Press release, IP/23/842, 15 February 2023.

116 European Commission, "Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal", Press release, IP/21/7070, 22 December 2021.

117 L. Pech, *The European Court of Justice's jurisdiction over national judiciary-related measures*, *European Parliament Study requested by the AFCO Committee*, PE 747.368, April 2023, pp. 38-39.

118 More recently, the Commission's latest infringement referral to the ECJ (pending Case C-448/23) was described as "clearly unlawful" by the person pretending to be President of the Constitutional Tribunal. See "Complaint against Poland to CJEU is "unlawful," says president of Poland's top court", *Notes from Poland*, 3 August 2023: <https://notesfrompoland.com/2023/08/03/complaint-against-poland-to-cjeu-is-unlawful-says-president-of-polands-top-court/>

similar to the aggressive rhetoric which is regularly used against Polish judges in breach of the Commission’s pre-Article 7 and Article 7 recommendations.

In 2023, and for the first time, Polish authorities have moved beyond denouncing the ECJ rule of law rulings to also aggressively denouncing a family law related judgment of the ECJ (Case C-638/22 PPU<sup>119</sup>), a development which follows the systemic violation of judgments issued by courts in other EU Member States and ordering the return of abducted children to the relevant EU Member State. The European Commission has in the meantime sent a letter of formal notice to Poland regarding the non-conformity of Polish law with relevant EU law obligations as regards cross-border disputes relating to parental responsibility and child abduction.<sup>120</sup>

**Table 6:** Recent example of unhinged rhetoric from Polish governmental officials in respect of an ECJ judgment

<b>Polish government’s reactions to the ECJ judgment of 16 February 2023 regarding the return of abducted children to other EU Member States</b>
The ECJ “political judges” are trying to “deprive Poland of the right to protect citizens who have returned to the country because they feel safe here” (Z. Ziobro, Minister of Justice and Poland’s Prosecutor General)
The ECJ’s judgment is an “attack on Polish children” and the ECJ is now “spitting in the face of the parents of children and the children themselves” (M. Wójcik, a minister in the Prime Minister’s chancellery)

In parallel to this more effective – albeit insufficient – use of the traditional infringement procedure, the Court of Justice has adopted a rule of law-enhancing interpretation of Article 279 TFEU which provides that the Court of Justice “may in any cases before it prescribe any necessary interim measures”. Following the Court’s order of 27 July 2017 in the *Białowieża Forest* infringement case<sup>121</sup> which, while not strictly speaking a rule of law case, was explicitly grounded on the need to more effectively defend the rule of law in the face of non-compliance with a previous ECJ order, the Commission finally requested the Court to order, for the very first time, the provisional suspension of the national provisions organising a de facto purge of Poland’s Supreme Court. The Court obliged on 17 December 2018.<sup>122</sup>

A second application for interim measures was subsequently but belatedly submitted on 23 January 2020 in relation to Poland’s Disciplinary Chamber. This was the first time the Commission requested and secured the provisional suspension of provisions governing the functioning of a body considered by national authorities to constitute a judicial body. The Court again obliged on 8 April 2020.<sup>123</sup>

119 *Rzecznik Praw Dziecka and Others (Suspension de la décision de retour)*, EU:C:2023:103.

120 European Commission, “Parental child abduction: Commission launches infringement procedure against POLAND for failure to protect children in cross-border family proceedings”, INF/23/142, 26 January 2023.

121 Case C-441/17 R, EU:C:2017:877.

122 Case C-619/18 R, EU:C:2018:1021.

123 Case C-791/19 R, EU:C:2020:277.

Finally, on 1 April 2021, the Commission, again belatedly, applied for interim measures in relation to Poland's 'Muzzle Law' of 20 December 2019. The Court once again obliged on 14 July 2021.<sup>124</sup> While in the previous two instances, Polish authorities found ways to indirectly disregard the Court's orders which offered the Commission an excuse not to ask for a penalty payment, in the 'Muzzle Law' case, Polish authorities defiantly refused to comply on account of the alleged unconstitutional nature of the Court of Justice's interim powers. This gave the Commission no choice but to request on 7 September 2021, for the first time in relation to judicial independence matters, the imposition of a daily penalty payment. The Court obliged on 27 October 2021<sup>125</sup> and ordered Polish authorities to pay the Commission a periodic penalty payment of €1.000.000 per day until such time as they comply with the obligations arising from the order of 14 July 2021 or it fails to do so, until the date of delivery of the judgment closing the proceedings in Case C-204/21.

Polish authorities have since refused to pay the daily penalty payment – leading the Commission in 2022 to begin deducting the unpaid amounts from EU funding allocated to Poland<sup>126</sup> – and failed to comply with the Court's order of 14 July 2021. Polish authorities pretended to have complied with it in March 2023, but the Court of Justice still found in another order of 21 April 2023 that that the measures put forward by Polish authorities were not sufficient to fully comply with the Court's order of 14 July 2021. The Vice-President did, however, order a reduction of the amount of the periodic penalty payment to €500.000 per day on account of some degree of compliance (wholly cosmetic in our view) such as the abolition of the Disciplinary Chamber.<sup>127</sup> Regrettably, the Vice-President's order of 21 April 2023 ignores findings from Council of Europe bodies, including the ECtHR, in addition to disregarding the fact that the body which replaced the Disciplinary Chamber suffers from the same legal flaws and cannot be considered a court established by law.<sup>128</sup> In any event, Polish authorities did not seek to subsequently address the continuing violations identified by the Vice-President. This meant an accumulated total of close to €570.000.000 in unpaid penalty payment by the time the ECJ issued its judgment on the merits on 5 June 2023 regarding the 'Muzzle Law'.

A recent infringement case may be mentioned although it is not primarily about Polish authorities' continuing systemic violations of EU effective judicial protection requirements but – for the first time – their violations of EU principle of democracy. In brief, Poland's ruling coalition have established an ad hoc committee to allegedly examine Russian influence on Poland's internal security with the clear objective to interfere with the next legislative elections, hence the informal name given to this law which is known as *Lex Tusk* (Donald Tusk being the main opposition leader). For the European Commission, and to focus on rule of law related aspects, this law violates the rights to effective judicial protection and ne bis

<sup>124</sup> Case C-204/21 R, EU:C:2021:593.

<sup>125</sup> Case C-204/21 R, EU:C:2021:878.

<sup>126</sup> Most recently, Polish authorities have decided to challenge the Commission's powers to recover penalties by offsetting by lodging – ironically – annulment actions with the very Court whose rule of law jurisdiction and interim powers they view as "unconstitutional". See Cases T-200/22, T-314/22, T-830/22 and T-156/23 (all pending) and for further analysis, see P. Pohjankoski, "Contesting the Ultimate Leverage to Enforce EU Law: Poland brings annulment actions against the Commission's powers to recover penalties by offsetting", *VerfBlog*, 12 July 2023: <https://verfassungsblog.de/contesting-the-ultimate-leverage-to-enforce-eu-law/>.

<sup>127</sup> Case C-204/21 R-RAP, EU:C:2023:334.

<sup>128</sup> To be detailed in Part II.

in idem.<sup>129</sup> The Venice Commission has since issued an opinion recommending the repeal of this “incredibly dangerous”<sup>130</sup> law, including the draft law as amended. For the Venice Commission, both the original and amended version of *Lex Tusk* fundamentally violates inter alia the principle of legal certainty and could “lead to abuse of powers and arbitrariness, and make any judicial review of the decisions of the State Commission very difficult”<sup>131</sup> and even more dangerously, could “easily become a tool in the hands of the majority to eliminate political opponents”.<sup>132</sup> The Polish President ignored these most serious concerns and signed the amended and manifestly unconstitutional *Lex Tusk* into law on 2 August 2023.

While all of the infringement actions outlined above must be viewed as positive from a rule of law point of view, one may be critical of the Commission for its extremely parsimonious use of its infringement powers with a grand total of five infringement actions lodged with the ECJ since the end of 2015. This means *less than one infringement action per year on average* since the beginning of Poland’s rule of law crisis. To this day, the Commission has for instance failed to directly tackle key bodies used to contaminate Poland’s judiciary from within (the verb “contaminate” was used by Didier Reynders himself in his previously mentioned letter to the President of the Commission in respect the College meeting of 31 May 2022), notwithstanding repeated demands from the European Parliament. One may highlight in particular the failure to bring an infringement action in relation to:

- (i) The unconstitutionally reconstituted National Council of the Judiciary due to its role in repeatedly undermining judicial independence and presiding over flagrantly unlawful judicial appointments and its own lack of independence from executive and legislative authorities.
- (ii) The Chamber of Extraordinary Control and Public Affairs (CECPA) “since its composition suffers from the same flaws”<sup>133</sup> as the Disciplinary Chamber while the CECPAC has been unlawfully granted the sole competence to rule on issues regarding judicial independence.
- (iii) The individuals appointed on the back of gross and systemic irregularities to Poland’s Supreme Court, including the individual currently acting as First President, and Poland’s Supreme Administrative Court and who cannot lawfully adjudicate due to these irregularities.
- (iv) The special unit established in 2016 within the national prosecutor’s office tasked with investigating judges and prosecutors,<sup>134</sup> as well as the special team of disciplinary commissioners<sup>135</sup> set up under Poland’s new disciplinary regime for judges as they both flagrantly violate EU law by inter alia failing to demonstrate any degree of operational and investigative independence as required under EU law.<sup>136</sup>

129 European Commission, “Rule of Law: Commission launches infringement procedure against POLAND for violating EU law with the new law establishing a special committee”, Press release IP/23/3134, 8 June 2023.

130 Venice Commission, Poland. Urgent Opinion on the Law on the State Commission to investigate Russian influence on the internal security of Poland in the period of 2007-2022 and on the draft Law amending that Law CDL-PI(2023)021, 26 July 2023, para. 36.

131 Ibid., para. 35.

132 Ibid., para. 36.

133 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, para. 23.

134 M. Jałoszewski, “The National Public Prosecutor’s Office is prosecuting seven judges for taking decisions which favour an oppressed prosecutor”, *Rule of Law in Poland*, 17 December 2020, <https://ruleoflaw.pl/the-national-public-prosecutors-office-is-prosecuting-seven-judges-for-taking-decisions-which-favour-an-oppressed-prosecutor/>

135 M. Jałoszewski, “Half a million for prosecuting defiant judges. The Law and Justice authority is throwing money at Ziobro’s disciplinary commissioners”, *Rule of Law in Poland*, 16 November 2020, <https://ruleoflaw.pl/half-a-million-for-prosecuting-defiant-judges/>

136 See Opinion of AG Bobek in Joined Cases C-83/19, C-127/19, C-195/19 et al, EU:C:2020:746.

By contrast, as of 1 August 2023, a total of 39 national requests for a preliminary ruling (Article 267 TFEU) raising questions directly related to the potential incompatibility of Polish national measures or actions with the principle of effective judicial protection have been lodged with the Court of Justice by Poland's *lawful* judges,<sup>137</sup> resulting in multiple instances in unlawful reprisals against these judges, including in the form of disciplinary proceedings and sanctions.<sup>138</sup> All of these preliminary ruling cases resulting in interpretations of EU rule of law requirements which make clear that Poland's ruling coalition's "reforms" are not compatible with EU law have also been openly violated without any infringement consequences to date.<sup>139</sup>

The consequences of the EU's failure to stop Poland's rule of law crisis are now being increasingly felt beyond the EU legal framework. In other words, by failing to address some of the key systemic issues mentioned above – first and foremost, the role of the captured and unconstitutionally reconstituted National Council for the Judiciary – the European Court of Human Rights is now faced with a seemingly exponential number of applications being lodged with it. As of 6 July 2023, 397 applications are pending before the ECtHR relating to Poland's rule of law crisis, with more to be expected as these applications mostly relate to changes made to the organisation of Poland's judiciary under laws that mainly entered into force in 2017 and 2018.<sup>140</sup> More than 100 of these applications have been communicated to the Polish government with the ECtHR having decided only about 10% of these applications on the merits (a total of 12 applications in nine judgments to date), with all of the judgments to date finding against Polish authorities.<sup>141</sup> In addition, in yet another unprecedented development, the Court has received a total of 60 requests for interim measures from Polish judges in 29 cases concerning the disciplinary and waiving of judicial immunity cases against them and granted these requests in 17 cases.<sup>142</sup>

In the past year, however, the European Commission has finally but indirectly financially sanctioned Polish authorities. The Commission has done so not via the Conditionality Regulation but via the horizontal enabling condition relating to the Charter.

## Horizontal enabling condition relating to the Charter since 2022

On 1 July 2022, the Commission endorsed a Partnership Agreement with Poland for the period 2021-2027.<sup>143</sup> This Partnership Agreement lays down Poland's Cohesion Policy

137 Data compiled by L. Pech. National requests for a preliminary ruling originating from individuals who are not lawful judges due to the multiple irregularities which characterised their judicial appointments are not included notwithstanding the Court of Justice's failure to consider this aspect in a number of preliminary ruling cases.

138 For detailed data, see L. Pech and J. Jaraczewski, "Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations", *CEU DI Working Paper 2023/02*.

139 See Part II for a full list of all of the ECJ rule of law judgments currently violated by Polish authorities.

140 "Multiple violations in case concerning disciplinary regime for judges in Poland", Press release ECHR 212 (2023), 6 July 2023.

141 As of 1 September 2023, the last judgment on the merits was issued in the case of *Tuleya v. Poland* (applications nos 21181/19 and 51750/20) with the Court finding a violation of Judge Tuleya's right to a fair trial, his right to respect for private life and his right to freedom of expression.

142 "Non-compliance with interim measure in Polish judiciary cases", Press release, ECHR 053 (2023), 16 February 2023.

143 A copy (in Polish) of the Agreement between the European Commission and Poland on funding through European Regional Development Fund (ERDF), the European Social Fund+ (ESF+), the Cohesion Fund, the Just Transition Fund (JTF) and the European Maritime, Fisheries and Aquaculture Fund (EMFAF) is available online: [https://commission.europa.eu/publications/partnership-agreement-poland-2021-2027\\_en](https://commission.europa.eu/publications/partnership-agreement-poland-2021-2027_en)

investment strategy and covers eight national programmes, 16 regional programmes, eight cross-border cooperation programmes and four interregional cooperation programmes. It is worth €76.5bn in total which continues to make Poland the largest beneficiary of EU funds.<sup>144</sup>

As previously explained, under the new Common Provisions Regulation 2021/1060, Member States must comply with a number of horizontal enabling conditions, one of which requires that each Member State puts in place effective mechanisms to guarantee compliance with the EU Charter of Fundamental Rights. While it is for the Member States to first “assess whether the enabling conditions are fulfilled”, should the Commission disagree with this assessment, expenditure related to the parts of the programme concerned will not be reimbursed until the conditions are fulfilled.<sup>145</sup>

In December 2022, for the very first time to the best of our knowledge, the Commission publicly acknowledged that Poland no longer complies with the EU Charter of Fundamental Rights. It is worth stressing that this does not reflect the Commission’s assessment but rather the Polish authorities’ own assessment. As a result, the Commission had no choice but to (seemingly) suspend all EU payments in relation to relevant EU financial programmes.<sup>146</sup>

Under the 2021-2027 Common Provisions Regulation, Member States must fulfil so-called horizontal and thematic enabling conditions in the implementation of Cohesion Policy programmes. One of the enabling conditions requires compliance with the EU Charter of Fundamental Rights. When preparing their programmes, Member States have to assess whether the enabling conditions are fulfilled. *The Polish authorities have indicated in their self-assessment that they do not currently comply with the enabling condition on the Charter.* Therefore, the Commission cannot reimburse expenditure related to the parts of the programme concerned, until the conditions are fulfilled. Member States must ensure that these conditions remain fulfilled during the whole programming period. The Commission is in dialogue with Poland to ensure that the requirements of the enabling conditionality are fully met. (*emphasis added*)

The exact amount of funding which is currently suspended on this basis is difficult to establish in the absence of clear communication and publication of relevant implementing decisions by the Commission. As observed by Professors Scheppele and Morijn, the exact *amount* of suspended Cohesion funding and the *rationale* underlying the Commission’s actions are difficult to gather in the absence of relevant documents being publicly available. They, however, estimate that about €75 billion in Cohesion Funds may have been withheld.<sup>147</sup> As noted by the same authors, it could be that “there may be even more funds withheld under other funding streams that are not visible because the implementing decisions for Poland – although many are listed in the register of Commission documents and dated 8, 12 and 19 December 2022 – have not so far been released.”<sup>148</sup> The Polish government has similarly not been transparent and has instead continued to announce “further competitions under EU cohesion policy programmes for 2021–2027” without making any mention “that the

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144 European Commission, “EU Cohesion Policy: Commission adopts €76.5 billion Partnership Agreement with Poland for 2021-2027”, Press release, IP/22/4223, 30 June 2022.

145 Ibid.

146 European Commission, “EU Cohesion Policy: €3.85 billion for a just transition toward climate neutral economy in five Polish Regions”, Press release, IP/22/7413, 5 December 2022.

147 K.L. Scheppele and J. Morijn, “What Price Rule of Law” in A. Södersten and E. Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions*, SIEPS, April 2023:1, 29, p. 34.

148 Ibid.

disbursement of these funds is currently impossible due to Poland's violation of the rule of law".<sup>149</sup>

According to a press report dated 7 February 2023, the European Commission has confirmed that it cannot agree to the disbursement of EU cohesion funding as "Poland does not meet the criterion concerning the EU Charter of Fundamental Rights" according to a Commission official quoted in this report.<sup>150</sup> The same press report regrets that the European Commission refuses to comment precisely on the matter "and speculates that the suspension of cohesion funding is connected to compliance with recovery rule of law milestones."<sup>151</sup> In other words, should the Commission view the Polish (unconstitutional and insufficient) legislation now pending before the (irregularly composed) Constitutional Tribunal as adequate to meet the milestones, EU cohesion funds may get unblocked.

The lack of transparency from both the Commission and the Polish government as regards access to €76.5bn in EU funding is unacceptable. This is not to say that the Commission is wrong to enforce the enabling condition requiring compliance with the EU Charter but in the absence of relevant details on legal basis and rationale(s), there cannot be any accountability. This could for instance result in this funding suspension being lifted for reasons of political expediency regardless of whether meaningful legal changes have been adopted and implemented as regards compliance with, inter alia, the right to an effective remedy (Article 47(1)) and the right to a fair trial by an independent and impartial tribunal established by law (Article 47(2)).

In this respect, it is worth stressing an unprecedented finding made by the Secretary General of the Council of Europe in a formal report adopted under Article 52 ECHR and published on 9 November 2022.<sup>152</sup> As a result of the "case law" of the captured "Constitutional Tribunal", the right to a fair trial by an independent and impartial tribunal established by law to everyone ought to be considered, in essence, systematically violated according to this report:

As a result of the findings of unconstitutionality in the judgments K 6/21 and K7/21 of the Constitutional Court, the European Court's competence as established in Article 32 of the Convention was challenged and the implementation of Article 6, paragraph 1 of the Convention – as interpreted by the European Court in the cases of *Xero Flor w Polsce sp. z o.o.*, *Broda and Bojara, Reczkowicz, Dolińska-Ficek and Ozimek* and *Advanced Pharma sp. z o.o.* – has so far not been carried out. The ensuing obligation of Poland to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction is not, at this stage, fulfilled.<sup>153</sup>

This means that Article 47(2) of the EU Charter can be similarly considered to be systematically violated by Polish authorities. It is particularly important to stress in this respect the most recent clarification made by the Court of Justice with respect of Article 47 of the Charter and the second subparagraph of Article 19(1) TEU in its 'Muzzle Law' judgment of 5 June 2023:

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149 "EU withholds all funds from Poland, not just National Recovery Plan. The government is silent on that matter", OKO. press article by P. Pacula dated 7 February 2023 whose English translation was made available on Iustitia's website on 8 February 2023: <https://www.iustitia.pl/en/4631-eu-withholds-all-funds-from-poland-not-just-national-recovery-plan-the-government-is-silent-on-that-matter>

150 Ibid.

151 Ibid.

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

153 Ibid., para. 29.

The reorganisation and centralisation of jurisdiction which the Commission disputes by its second complaint concern certain requirements arising from the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, namely provisions of *both a constitutional and procedural nature*, compliance with which must, moreover, be guaranteed *across all the substantive areas* of application of EU law and *before all national courts* seized of cases falling within those areas.<sup>154</sup> (emphasis added)

As the European Commission's recovery rule of milestones do *not* address Poland's systemic violations of the right to a fair trial by an independent and impartial tribunal established by law organised by Poland's (captured) "Constitutional Tribunal", one would therefore expect the Commission to continue withholding EU cohesion funding in addition to making use of the Conditionality Regulation to address this crucial aspect of Poland's worsening rule of law crisis. Yet there has been no attempt to do so – seemingly for primarily geopolitical considerations<sup>155</sup> – apart from a request for information sent in November 2021.

## 2.3 Key rule of law tool yet to be used: The Conditionality Regulation

In its resolution of 5 May 2022 on ongoing hearings under Article 7(1) regarding Poland and Hungary, the European Parliament welcomed the (belated) activation of the Conditionality Regulation in respect of Hungary but regretted the Commission's failure to do so in respect of Poland (emphasis added):

14. Notes with concern that the Commission has not started such proceedings with regard to Poland, and calls for further assessment and action from the Commission under the regulation; regrets, moreover, that the Commission applies *the narrowest interpretation* of the regulation when assessing breaches of the principles of the rule of law in a Member State, by *effectively excluding a serious risk* affecting the financial management of the Union and its financial interests as a condition under which the conditionality mechanism should be activated; reiterates that the regulation clearly establishes that endangering the independence of the judiciary constitutes a breach of the principles of the rule of law<sup>156</sup>

In another resolution adopted shortly after this one, the European Parliament explicitly called for the Conditionality Regulation procedure to be swiftly initiated in respect of Poland:

57. [...] takes note of the fact that on 27 April 2022, the Commission finally started the formal procedure against Hungary under the Rule of Law Conditionality Regulation by sending a written notification; urges the Commission to launch the procedure enshrined in Article 6(1) of that Regulation also at least in the case of Poland<sup>157</sup>

As Part II of this study will show, the current rule of law situation in Poland warrants the immediate activation of the Conditionality Regulation. Prior to making the case for this activation, the content of the Commission's request for information sent to Polish authorities on 17 November 2021 and the key clarifications provided by the Court of Justice in its twin judgments of 16 February 2022 will be summarised below.

154 Case C-204/21, EU:C:2023:442, para. 268.

155 See P. Bárd and D. Kochenov, "War as a pretext to wave the rule of law goodbye?" (2022) 27 *European Law Journal* 39; J. Jaraczewski, "Unexpected Complications: The impact of the Russian invasion of Ukraine on the rule of law crisis in the EU", *VerfBlog*, 23 December 2022: <https://verfassungsblog.de/unexpected-complications-the-impact-of-the-russian-invasion-of-ukraine-on-the-rule-of-law-crisis-in-the-eu/>

156 P9\_TA(2022)0204.

157 European Parliament resolution of 19 May 2022 on the Commission's 2021 Rule of Law Report, P9\_TA(2022)0212.

### 2.3.1 Request for information sent to Polish authorities on 17 November 2021 pursuant to Article 6(4) of the Conditionality Regulation<sup>158</sup>

Article 6(4) of Regulation 2020/2092 provides that “The Commission may request any additional information it requires to carry out the assessment referred to in paragraph 3, both before and after having sent the written notification pursuant to paragraph 1.”

In the case of Poland, the Commission submitted a written request for information on 17 November 2021. Four issues were mentioned in this request and were described as “issues being analysed by the Commission services at this stage”:

- (i) Rulings with regard to the primacy of EU Law.
- (ii) Effectiveness and impartiality of prosecution service.
- (iii) Ineffective investigation, prosecution or sanctioning of rule of law breaches linked to the protection of the financial interests of the European Union.
- (iv) Independence of the judiciary.

When referencing rulings with regard to the primacy of EU Law, the Commission meant the previously mentioned decisions of the captured “Constitutional Tribunal” of July and October 2021 in which this body found multiple provisions of the EU Treaties (allegedly) unconstitutional. For the Commission, these two decisions:

could give rise to breaches of the principles of the rule of law within the meaning of Article 2(a) of Regulation 2020/2092, insofar as the correct application of Union law in Poland is concerned, and thereby *put at risk* the application of Union primary law and secondary legislation *relevant to the protection of the financial interests of the European Union*<sup>159</sup> (emphasis added)

As previously indicated, the Commission has since lodged an infringement action with the Court of Justice in which it, *inter alia*, submitted that the captured Constitutional Tribunal can no longer be considered a proper court and that the two “decisions” of July and October 2021 manifestly violate the principles of autonomy, primacy, effectiveness, uniform application of EU law as well as the right to effective judicial protection and the binding effect of ECJ rulings. However, the Commission did not include in this infringement action a violation of Article 325 TFEU which the Commission mentioned in its request of 17 November 2021 and described as requiring “an effective protection of the Union financial interests with deterrent effect, which should be equivalent to the protection granted to the national financial interest”.

As regards the second issue (effectiveness and impartiality of prosecution service), the Commission recalled the “concerns” it had previously expressed on this issue in its Article 7(1) TEU reasoned proposal and in its 2021 ARoLR chapter on Poland. In addition, references were made to relevant resolutions of the European Parliament and an opinion of the Venice Commission of 8-9 December 2017 on the Act on the Public Prosecutor’s office. The Commission concluded by emphasising that the issues it has identified:

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<sup>158</sup> This document is not publicly available notwithstanding the obvious overriding public interest which ought to have led to the disclosure of this letter but it was in any event disclosed to one of the present authors.

<sup>159</sup> Request for information sent to Polish authorities on 17 November 2021 pursuant to Article 6(4) of the Conditionality Regulation, p. 3.

could affect the effectiveness and impartiality of the prosecution service that may be directly responsible for indictments for irregularities in cases related to the management of the Union funds. This would create *a risk* as to the protection of the financial interests of the European Union because of potential recurrent wrongdoing and the absence of any deterrent effect of criminal sanctions<sup>160</sup> (emphasis added)

As regards the third issue (ineffective investigation, prosecution or sanctioning of rule of law breaches), the Commission referred to the concerns it expressed in its 2021 ARoLR report regarding the fight against high-level corruption; OLAF declining figures regarding the indictment rate of judicial recommendations sent to Polish authorities; and Poland's decision not to participate in the EPPO. The Commission then concluded that based on the information available to it, the issues identified under this heading:

could affect the way irregularities in the implementation of Union funds are addressed (...) [and] could affect the effectiveness and impartiality of the prosecution service that may be directly responsible for indictments for irregularities in cases related to the management of the Union funds, creating *a risk* to the protection of the financial interests of the European Union<sup>161</sup> (emphasis added)

As regards the fourth and final area identified by the Commission (independence of the judiciary), the Commission specifically highlighted its multiple concerns in relation to (a) the lack of independence of the (unconstitutionally reconstituted) National Council of the Judiciary; (b) the lack of independence of the Disciplinary Chamber; (c) the 'Muzzle Law' which prevents Polish judges from assessing compliance with EU law requirements in judicial independence. Repeating the formula previously used, the Commission indicated that based on the information available to it, these issues:

could affect the effectiveness and impartiality of the judicial proceedings on cases related to the irregularities in the management of the Union funds, creating *a risk* to the protection of the financial interests of the European Union.<sup>162</sup> (emphasis added)

The Commission again concluded its preliminary assessment by asking Polish authorities to answer a number of questions. For instance, the Commission asked them to "explain how it is ensured that Polish judges are able to deal with cases relevant to the implementation of the Union budget, in full independence and impartiality".<sup>163</sup>

Polish authorities were given two months to reply. However, and similarly to the Commission's request for information sent on 17 November 2021 pursuant to Article 6(4) of the Conditionality Regulation, their reply is not publicly available. Since then, the Commission has in any event refused to go further and issue a written notification pursuant to Article 6(1). In other words, the Commission has refused to activate the Conditionality Regulation in respect of Poland notwithstanding the continuing deterioration of the rule of law situation across the board.

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160 Ibid., p. 5.

161 Ibid., p. 6.

162 Ibid., p. 8.

163 Ibid.

### 2.3.2 Commission's refusal to issue a written notification pursuant to Article 6(1) of Regulation 2020/2092

To the best of our knowledge, the Commission has neither publicly nor comprehensively motivated its refusal to initiate the procedure set out in Article 6 of the Conditionality Regulation following the expiry of the above-mentioned deadline. The European Parliament did, however, indirectly clarify why the Commission is yet to activate the Conditionality Regulation when it regretted the Commission's adoption of "the narrowest interpretation of the regulation when assessing breaches of the principles of the rule of law in a Member State, by *effectively excluding a serious risk* (our emphasis) affecting the financial management of the Union and its financial interests as a condition under which the conditionality mechanism should be activated".<sup>164</sup>

To assess the extent to which (if any) the Commission may have adopted an excessively narrow interpretation of the activation test provided for in Article 4 of the Conditionality Regulation ("Conditions for the adoption of measures"), one must refer to what the Court of Justice held in its twin rulings of 16 February 2022.<sup>165</sup>

In its final adopted version, Article 4 did provide for a reduction in the scope of application of the Conditionality Regulation through the added requirement of a *sufficiently direct link* between the EU budget/financial interests and the breach(es) of the principle(s) of the rule of law compared to the original version of the Regulation put forward by the Commission. As detailed in the table below, when it comes to the notion of a "sufficiently direct way", the Court of Justice has furthermore interpreted it as requiring a genuine/real link<sup>166</sup> between breaches of the rule of law and an effect *or* serious risk of an effect on the sound financial management of the EU budget or the protection of the EU's financial interests.

However, and this is a key aspect, the Court did "not go into further detail *when* such a link is genuine".<sup>167</sup> In other words, the Court did *not* provide any details regarding how one may legally understand the notion of genuine/real link (in the French version of the judgments, the sole expression of *lien réel* is used) for the purpose of applying the Conditionality Regulation.

<sup>164</sup> Resolution of 5 May 2022 on ongoing hearings under Article 7(1) regarding Poland and Hungary P9\_TA(2022)0204, para. 14.

<sup>165</sup> Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v Parliament and Council*, EU:C:2022:98.

<sup>166</sup> By contrast, Advocate General Campos Sánchez-Bordona used the expression of "closely related". See his Opinion of 2 December 2021 in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974, para. 167: "The *sufficiently direct* link ensures that the conditionality mechanism will not apply to all serious breaches of the rule of law, but will be limited to serious breaches that are closely related to implementation of the budget. The Commission must prove this link before proposing remedial measures, and such a link is not automatically assumed proven, however serious the breach of the principles of the rule of law".

<sup>167</sup> E. Rubio et al, *The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context*, Study requested by the BUDG committee, PE 747.469, April 2023, p. 62.

**Table 7:** The Court of Justice’s interpretation of the notion of sufficiently direct link

Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget	Case C156/21, Hungary v Parliament and Council, EU:C:2022:97	Case C-157/21, Poland v Parliament and Council, EU:C:2022:98
<p>Article 4 (‘Conditions for the adoption of measures’) provides as follows:</p> <p>1. Appropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union <b>in a sufficiently direct way</b>.</p>	<p>147 Article 4 of the contested regulation limits, in paragraph 2, the scope of the conditionality mechanism established by that regulation to situations and conduct of authorities that are related to the implementation of the Union budget and requires, in paragraph 1, that the adoption of appropriate measures be subject to the existence of breaches of the principles of the rule of law which affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union <b>in a sufficiently direct way</b>. The latter condition thus requires that a <b>genuine link</b> be established between those breaches and such an effect or serious risk of an effect.</p>	<p>165 Article 4 of the contested regulation limits, in paragraph 2, the scope of the conditionality mechanism established by that regulation to situations and conduct of authorities that are related to the implementation of the Union budget and requires, in paragraph 1, that the adoption of appropriate measures be subject to the existence of breaches of the principles of the rule of law which affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union <b>in a sufficiently direct way</b>. The latter condition thus requires that a <b>genuine link</b> be established between those breaches and such an effect or serious risk of an effect.</p>
	<p>176 Moreover, the only substantive condition required for the adoption of measures under Article 7 TEU lies in the European Council’s determining the existence of a serious and persistent breach by a Member State of the values contained in Article 2 TEU. By contrast, as noted in paragraph 147 above, under Article 4(1) and (2) of the contested regulation, measures under that regulation may be taken only where two conditions are satisfied. First, it must be established that a breach of the principles of the rule of law in a Member State concerns one or more of the situations or forms of conduct of authorities referred to in paragraph 2, in so far as it is relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union. Secondly, it must also be demonstrated that those breaches affect or seriously risk affecting that sound financial management or those financial interests in a sufficiently direct way; that condition thus requires that a <b>genuine link</b> be established between those breaches and such an effect or serious risk of an effect.</p>	<p>179 Consequently, Article 4(1) and (2) of the contested regulation requires that a <b>sufficiently direct link be systematically established</b> between such a breach and an effect or serious risk of an effect on that sound management or those financial interests, and that link must, as has been noted in paragraph 165 above, be <b>genuine</b>. [...]</p> <p>180 Therefore [...] the Republic of Poland, supported by Hungary, is wrong to argue that such a link could be determined automatically.</p> <p>288 In the second place [...] it follows from a combined reading of Article 4 and Article 6(1) of the contested regulation that [...] the Commission may initiate that procedure only where it finds that there are reasonable grounds for considering that at least one of the principles of the rule of law referred to in Article 2(a) of that regulation has been breached in a Member State, that that breach concerns at least one of the situations attributable to an authority of a Member State or at least one instance of conduct of such authorities referred to in Article 4(2) of that regulation, in so far as those situations or that conduct is relevant to the sound financial management of the</p>

Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget	Case C156/21, Hungary v Parliament and Council, EU:C:2022:97	Case C-157/21, Poland v Parliament and Council, EU:C:2022:98
		Union budget or for the protection of the Union's financial interests, and that that breach affects or risks seriously affecting that sound management or those financial interests, <b>in a sufficiently direct way, by a real link</b> between those breaches and that effect or serious risk of effect.

To solely focus on the notion of “serious risks”, the Commission summarised Article 4(1) of the Conditionality Regulation post the Court’s twin judgments as follows:<sup>168</sup>

- (i) A serious risk may be established in cases where the effects of the relevant breach of the principles of the rule of law, although not yet proven, can nevertheless be reasonably foreseen, since there is a high probability that they will occur.
- (ii) It is not sufficient to demonstrate that a breach of the principles of the rule of law seriously risks affecting the sound financial management of the EU budget or the protection of the EU financial interests to trigger the Conditionality Regulation.
- (iii) The Commission must instead demonstrate on a case-by-case basis a sufficiently direct relation between the breach(es) and serious risk(s) of affecting the sound financial management of the EU budget or the protection of the EU financial interests which must be understood as requiring the demonstration of a ‘genuine’ or ‘real’ link between the breach(es) and the serious risk(s). This means that the procedure of the Regulation should not be triggered with regard to situations in which the connection is merely hypothetical, too uncertain or too vague.

In light of the above, it cannot be said that the Commission’s guidelines do not accurately reflect the Court of Justice’s twin rulings of 16 February 2022. The key problem rather is the Commission’s subsequent *political* rewriting of the Conditionality Regulation as not being applicable to situations where breaches of the rule of law occur at the macro level of national courts, national investigation and public prosecutions services or even national public audit bodies. It would appear that for the time being, the dominant view within the Commission is that no matter how manifest, systemic and recurrent the breaches of the rule of law are in Poland, they would seemingly never be capable of seriously risking to affect the sound financial management of the EU budget/the protection of the EU’s financial interests in a sufficiently directly way. One may furthermore mention in passing that as regards the multiple individual breaches of the rule of law listed in relation to Poland, including in cases directly connected to EU funds, it is as if the Commission actively ignores them.<sup>169</sup>

The Commission’s approach was rightly criticised by the Parliament as it amounts to “the narrowest interpretation” of the Conditionality Regulation and one which effectively excludes

<sup>168</sup> 2022 Commission’s Conditionality Regulation Guidelines, paras. 31-33.

<sup>169</sup> See Part II *infra* for a plethora of examples primarily relation to Poland’s Supreme Audit Office and Poland’s prosecution services.

“a serious risk affecting the financial management of the Union and its financial interests as a condition under which the conditionality mechanism should be activated”.<sup>170</sup>

The Commission’s refusal to activate the Conditionality Regulation is misguided. As outlined in a recent expert study commissioned by the Parliament, notwithstanding the clarifications provided by the Commission in its guidelines, “there are still several possible interpretations of what makes a link sufficiently direct, or certain, to allow the application of the Conditionality Regulation.”<sup>171</sup> One may distinguish in this respect between three main situations:

(i) “the breach of rule of law results from actions or omissions by public authorities in charge of managing and controlling the use of EU funds”;

(ii) “the infringement comes from the adoption of a national law or a nationwide administrative decision which is of relevance for the implementation of EU funds” and;

(iii) “the breach stems from actions or omissions of public authorities not directly involved in the use of EU funds or not directly determining how these funds will be used but playing a role in the protection of the EU’s financial interests. This is the case of national public prosecution services, judicial authorities or administrative authorities in charge of investigating and sanctioning fraud.”<sup>172</sup>

The third situation is the one which corresponds the most (but not exclusively) to the situation currently existing in Poland. To quote from the same study, in this situation:

“one may imagine different possible interpretations of the notion of ‘sufficiently direct link’. If we take the case of the judiciary, for instance, under a more restrictive interpretation the mere lack of an independent judiciary would not suffice to establish a sufficiently direct link. Rather, to establish such a link, evidence would be needed to prove that a judge in charge, for instance, of reviewing decisions taken by national authorities implementing EU funds has been subjected to disciplinary proceedings or relocated without their consent, thereby barring them from working on the cases concerned. Under a broader interpretation, one could argue that a situation in which there is strong evidence of total absence of independence in the judiciary – i.e. lack of proper legal and institutional safeguards, evidence of repeated political interference in judiciary decisions or decisions concerning the appointment or reassignment of judges – there is a clear and serious risk of lack of effective judicial review over the actions of public authorities in charge of managing and controlling the use of EU funds. One may argue that this *wider interpretation of the ‘sufficiently direct link’ is in line with the preventive nature of the Regulation, which does not require hard proof of an effect of rule of law breaches on the EU budget but proof of a high probability of a risk occurring.*” (emphasis added)

We agree. In fact, in the case of Poland, the demonstration of a genuine/real link between the (systemic<sup>173</sup>) breaches of the rule of law (deliberately<sup>174</sup>) committed by Polish authorities and the serious risks of affecting the EU budget/financial interests has been made easier following the “unconstitutionalisation” in 2021 of the EU requirements relating to effective judicial protection, whereas the requirements that arise from the provisions of the second

170 Resolution of 5 May 2022, op. cit., para. 14.

171 Rubio et al, op. cit., p. 62.

172 Ibid.

173 This is not to say that the Conditionality Regulation only covers systemic breaches. As rightly noted in the 2022 Commission’s Conditionality Regulation Guidelines at para. 13, the “Conditionality Regulation covers both individual and systemic breaches, which are covered in so far as they are relevant for the sound financial management of the Union budget or for the protection of the Union’s financial interests.” Due to their nature, gravity and scope, the systemic nature of the breaches will, however, matter when it comes to deciding the measures to be adopted to remedy them. See Article 5(3) of the Conditionality Regulation: “[...] The nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account [...]”

174 This also not to say that the Conditionality Regulation requires a demonstration of a Member State’s intention to breach the rule of law. See Rubio et al, op. cit., p. 30 (bold in original): “As in the Court’s ruling, the Guidelines do not explicitly require intentionality in infringing the principles. Hence, one may deduce that this **intentionality is not required.**”

subparagraph of Article 19(1) TEU and Article 47 of the Charter must “be guaranteed across all the substantive areas of application of EU law and before all national courts seized of cases falling within those areas”.<sup>175</sup> This means that Polish authorities have engineered a legal framework – in clear breach of Poland’s Constitution – which *formally* prevents effective judicial review by independent courts of the actions or omissions of the authorities listed in the Conditionality Regulation such as Poland’s investigation and public prosecution services.

In addition, there is not even a need to adopt a wide interpretation of the “sufficiently direct link” requirement in relation to the multiple, sustained and manifest breaches of the rule of law one may identify in Poland in relation to:

- The proper functioning of authorities carrying financial control, monitoring and audit in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union (Article 4(2)(b));
- The proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union (Article 4(2)(c); and
- The overall legal framework regarding the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities (Article 4(2)(e)).

In this respect, there is an overwhelming body of evidence (including dozens and dozens of domestic and European rulings) demonstrating how Poland’s ruling coalition’s repeated actions in these areas since the end of 2015 have resulted in breaches of the rule of law creating *at the very least* the *most serious risks* as regards the sound financial management of the EU budget and the protection of the EU’s financial interests. In fact, one could even argue that as regards the functioning of authorities carrying financial control, monitoring and audit, we are facing a situation where Polish authorities already have a well-established track record of repeatedly breaching the rule of law in a manner which directly affects rather than risks affecting the EU budget and EU’s financial interests in a sufficiently direct way.

As Part II of this study will demonstrate, the most serious breaches of the rule of law have been committed by Polish authorities over a long time and a genuine link can be established between those breaches and at the very least, the serious risk of an effect on the EU budget and EU’s financial interests. Not activating the Conditionality Regulation in such a situation creates a serious risk of another nature, that is, transforming the Conditionality Regulation into a “toxic” rule of law tool, to be used only as a last resort and a very high threshold of application and considerable political costs attached”.<sup>176</sup> This transformation would in effect allow the Council, with the Commission’s complicity, to de facto reverse all of the amendments

<sup>175</sup> Case C-204/21, para. 268.

<sup>176</sup> Rubio et al, op. cit., p. 11.

successfully defended by the Parliament in the course of the contentious legislative process which led to the adoption of Regulation 2020/2092. Be that as it may, the case for activating the Conditionality Regulation in respect of Poland will now be made.

## II. BREACHES OF THE RULE OF LAW FALLING WITHIN THE SCOPE OF THE CONDITIONALITY REGULATION

Each of the three situations provided for by Article 3 of the Conditionality Regulation as examples of situations indicative of breaches of the rule of law may be said to characterise the current rule of law situation in Poland where national authorities have a well-established track record of (a) endangering the independence of the judiciary; (b) failing to prevent, correct or sanction arbitrary or unlawful decisions; and (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments (in the case of Poland, both domestic and European judgments), or limiting the effective investigation, prosecution or sanctioning of breaches of law, in particular when they are committed by governmental officials, members of the ruling coalition, or individuals and organisations connected with the ruling coalition.

As will be detailed below, the breaches of the principles of the rule of law as defined in the Conditionality Regulation (in particular, the principles of legality, legal certainty, prohibition of arbitrariness, effective judicial protection and separation of powers) and committed by Polish authorities over a long period of time concern *at the very least* five situations outlined in Article 4(2) of the Conditionality Regulation. In other words, current Polish authorities are responsible for rule of law breaches which have seriously undermined:

- the proper functioning of the authorities carrying out financial control, monitoring and audit;
- the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or the protection of the financial interests of the Union;
- the effective judicial review by independent courts of actions or omissions by the authorities mentioned above;
- the effective and timely cooperation with OLAF and with EPPO (notwithstanding Poland's decision not to join the EPPO) in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation.

By capturing the prosecution services and the courts via repeated laws and executive actions in violation of Poland's Constitution, EU law or the ECHR while making EU and ECHR effective judicial protection requirements "unconstitutional" via the captured "Constitutional Tribunal", one may in addition submit that Polish authorities have furthermore undermined:

- the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities.

When it comes to making the case of activating the Conditionality Regulation, it is, however, sufficient to highlight how current Polish authorities' breaches of the rule of law have resulted in the systemic undermining of the proper functioning of three crucial institutions from the

point of view of the sound financial management of the EU and the protection of the EU's financial interests in Poland: (i) the Supreme Audit Office (SAO); (ii) prosecution services and (iii) the judiciary. These three institutions significantly impact both the sound financial management of the EU budget and the protection of the financial interests of the EU. This is because each of them is responsible for a different stage of safeguarding the EU budget and its financial interests:

- The SAO examines and reports on actual or potential breaches of financial discipline, which may involve EU funds or the effective collection of Poland's contribution to the EU budget;
- The prosecution services are expected to investigate impartially and effectively potential irregularities and wrongdoings, for instance, in cases relating to the management of EU funds or cases of corruption, fraud and conflict of interest in relation to the implementation of EU funds, and must determine whether these irregularities and wrongdoings ought to be subject to criminal prosecution without undue interference and pressure from, inter alia, the country's executive;
- The courts deal with criminal, civil, or tax cases, and only lawfully established and independent courts can provide effective judicial review in cases relating, inter alia, to financial management of the EU budget or the protection of the EU's financial interests of the EU, and, where relevant, impose effective and dissuasive penalties.

Before summarising how Polish authorities have systematically undermined the proper functioning of the SAO, the prosecution services and the judiciary in a manner that satisfies the conditions governing the activation of the Conditionality Regulation, one may helpfully recall that this secondary law instrument must be interpreted in the light of EU's primary law, i.e., the Treaties.

To begin with, the principle of sincere cooperation (Article 4(3) TEU) requires Member States to ensure that EU law is applicable in its entirety and to refrain from any measure that could jeopardise the attainment of the Union's objectives. According to the Court of Justice, this also entails the obligation to impose appropriate sanctions and effective prosecution of violations of EU law.<sup>177</sup> The effective application of EU law in Member States is furthermore inseparably linked to the principle of the rule of law.<sup>178</sup>

The protection of the EU's financial interests also amounts to a specific Treaty objective.<sup>179</sup> This objective is currently expressed in Article 325(1) TFEU, which requires Member States to counter fraud and any other illegal activities affecting the EU's financial interests. This obligation, stemming from the previously mentioned principle of sincere cooperation, should be carried out using deterrent measures and afford effective protection. As the Court has established, this requirement necessarily entails the adoption of deterrent and effective measures to protect the EU's financial interests.<sup>180</sup> In its case-law, the Court has also

<sup>177</sup> Judgment of the Court of 21 April 1989, *Commission v Greece*, 68/88, EU:C:1989:339, paras 23–25.

<sup>178</sup> Order of the Court of 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877, para. 102.

<sup>179</sup> Judgment of the Court of 18 November 1999, *Commission v Council*, C-209/97, EU:C:1999:559, para. 29.

<sup>180</sup> Judgment of the Court of 5 June 2018, *Kolev and Others*, C-612/15, EU:2018:392, para. 64.

confirmed that illegal activities affecting the EU's financial interests encompass, without distinction, all types of prohibited acts,<sup>181</sup> such as corruption,<sup>182</sup> tax and customs offenses, including those committed within organised crime,<sup>183</sup> fraud,<sup>184</sup> violations of accounting or reporting rules,<sup>185</sup> making false statements or declarations,<sup>186</sup> or abuse of power or neglect of duty by public officials.<sup>187</sup>

Article 325(1) TFEU thus imposes an obligation to combat any actions that may affect the EU's financial resources. The rationale behind this approach is that the risk of affecting the financial interests of the Union can occur at any level (both within EU institutions and within Member States at central or local levels), and it can involve multiple entities.<sup>188</sup> It is also irrelevant whether actual damage or any other negative consequences have occurred as the aforementioned requirement covers any threat to the financial interests of the Union.<sup>189</sup> Furthermore, it is impossible to establish in advance a fixed list of actions that violate these interests, as the nature of financial abuses can change over time.<sup>190</sup>

It follows that the obligation to ensure the sound financial management of the EU budget and the protection of the EU's financial interests covers any domestic measures concerning national provisions and practical functioning of state bodies. These measures include criminal offences and penalties, procedural provisions, the financial audit system, the framework of prosecution services and the judiciary, and the status of individuals appointed to managerial positions in these entities, as well as individual auditors, prosecutors, and judges.

This broad approach is also reflected in Article 4(2) of the Conditionality Regulation, which covers, *inter alia*:

- The proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union (c).
- The prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities (e).

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181 Judgment of the Court of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295, para. 45.

182 Judgment of the Court of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para. 185.

183 Judgments of the Court: of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 25; of 7 August 2018, *Clergeau and Others*, C-115/17, EU:C: 2018:651, paras 29–30; and of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, para. 42.

184 Judgment of the Court of 1 October 2020, *Úrad špeciálnej prokuratúry*, C-603/19, EU:C:2020:774, para. 59.

185 Judgment of the Court of 8 March 2022, *Commission v United Kingdom (Action to counter undervaluation fraud)*, C-213/19, EU:C:2022:167, para. 331.

186 Judgment of the Court of 14 October 2021, *Ministerul Lucrărilor Publice, Dezvoltării și Administrației*, C-360/20, EU:C:2021:856, para. 29.

187 Judgment of the Court of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para. 185.

188 Judgment of the Court of 10 July 2003, *Commission v ECB*, C-11/00, EU:C:2003:395, para 104.

189 See *Commission v Denmark*, C-19/05, EU:C:2007:606, para. 35 and *Oikonomopoulos v Commission*, T-483/13, EU:T:2016:421, para. 45.

190 Judgment of the Court of 8 March 2022, *Commission v United Kingdom (Action to counter undervaluation fraud)*, C-213/19, EU:C:2022:167, para. 220.

- The effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation (g).

It is, therefore, important to examine the three mentioned sets of institutions of Poland not only from a “law-in-books” point of view but also from a “law-in-action” angle, that is, by taking into account the practical (mal)functioning of the SAO, the prosecution services and the judiciary.

As will be outlined in the rest of this study, Current Polish authorities’ actions and omissions amount to repeated breaches of the principles of the rule of law which fall within the different categories provided for in the Conditionality Regulation. At a minimum, these actions and omissions seriously risk affecting the sound financial management of the EU budget or the protection of the EU’s financial interests in a sufficiently direct way.

## Supreme Audit Office

As regards the SAO, its proper functioning has been recurrently undermined via Polish authorities’ actions or inactions taking the following form:

- Adoption of measures weakening the independence of the SAO.
- Proceedings and smear campaign against the SAO President.
- Criminal investigations against SAO auditors.
- Failure to ensure a swift appointment of the Members of the SAO College.
- Failure to ensure the appointment of the Director General of the SAO.
- Failure to increase the SAO’s budget.
- Failure to follow up on the SAO’s criminal notifications, including the systemic refusal of the prosecution services to initiate criminal proceedings following SAO’s criminal notifications.
- Failure to intervene when the SAO’s attempts to carry out audits in state-owned companies are being obstructed.
- Failure to effectively respond to breaches of financial discipline, including EU funds, established as a result of the SAO’s audits.
- Failure to address the lack of sincere cooperation by audited bodies relying on public funds, including companies with shares owned by the State Treasury and foundations established by these companies.

These practices are indicative of multiple breaches of the rule of law as indicated by Article 3(b) of the Conditionality Regulation (withholding financial and human resources affecting

the proper functioning of the SAO and failing to ensure the absence of conflicts of interest as regards audited institutions) and 3(c) (limiting the effective investigation, prosecution and sanctioning of breaches of law). These breaches of the rule of law undermine the proper functioning of the SAO as well as the effective and transparent financial management and accountability systems. These breaches, which can be attributed directly to state bodies or individuals occupying managerial positions in these institutions, manifestly and at a minimum “seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way” considering the SAO’s central control over the spending of EU funds in Poland.

## Prosecution services

As regards the prosecution services, current Polish authorities have committed repeated breaches of the principle of the rule of law starting with the adoption in 2016 of the Act on the Public Prosecutor’s office which the Venice Commission described as “unacceptable in a State governed by the rule of law as it could open the door to arbitrariness”.<sup>191</sup> Since then, the proper functioning of the prosecution services has been systemically undermined via Polish authorities’ actions and inactions taking the following forms:

- Disguised harassment and sanctions of prosecutors via forced secondment and transfers to lower-level units in violation of the case law of both the ECJ and ECtHR, in particular regarding prosecutors who seek to comply and enforce domestic and European rule of law standards.
- Dismissals of multiple prosecutors from their managerial functions and the chilling effect created by the possibility to do so at will without any constraint, including towards prosecutors handling cases relating to the management of EU funds.
- Instructions binding on all prosecutors ordering them to consider as non-binding the rule of law related judgments of the ECJ and of the ECtHR in all situations, including cases relating to the sound financial management of EU budget or the protection of the EU’s financial interests.
- Failure to follow up on the SAO’s requests while subjecting the SAO auditors to arbitrary criminal investigations.
- Failure to effectively investigate high-level corruption or potential misuse of EU funds by public authorities, including the Minister of Justice himself, as well as individuals and organisations associated or close to the ruling coalition while criminal proceedings are launched against individuals and organisations associated with the opposition.
- Failure to effectively cooperate with the EPPO – a legal obligation which also applies to non-participating Member States – in a context where in the absence of Poland’s participation in the EPPO, the national prosecution services remain the only services

<sup>191</sup> Venice Commission Opinion of 8-9 December 2017 on the Act on the Public Prosecutor’s office, as amended, CDL-AD(2017)028, para. 97.

with the power to conduct criminal investigations into crimes affecting the EU's financial interests.

The above actions or omissions have not therefore merely undermined in a systemic way the effectiveness and impartiality of Poland's investigation and public prosecution services within the meaning of Article 4(2)(c) of the Conditionality Regulation; they have also undermined "the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union" (Article 4(2)(e) of the Conditionality Regulation) and prevented "effective and timely cooperation" with both OLAF and the EPPO (Article 4(2)(g) of the Conditionality Regulation).

In the absence of any meaningful protection afforded to Polish public prosecutors, including those in charge of investigating potential irregularities and wrongdoings regarding the EU's financial interests, against undue interference from the Minister of Justice, who is also simultaneously Poland's Prosecutor General and leader of a political party, the above breaches of the rule of law must be viewed *at a minimum* as creating *serious risks* as regards the sound financial management of the EU budget or the protection of the EU's financial interests in a sufficiently direct way.

## Judiciary

As regards Poland's judiciary, one may first recall that according to the Conditionality Regulation, "endangering the independence of the judiciary" may be indicative of breaches of the principles of the rule of law. The Conditionality Regulation also explicitly mentions "limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law" as another situation indicative of breaches of the rule of law.

These two situations may interconnect in practice and indeed characterise the situation in Poland. However, the systemic violation of EU principles of the rule of law leading to the absence of effective judicial review by independent courts does not, in and of itself, suffice to justify the activation of the Conditionality Regulation. As provided for by Article 4.2(d), breaches of the principles of the rule of law which concern "the effective judicial review by independent courts" must relate to the "actions or omissions" by (a) national authorities implementing the EU budget; (b) national authorities carrying out financial control, monitoring and audit; and (c) investigation and public prosecution services in relation to national breaches of EU law relating to the implementation of the EU budget or to the protection of the EU's financial interests.

The situation in Poland satisfies this requirement as judicial independence has been repeatedly violated across the board, meaning that all national courts have been affected, including those with jurisdiction over actions and omissions by the national authorities mentioned in Article 4(2) of the Conditionality Regulation.

When it comes to Polish authorities' repeated and multi-faceted rule of law breaches relating to the judiciary, which have led to a situation where effective judicial review by independent courts of the actions/ omissions of the authorities mentioned in the Conditionality Regulation and beyond can no longer be guaranteed, one may mention the following key aspects:

- The capture of Poland's Constitutional Tribunal, which has resulted, inter alia, in a situation where all Polish judges, including those dealing with cases relating to the sound financial management of the EU budget or the protection of the EU's financial interests, are formally prohibited from assessing compliance with EU effective judicial requirements following two decisions of the captured Constitutional Tribunal which found several provisions of the EU Treaties incompatible with Poland's Constitution, including the second subparagraph Article 19(1) TEU which requires a system of effective and independent courts and remedies.
- The capture of Poland's National Council for the Judiciary, which has resulted, inter alia, in a situation where any Polish court composed of individuals appointed or promoted in a procedure involving this captured body ought to be considered systematically compromised.
- The capture of Poland's Supreme Court, which has resulted, inter alia, in a situation where more than half of the members of the Supreme Court cannot lawfully adjudicate.
- The capture of Poland's Supreme Administrative Court, which has resulted inter alia in a situation where each chamber of the Supreme Administrative Court is also currently irregularly composed as each includes members who cannot lawfully adjudicate.
- Instrumentalisation of the new disciplinary regime for judges, which has resulted, inter alia, in a situation where disciplinary proceedings have been repeatedly used as a system of political control of the content of judicial decisions and as an instrument of pressure and intimidation against judges across the board.
- Violation of an increasing number of rule of law related-orders and judgments from both the ECtHR and ECJ, including ECJ orders imposing daily penalty payments for non-compliance with previous orders on account of their alleged unconstitutionality, resulting in a situation where an exponential number of applications are being lodged with the ECtHR concerning Poland's "neo-judges".

To summarise, current Polish authorities have created a situation where there is no longer any effective judicial review in Poland across the board due to a legal framework precluding compliance with EU effective judicial protection requirements *in all situations* while an increasing number of inherently defective judicial appointments continue to be made *at all court levels* in a broader context where *all of its top courts* are now composed of neo-judges who cannot lawfully adjudicate and where Polish authorities no longer recognise as binding the rule of law related orders and judgments of the ECJ while they continue to harass judges on the basis of provisions of national law found incompatible with EU law by the ECJ, most recently in a judgment of 5 June 2023 with respect of Poland's 'Muzzle Law'.

In light of the above, Polish authorities' transversal and sustained violation of EU effective judicial protection requirements necessarily creates, *by definition and at a minimum*, serious risks for the sound financial management of the EU budget and the protection of the EU's financial interests.

In addition to Article 4.2(d), the breaches of the rule of law repeatedly committed by Polish authorities since the end of 2015 also arguably concern "the imposition of effective and dissuasive penalties on recipients by national courts" (Article 4.2(e)) in cases involving recipients connected to Poland's ruling coalition due, *inter alia*, to the adoption of disciplinary regime for judges incompatible with EU law and which has been illegally used as a system of political control of the content of judgments and punishment when the content of judgments is not to the Polish authorities' liking.

Following the capture of the Constitutional Tribunal and the decisions irregularly issued by the neo-CT which have organised the transversal violation of the EU right to effective judicial protection and the EU general principles of autonomy, primacy, effectiveness, uniform application of EU law as well as the binding effect of ECJ rulings, one may further argue that the activation of the Conditionality Regulation could also be justified on the basis of Article 4(2)(h): "other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union". This situation may be understood as putting at serious risks the correct application of EU primary law and secondary legislation relevant to the implementation, sound financial management and protection of the Union budget as well as the protection of the financial interests of the EU, and compliance with ECJ judgments in that regard.

More broadly speaking, one may also argue that by considering EU effective judicial protection requirements guaranteed under Article 19(1) TEU and connected ECJ orders judgments "unconstitutional", the Polish authorities have rendered compliance with EU law impossible across the board resulting *in a situation where breaches of the rule of law concern every single one of the situations laid down in Article 4.2 of the Conditionality Regulation*.

The transversal nature of Polish authorities' repeated breaches of EU rule of law principles as regards Poland's judiciary also satisfies the requirement of a sufficiently direct link as the lack of effective judicial review concerns *all courts* with jurisdiction to adjudicate cases concerning actions or omissions by (a) national authorities implementing the EU budget; (b) national authorities carrying out financial control, monitoring and auditing and (c) investigation and public prosecution services. In other words, there is at the very least a manifest serious risk that the effectiveness and impartiality of judicial proceedings on cases related to the irregularities in the management of the EU budget may be affected, which creates, in turn, a serious risk to the protection of the EU's financial interests in a sufficiently direct way.

Finally, regarding the "complementarity test",<sup>192</sup> its application is straightforward in terms of the current rule of law situation existing in Poland as there are no layers of protection that would be available to effectively address the serious risks to the EU budget/EU's financial interests arising from the systemic malfunctioning of Poland's Supreme Audit

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<sup>192</sup> For further analysis of the "complementarity test" and of the situations where the Conditionality Regulation can be said to be more effective than other existing "layers of protections", see Rubio et al, *op. cit.*, pp. 60-62 and Annex 2.

Office, prosecution services and courts and which can in all cases be connected to repeated breaches of rule of law principles committed by Polish authorities over a long period of time as comprehensively established, inter alia, in multiple domestic and European judgments from both the ECJ and the ECtHR.

In other words, in each of the situations outlined above and to be detailed below, the Conditionality Regulation can be considered manifestly more effective than any other existing budget/financially related procedures as none of them would be as effective in addressing the serious risks affecting all EU funds in Poland which flow from (1) the systemic undermining of the proper functioning of Poland's Supreme Audit Office; (2) the political capture and ensuing systemic instrumentalisation of Poland's investigation and prosecution services across the board, including in relation to the investigation and prosecution of fraud, such as tax fraud, corruption or other breaches of EU law relating to the implementation of the EU budget or to the protection of the EU's financial interests; and (3) the systemic violation of EU effective judicial protection requirements, in particular by no longer recognising them and the judgments applying them as legally binding, resulting in the neutralisation across the board of effective judicial review by independent courts, including in relation to the actions or omissions of all relevant authorities mentioned in the Conditionality Regulation.

# 1. Systemic undermining of the proper functioning of Poland's Supreme Audit Office (SAO)

In a state governed by the rule of law, independent financial oversight ensures budget accountability. In Poland, the Supreme Audit Office (in Polish: *Najwyższa Izba Kontroli*, abbreviated NIK) is the constitutional body responsible for conducting independent audits and inspections of public finances, government entities, and public institutions in light of the principles of legality, economic prudence, efficacy and diligence.<sup>193</sup> It may also audit local government bodies and other entities if they rely on public assets or resources, or fulfill financial obligations to the State.

Broadly speaking, the SAO has a *preventive* role in monitoring the public spending of government administration bodies and operates according to the principle of collegiality. The SAO approves the reports on the implementation of state budget, monetary policy guidelines, the SAO's annual report, motions to the Sejm regarding activities of public bodies, statements containing charges against members of the Council of Ministers or persons managing top state institutions, and annual audit plans.

Constitutionally speaking, the SAO is subordinate to the Sejm (i.e., the lower chamber of Poland's Parliament). The Sejm plays a critical role in the appointment and removal process of the SAO President. SAO College members are appointed by the Speaker of the Sejm upon proposal by the SAO President.

According to the most recent CBOS survey from March 2023, 45% of Poles, up six percentage points from 2022 have a favourable opinion of the SAO's activities. An adverse opinion, however, is held by one-fifth of Poles (20%), down 5 percentage points from 2022.<sup>194</sup> This is worth noting as the SAO President has been in intense conflict with the governing majority in Poland since 2019. This conflict has been characterised by public attacks against the SAO President and a number of actions or failures to act which have resulted in the sustained weakening of the SAO's independence and the undermining of its proper functioning, as will be detailed below.

The European Commission has acknowledged these serious problems and the Polish authorities' failure to take remedial action, particularly in its last two ARoLR country chapters for Poland published in July 2022 and July 2023 respectively.

<sup>193</sup> See Articles 202-207 in chapter IX of the 1997 Polish Constitution.

<sup>194</sup> CBOS. Oceny działalności instytucji publicznych w marcu (Assessments of the performance of public institutions in March). Komunikat z Badań no. 39/2023, March 2023, [https://www.cbos.pl/SPISKOM.POL/2023/K\\_039\\_23.PDF](https://www.cbos.pl/SPISKOM.POL/2023/K_039_23.PDF)

**Table 8:** Malfunctioning of Poland’s Supreme Audit Office as outlined in the 2022 and 2023 ARoLR<sup>195</sup>

2022 ARoLR Report, Poland’s Country Chapter, pp. 27-28 (bold in original)	2023 ARoLR, Poland’s Country Chapter, p. 29 (bold in original)
<p><b>The Supreme Audit Office continues its operation under adverse conditions.</b> As of 2021, the Marshal of the Sejm has been refusing to appoint Members of the SAO College, thus hampering the effective functioning of the Office. The Prosecutor-General has made a request to deprive the President of the SAO of his immunity, which is currently under examination of the Sejm. Representatives of the SAO raised concerns about the lack of effective follow-up by the prosecution services to its requests made in the aftermath of audits. Furthermore, the chief office-holders in Poland refuse to cooperate with the SAO in the context of audit reports. Since 2021, the Supreme Audit Office (‘SAO’) has produced a number of audit reports raising concerns regarding possible instances of public funds’ embezzlement and mismanagement by public authorities, notably by the Ministry of Justice and bodies responsible for implementing the state budget. While the SAO raised concerns about developments adversely affecting its own independence at the forum of the European Organisation of Supreme Audit Institutions, no steps have so far been taken by the state authorities to rectify the situation.</p>	<p><b>There has been no progress as regards the appointment of members of the College of the Supreme Audit Office, putting at risk its effective functioning.</b> The 2022 Rule of Law Report recommended to Poland to “[e]nsure a more systematic follow-up to findings by the Supreme Audit Office and ensure a swift appointment of the Members of the College of the Supreme Audit Office”. The Marshal of the Sejm has however still not appointed any new member of the College, which now consists of nine out of 19 members. The Supreme Audit Office reported that this puts it at risk of losing the capacity to carry out its functions as of September 2023, including on the sound and independent audit of public funds’ expenditure. A Director General of the Supreme Audit Office was still not appointed, and the Office’s budget was not increased, which may further impact its proper functioning. Auditors face severe obstacles when carrying out audits in state-owned companies, being denied access to the necessary documentation. The public prosecution does not follow up on the Supreme Audit Office’s requests, while auditors themselves are subject to criminal investigations.</p>

Considering Polish authorities’ *continuing* failure to organise a more systematic follow-up to the SAO’s findings and failure to ensure a swift appointment of SAO College Members in a context where SAO members face arbitrary criminal investigations, the Commission was forced to state the absence of any progress in July 2023 as regards the implementation of the SAO related recommendation made in the 2022 ARoLR.

It is submitted that the current situation satisfies the conditions laid down in the Conditionality Regulation insofar as the SAO’s functioning has been so undermined that according to the SAO itself, there is a *serious risk* that it may lose its capacity “to carry out its functions as of September 2023, including on the sound and independent audit of public funds’ expenditure”.<sup>196</sup>

Firstly, Polish authorities are “withholding financial and human resources affecting” the “proper functioning” of the SAO, which is indicative of breaches of the principles of the rule of law (Article 3(b) of the Conditionality Regulation).

<sup>195</sup> Country Chapter on the rule of law situation in Poland, SWD(2022) 521 final (“2022 Poland’s ARoLR Country chapter” hereinafter); Country Chapter on the rule of law situation in Poland, SWD(2023) 821 final, 5 July 2023 (“2023 Poland’s ARoLR Country Chapter” hereinafter).

<sup>196</sup> 2023 Poland’s ARoLR Country Chapter, p. 29.

Secondly, these serious, systemic and long-lasting breaches are relevant for the sound financial management of the EU budget or for the protection of the financial interests of the Union as they concern in this instance “the proper functioning” of Poland’s principal state body in charge of “carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems” (Article 4(2)(b) of the Conditionality Regulation). In practice, the SAO’s proper functioning has been recurrently undermined via Polish authorities’ actions or inactions taking the following form:

- Adoption of measures weakening the independence of the SAO.
- Proceedings and smear campaign against the SAO President.
- Criminal investigations against SAO auditors.
- Failure to ensure a swift appointment of the Members of the SAO College.
- Failure to ensure the appointment of the Director General of the SAO.
- Failure to increase the SAO’s budget.
- Failure to follow up on the SAO’s criminal notifications, including the systemic refusal of the prosecution services to initiate criminal proceedings following SAO’s criminal notifications.
- Failure to intervene when the SAO’s attempts to carry out audits in state-owned companies are being obstructed.
- Failure to effectively respond to breaches of financial discipline, including EU funds, established as a result of the SAO’s audits.
- Failure to address the lack of sincere cooperation by audited bodies relying on public funds, including companies with shares owned by the State Treasury and foundations established by these companies.

Finally, these breaches manifestly and, at a minimum, “seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way” (Article 4(1) of the Conditionality Regulation) considering the SAO’s central control over the spending of EU funds in Poland. In particular, a number of these breaches – those concerning the SAO’s membership, financing and human resources – can be solely attributed to the Sejm and the Speaker of the Sejm, despite numerous calls from the SAO to take action to preserve its independent and effective functioning.

## **1.1 Systemic undermining of the Supreme Audit Office’s functioning**

In its 2022 ARoLR chapter on Poland, the European Commission acknowledged the serious nature of the situation by stressing that Poland’s SAO continues its operation under adverse conditions” due to, inter alia, the Speaker of the Sejm refusing “to appoint Members of the Supreme Audit Office College, thus hampering the effective functioning of the Office”.<sup>197</sup>

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197 2022 Poland’s ARoLR Country Chapter, p. 27.

Similarly, the International Organization of Supreme Audit Institutions (INTOSAI), in a study requested by the SAO President, found evidence of Polish authorities' systemic undermining of the SAO's independence.<sup>198</sup> The INTOSAI report highlighted:

- (iv) significant delays in the appointment of the SAO officials (members of the College and Director General).
- (v) interference faced by the SAO and its auditors in conducting specific audits.
- (vi) financial limitations faced by the SAO.

Firstly, regarding the significant delays in the appointment of the SAO officials, INTOSAI found that from August 2019 to July 2022, the SAO President submitted 34 motions for appointment of members of the SAO College and only seven candidates received positive assessment from the Committee on State Audit of the Sejm and consequently were appointed by the Sejm.<sup>199</sup>

The report also found, citing the SAO's statement to the Speaker of the Sejm, that the Speaker of the Sejm, in one case, appointed a member of the Council despite a negative opinion of the Committee and in another, did not appoint a candidate who received an equal number of votes for and against. Moreover, the Speaker of the Sejm did not forward 14 motions by the President to the Committee.

INTOSAI concluded that the SAO President's requests regarding appointments of the College's members are "systematically disregarded"<sup>200</sup> and stated that "one can opine [sic] on whether the delays in the appointment of members of the NIK can threaten the independence of NIK and the full implementation of the principle of collegiality."<sup>201</sup> In addition to preventing appointments to the SAO College, the Speaker of the Sejm rejected the appointment of the Director General approved by the SAO President on 23 February 2022. The Director General exercises direct supervision over organisational units of the Supreme Audit Office. In the Director General's absence, the SAO President assumes most of the Director General's duties.

Secondly, in reference to the interferences faced by the SAO and its auditors in conducting specific audits, INTOSAI raised the issue of limitations faced by the SAO and its auditors in conducting specific audits. According to INTOSAI's findings, the SAO's authority to audit specific entities has been challenged, and its staff have been prevented from accessing the premises of those entities. In addition, the SAO has been hindered in its access to information, as entities have delayed or refused to provide necessary information. In some cases, investigations and judicial procedures have been initiated against SAO staff for allegedly exceeding their authority.

INTOSAI stressed that these challenges arose in relation to audits of companies in which the State Treasury has a dominant or significant share of ownership, such as oil and gas companies PKN ORLEN SA (50% state ownership according to data in INTOSAI report), PGNiG SA (71.88%), ORLEN Foundation (100%), Energa SA in Gdańsk (90,9%), and insurer

198 SAI Independence Rapid Advocacy Mechanism (SIRAM) Assessment report on the allegations of systematic restrictions to the independence of the Supreme Audit Office of Poland (NIK), May 2023: <https://www.nik.gov.pl/plik/id.27698.vp..pdf>

199 Ibid, para 19.

200 Ibid, para 27.

201 Ibid, para 24.

Link 4 (100%).<sup>202</sup> INTOSAI assessed that the limitations faced by the SAO and its auditors “constitute an infringement of the principle 3 and 4 of the Mexico Declaration on SAI Independence”. Furthermore, the report cited a Gdańsk court decision from 30 January 2023, which overturned the prosecutor’s decision to refuse to initiate an investigation into the obstruction of the SAO inspection at the Energa Foundation.<sup>203</sup>

Thirdly, as regards the financial limitations faced by the SAO, INTOSAI highlighted how the SAO’s budget was significantly reduced while the budget to the Chancellery of the Prime Minister was, by contrast, increased by 80 per cent.<sup>204</sup> The report referred to an assessment made by the SAO concluding that the budget cut will significantly limit its ability to recruit staff. Evidence was offered to support this serious risk to its proper functioning with, for instance, 21 recruitment processes not completed in 2022, a total representing approximately 35% of all recruitments, with some candidates allegedly rejecting offers on account of the low level of remuneration at a time of record inflation in Poland. INTOSAI concluded that the budget cuts significantly hinder the SAO’s “ability to retain its workforce and recruit the staff complement necessary to carry out its mandate.”<sup>205</sup>

In conclusion, INTOSAI has recommended that the Polish authorities “take necessary action to uphold the independence of the SAO and optimise its contribution to accountability, including appointing members of the council, providing timely access to information, and finding ways to provide the appropriate level of financial means to the SAO”.<sup>206</sup>

## 1.2 Actions and proceedings targeting the President of the Supreme Audit Office

The structural limitation of the independence of the SAO is taking place against the backdrop of a high-profile conflict between the SAO President (Marian Banaś), who was initially appointed with the support of Poland’s ruling party, and members of Poland’s ruling coalition and the institutions subordinate to them. For ease of understanding, the main episodes in this conflict will be outlined chronologically below.

On 30 August 2019, Mr. Banaś, former Minister of Finance under the Law and Justice government, formally assumed office following his appointment by the Sejm as SAO President. At that time, Poland’s de facto leader, Jarosław Kaczyński, praised him publicly.<sup>207</sup>

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202 Ibid., para. 33.

203 Kontrola NIK w Orleniu? Wątpliwości po werdykcie sądu (NIK’s audit of PKN Orlen? Doubts arise following the court’s verdict), *Dziennik Gazeta Prawna*, 3 February 2023: <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8652942.kontrola-nik-w-orlenie-marian-banas-sad.html>

204 SIRAM, op. cit., para. 38.

205 SIRAM, op. cit., para. 44.

206 Ibid., para. 46.

207 J. Szymczak, Kaczyński: PO-PSL ukradło 400 miliardów, a Banaś odzyskał 200. Niestety, to brednie (Kaczyński: PO-PSL stole 400 billion, and Banas has recovered 200 billion. Unfortunately, these are nonsense), *OKO.press*, 9 October 2019: <https://oko.press/kaczynski-po-psl-ukradlo-400-miliardow-a-banas-odzyskal-200-niestety-brednia/>

On 21 September 2019, investigative journalists from TVN24 revealed that in a tenement building owned by Banaś in Krakow, business people, allegedly with links to the mafia, were operating a hotel with rooms rented out by the hour.<sup>208</sup>

In October 2019, the Central Anti-Corruption Bureau (CBA), which reports to the Prime Minister's Office, claimed that it found irregularities in Mr. Banaś's financial declarations. The following month, Kaczyński demanded Mr. Banaś's resignation. At the same time, the CBA filed a notification with the prosecutor's office regarding potential offences committed by Mr. Banaś, including making false statements in his asset declarations.<sup>209</sup> This led the National Prosecutor to file a request with the Sejm to lift the immunity of the SAO President. Mr. Banaś has since claimed that prosecutors have been pressuring witnesses or suspects to make false accusations against him.<sup>210</sup> In parallel, Mr. Banaś's son, Jakub Banaś, and his wife, were detained by the CBA in July 2021 and charged, among others, with using forged invoices. There have been no further developments in their cases since then.<sup>211</sup>

In January 2023, after a long period of inaction, the National Prosecutor's request regarding Mr. Banaś was processed by the Sejm's Rules and Procedures Committee, which approved the prosecutor's request to hold the SAO President criminally responsible. As of August 2023, the Sejm is, however, yet to organise a vote on the request.<sup>212</sup>

In August 2023, the Polish Development Fund (Polski Fundusz Rozwoju, PFR) has initiated legal proceedings against the SAO and the SAO President in relation to the declarations made by Mr. Banaś suggesting potential irregularities in the disbursement of public funds within the context of the Polish Development Fund's support initiatives for businesses.<sup>213</sup>

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208 "Pancerny Marian i pokoje na godziny". Reportaż „Superwizjera” (“Pancerny Marian and hourly hotel rooms.” A report by „Superwizjer.”), *TVN24*, 21 September 2019: <https://tvn24.pl/polska/pancerny-marian-i-pokoje-na-godziny-reportaz-superwizjera-w-tvn24-ra971093-2311632>

209 CBA zawiadamia prokuraturę po kontroli oświadczeń majątkowych Mariana Banasia (The CBA reports to the prosecutor's office after inspecting Marian Banas's financial disclosures), CBA, 29 November 2019: <https://cba.gov.pl/pl/aktualnosci/4276.CBA-zawiadamia-prokurature-po-kontroli-oswiadczen-majatkowych-Mariana-Banasia.html>

210 Prokuratura Krajowa: W żadnym z postępowań nie nakłaniano do fałszywego oskarżenia Mariana Banasia (National Prosecutor's Office: In none of the proceedings was there an attempt to induce false accusations against Marian Banas), *Dziennik Gazeta Prawna*, 18 October 2021: <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8273478,prokuratura-krajowa-falszywe-oskarzenie-banas.html>

211 Rozmyta afera Banasiów. Start w wyborach syna prezesa NIK to ucieczka do przodu (The blurred Banas affair. The president of the Supreme Audit Office's son running in the elections is a way to move forward), *Rzeczpospolita*, 26 July 2023: <https://www.rp.pl/kraj/art38801791-rozmyta-afere-banasiow-start-w-wyborach-syna-prezesa-nik-to-ucieczka-do-przodu>

212 M. Kowalczyk, K. Prusiewicz, Sejmowa komisja zarekomendowała uchylene immunitetu szefowi NIK (The parliamentary committee recommended lifting the immunity of the head of the Supreme Audit Office), *Newsweek Polska*, 26 January 2023: <https://www.newsweek.pl/polska/polityka/sejmowa-komisja-zarekomendowala-uchylenie-immunitetu-szefowi-nik/kp41pq5>

213 T. Żółciak, PFR idzie na wojnę z NIK. Pozywa Banasia, w tle oskarzenie o korupcję [NEWS DGP] (The State Development Fund (PFR) is gearing up for a battle with the Supreme Audit Office (NIK). It is suing Banas, with allegations of corruption in the background), *Dziennik Gazeta Prawna*, 16 August 2023: <https://biznes.gazetaprawna.pl/artykuly/9276703,pfr-idzie-na-wojne-z-nik-pozywa-banasia-w-tle-oskarzenie-o-korupcje.html>

**Table 9:** Selected examples of public statements from members of Poland's ruling coalition and public broadcaster attacking the SAO President since 2019

<ul style="list-style-type: none"> <li>Deputy Prime Minister, PiS party chairman and Poland's de facto leader Jarosław Kaczyński (In December 2019: "The resignation of the President of NIK, Marian Banaś, would be the simplest way out of the situation. Our persuasive means of influencing him have been exhausted, but we still hope that the President of NIK's common sense will prevail."<sup>214</sup>; In May 2021: "A major flaw in our legal system is that a person who is under serious investigation can still be the President of the Supreme Audit Office (NIK)."<sup>215</sup>; "The President of the Supreme Audit Office, Marian Banaś, is currently conducting an action that has led to the loss of the attribute of a state office by the Supreme Audit Office."<sup>216</sup>; In July 2023, following Mr. Banaś press conference with a leader of the far-right party Konfederacja "Cooperation between the Supreme Audit Office and a political party is unacceptable."<sup>217</sup></li> </ul>
<ul style="list-style-type: none"> <li>Prime Minister Mateusz Morawiecki In November 2019: "I have familiarised myself with the report of the Central Anti-Corruption Bureau (CBA) regarding Mr. Marian Banaś, and I have come to the conclusion that the findings from this report should prompt Mr. Banaś to resign." And "If he does not resign, we have a 'Plan B'"<sup>218</sup></li> </ul>
<ul style="list-style-type: none"> <li>Leader of Solidarna Polska/Suwerenna Polska party, Justice Minister and Prosecutor General Zbigniew Ziobro in October 2021 after the SAO published a scathing assessment of management of the Justice Fund by the Justice Ministry: "I certainly won't bow to Mr. Banaś's threats"<sup>219</sup>; deputy Justice Minister Marcin Warchol: "[Mr. Banaś] should report himself to the authorities";<sup>220</sup></li> </ul>
<ul style="list-style-type: none"> <li>A government-controlled public broadcaster informed about how Minister Coordinator of Special Services Mariusz Kamiński accused the Supreme Audit Office of selective and dismissive approach to regulations, lack of transparency and apoliticism. Journalists from the tvp.info portal obtained a letter from Kamiński, in which he warned the Speaker of the Sejm about the scandalous practices of NIK controllers during the proceedings in the Chancellery of the Prime Minister.<sup>221</sup> The President of the Supreme Audit Office strongly denies the allegations contained in the publication.<sup>222</sup></li> </ul>

The above attacks and developments have been taking place in a context where, since 2020, the SAO has begun issuing highly critical statements of the actions of public authorities, including the preparations for the manifestly unconstitutional presidential elections of spring 2020, which were later postponed by several months, and the Ministry of Finance's

214 Prezes PiS rozkłada ręce. "Nasze możliwości oddziaływania na Mariana Banasia wyczerpały się, Business Insider, 14 December 2019: <https://businessinsider.com.pl/wiadomosci/prezes-pis-jaroslaw-kaczynski-o-szefie-nik-marianie-banasiu/nkw98tc>

215 Kaczyński: Ktoś taki nie powinien być prezesem NIK, Do Rzeczy, 24 May 2021: <https://dorzeczy.pl/opinie/185868/kaczynski-o-banasiu-nie-powinien-byc-prezesem-nik.html>

216 Jarosław Kaczyński dla PAP: Banaś prowadzi akcję, która doprowadziła do utraty przez NIK atrybutu urzędu państwowego, PAP, 2 February 2022: <https://www.pap.pl/aktualnosci/news%2C1068981%2Cjaroslaw-kaczynski-dla-pap-banas-prowadzi-akcje-ktora-doprowadzila-do>

217 Kaczyński: Współpraca NIK z partią polityczną jest niedopuszczalna, Dziennik Gazeta Prawna, 27 February 2023, <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8994634.kaczynski-wspolpraca-nik-z-partia-polityczna-jest-niedopuszczalna.html>

218 Morawiecki o Banasiu: Jeśli się nie poda do dymisji, mamy "plan B", Do Rzeczy, 29 November 2019: <https://dorzeczy.pl/kraj/121958/morawiecki-o-banasiu-jesli-sie-nie-poda-do-dymisji-mamy-plan-b.html>

219 Zbigniew Ziobro: nie ugnę się pod groźbami pana Banasia, Business Insider, 8 October 2021, <https://businessinsider.com.pl/wiadomosci/zbigniew-ziobro-nie-ugne-sie-pod-grozbami-pana-banasia/hb1vdwn>

220 Banaś zarzuca nieprawidłowości w finansowaniu konferencji, w której... wziął udział. Warchol: Powinien złożyć donos sam na siebie, wPolityce.pl, 2 October 2021: <https://wpolityce.pl/polityka/568569-raport-nik-warchol-banas-powinien-zlozyc-donos-na-siebie>

221 Tak kontroluje NIK. Minister ujawnia kuriozalne praktyki, TVP Info, 19 June 2023: <https://www.tvp.info/70660061/najwyzsza-izba-kontroli-marian-banas-i-kuriozalne-praktyki-ujawniamy-pismo-kaminskiego>

222 Oświadczenie Mariana Banasia Prezesa Najwyższej Izby Kontroli dot. publikacji portalu TVP Info, NIK, 20 June 2023: <https://www.nik.gov.pl/aktualnosci/oswiadczenie-prezesa-nik-ws-publikacji-tvp-info.html>

mismanagement of the so-called “Justice Fund” (these aspects will be detailed in the following sub-section).

In January 2022, Mr. Banaś announced during a session of the extraordinary Senate Committee on explaining cases of illegal surveillance and their impact on the electoral process in Poland that Mr. Kaczyński, in his capacity as Deputy Prime Minister for Security, ought to be summoned and questioned regarding the system of oversight of the activities of Poland’s special services.<sup>223</sup> The same month, the SAO Vice-President, Tadeusz Dziuba, notified the prosecutor’s office about a suspicion of a crime committed by Mr. Banaś.

In February 2022, the District Prosecutor’s Office in Warsaw initiated an investigation regarding potential abuse of powers allegedly committed by the SAO President in relation to the functioning of the SAO in alleged violation of relevant law provisions.<sup>224</sup> The same month, Mr. Banaś filed a notification with the District Prosecutor’s Office in Warsaw regarding the statements made by Mr. Kaczyński in an interview with the Polish Press Agency (PAP), in which Poland’s de facto leader assessed that “The SAO has lost the attributes of a state institution” and that “there are many actions there that are inconsistent with the law”.<sup>225</sup>

In June 2023, as previously outlined, and on the back of a request by Mr. Banaś, the International Organization of Supreme Audit Institutions (INTOSAI) published a report and determined that the situation is such in Poland that there is a risk of violation of several key principles relating to the independence of supreme audit institutions. One may, however, note that it has been reported that Mr. Banaś may have provided selective information to the INTOSAI according to a press article published in *Rzeczpospolita*.<sup>226</sup> In addition, and most recently, Mr. Banaś participated to a press conference in front of the SAO headquarters with the leader of the far-right Confederation (Konfederacja) party on 27 July 2023. At the conference, Mr. Banaś announced that he had drafted a bill to strengthen the independence of the SAO, which was supported by the Konfederacja party. The participation of the SAO President to such an event was widely criticised by politicians from the ruling and opposition parties, as well as the media and the former SAO President, as this may be viewed as undue involvement in an ongoing electoral campaign.<sup>227</sup>

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223 G. Osiecki, T. Żółciak, Banaś przesłucha Kaczyńskiego. Chodzi o nadzór nad służbami specjalnymi (Banas questions Kaczyński. It concerns oversight of the special services), *Dziennik Gazeta Prawna*, 19 January 2022: <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8336412.senacka-komisja-nielegalna-inwigilacja-pegasus-banas-kaczyński.html>

224 R. Opas, Banaś będzie miał kłopoty? Kaczyński: Pewne sprawy trzeba wyjaśnić w sądzie (Will Banas face trouble? Kaczyński: Certain matters need to be clarified in court), *Wirtualna Polska*, 2 February 2022, <https://wiadomosci.wp.pl/banas-bedzie-mial-klopoty-kaczyński-pewne-sprawy-trzeba-wyjasnic-w-sadzie-6733088245275328a>

225 G. Bruszewski, Jarosław Kaczyński dla PAP: Banaś prowadzi akcję, która doprowadziła do utraty przez NIK atrybutu urzędu państwowego (Jarosław Kaczyński to PAP: Banas is conducting an operation that has led to the loss of the Supreme Audit Office’s status as a state institution), *PAP*, 2 February 2022, <https://www.pap.pl/aktualnosci/news%2C1068981%2Cjaroslaw-kaczyński-dla-pap-banas-prowadzi-akcje-ktora-doprowadzila-do>

226 I. Kacprzak, G. Zawadka, Prezes NIK włączył alarm. Bez weryfikacji przyjęto wersję Banasia (The President of the Supreme Audit Office has raised an alarm. Banaś’ version was accepted without verification), *Rzeczpospolita*, 24 July 2023: <https://www.rp.pl/polityka/art36750971-prezes-nik-wlaczyl-alarm-bez-weryfikacji-przyjeto-wersje-banasia>

227 Marian Banaś i Sławomir Mentzen na wspólnej konferencji. Prezes NIK przedstawił projekt ustawy (Marian Banaś and Sławomir Mentzen at a joint conference. The President of the Supreme Audit Office presented a draft law), *Polsat News*, 27 July 2023: <https://www.polsatnews.pl/wiadomosc/2023-07-27/marian-banas-i-slawomir-mentzen-na-wspolnej-konferencji-prezes-nik-przedstawil-projekt-ustawy/>

## 1.3 Supreme Audit Office's negative assessment of public authorities in Poland

As will be shown below, the sustained attacks and legal proceedings initiated against Mr. Banaś have been taking place in a context where the SAO has adopted critical reports highlighting serious budgetary and financial mismanagement. As most recently observed by the European Commission in its July 2023 ARoLR country chapter, Polish authorities have continued to fail to ensure a systematic follow-up to SAO findings while continuing to obstruct the appointment of the SAO College Members and in doing so, "putting at risk its effective functioning".<sup>228</sup>

### 1.3.1 Report on the implementation of the 2022 State Budget

In June 2023, the SAO did not provide a positive assessment of the government's report on implementing the state budget.<sup>229</sup> This is the first such decision since 1994. The SAO found that the year 2022 was the third consecutive year in which various solutions were implemented in violation of basic budgetary principles. Among other issues, the SAO critically stressed that the budget did not encompass many significant financial transactions related to the implementation of state tasks and impacting on the increase of the national debt. The audit concluded that the state's budget deficit figure was misleading and did not accurately reflect the state's financial imbalance. In an unprecedented way, the state's essential tasks are being financed outside the state budget as well as outside parliamentary control. In 2022, two new funds, operating outside of the state budget, were created that are not subject to the Public Finance Act: the Aid Fund and the Armed Forces Support Fund. The list of tasks performed by the COVID-19 Countermeasure Fund was also expanded. This fund, due to its very general title and purpose, has become a de facto tool for financing any range of tasks. The SAO audit found that funds planned for public tasks outside the budget law are not subject to parliamentary or external oversight. These funds, which operate the sum equal to about 25% of the expenditures included in the state budget, are also spent without any rules or regulations, increasing the risk of corruption and cronyism.

### 1.3.2 The 2020 "ghost presidential election"

In April 2021, the SAO published its audit report of the actions of selected entities in connection with the preparations for the general elections for the President of the Republic of Poland whose first round was due to take place on 10 May 2020 using postal voting.<sup>230</sup> In the end, the elections were postponed at the last minute, i.e., on 6 May 2020, due to political pressure exercised on Poland's ruling party by junior coalition partner Porozumienie party.<sup>231</sup>

228 2023 ARoLR Poland Country Chapter, p. 29.

229 Naczelną Izbę Kontroli. Analiza wykonania budżetu państwa i założeń polityki pieniężnej w 2022 roku (Supreme Audit Office. An analysis of the execution of the state budget and the assumptions of monetary policy in 2022), 7 June 2023: <https://www.nik.gov.pl/plik/id.27852.vp.30672.pdf>

230 Działania wybranych podmiotów w związku z przygotowaniem do wyborów powszechnych na prezydenta Rzeczypospolitej Polskiej zarządzonych na dzień 10 maja 2020 r. z wykorzystaniem głosowania korespondencyjnego, Informacja o wynikach kontroli, NIK, KAP.430.015.2021 Nr ewid. 79/2021/D/20/502/KAP, <file:///Users/aniawojcik/Downloads/NIK-D-20-502-informacja-WYBORY-wystapienia.pdf>

231 See D. Tatarczyk and W. Wojtasik, "The incumbency advantage during the COVID-19 pandemic: examining the 2020 Polish presidential election" (2023) 37 *East European Politics and Societies* 608.

This postponement was preceded by numerous irregularities, such as the decisions of the Chancellery of the Prime Minister (Kancelaria Prezesa Rady Ministrów, KPRM) adopted on 16 April 2020 which ordered the state postal firm (Poczta Polska) and Polish Security Printing Works (Polska Wytwórnia Papierów Wartościowych) to take steps to prepare for the 2020 presidential election via postal ballot. However, the KPRM did not have the legal authority to issue these decisions, as the organisation of elections is the responsibility of the National Electoral Commission (Państwowa Komisja Wyborcza, PKW). In addition, the KPRM did not have an estimate of the costs of implementing these decisions, which would have been paid for by the state budget. Moreover, the audit noted that the decisions were issued based on the so-called Anti-COVID Act and the Code of Administrative Procedure in disregard of the application of the provisions of the Electoral Code. However, in accordance with the constitutional principle of the rule of law and the hierarchy of norm, the exclusion of statutory competencies reserved for certain bodies (in the case of electoral bodies: the National Electoral Commission, electoral officials and electoral commissions) can only be provided by law and not by way of an administrative decision.<sup>232</sup>

Additional irregularities were identified such as the lack of funds to implement the decisions of 16 April 2020 which means that the relevant companies had to use their own resources to prepare the requested postal ballot; the production of templates for documents forming the electoral package (with a list of the candidates' names), even though the legislative process regarding the postal vote had not yet been completed. The actions of Poczta Polska in the collection and processing of personal data of voters were also illegal according to the SAO. For instance, Poczta Polska requested the transfer of data from the PESEL (personal identification number) register to the Minister of Digital Affairs and data from the voters' lists to the bodies of local governments without a legal basis while also processing the obtained data in violation of the GDPR.<sup>233</sup> Finally, the SAO deplored the spending of PLN 56 million from the state budget inefficiently.<sup>234</sup>

### 1.3.3 Justice Fund operated by the Ministry of Justice

The Fund for Assistance to Victims and Post-penitentiary Aid, which is known as the "Justice Fund", is operated by the Ministry of Justice (MoJ) which has been led by Mr. Zbigniew Ziobro, Sovereign Poland's party leader; a governing junior coalition partner who simultaneously acts as Justice Minister and Poland's Prosecutor General.

In September 2021, the SAO published an analysis focusing on the misuse of the Justice Fund.<sup>235</sup> In short, the SAO found the financial management was conducted in a way that

232 Działania wybranych podmiotów w związku z przygotowaniem do wyborów powszechnych na prezydenta Rzeczypospolitej Polskiej zarządzonych na dzień 10 maja 2020 r. z wykorzystaniem głosowania korespondencyjnego, Informacja o wynikach kontroli, NIK, KAP.430.015.2021, Nr ewid. 79/2021/D/20/502/KAP, p. 9.

233 See also Letter from the EDPB to MEPs R. Metsola and A. Halicki, 8 May 2020, Ref: OUT2020-0041, [https://edpb.europa.eu/sites/default/files/files/file1/edpb\\_letter\\_pl\\_elections\\_data\\_sharing\\_en.pdf](https://edpb.europa.eu/sites/default/files/files/file1/edpb_letter_pl_elections_data_sharing_en.pdf)

234 Działania wybranych podmiotów w związku z przygotowaniem do wyborów powszechnych na prezydenta Rzeczypospolitej Polskiej zarządzonych na dzień 10 maja 2020 r. z wykorzystaniem głosowania korespondencyjnego, op. cit., p. 11.

235 Realizacja zadań Funduszu Pomocy Pokrzywdzonym oraz Pomocy Postpenitencjarnej – Funduszu Sprawiedliwości. Informacja o wynikach kontroli, NIK, KPB.430.010.2021 Nr ewid. 132/2021/P/20/037/KPB, <https://www.nik.gov.pl/plik/id,24738,vp,27486.pdf>

violated the basic principles of public finance, such as transparency, purposefulness, and economy, which allowed the Justice Fund to become a “corruption-generating mechanism”.<sup>236</sup>

More specifically, the SAO found that following legislative changes in 2017, the provisions of the Act on the Justice Fund resulted in the establishment of an open, undefined catalogue of the Fund's tasks since it may now finance any action related to “crime prevention”. In turn, this created the possibility of financing an unlimited range of activities, even if they only tangentially referred to the Fund's goals such as crime prevention and support and development of the system of assistance to crime victims. In addition, the MoJ consistently applied a broad interpretation of the Fund's tasks, pointing to their “holistic” nature and the possibility of financing, within the framework of crime prevention, any positive social and economic change that the fund operator considers positive (e.g., in the areas of education, social and family policy, the labour market, or religious values).

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<sup>236</sup> D. Tilles, “Justice ministry oversaw “corruption-generating mechanism”, finds Polish state auditor”, *Notes from Poland*, 30 September 2021: <https://notesfrompoland.com/2021/09/30/justice-ministry-oversaw-corruption-generating-mechanism-finds-polish-state-auditor/>

**Table 10:** Misuse of Justice Fund to illegally purchase spyware (“Pegasus”)

Findings from the European Parliament <sup>237</sup> (bold added)	Findings from PACE Rapporteur <sup>238</sup> (bold added)
<p>In the framework of the 2018 state budget execution audit, NIK’s auditors discovered an invoice covering 25 million PLN to purchase the Pegasus surveillance system for the Central Anticorruption Bureau (CBA).</p> <p>The auditors found that the software was paid for with the resources from the Justice Fund, which pools money from court fines and is earmarked for helping victims of crimes and preventing further crimes by rehabilitating criminals. As CBA can only be funded from the state budget, <b>the auditors assessed the purchase of Pegasus using money from this fund as illegal.</b></p> <p>NIK therefore informed the responsible authorities and requested an enquiry to be opened on violation of budgetary procedure by high-ranking officials. After years, the investigation was dismissed: the Head of the Public Finance Discipline Office admitted that the purchase was made but authorised the invoice on the ground that there had been minor social harm.</p> <p>After this first inspection, the President of the Polish Supreme Audit Office requested a second follow-up audit on how the funds were used. <b>All identified irregularities have been notified to the Ministry of Justice but none of the actions required has been carried out.</b> [...]</p> <p>The interlocutors explained that the conduct of several audits unfavorable for the government and its agencies have put NIK in a difficult situation: they have for instance been informed by their operator that there were attacks on the office IT infrastructure as well as strong presumptions of surveillance and hacking of NIK employees and President Marian Banaś’ close advisers’ mobile phones.</p>	<p>21. While the <b>Polish government had initially denied the acquisition of the spyware, it confirmed in early 2022 that it was in possession of Pegasus.</b> Jarosław Kaczyński, the chairperson of the ruling PiS party, admitted that Poland had acquired the Pegasus spyware but dismissed any allegations about its misuse for political purposes, for instance against opposition politicians in the 2019 parliamentary election campaign. The Minister of Justice, Mr Ziobro stated that any use of Pegasus was done “according to the law”. In this connection, a committee set up by the Polish Senate to investigate the use of Pegasus (Senate Extraordinary Committee on Investigation of Cases of Illegal Surveillance, their Impact on the Electoral Process in the Republic of Poland and the Reform of the Special Services) heard different witnesses and experts, among them cybersecurity experts (from Citizen Lab) and the former president of the Supreme Audit Office and subsequently independent Senator Krzysztof Kwiatkowski. In January 2022, he presented two invoices to the committee confirming the purchase of spyware for the Central Anti-Corruption Bureau with PLN 25 million from a Ministry of Justice fund earmarked for victims of crime. <b>Since according to Polish law the operations of the CBA can only be financed from the state budget</b> (the above-mentioned Justice fund not being part of it), <b>it appears that the purchase of Pegasus breached Polish law.</b> As regards the use of Pegasus, it has not been made explicitly clear whether any, let alone all of the persons targeted by Pegasus to date were spied on with judicial authorisation, as required by law. It seems that only the case of prosecutor Ewa Wrzosek and Krzysztof Brejza have been taken up by the courts following their complaints and appeals.</p>

The SAO emphasised that the lack of restrictions on the use of public funds also extended to the mechanisms for selecting beneficiaries of the Fund.<sup>239</sup> It also found that the Fund Manager made decisions to finance key tasks in an unreliable manner. This was because the Fund Manager was not in possession of objective data that confirmed the rationale, scale

237 European Parliament, Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware, Mission Report following the delegation to Warsaw, Poland, 19-21 September 2022, 20 October 2022: [https://www.europarl.europa.eu/doceo/document/PEGA-CR-736647\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/PEGA-CR-736647_EN.pdf)

238 PACE, Committee on Legal Affairs and Human Rights, Pegasus and similar spyware and secret state surveillance, Report, Rapporteur: Mr Pieter Omtzigt, 8 September 2023: <https://pace.coe.int/en/news/9186/five-member-states-must-investigate-spyware-abuse-says-pace-committee>

239 Ibid., p. 9.

and desired form of implementation of the Fund's goals.<sup>240</sup> The SAO highlighted that this resulted in the allocation of PLN 140 million under 2,455 contracts to volunteer fire brigades; purchases of equipment for healthcare facilities under 121 contracts for a total of PLN 35 million; or a grant of PLN 37 million for the construction and equipment of a specialised treatment centre for adult victims of crime, with particular emphasis on people in a coma.

The SAO also found that the MoJ abandoned planned actions that would have had a real impact on crime victims and the prevention of crime and instead chose to focus on tasks that were only marginally related to the Fund's goals. Decisions on allocating funds to beneficiaries were assessed as "discretionary". The SAO also had concerns about supporting documentation with the SAO finding that the relevant documentation was not reliable or accurate and did not provide recipients with enough information about the state of the Fund and its costs. This led the SAO to conclude that the Fund Manager's non-transparent and discretionary allocation of public funds resulted in numerous cases of grants being awarded in a non-targeted manner. The SAO also issued five notifications to prosecutor's office on potential crimes being committed. There cannot, however, be any effective investigation of these potential crimes as all prosecutors are overseen the Prosecutor General who is simultaneously the MoJ while also being the one operating the Justice Fund and therefore, someone directly implicated in its systematic misuse.

#### **1.3.4 Funds operated by the Ministry of Education and Science**

The SAO has also found numerous irregularities in relation to a fund operated by the Ministry of Education and Science ("Development of the infrastructural potential of entities supporting the education and upbringing system"). According to the SAO:<sup>241</sup>

- The conditions for participation in the programme, the procedure for submitting applications, and the detailed evaluation criteria were not precisely defined.
- Two grants totalling PLN 1.5 million were awarded to cultural institutions that were not eligible to participate in the programme.
- A grant of PLN 4.5 million was awarded to a single entity outside the application submission procedure.
- Three entities were awarded targeted grants for the implementation of investments to the total amount of PLN 6 million, although they did not meet the criterion specified by the Minister in part VI, point 7 of the communication of August 22, 2022 in the area of the applicant's experience in the implementation of activities in support of the education system, which was confirmed by external experts, reviewing applications, employed by the Minister.

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<sup>240</sup> Ibid., p. 11.

<sup>241</sup> Naczelna Izba Kontroli. Analiza wykonania budżetu państwa i założeń polityki pieniężnej w 2022 roku (Supreme Audit Office. An analysis of the execution of the state budget and the assumptions of monetary policy in 2022), 7 June 2023, p. 7: <https://www.nik.gov.pl/plik/id.27852.vp.30672.pdf>

- Two entities were awarded grants totalling PLN 615,000, despite the fact that their applications were not properly evaluated from a substantive point of view.<sup>242</sup>

A statement issued in June 2023 by the Education and Science Ministry claimed that “a significant part of the irregularities identified during the audit have been corrected by the employees, and the errors have been removed even before the start of the audit. The remaining SAO recommendations are being implemented.”<sup>243</sup>

### 1.3.5 National Centre for Research and Development (NCBiR)

The National Centre for Research and Development (NCBiR) is a government executive agency supervised by the Ministry of Development Funds and Regional Policy. In 2021, the NCBiR “distributed more than PLN 5.8 billion, of which the vast majority were funds transferred to Poland from the European Union’s budget.”<sup>244</sup>

In 2022, the SAO published the results of an audit of the NCBiR’s implementation of its tasks through companies. It was found that the establishment of one of the companies did not contribute to the more efficient implementation of the Centre’s tasks.<sup>245</sup> However, the main controversies surrounding the NCBiR were revealed by the media in 2023. The controversies involved allocating public funds connected to the “Fast Track - Digital Innovations” programme. Two companies were due to get 22% of the funding available under the call for digital innovations. The scandal erupted when media reported that a company led by a 26-year-old individual, set up after the announcement of the competition, was granted PLN 55 million and a company on the verge of bankruptcy, whose partner was a friend of the brother-in-law of Deputy Minister Jacek Żalek, received PLN 123 million. Following these media revelations, Deputy Minister Jacek Żalek was deprived of the authority to supervise the NCBiR. In addition, a person connected to the Deputy Minister and who had just been made deputy director of the Centre in November 2022, lost her position.<sup>246</sup>

The SAO, the prosecutor’s office, the Central Anti-Corruption Office (CBA) and the Ministry of Funds and Regional Policy are currently investigating this competition and associated grants. In May 2023, it was announced that the European Anti-Fraud Office (OLAF) had also began an audit of the NCBiR.<sup>247</sup>

242 Ibid.

243 Oświadczenie MEiN w związku z artykułem autorstwa red. Justyny Sucheckiej i Piotra Szostaka z dnia 19.06.2023 r. opublikowanym na portalu tvn24.pl, 19 June 2023: <https://www.gov.pl/web/edukacja-i-nauka/oswiadczenie-mein-w-zwiazku-z-artykulem-autorstwa-red-justyny-suscheckiej-i-piotra-szostaka-z-dnia-19062023-r-opublikowanym-na-portal-tvn24pl>

244 M. Pankowska, “What is the NCR&D scandal about? Huge grants for suspicious firms”, *Rule of Law in Poland*, 6 March 2023: <https://ruleoflaw.pl/what-is-the-ncrd-scandal-about-huge-grants-for-suspicious-firms/>

245 Realizacja zadań Narodowego Centrum Badań i Rozwoju przez Spółki. Informacja o wynikach kontroli, Naczelna Izba Kontroli, KNO.430.005.2021 Nr ewid. 161/2021/P/21/022/KNO.

246 M. Pankowska, “What is the NCR&D scandal about? Huge grants for suspicious firms”, *Rule of Law in Poland*, 6 March 2023: <https://ruleoflaw.pl/what-is-the-ncrd-scandal-about-huge-grants-for-suspicious-firms/>

247 Stanowisko NCBR ws. konkursu Szybka Ścieżka i programu BRIDGE Alfa, 06.05.2023, <https://www.gov.pl/web/ncbr/stanowisko-ncbr-ws-konkursu-szybka-sciezka-i-programu-bridge-alfa>; SAO, “Working meeting with OLAF representatives at NIK”, 8 August 2023: <https://www.nik.gov.pl/en/news/working-meeting-with-olaf-representatives-at-nik.html>

### 1.3.6 “Constitutional Tribunal”

The SAO has also investigated Poland’s (captured) “Constitutional Tribunal” whose irregular composition and lack of independence, as previously noted, is, inter alia, the subject of an infringement action now pending before the ECJ. Following its investigation, the SAO has found that employees of the “Constitutional Tribunal” may have acted against the public interest by failing to fulfil their duties. This concerns two contracts. The first one was concluded with a professor of law from Ukraine and involved analyses on legal systems of countries outside of the EU. Auditors found that the only deliverables under this contract were a proposal to organise a conference and an electronic version of a Ukrainian book sent to the “President” of the “Constitutional Tribunal”. The second contract was entered into with a former employee of the “Constitutional Tribunal”. In this case, it involved preparing a concept for a display board exhibition and organising a discussion panel on Polish constitutional tradition. According to the SAO, both of these contracts, which amounted to PLN 110,000 in total, were inaccurately accounted for, and the execution of neither was properly verified. The signing of these contracts could have resulted in significant financial losses for the “Constitutional Tribunal”.<sup>248</sup>

As a result, in July 2023, the SAO sent a notification to the Warsaw-Śródmieście District Prosecutor’s Office in Warsaw in relation to a suspicion of a crime having been committed under Article 231(2) of the Criminal Code (abuse of authority by a public official for the purpose of achieving financial or personal gain).<sup>249</sup>

## 1.4 Restrictions imposed on the SAO to conduct specific audits

The SAO planned to conduct an audit in 2022 entitled “Selected expenditures of companies with the shares owned by the State Treasury and foundations established by these companies”. The SAO has a history of conducting such audits,<sup>250</sup> and the planned 2022 audit was to be conducted in relation to the following companies: (i) PKN Orlen (Polski Koncern Naftowy ORLEN S.A.), one of the largest oil industry corporations in Central and Eastern Europe; (ii) Energa and Sigma BIS (whose dominant shareholder is PKN Orlen); (iii) Alior Bank and Link4 (companies of the PZU Group, to which the PZU insurance company belongs); and (iv) PGNiG (Polskie Górnictwo Naftowe i Gazownictwo SA). The SAO also planned to conduct an audit of the following foundations: (i) Orlen Foundation; (ii) Energa Foundation; (iii) BGK Foundation; and (iv) PGNiG Foundation.

248 M. Nycz, M. Piekarski, Zawiadomienie do prokuratury po kontroli NIK-u w Trybunale Konstytucyjnym (A report to the prosecutor’s office following the Supreme Audit Office’s audit of the Constitutional Tribunal), 14 July 2023: [https://www.rmfm24.pl/fakty/polska/news-zawiadomienie-do-prokuratury-po-kontroli-nik-u-w-trybunale-k.nld.6902529#crp\\_state=1](https://www.rmfm24.pl/fakty/polska/news-zawiadomienie-do-prokuratury-po-kontroli-nik-u-w-trybunale-k.nld.6902529#crp_state=1)

249 Kontrola NIK w Trybunale Konstytucyjnym. Jest zawiadomienie do prokuratury (Supreme Audit Office’s audit of the Constitutional Tribunal. A report has been made to the prosecutor’s office), *Dziennik Gazeta Prawna*, 14 July 2023: <https://serwis.gazetaprawna.pl/orzeczenia/artykuly/8788417.kontrola-nik-w-trybunale-konstytucyjnym-jest-zawiadomienie-do-prokura.html>

250 Wydatki spółek z udziałem Skarbu Państwa na działalność sponsoringową, medialną i usługi doradcze. Informacja o wynikach kontroli. KGP.430.023.2017 Nr ewid. 172/2017/P/17/021/KGP: [file:///Users/aniawojcik/Downloads/kgp-p\\_17\\_021\\_201708301009441504087784-01.pdf](file:///Users/aniawojcik/Downloads/kgp-p_17_021_201708301009441504087784-01.pdf)

The SAO was unable, however, to conduct the planned audits of PKN Orlen in 2022 as the company prevented the controllers from carrying out their duties. The first audit concerned the company's expenditures on sponsorship, media, legal, and consulting services, as well as its donation practices. The second audit was to examine the merger process of PKN Orlen with Lotos and PGNiG. Both audits could not take place as the SAO auditors were not allowed to perform their statutory duties after being denied access to documents and the necessary information.<sup>251</sup>

In the light of this obstruction and impediment of its work, the SAO subsequently filed three notifications with the Prosecutor's Office in relation to alleged crimes under Article 98 of the Act on the Supreme Audit Office and a further set of eight "claims of other suspected offences, including one relating to a false accusation of a criminal offence after PKN Orlen complained to the public prosecutor's office about the authority's inspectors".<sup>252</sup> The Prosecutor's Office refused to initiate proceedings for each of the acts covered by the three notifications, leading the SAO to file appeals in each of the three cases. The appeals are currently pending before the Warsaw-Śródmieście District Court in Warsaw.

Other foundations established by state-run companies include the Polish National Foundation (Polska Fundacja Narodowa), established in 2016. The following year, this foundation financed a billboard campaign called "Fair Courts" for PLN 8.4 million, which amounted to a smear campaign against Polish judges.<sup>253</sup> The foundation also commissioned an American PR firm to create profiles of Poland on social media for over PLN 27 million for no apparent results.<sup>254</sup> According to the SAO, the Polish National Foundation obstructed an audit ordered by the SAO President by refusing to provide the necessary documents. However, in March 2023, a court (whose exact composition we have not been able to establish) ruled that the Foundation had not committed a crime.<sup>255</sup> This appears difficult to reconcile with the SAO's statutory authority to audit every entity that uses public funds.

## 1.5 Prosecutor's Office refusal to initiate proceedings based on the SAO notifications

The SAO filed 11 notifications of possible criminal offences concerning 10 entities. The notifications concerned: (i) The performance of tasks in the field of security in the oil sector by PKN Orlen and (ii) The expenditures of companies with the participation of the State Treasury

251 PKN Orlen sells assets to carry on with Lotos merger. *TVN24*, 12 January 2022: <https://tvn24.pl/tvn24-news-in-english/polands-oil-giant-orken-sells-assets-to-carry-on-with-lotos-merger-5556794>

252 A. Ptak, "State audit office notifies prosecutors of alleged crimes by Polish oil giant Orlen", *Notes from Poland*, 1 February 2023: <https://notesfrompoland.com/2023/02/01/state-audit-office-notifies-prosecutors-of-alleged-crimes-by-polish-oil-giant-orken/>

253 A. Sanders, and L. von Danwitz, "Defamation of Justice – Propositions on how to evaluate public attacks against the Judiciary", *VerfBlog*, 31 October 2021: <https://verfassungsblog.de/defamation-of-justice-propositions-on-how-to-evaluate-public-attacks-against-the-judiciary/> ("The government and the governing Law and Justice Party deny any involvement in the campaign. However, Prime Minister Beata Szydło was present at the official inauguration of the campaign and the campaign itself was registered and is run, apparently, by two former employees of the chancellery of the Prime Minister. Further, their financial resources are provided by state-owned companies whose managers have all been nominated by the Law and Justice Party")

254 S. Kluziński, Polska Fundacja Narodowa wydała w rok ponad 60 mln zł. I twierdzi, że to nie jest jej ostatnie słowo (The Polish National Foundation has spent over 60 million PLN in a year and claims that it is not their final word), *OKO.press*, 13 July 2021: <https://oko.press/polska-fundacja-narodowa-2020-sprawozdanie/>

255 I. Kacprzak, G. Zawadka, Banaś już PFN nie sprawdzi (Banas will no longer oversee the Polish National Foundation), *Rzeczpospolita*, 20 March 2022: <https://www.rp.pl/polityka/art35899851-banas-juz-pfn-nie-sprawdzi>

and foundations established by these companies, as well as the financial management and the fulfilment of the statutory goals of the foundations in the case of: PKN Orlen, Energa, Sigma BIS, Orlen Foundation, Energa Foundation, PGNiG, PGNiG Foundation, LINK 4 Insurance Company, BGK Foundation, Alior Bank.

As of February 2023, the Prosecutor's Office has reviewed five of these notifications and in all cases, prosecutors have refused to initiate investigations.<sup>256</sup> "There is no legal basis for the Supreme Audit Institution to audit PKN Orlen", argued in January 2022 PKN Orlen CEO Daniel Obajtek.<sup>257</sup> Moreover, In connection with the 2020 audit of the controversial purchase of respirators by the Ministry of Health from KGHM company at the peak of the first wave of the COVID-19 pandemic in 2020, the SAO filed two notifications to the prosecutor's office about suspected criminal offences by government officials, one of whom is former Deputy Minister of Health Janusz Cieszyński (current Minister for Digitization).<sup>258</sup> The status of these two notifications is unclear.

## 1.6 Motions to the "Constitutional Tribunal"

In June 2022, the SAO President submitted requests to the (captured) "Constitutional Tribunal" to examine the compatibility with the Constitution of the provisions on the government's business assistance program during the pandemic (pending Case K 10/23) and the so-called "Anti-COVID-19 special law",<sup>259</sup> that is, the law on special solutions related to the prevention, mitigation and combating of COVID-19, other infectious diseases and crisis situations (pending Case K 9/23).<sup>260</sup>

## 1.7 Concluding remarks

In light of the above, and considering the European Commission's own ARoLR assessment, which was most recently corroborated by the International Organization of Supreme Audit Institutions (INTOSAI) via the SIRAM mechanism, it is submitted that the current malfunctioning of Poland's SAO manifestly falls within the scope of the Conditionality Regulation and would justify its prompt activation as the SAO is at the very least close to effectively losing its capacity to carry out its functions, including as regards the sound and independent audit of public funds' expenditure in Poland. Indeed, as of September 2023, the SAO Supreme Chamber of Control (Kolegium Najwyższej Izby Kontroli) will consist of no more

256 Kontrola NIK w Orlenie? Wątpliwości po werdykcie sądu (NIK audit at PKN Orlen? Doubts arise following the court's verdict), *Dziennik Gazeta Prawna*, 3 February 2023: <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8652942.kontrola-nik-w-orlenie-marian-banas-sad.html>

257 Obajtek: Nie ma podstawy prawnej, żeby NIK miał kontrolować PKN Orlen (Obajtek: There is no legal basis for NIK to control PKN Orlen), *Dziennik Gazeta Prawna*, 4 January 2023: <https://serwisy.gazetaprawna.pl/energetyka/artykuly/8626736.obajtek-pkn-orken-kontrola-nik-podstawa-prawna.html>

258 NIK zawiadamia prokuraturę o podejrzeniu popełnienia przestępstwa ws. kupna respiratorów (The Supreme Audit Office (NIK) reports to the prosecutor's office regarding suspected criminal activity related to the purchase of respirators), *Dziennik Gazeta Prawna*, 22 April 2022: <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8405881.nik-zawiadamia-prokurature-kupno-respiratorow-cieszynski.html>

259 Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych, Dz.U. 2020 poz. 374.

260 Wnioski Prezesa NIK do Trybunału Konstytucyjnego, Naczelna Izba Kontroli (The President of the Supreme Audit Office's submissions to the Constitutional Tribunal, the Supreme Audit Office), 16 June 2023: <https://www.nik.gov.pl/aktualnosci/wnioski-prezesa-nik-do-trybunalu-konstytucyjnego-062023.html>

than three individuals due to the three-year terms of office of the other members having come to an end: the head of the Supreme Chamber of Control and two vice-presidents who are in open conflict with him. With the current Speaker of the Sejm, Elżbieta Witek, continuing to consistently block further nominations put forth by the current SAO President, the total paralysis of the Supreme Chamber of Control may be expected.<sup>261</sup> This is bound to result in audit reports with “inconvenient” findings for the current ruling coalition no longer being published.

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<sup>261</sup> G. Osiecki, T. Żółciak, Wyciszenie NIK na czas kampanii. Banaś traci kontrolę nad kolegium (Silencing NIK for the duration of the campaign. Banaś loses control of the college), *Dziennik Gazeta Prawna*, 6 September 2023: <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/9291225.wyciszenie-nik-na-czas-kampanii-banas-traci-kontrolę-nad-kolegium.html>

## 2. Political capture and ensuing systemic instrumentalisation of Poland’s investigation and prosecution services

The European Commission has repeatedly expressed its most serious concerns regarding the status of the Prosecutor General and the proper functioning of the prosecution services in Poland following the merger of the functions of the Minister of Justice (MoJ) and the Prosecutor General (PG) in 2016.<sup>262</sup> The European Commission has done so via the pre-Article 7 procedure; the ongoing Article 7(1) TEU procedure; and the ARoLR’s country chapters relating to Poland. Within the framework of a national request for a preliminary ruling, ECJ Advocate General Bobek has also characterised Poland’s MoJ/PG merger as creating an “unholy” alliance between two institutional bodies that should normally function separately.<sup>263</sup>

Beyond EU institutions, one may also mention the Venice Commission’s assessment that this merger violates Poland’s Constitution and international human rights law standards. From a rule of law point of view, this merger must also be viewed according to the Venice Commission as “unacceptable in a State governed by the rule of law as it could open the door to arbitrariness”<sup>264</sup> due to “the accumulation of too many powers for one person” with “direct negative consequences for the independence of the prosecutorial system from the political sphere.”<sup>265</sup> PACE subsequently and similarly observed that “the *ad personam* merger of the posts of Minister of Justice and Prosecutor General, and the extensive discretionary powers over the prosecution service and the actual prosecution of individual cases itself given to the Minister of Justice, undermine the impartiality and independence of the Prosecution Service and make it vulnerable to politicisation and abuse.”<sup>266</sup>

As will be shown below, this is no longer a theoretical risk as there is an overwhelming body of evidence showing that Poland’s prosecution services have been completely politicised with abuse a recurrent feature of the (mal)functioning of the captured prosecution services since 2016. In its most recent ARoLR country chapter for Poland, the European Commission itself was forced to conclude that Polish authorities continue to disregard its repeated concerns as regards the functions of the MoJ and the PG which are still not separate. The Commission also concluded that there was no progress on ensuring independent and effective investigations and prosecutions. The Commission did however detect – albeit wrongly in our view – “some progress” when it comes to ensuring functional independence of the prosecution service from the Polish government. The reality is different: The alleged progress is in fact directly motivated by the need to further consolidate control over the prosecution services until at least 2025 should Poland’s current ruling coalition lose the next elections in October 2023.<sup>267</sup>

262 Law of 28 January 2016 on the Prosecutor’s Office, published in Official Journal on 15 February 2016, item 177; law of 28 January 2016 – Regulations implementing the Act – law on the Prosecutor’s Office, published in Official Journal on 15 February 2016, item 178.

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

264 Venice Commission Opinion of 8-9 December 2017 on the Act on the Public Prosecutor’s office, as amended, CDL-AD(2017)028, para. 97.

265 *Ibid.*, para. 115.

266 PACE, *The functioning of democratic institutions in Poland, Resolution 2316 (2020)*, para. 7.1.

267 M. Jalošzewski, “PiS uwłaszczył się na prokuraturze. Ludzie Ziobry mogą nią rządzić co najmniej do 2025 roku” (“PiS has taken possession of the prosecutors’ office. Ziobro’s people can rule it at least until 2025”), *OKO.press*, 17 August 2023: <https://oko.press/pis-prokuratura-barski>

**Table 11:** Malfunctioning of the prosecution services as outlined in the Commission’s ARoLR 2022 and 2023 Poland’s Country Chapter

<p style="text-align: center;"><b>2022 Rule of Law Report, Poland’s Country Chapter, pp. 10-11 and p. 27 (bold in original)</b></p>	<p style="text-align: center;"><b>2023 Rule of Law Report, Poland’s Country Chapter, pp. 11-12, p. 18 and p. 29 (bold in original)</b></p>
<p><b>Concerns regarding the functioning of the prosecution service persist.</b> The offices of Minister of Justice and Prosecutor-General continue to be occupied by the same person. The practice of seconding prosecutors, already considered by Polish courts to be a form of demotion and discrimination, continues to be used by superior prosecutors. Instructions binding on prosecutors reportedly continue to be issued in concrete cases. [...] Furthermore, the National Prosecutor’s Office issued instructions binding on all prosecutors recalling the allegedly non-binding force of judgments of the European Court of Justice and of the ECtHR as well as requesting prosecutors to report to the National Prosecutor’s office and to the Disciplinary Officer cases in which judges question the status of other judges. Prosecution services are also seized in the context of actions undertaken by judges. Whilst the European Public Prosecutor’s Office (EPPO) currently has 23 ongoing investigations involving Poland, the Polish prosecution services refuse to cooperate with the EPPO. [...]</p> <p>Representatives of the SAO raised concerns about the lack of effective follow-up by the prosecution services to its requests made in the aftermath of audits.</p>	<p><b>Some progress has been made to ensure functional independence of the prosecution service from the Government, while no progress has been made to separate the office of the Minister for Justice and the Prosecutor General.</b> [...] On 27 October 2022, Parliament adopted an amendment to the Law on the Prosecution Service, transferring the competence to appoint and dismiss persons to management positions within the prosecution service from the Prosecutor General to the National Prosecutor (who can be dismissed solely with the consent of the President of the Republic). [...] However, the separation of the office of the Prosecutor General from that of the Minister of Justice has not been carried out. Prosecutors are still being seconded without their consent, which risks affecting prosecutorial independence, while courts continue considering such secondments as a form of harassment. Disciplinary proceedings against prosecutors in sensitive cases continue. [...]</p> <p>The public prosecution does not follow up on the Supreme Audit Office’s requests, while auditors themselves are subject to criminal investigations.</p>

Considering the nature and extent of Poland’s prosecution services’ malfunctioning, which will be further detailed below, it is submitted that the situation in Poland manifestly falls within the scope of the Conditionality Regulation.

Firstly, Polish authorities have committed multiples breaches of the principles of the rule of law since 2016 when they adopted their first (unconstitutional) law dedicated to the Prosecutor’s Office and which was described, as previously noted, as “unacceptable in a State governed by the rule of law as it could open the door to arbitrariness”.<sup>268</sup>

Secondly, the breaches of the rule of law committed, which can be identified in relation to both the adoption of the Act on the Public Prosecutor’s office (as amended) and the subsequently malfunctioning of the prosecution services as a result of the actions/inactions justified on the basis of this law and following measures adopted since, have had a manifest, serious and sustained impact on:

<sup>268</sup> Venice Commission Opinion of 8-9 December 2017, op. cit., para. 97.

- “the proper functioning of investigation and public prosecution services”, including “in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union” (Article 4(2)(c) of the Conditionality Regulation);
- “the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union” (Article 4(2)(e) of the Conditionality Regulation);
- “effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation” (Article 4(2)(g) of the Conditionality Regulation).

In practice, the effectiveness and impartiality of Poland’s prosecution services that may be directly responsible for indictments for irregularities in cases related to the management of the EU funds have been systemically undermined by Polish authorities’ actions or inactions taking the following form:

- Disguised harassment and sanctions of prosecutors via forced secondment and transfers to lower-level units in violation of the case law of both the ECJ and ECtHR, in particular as regards prosecutors who seek to comply and enforce domestic and European rule of law standards;
- Dismissals of multiple prosecutors from their managerial functions and chilling effect created by the possibility to do so at will without any constraint, including prosecutors handling cases relating to the management of EU funds;
- Instructions binding on all prosecutors ordering them to consider as non-binding the rule of law related judgments of the ECJ and of the ECtHR in all situations, including cases relating to the sound financial management of the EU budget or the protection of the EU’s financial interests;
- Failure to follow up on the SAO’s requests while subjecting the SAO auditors to arbitrary criminal investigations with the manifest aim of deterring them for fulfilling their missions and preventing criminal proceedings against members of the Poland’s current ruling coalition or individuals and organisations associated or close to the current ruling coalition;
- Failure to effectively investigate high-level corruption or potential misuse of EU funds by public authorities, including the Minister of Justice himself, as well as individuals and organisations associated or close to the current ruling coalition while criminal proceedings are launched against individuals and organisations associated with the opposition;
- Failure to effectively cooperate with the EPPO – a legal obligation including for non-participating Member States – in a context where in the absence of Poland’s participation in the EPPO, the national prosecution services remain the only services with the power to conduct criminal investigations into crimes affecting the EU’s financial interests.

Thirdly, in the absence of any meaningful protection afforded to public prosecutors as a whole – including therefore those in charge of investigating potential irregularities and wrongdoings regarding EU’s financial interests – against undue interference from the MoJ/PG who is also a leader of a political party, the above breaches of the rule of law must be viewed *at a minimum* as creating serious risks as regards the sound financial management of the EU budget or the protection of the EU’s financial interests in a sufficiently direct.

Fourthly, given the absence of any effective measures available to domestic courts, other state authorities, or victims of crimes to compel the prosecution services to investigate

manifestly evident instances of potential crimes affecting EU financial interests, such as corruption and the improper use of public resources, and to subsequently file criminal charges following such investigations, as well as to suspend investigations conducted in cases that clearly fall outside the scope of criminal law, these violations affect “the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union” (Article 4(2)(e) of the Conditionality Regulation).

## 2.1 Prosecutor General’s excessive powers

In Poland, a highly hierarchical structure of the prosecution service exists, under which the Prosecutor General concentrates many powers and may directly or indirectly instruct prosecutors, attributing or removing cases from them, without explanations. This, coupled with other possible issues relating to investigation, entails a serious risk of weakening the effective pursuit of investigations and prosecutions in cases involving EU funds. Against this background, it is not surprising to see non-governmentally controlled media regularly alleging that investigations and prosecution proceed at different paces, depending on the cases and suspects concerned. The deficiencies, weaknesses, limits and risks described below are widespread and intertwined.

The top-down undermining of the proper functioning of the prosecution services in Poland began in 2016 with the adoption of an unconstitutional piece of legislation granting the Prosecutor General sweeping additional powers, effectively giving him complete control over the subordinated Prosecutor’s Office.

This 2016 law was described by the Venice Commission as “unacceptable in a State governed by the rule of law as it could open the door to arbitrariness”.<sup>269</sup> To the best of our knowledge, this represents an unprecedented diagnosis as regards a law governing the public prosecutor’s office of an EU Member State. This diagnosis was justified by the Venice Commission on several grounds. To begin with, the Venice Commission found that “the amalgamation between the political office and the office of chief prosecutor is accompanied by an important increase in the powers of the Public Prosecutor General in the management of the prosecutorial system, including new competences enabling the Minister of Justice to directly intervene in individual cases.”<sup>270</sup> This has, in turn, created “a number of insurmountable problems as to the separation of the prosecution system from the political sphere”<sup>271</sup> in addition to creating “a potential for misuse and political manipulation of the prosecutorial service,”<sup>272</sup> in a context where the Minister of Justice has simultaneously gained extensive powers on courts and individual judges under the Act on the Organisation of Common Courts of 2017, in particular the power to dismiss and replace courts presidents and vice presidents.<sup>273</sup> The abuse of this power and others will be further detailed in the Section decided to the lack of effective judicial review in Poland.

<sup>269</sup> Venice Commission, Opinion on the Act on the Public Prosecutor’s Office as amended, op. cit., para. 97.

<sup>270</sup> Ibid., para. 109.

<sup>271</sup> Ibid., para. 110.

<sup>272</sup> Ibid., para. 111.

<sup>273</sup> Ibid.

To solely focus on prosecutions services at this stage, one may add an additional structural weakness identified by the Venice Commission as regards the National Council of Public Prosecutors which does not have sufficient powers to perform an effective check on the exercise of the Prosecutor General's powers to issue instructions to prosecutors in specific cases and to transfer prosecutors.

In light of all the changes made by Poland's ruling coalition in 2016-17, the Venice Commission concluded that these "reforms" have resulted "in the accumulation of too many powers for one person. This has direct negative consequences for the independence of the prosecutorial system from the political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland."<sup>274</sup>

To this day, Polish authorities have not implemented the recommendations made by the Venice Commission in December 2017, the same month the European Commission decided to activate Article 7(1) TEU in view of the existence of a systemic threat to the rule of law in Poland. In addition to the need to depoliticise the prosecutorial system and separate once more the offices of the Public Prosecutor General and the Minister of Justice, the Venice Commission also recommended to:<sup>275</sup>

- Introduce a requirement that any instruction reversing the acts of a subordinate prosecutor to be reasoned;
- Clearly establish in law that the parties to the case have access to the instructions given by a superior public prosecutor;
- Provide subordinate public prosecutor with the possibility to contest the validity of the instruction on the basis of its illegal character or its improper grounds before a court or an independent body;
- Clearly indicate the limited circumstances under which the Prosecutor General may request operational activities directly linked to on-going preparatory proceedings and to get acquainted with materials collected in the course of such activities;
- Should the current system of merger of offices not be remedied, exclude at least the Prosecutor General's competence to intervene in individual cases and limit the Prosecutor General's competence to giving general regulations and guidelines to the subordinate prosecutors in order to prevent any risk of political manipulation of individual cases by an active politician;
- Better protect the presumption of innocence and privacy when information is transmitted to the media and "other persons", which is a category that should also be more clearly determined;
- Reconsider the purely advisory role of the National Council of Public Prosecutors, its composition and how a member of the Council may be dismissed;
- Repeal the provision excluding disciplinary liability for decisions taken exclusively in the *public interest*.

The European Commission has repeatedly expressed its concerns regarding the unrestricted competencies of the PG in Poland's ARoLR country chapters in 2020,<sup>276</sup> 2021,<sup>277</sup> 2022,<sup>278</sup> and most recently, in 2023.<sup>279</sup>

274 Ibid., para. 115.

275 Ibid., paras. 112-114.

276 2020 Poland's ARoLR Country Chapter, p. 3.

277 2021 Poland's ARoLR Country Chapter, p. 11.

278 2022 Poland's ARoLR Country Chapter, p. 11.

279 2023 Poland's ARoLR Country Chapter, p. 12.

To remain brief, the PG has indeed been given the power to appoint, without any competition, the heads of subordinate units (the regional, district, and local public prosecutor) at the request of the National Prosecutor, who is subordinate to him. In addition, the 2016 legislation changed the structure of the prosecution offices, with the establishment of the National Prosecutor's Office and regional prosecutor's offices. The PG was simultaneously granted powers to appoint prosecutors to the new units. The PG and National Prosecutor had full discretion in determining the status of the prosecutors of the dissolved units and many high-ranking prosecutors were not offered leadership positions under the new structure.<sup>280</sup>

In addition, the PG has the authority to second (delegate) a prosecutor from a regular unit in the prosecutor's office to work at the MoJ, or another department under the control of the MoJ. Moreover, the PG or his subordinate, the National Prosecutor, has the authority to second (delegate) a prosecutor from a regular unit in the prosecutor's office to another organisational unit of the prosecutor's office. If these assignments are for less than six months, the seconded prosecutor's consent is not required.<sup>281</sup> The current PG and his subordinates have used these powers to reward certain prosecutors by promoting them to higher units within the prosecutor's office, and also to penalise prosecutors who criticise changes in the justice system which clearly violate constitutional and European rule of law requirements, for instance, by immediately sending them to prosecutor's offices far from their place of residence.

The PG has the power to intervene directly in preliminary proceedings, the right to access the files of every case, give instructions, including those related to specific procedural steps, to prosecutors working on the case, change or revoke decisions of the prosecutor in charge of the case and provide selected individuals with information from ongoing preliminary proceedings.<sup>282</sup> The Prosecutor General also has the right to lift and change the classified status of a document or other piece of evidence.<sup>283</sup> Finally, one may mention that the PG, the National Prosecutor, or any prosecutor authorised by them, have the power to provide public authorities and, in specific cases, individuals, with information about the activities of the prosecution service, including details of specific cases, if such information may be important for the security or proper functioning of the state.<sup>284</sup> Moreover, there are instances where the PG granted members of the ruling Law and Justice party access to investigation files. Jarosław Kaczyński, the leader of Poland's ruling party, has been reportedly given access to 13 case files.<sup>285</sup> However, the prosecution services have refused to provide exact figures under Poland's Freedom of Information Law in disregard of courts' decisions holding that this kind of information falls within the scope of public information.<sup>286</sup>

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280 Helsinki Foundation for Human Rights, *A state of accusation. Polish prosecution service 2016-2022*, 2022, pp. 16-17: <https://hfhhr.pl/upload/2022/04/state-of-accusation-en.pdf>

281 Ibid.

282 Ibid., p. 6.

283 Ibid., p. 13.

284 Ibid., p. 14.

285 W. Cieśla, P. Reszka, M. Krzymowski, W "Newsweeku": Lex Kaczyński. Prezes PiS dostał informacje z 13 śledztw (In "Newsweek": Lex Kaczyński. The President of PiS received information from 13 investigations), *Newsweek*, 12 June 2017: <https://www.newsweek.pl/polska/polityka/prezes-pis-i-informacje-ze-sledztw-z-prokuratury-krajowej/nk969el>

286 See judgment of the Supreme Administrative Court of 25 March 2023, case III OSK 1159/21.

The actions of the PG and his subordinates indicate that they have *repeatedly misused these powers for political purposes*. To give a recent example, in August 2023, during a press conference at the Ministry of Justice, alongside the MoJ/PG, prosecutor Tomasz Szafrąński revealed the full name of the victim of a homophobic attack. This disclosure had a political dimension as the PG had simultaneously decided to suspend the three-year prison sentence for robbery and hooliganism the perpetrator of the attack, a member of a neo-fascist organisation, was serving. The PG took this opportunity to publicly criticise the court's rulings in this case, question the legal qualification of the act, and express his opinions on the sentence. Last but not least, the PG removed the prosecutor who handled the case from his role as head of the district prosecutor's office.<sup>287</sup>

## 2.2 Politicisation and instrumentalisation of the Prosecutor General and the Minister of Justice's offices

Under the 2016 Law on the Prosecutor General's Office, the requirement of at least 10 years of experience working as a judge or prosecutor was abolished for the post of PG. It was also no longer prohibited for the MoJ/PG to hold a parliamentary mandate. Moreover, the previous fixed-term nature of the position was removed.<sup>288</sup>

The current MoJ/PG, Mr. Zbigniew Ziobro, is also an MP and the chairman of the Sovereign Poland, *Suwerenna Polska* (formerly *Solidarna Polska*) party, a junior coalition partner of Poland's ruling party PiS. In his capacity as Prosecutor General, he has played a key role in the systemic undermining of the rule of law in Poland by, for instance, supporting the Prime Minister's motion to the captured "Constitutional Tribunal" in Case K 3/21 on the alleged unconstitutionality of Article 19(1) TEU and lodging cases such as cases K 6/21 and K 7/21 on the alleged unconstitutionality of Article 6 (1) ECHR, and (pending) case K 8/21 on the alleged unconstitutionality of ECJ interim orders.

Numerous public statements could be cited to show the unprecedentedly aggressive nature of Mr Ziobro's rhetoric to justify what amounts to repeated violations of Poland's Constitution, the EU Treaties and the ECHR. For instance, a day after the (captured and irregularly composed) "Constitutional Tribunal" issued its decision in the case K 3/21, Ziobro in his capacity as MoJ, officially addressed the former Polish PM and former European Council President Donald Tusk, now the leader of one of the opposition parties in Poland, saying that the Constitutional Tribunal was repelling "legal aggression" from the EU.<sup>289</sup> Similar aggressive rhetoric followed the decision of the Constitutional Tribunal in case P 7/20, in which this body claimed that the ECJ interim orders on the structure of courts in Poland were (allegedly) inconsistent with the Polish Constitution. According to Mr Ziobro, the Constitutional Tribunal must be praised for protecting "the Polish constitutional order from unlawful interference,

287 Sprawa Mariki, Ziobro wyciąga konsekwencje personalne (The Marika case. Ziobro is taking personnel actions), TVN24, 2 August 2023: <https://tvn24.pl/polska/sprawa-skazanej-24-letniej-mariki-zbigniew-ziobro-zdecydowalem-o-odwolaniu-zastepcy-szefa-poznanskiej-prokuratury-rejonowej-7275993>.

288 Helsinki Foundation for Human Rights, *A state of accusation*, op. cit., p. 13.

289 Minister Sprawiedliwości: przypomnę Donaldowi Tuskowi o prymacie Konstytucji (Minister of Justice: I will remind Donald Tusk of the primacy of the Constitution), gov.pl, 8 October 2021, <https://www.gov.pl/web/sprawiedliwosc/minister-sprawiedliwosci-przypomne-donaldowi-tuskowi-o-prymacie-konstytucji>.

usurpation and legal aggression by EU bodies.”<sup>290</sup> As will be shown below and in this study’s section on the systemic undermining of judicial independence, this belligerent rhetoric has been accompanied by multiple and repeated arbitrary proceedings not only against prosecutors and national judges but also, in another unprecedented instance, against all of the judges of the Court of Justice against whom a criminal investigation was launched. This grossly unlawful move from an EU law point of view was followed by the opening of another grossly unlawful criminal investigation against members of the EU Court of Auditors.

**Table 12:** Criminal investigation of all CJEU judges on account of their Poland-related rule of law rulings<sup>291</sup>

On 15 December 2021, Polish prosecutors launched a preliminary criminal investigation against all of the CJEU judges on account of a possible abuse of powers by CJEU judges, which may have been committed when deciding cases relating to Poland’s judicial “reforms” (the letter originating from the regional prosecution office in Warsaw, dated 15 December 2021 in file no. 3041-1.Ds.90.2021, does not make it clear which specific EU cases CJEU judges are being criminally investigated for):

Prosecutors in Warsaw have begun to gather information on whether judges from the Court of Justice of the European Union (CJEU) exceeded their powers when dealing with complaints against Poland. Meanwhile, Poland’s National Council of the Judiciary (KRS) has prepared a resolution calling on the CJEU to “suspend activity until doubts as to its independence are resolved”. [...] As well as being justice minister, Ziobro also serves as prosecutor general. Yesterday, Polish media reported that prosecutors in Warsaw had begun an investigation into “the exceeding of powers by judges of the CJEU in the course of examining complaints against Poland”. What that means in practice, reports news website Onet, is that they want to ascertain whether CJEU judges can be held criminally responsible in Poland.<sup>292</sup>

The launch of a criminal investigation of this nature is unprecedented in the history of the EU in addition to amounting to a manifestly abusive attempt to intimidate ECJ judges and a gross violation of the provisions of the EU Protocol regarding the immunities of the EU applicable to the CJEU judges. The ongoing criminal investigation against members of the CJEU was officially confirmed in January 2022 when it also emerged that a similar (unlawful) criminal investigation has been opened in relation to the members of the EU Court of Auditors.<sup>293</sup>

290 Trybunał Konstytucyjny potwierdził bezprawność działań TSUE (The Constitutional Tribunal confirmed the unlawfulness of actions by the Court of Justice of the European Union), 14 July 2021, <https://www.gov.pl/web/sprawiedliwosc/trybunal-konstytucyjny-potwierdzil-bezprawnosc-dzialan-tsue>

291 The Commission briefly referred to this criminal investigation in its 2022 Poland’s ARoLR Country Chapter, p. 10.

292 D. Tilles, ‘Polish prosecutors investigate if EU judges committed crime when ruling on Poland’, *Notes from Poland*, 17 December 2021: <https://notesfrompoland.com/2021/12/17/polish-prosecutors-investigate-whether-eu-judges-exceeded-powers-in-rulings-against-poland/>

293 See “Afera na szczytach UE. Polska prokuratura wszczęła śledztwo” (Corruption scandal at the top of EU institutions. The Polish Office of Prosecutors begun investigating), *TVP.Info*, 25 January 2022: <https://www.tvp.info/58132359/afera-korupcyjna-na-szczytach-ue-tsue-sledztwo-polskiej-prokuratury>

Mr. Ziobro did not merely use bellicose rhetoric in relation to European and national courts but also did so in relation to actions taken by EU and Council of Europe Institutions. For instance, following the Commission's warning that EU funds may be withdrawn after the adoption of anti-LGBT resolutions by a number of Polish local governments, Ziobro argued that "we are witnessing the use of mechanisms of coercion and economic violence. The European Commission is using threats and blackmail to block the payment of funds to local governments that have adopted resolutions protecting the family. This is made possible by the expansion of the European Union's powers last year, which we warned against."<sup>294</sup>

Multiple and clear abuses of power also followed Mr Ziobro's appointment. One may recall for instance the secret "troll farm" which was set up within the MoJ with the view of harassing and intimidating prosecutors and judges. As reported by two members of the Council of Europe's Parliamentary Assembly in January 2020:<sup>295</sup>

104. The issue of politically motivated smear campaigns and harassment of judges and prosecutors came to the foreground when a political scandal broke out on 19 August 2019. The scandal involved Deputy Justice Minister Łukasz Piebiak who was, until then, one of the main driving forces behind the reform of the judiciary. [...] According to these communications, which were widely distributed on the internet, Emelia executed a smear campaign against several judges at the behest of Mr Piebiak, who also allegedly orchestrated the campaign and provided her with personal information about these judges, including their private addresses, which would constitute a gross violation of privacy regulations. In addition to Mr Piebiak, two other judges seconded to the Ministry of Justice, alongside two members and an employee from the National Council of the Judiciary, were identified as being involved in this smear campaign that targeted, among others, the President of the IUSTITIA judges' association.<sup>296</sup> [...]

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

PACE has deplored the organisation of these smear campaigns and called "upon the Polish authorities to establish, at the earliest opportunity, but no later than 31 March 2020, an independent public inquiry into these smear campaigns and those responsible for them" considering that any investigation "by the prosecution service under direct control of the Minister of Justice, which is also a potential party to the investigation, would lack the required independence and credibility".<sup>297</sup>

To this date, no such independent public inquiry has been organised and the members of the "Kasta group" have faced no disciplinary and/or criminal consequences for their actions.

294 STOP szantażowi Unii Europejskiej wobec polskich samorządów (STOP the European Union's blackmail of Polish local governments), gov.pl, 24 September 2021, <https://www.gov.pl/web/sprawiedliwosc/stop-szantażowi-unii-europejskiej-wobec-polskich-samorządów>.

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

296 The group coordinated its activities on a WhatsApp group called "Kasta" (meaning "caste", a frequent term used by members of the ruling coalition and associates to refer to judges critical of the post-2015 judicial changes).

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

## 2.3 Undermining of the effectiveness and impartiality of prosecution service

Following the merger outlined above, guarantees regarding prosecutorial independence have been systemically weakened<sup>298</sup> and there is no longer any meaningful independence of the prosecutorial system from the political sphere since 2016. In brief, the MoJ/PG and other high-ranking prosecutors have been authorised to directly interfere with decisions of prosecutors. The National Prosecutor and the PG also gained the status of superior prosecutors for all prosecutors. This is significant as superior prosecutors may, at any time, decide that a prosecutor must charge a suspect with a specific offence, request pre-trial detention, use a preventive measure in the form of professional disqualification, file an indictment or discontinue the proceedings.

To facilitate the political capture of Poland's prosecution services, "friendly" appointments have also been made. For instance, while the Prosecutor General has published more than 650 vacancies for the 2016-2022 period, the review of the vacancy notices shows that competitions for new prosecutors have not been organised at certain units of the prosecution.<sup>299</sup> The non-compulsory competitive procedure notably applies only to first-time appointments for prosecutorial posts in district prosecutor's offices. Appointments to higher-level prosecutorial positions are mostly wholly discretionary and guided by no criteria whatsoever.<sup>300</sup> Simultaneously, the PG frequently bypasses the appointment procedure by substituting promotions within the prosecution service with discretionary secondments to higher-level units.

While the Commission identified (erroneously) some steps in the right direction regarding the re-establishment of the prosecution service's functional independence from the Government in 2023, the function of the Minister of Justice from that of the PG remains merged and in the real world, "prosecutors are being seconded without their consent",<sup>301</sup> which Polish courts have considered to constitute a form of harassment, and "disciplinary proceedings against prosecutors in sensitive cases"<sup>302</sup> also continue.

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298 Helsinki Foundation for Human Rights, *A state of accusation*, op. cit., p. 20 and following.

299 Ibid.

300 Report submitted by several Polish civil society organisations, *2023 Rule of Law Report - Targeted Stakeholder Consultation*, February 2023, p. 5: [https://www.batory.org.pl/wp-content/uploads/2023/02/report\\_2023\\_rule\\_of\\_law.pdf](https://www.batory.org.pl/wp-content/uploads/2023/02/report_2023_rule_of_law.pdf)

301 2023 Poland's ARoLR Country Chapter, p. 12.

302 Ibid.

**Table 13:** Functional independence of Poland’s prosecution service: Commission’s progress assessment v. real world

Commission’s assessment <sup>303</sup>	Reality check <sup>304</sup>
<p>On 27 October 2022, Parliament adopted an amendment to the Law on the Prosecution Service, transferring the competence to appoint and dismiss persons to management positions within the prosecution service from the Prosecutor General to the National Prosecutor (who can be dismissed solely with the consent of the President of the Republic). The Government is working on an additional reform of the prosecution services that would further increase the powers of the National Prosecutor. These changes could increase the functional independence of the prosecution service from the Government. [...]</p> <p>As new rules were adopted to increase the functional independence of the prosecution service and further measures are being prepared [...] there has been some progress on the recommendation made in the 2022 Rule of Law Report.</p>	<p>In August 2023, the Parliament passed a law that delegates most of the tasks currently carried out by the Prosecutor General to the National Prosecutor, with the exception of the power to issue instructions to subordinate prosecutors.</p> <p>This transfer of authority, coupled with the provision granting the President of the Republic the power to approve the dismissal of the National Prosecutor, creates a situation where it will be exceedingly difficult for any non-PiS government to enhance the independence of the prosecution service, as critical decisions will now rest with either the National Prosecutor or the President of the Republic.</p> <p>It’s worth noting that the current National Prosecutor, Dariusz Barski, has a close personal relationship with the Prosecutor General and even served as a witness at his wedding.</p>

Regarding the abusive practice of forced secondments, one must stress that this has primarily been done to retaliate against prosecutors who criticised the repeated changes made to the organisation of Poland’s justice system, which have repeatedly been found incompatible with EU and ECHR rule of law requirements. The Commission is aware of this serious problem and noted in 2021 that the National Prosecutor had seconded prosecutors to another post for up to six months, without their consent and without providing a justification.<sup>305</sup> In some cases, prosecutors have been ordered to relocate to another town hundreds of kilometres away from their residence in a matter of days following their sudden secondment to a different office. Secondment rules were also used to demote and discriminate against certain

303 Ibid., pp. 11-12.

304 M. Jalszewski, “PiS uwłaszczył się na prokuraturze. Ludzie Ziobry mogą nią rządzić co najmniej do 2025 roku” (“PiS has taken possession of the prosecutors’ office. Ziobro’s people can rule it at least until 2025”), OKO.press, 17 August 2023: <https://oko.press/pis-prokuratura-barski> (excerpts reproduced above have been translated by the present authors)

305 2021 Poland’s ARoLR Country, p. 12.

prosecutors, especially those active in association of prosecutors Lex Super Omnia.<sup>306</sup> It is important to duly note that the law – in manifest breach of basic rule of law requirements – does *not* provide any effective judicial review of such secondments. This means that illegally seconded prosecutors cannot even apply for interim suspensions of their secondments. As will be briefly outlined below, however, we have some examples of prosecutors having been able to rely successfully on anti-discrimination at work claims based on ordinary employment law to indirectly challenge their arbitrary forced transfers.

To give but a few examples, in January 2019, seven prosecutors, including Katarzyna Kwiatkowska, Jarosław Onyszczyk, Ewa Wrzosek, Artur Matkowski who are active members of the Lex Super Omnia association, were transferred to remote units of the prosecution service.<sup>307</sup> In July 2019, the National Prosecutor transferred prosecutor Mariusz Krasoń, who initiated the resolution of the prosecutors' assembly at the Regional Prosecutor's Office in Kraków stating that the independence of prosecutors was limited in law and in fact. Mr. Krasoń was transferred to the Wrocław-Krzyki District Prosecutor's Office, which is about 260 kilometres from Krasoń's place of residence. On 23 June 2021, the Regional Court of Krakow ruled that the National Prosecutor's criminal prosecutor's transfer of prosecutors is unlawful.<sup>308</sup> On 21 March 2023, the District Court for the Capital City of Warsaw ruled that the prosecutor's delegation was a form of discrimination at work and ordered the prosecutor's office to pay him PLN 45,000 in compensation. The verdict is not final.<sup>309</sup> The Supreme Administrative Court also ruled in May 2023 that it is groundless to withhold salary rates from prosecutors transferred to the district. A demoted prosecutor of a former district prosecutor's office retains the right to change the rates of pay to which he would have been entitled had he remained in office.<sup>310</sup>

A study by the Helsinki Foundation of Human Rights in Warsaw found that in 2016-2022 disciplinary proceedings against prosecutors, especially against those who publicly criticise changes in the prosecution service or speak publicly in defence of the rule of law, was on the rise.<sup>311</sup> For example, Krzysztof Parchimowicz, co-founder and former head of the Lex Super Omnia association, has faced repeated disciplinary proceedings. On 15 November 2022, the legally flawed Chamber of Professional Responsibility, which replaced the unconstitutional Disciplinary Chamber, upheld the decision of the disciplinary court which dismissed the charges against Krzysztof Parchimowicz in one case. This case concerned his public criticism of the 'Muzzle Law' from March 2020 which the ECJ recently found incompatible with EU law

306 See Open Dialogue and THEMIS, *Polish Public Prosecutor's Office: Selected Cases of Malicious Prosecution and Dereliction of Duties since 2015*, February 2022: <https://en.odfoundation.eu/a/190999.polish-public-prosecutors-office-selected-cases-of-malicious-prosecution-and-dereliction-of-duties/>

307 Ibid., p. 9.

308 M. Jałoszewski, Prokurator Krasoń wygrał z prokuraturą Ziobry. Sąd: karne delegacje w Polskę bezprawne (Prosecutor Krasoń has won against Ziobro's prosecutor's office. Court: punitive delegations to Poland are unlawful), *OKO.press*, 23 June 2021, <https://oko.press/prokurator-krason-wygral-z-prokuratura-ziobry-sad-karne-delegacje-w-polske-bezprawne/>

309 M. Jałoszewski, Ważne. Pierwszy wyrok za degradowanie prokuratorów przez Ziobrę. Prokuratura ma zapłacić 45 tys. zł (The first verdict for the demotion of prosecutors by Ziobro. The prosecutor's office is ordered to pay 45,000 PLN), *OKO.press*, 30 July 2023, <https://oko.press/pierwszy-wyrok-za-degradacje-prokuratorow/>

310 K. Żączkiewicz-Zaorska, NSA: Wynagrodzenia przenoszonych prokuratorów nie do ruszenia (Supreme Administrative Court: The salaries of transferred prosecutors are untouchable), *Prawo.pl*, 30 May 2023, <https://www.prawo.pl/prawnicy-sady/wynagrodzenia-prokuratorow-nie-do-ruszenia.521503.html>

311 *A state of accusation. Polish prosecution service 2016-2022*, op. cit.

in its judgment in Case C-204/21. Multiple charges against Krzysztof Parchimowicz remain pending.<sup>312</sup>

On 18 April 2023, the District Court for Warsaw's Praga-Północ District awarded prosecutor Katarzyna Kwiatkowska (who is also the President of Lex Super Omnia), PLN 9,000 in damages for suffering a violation of the principle of equal treatment in employment. Kwiatkowska was forcibly seconded for six months in January 2021. In February 2022, the Warsaw District Court awarded her PLN 16,800 in damages as it found that the punitive secondment amounted to discrimination for her work at Lex Super Omnia. The verdicts are not final. Moreover, the National Prosecutor's Office has filed a personal rights lawsuit against prosecutor Kwiatkowska in connection with her public statements which allegedly violated the interests of the Prosecutor's Office. The Prosecutor's Office has also applied for PLN 250,000 in damages, plus the costs of an apology in the media (overall costs estimated at PLN 2 million). The case is pending.<sup>313</sup>

The harassment of prosecutors has also taken the form of illegal use of spyware ("Pegasus"). The most widely known example is the case of Warsaw District Prosecutor Ewa Wrzosek. In 2020, Wrzosek opened an investigation into the preparation of mail-in voting for the "ghost" presidential election. Her supervisors took over the case and soon closed it. In 2022, media reports indicated that prosecutors were pursuing disciplinary proceedings against Wrzosek and planned to file a motion to lift her immunity for allegedly disclosing information from an ongoing investigation. Wrzosek was suspended during the course of the disciplinary proceedings. On 25 May 2023, the Disciplinary Court at the Prosecutor General Office extended the further suspension of Prosecutor Wrzosek for another six months.<sup>314</sup> The use of Pegasus against Prosecutor Ewa Wrzosek took place in a broader context where, as previously detailed in this study, the SAO has also been facing thousands of cyberattacks – allegedly via Pegasus as well – with these attacks peaking at the time of the SAO investigating the same "ghost" presidential election and the illegal use of the Justice Fund by the Ministry of Justice.

In this context, it is important to mention in passing that the 2016 law on the Prosecutor's Office granted the PG and the National Prosecutor (the former's high-ranking subordinate) powers to supervise operational and intelligence-gathering procedures. Moreover, Poland lacks an independent body to oversee the intelligence services, despite repeated calls from the Commissioner for Human Rights for its creation. The intelligence services' powers were expanded in 2016, allowing them to collect data about citizens using fixed internet connections without having to submit requests to telecommunications providers. This means that Poland's intelligence services can collect data not only when it is necessary to detect serious crimes, but also when it is convenient for them. Since 2013, the SAO has

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312 M. Jałoszewski, Zwycięstwo prokuratora Parchimowicza. Jest niewinny za manifest przeciwko ustawie kagańcowej (Victory for Prosecutor Parchimowicz. He is acquitted for the protest against the 'muzzle law'), *OKO.press*, 15 November 2022: <https://archiwumosiatynskiego.pl/wpis-w-debacie/zwyciestwo-prokuratora-parchimowicza-jest-niewinny-za-manifest-przeciwko-ustawie-kagancowej/>.

313 M. Jałoszewski, Zwycięstwo prokurator Kwiatkowskiej. Sąd: prokuratorzy z Lex Super Omnia też mają prawo do nagród (Victory for Prosecutor Kwiatkowska. Court: Prosecutors under Lex Super Omnia also have the right to bonuses), *OKO.press*, 28 May 2023, <https://oko.press/prokurator-kiatkowska-sad-prokuratorzy-lex-super-omnia/>.

314 M. Jałoszewski, Prokurator Wrzosek zawieszona „potajemnie” i bez prawa do obrony. Nic nie wiedziała o sprawie (Prosecutor Wrzosek suspended "secretly" and without the right to defense. She had no knowledge of the case), *OKO.press* 12 June 2023, <https://oko.press/prokurator-wrzosek-zawieszona-potajemnie-i-bez-prawa-do-obrony-nic-nie-wiedziala-o-sprawie>.

been calling for the reform of the intelligence services system and the establishment of an effective mechanism of supervision and control over their activities, in line with European standards.<sup>315</sup>

The Second Interim Compliance report on GRECO's Fourth Evaluation Round regarding Corruption prevention in respect of members of parliament, judges and prosecutors found that Poland has not implemented Recommendations i-iii, v, vi, ix, xii, xiv and xvi as well as Rule 34 recommendations i, ii, iv, v and vi.<sup>316</sup> The recommendation xii concerning the prosecutors remains partly implemented.<sup>317</sup> GRECO recommended that the "Collection of Ethical Principles governing the Prosecutors' Profession" (i) be disseminated among all prosecutors and made easily accessible to the general public; and (ii) that they be complemented in such a way so as to offer proper guidance specifically with regard to conflicts of interest (e.g. definitions and/or types) and related areas (including in particular the acceptance of gifts and other advantages, incompatibilities and additional activities). Poland has implemented the first part of the recommendation, but has provided no guidance on conflicts of interest and other related issues (such as the acceptance of gifts and other advantages, incompatibilities and additional activities), including practical examples. Poland has also partially implemented recommendation xiv, as no measures had been put in place to ensure a more in-depth scrutiny of prosecutors' asset declarations,<sup>318</sup> and recommendation xvi, as the Polish authorities did not consider it necessary to appoint ethics advisors for prosecutors.<sup>319</sup>

## **2.4 Practical consequence of the politicisation of Poland's prosecution services: No effective investigation and prosecution in cases of alleged fraud and high-level corruption involving members of Poland's ruling coalition or parties connected to it**

The politicisation and instrumentalisation of Poland's prosecution services, which has resulted, inter alia, in repeated arbitrary secondments and/or disciplinary proceedings and sanctions against prosecutors acting in a way not to the PG/MoJ's liking, has created a manifest and serious risk as to the protection of the EU's financial interests in practice. Indeed, the post-2016 legal framework in Poland allows for systemic undue interference from the PG/MoJ, in relation to investigation and prosecution of fraud, corruption or other breaches of EU law relating to the implementation of the EU budget or to the protection of the EU's financial interests. In addition, Polish authorities have repeatedly refused to revise the rules under which the Central Anti-Corruption Bureau (CAB), Poland's specialised anti-

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315 See Prezes NIK odmówił skontrolowania działań służb specjalnych pod kątem przestrzegania praw obywateli (The SAO President refused to audit the actions of special services regarding the protection of citizens' rights), Biuro Rzecznika Praw Obywatelskich, 29 January 2020: <https://bip.brpo.gov.pl/pl/content/prezes-nik-odmowil-rpo-kontroli-sluzb-specjalnych>

316 Four Evaluation Round Corruption prevention in respect of members of parliament, judges and prosecutors SECOND INTERIM COMPLIANCE REPORT Including FOLLOW-UP TO THE AD HOC (RULE 34) REPORT POLAND, adopted by GRECO at its 93rd Plenary Meeting (Strasbourg, 20-24 March 2023), 20 July 2023, p. 3.

317 Ibid., p. 5.

318 Ibid., p. 5.

319 Ibid., p. 6.

corruption body, operates which makes the CAB completely subordinated to the executive.<sup>320</sup>

This institutional framework, as recognised by the Commission itself, means that risks remain in Poland “concerning the effective enforcement against high level corruption in practice, including the threat of selective application of the law, disparity in the treatment of corruption cases for political purposes”.<sup>321</sup> In addition, new impunity provisions have been adopted for public officials which further “increase the risk of corruption”.<sup>322</sup> At the very least, the arbitrary secondments and/or disciplinary proceedings and sanctions targeting prosecutors have created a chilling effect on any prosecutor who may be directly responsible for indictments for irregularities in cases related to the EU’s financial interests, in particular cases which concern potential irregularities committed by members of Poland’s ruling coalition, individuals or organisations connected to it.

To begin with, potential irregularities relating to EU funds committed by the current PG/MoJ cannot be subject to any effective investigation let alone any prosecution. This is not a theoretical consideration as Mr Ziobro’s party is alleged to have submitted falsified documents in order to obtain EU funding in 2013. Conveniently, Mr Ziobro, acting in his capacity as PG, closed the investigation into Mr Ziobro, in his then capacity of leader of the political party, where he was alleged to have misused EU funds.

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320 2020 Poland’s ARoLR Country Chapter, p. 11: “The CAB works under the authority of the Prime Minister and of a designated ‘Minister-coordinator for special services’. Under the current legal framework, this appointment procedure and the office’s subordination to the executive has raised concerns as regards the CAB’s independence and ultimate independence from executive power.”

321 2023 Poland’s ARoLR Country Chapter, p. 1.

322 Ibid.

**Table 14:** OLAF investigation regarding the misuse of European funds by Zbigniew Ziobro’s Solidarna Polska party

<p>Parliamentary questions 14 January 2021 Question for written answer E-000202/2021 to the Commission Rule 138 Andrzej Halicki (PPE)</p>	<p>22 April 2021 Answer given by Mr Hahn on behalf of the European Commission</p>
<p><b>Subject: Enquiry into the misuse of European funds – OLAF investigation</b></p> <p>In 2013, the leadership of Zbigniew Ziobro's <i>Solidarna Polska</i> party, seeking to obtain funding for their party from the MELD (Movement for a Europe of Liberties and Democracy) group, which is funded by the European Parliament, submitted documents which were unreliable or made false claims of a material nature in order to obtain financial support. The group to which <i>Solidarna Polska</i> MEPs (Zbigniew Ziobro, Jacek Kurski and Jacek Włosowicz) belonged – MELD – covered the costs of a climate congress organised by the <i>Solidarna Polska</i> party. The congress allegedly took place on 30 June 2013 in Kraków. However, the event did not take place. On the same day, a convention of the <i>Solidarna Polska</i> party was held under the slogan 'New State, New Constitution'.</p> <p>Given that an investigation by the European Anti-Fraud Office (OLAF) was launched in 2015 in connection with fraud suspicions, including from the right-wing MELD group and its associated FELD foundation, which received EU grants between 2012 and 2015:</p> <ol style="list-style-type: none"> <li>1. Has OLAF opened and closed an investigation into the case of this sham climate congress in Poland?</li> <li>2. Is OLAF aware of the case being pursued by the Polish Public Prosecutor's Office and its recent dismissal by the Polish Public Prosecutor General, Zbigniew Ziobro?</li> <li>3. Has the final report of this investigation been drafted and have the recommendations and conclusions of the Polish Public Prosecutor's Office been forwarded in this case?</li> </ol>	<p>The European Anti-Fraud Office (OLAF) informed the Commission that it decided to open an investigation into the alleged irregularities the Honourable Member is referring to. As the investigation is ongoing, OLAF cannot issue any further comment at this stage.</p> <p>This is in order to protect the confidentiality of ongoing and possible ensuing investigations, subsequent judicial proceedings, personal data and procedural rights.</p> <p>When the findings of an OLAF investigation identify fraud affecting the EU budget, the Office issues recommendations to the relevant EU institutions or national authorities in order to ensure that the funds affected by fraud are recovered and the criminal behaviour is prosecuted.</p> <p>OLAF is aware of judicial proceedings conducted in Poland as reported by the media.</p> <p>The cooperation with the national authorities is an essential element of OLAF's investigations.</p>

Further details regarding this case and OLAF’s investigations will be provided in the next Section. At this stage, it is important to stress that this is not a one-off example where the Poland’s PG prevents investigation of potential fraud committed by himself. With respect of the repeated misuse of the Justice Fund, for instance, Mr. Ziobro has also prevented the opening of a criminal investigation regarding his (mis)use of the Justice Fund following his

decision to grant funding to a number of towns whose EU funding was suspended by the Commission following their adoption of anti-LGBT resolutions.<sup>323</sup>

Another representative example proving that “Polish prosecutors are unable to effectively prosecute crimes against the EU’s financial interests when people associated with the Law and Justice party are involved” is the case involving a former Law and Justice MP, and his business partners, which concerns the misappropriation of EU funds via the Polish Agency for Enterprise Development. As reported in the press, according to the prosecutor’s office itself, these individuals submitted false documents and did not repay the relevant loan yet the head of the district prosecutor’s office in Gdynia “used an exceptional procedure that resulted in a definitive closing of the investigation by the Prosecutor’s Office, which meant that it would not be possible to bring any future charges related to the case against those involved in the original indictment”.<sup>324</sup> This example “shows that the prosecutor’s office, which is directly controlled and completely subordinated to a politician from the ruling party, is not able to effectively prosecute and issue charges in cases of suspected embezzlement of EU funds when those at fault are connected to the Law and Justice party.”<sup>325</sup>

There are more examples of prosecutors declining to start criminal investigations or halting ongoing cases in specific situations. For example, those involving politicians from the governing majority can be easily found beyond cases relating to crimes against the EU’s financial interests. The other side of the capture and ensuing instrumentalisation of Poland’s investigation and prosecutions services is that they can be instrumentalised to target opponents of Poland’s ruling coalition. We will give a few examples below of these two dimensions.

In 2020, the Warsaw District Court upheld the decision to refuse to initiate an investigation after a notification from 2019 by Austrian businessman Gerald Birgfellner in a case concerning plans to build two skyscrapers in Warsaw by the PiS-affiliated company Srebrna.<sup>326</sup> In 2019, Jarosław Kaczyński, the PiS party chairman and de facto head of the government, was recorded at the party headquarters negotiating a solution to the problem of the fee payment to Mr. Birgfellner.<sup>327</sup> The prosecutors conducted preliminary checks for 259 days. After this period, they refused to initiate a formal investigation. The court’s ruling from 2020 upheld this decision.<sup>328</sup>

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323 “Prokurator generalny Ziobro umorzył postępowanie wobec ministra sprawiedliwości Ziobro” (“Prosecutor General Ziobro discontinued the proceedings against the Minister of Justice Ziobro”), *TVN24*, 7 January 2021: <https://tvn24.pl/polska/pieniadze-dla-gmin-przeciwnych-ideologii-lgbt-smiszek-zlozyl-zawiadomienie-do-prokuratury-ws-ziobry-ta-odmowila-wszczecia-sledztwa-komentarz-smiszka-4927623>.

324 E. Ivanova, “Warsaw is Eager to Get the EU Recovery Cash. It Should Recognize the Authority of the EU Chief Prosecutor First”, *Wyborcza.pl*, 22 April 2022: <https://wyborcza.pl/7,173236,28363471.html>

325 Ibid.

326 K. Sobczak, Sąd: Prokuratura prawidłowo prowadziła śledztwo w sprawie wież spółki Srebrna (Court: The prosecution correctly conducted the investigation into the affairs of the Srebrna company), *Prawo.pl*, 7 February 2020: <https://www.prawo.pl/prawnicy-sady/sledztwo-w-sprawie-wiez-spolki-srebrna-sa-odrzucil-zazalenie-na,497788.html>

327 G. Makowski, *Laying the groundwork for “grand corruption”: the Polish government’s (anti-)corruption activities in 2015–2019*, Stefan Batory Foundation, Warsaw 2022, p. 24: [https://www.batory.org.pl/wp-content/uploads/2020/12/Laying-the-groundwork-for-Grand-Corruption\\_ENG.pdf](https://www.batory.org.pl/wp-content/uploads/2020/12/Laying-the-groundwork-for-Grand-Corruption_ENG.pdf)

328 P. Słowik, Sz. Jadczyk, Nawet Kaczyński czekał krócej. W sprawie Cieszyńskiego prokuratura bije rekord (Even Kaczyński waited for a shorter period. In Cieszyński’s case, the prosecutor’s office is setting a record), *Wirtualna Polska*, 22 May 2023: <https://wiadomosci.wp.pl/nawet-kaczynski-czekal-krocej-w-sprawie-cieszynskiego-prokuratura-ziobry-bije-rekord-6899879243533216a>.

Another representative example is the prosecutor's office's failure to make a decision for more than two years regarding whether to initiate an investigation into allegations of wrongdoing by Janusz Cieszyński, the former deputy Minister of Health and the current Minister of Digitisation. In April 2020, the SAO filed two reports with the Prosecutor's Office, indicating a justified suspicion of criminal activity by Mr. Cieszyński regarding the respiratory device procurement related to the purchase of 1,241 respiratory devices by the Ministry of Health in April 2020 as part of the government's emergency response to the COVID-19.<sup>329</sup>

One may also refer to the case of another high-ranking member of the ruling coalition potentially involved in EU funds fraud. Between 2019 and 2021, before Mr. Łukasz Mejza, former deputy Minister of Sport and Tourism became an MP, his company was engaged in training activities funded by EU funds.<sup>330</sup> EU funds were channelled through a local government, with several businesspeople choosing Mejza's company, resulting in vouchers worth PLN 980,000 effectively becoming the MP's earnings according to his asset declarations. After an audit in 2021, irregularities in EU fund allocation were identified and officials notified the prosecution service, which also prompted an investigation by the CAB. The audit raised doubts about whether Mejza's company actually conducted any training, as post-audit findings lacked comprehensive documentation and evidence of participant involvement. Officials contested 100% of the funds received by Mejza's company, demanding a refund from programme operators. The agency responsible for the programme managed to return PLN 752,345, pending civil court proceedings along with the investigation. Efforts are underway to recover the disputed training costs from beneficiaries, with ongoing investigations involving those who were supposed to benefit. Investigations into EU fund irregularities began in February 2022, with a parallel investigation in Warsaw regarding other Mejza's businesses. The initial investigation has been transferred from a local prosecution office to a central unit located in Poznań. This is a common practice in cases involving members of the ruling coalition, as it allows those holding top managerial positions in the prosecution service to have more direct oversight of the investigation and its timing. Despite these circumstances, in September 2023, Mr. Mejza was announced as a Law and Justice candidate for the Sejm in the upcoming elections.

Speaking of the 2023 parliamentary elections, there is evidence that internet-published recordings featuring candidates and members of Suwerenna Polska, the party led by the current MoJ/PG, were recorded within the Ministry of Justice premises, a practice which is strictly prohibited by Polish electoral law. Simultaneously, the recordings published by MEPs from Suwerenna Polska show the logo of the European Conservatives and Reformists Group in the European Parliament.<sup>331</sup> Such behaviour amounts to a violation of the rules of the European Parliament regarding the funding of political groups, as the funds allocated to

329 400 dni minęło, decyzji śledczych nie ma. "Mamy w ogóle tę prokuraturę?" (400 days have passed, and there's still no decision from the investigators. "Do we even have a prosecutor's office?"), *TVN24*, 23 May 2023: <https://tvn24.pl/polska/janusz-cieszynski-zawiadomienie-do-prokuratury-od-400-dni-bez-decyzji-7139489>

330 S. Jadczyk, Unijne dotacje na szkolenia w firmie Łukasza Mejzy do zwrotu. A śledztwo do ważniejszej prokuratury (EU grants for training at Łukasz Mejza's company to be refunded. The investigation to be transferred to a more significant prosecutor's office), *Wirtualna Polska*, 4 January 2023: <https://wiadomosci.wp.pl/unijne-dotacje-na-szkolenia-w-firmie-lukasza-mejzy-do-zwrotu-a-sledztwo-do-wazniejszej-prokuratury-6851632201776064a>

331 See e.g. a tweet of MEP Patryk Jaki dated 27 August 2023: <https://twitter.com/PatrykJaki/status/1695689236324737069>

them cannot be used for campaigns in European Parliament elections or national elections.<sup>332</sup> NGOs have reported this blatant breach of the principle of fair electoral competition and equal financing of participating parties to the prosecutor's office. This is, however, akin to asking a prosecutor to investigate his/her boss for a potential criminal offence.

Poland has also experienced discriminatory legalism,<sup>333</sup> a concept used to describe a situation where the law is enforced against ideological and political opponents in addition to not being used against authorities, their supporters and the entities they control when, for instance, they misuse public funds.

As examples of abusive investigations initiated against prominent government critics, one can cite the proceedings initiated against judges defending the rule of law and who have faced manifestly politically motivated investigations over alleged and in reality, inexistent corruption. Among these, one may mention the proceedings targeting Judge Beata Morawiec, a former President of the Regional Court in Cracow and the president of THEMIS Association of Judges, whose proceedings ended when the relevant court did not find any evidence of corruption.<sup>334</sup> Coincidentally, Judge Beata Morawiec had been previously unlawfully dismissed in 2017 from the position of the President of the Regional Court in Kraków<sup>335</sup> and had her judicial immunity lifted on 12 October 2020 by the Disciplinary Chamber which resulted in her automatic suspension and her salary being reduced by 50%. Her suspension lasted 235 days. While being subject to criminal investigation, Judge Beata Morawiec had won in the second instance a case against the State Treasury in relation to Mr. Ziobro's remarks implicating a link between her and an unrelated case of corruption in one of the nearby courts. The MoJ/PG was ordered to issue an apology on the Ministry's website, but he refused to comply and publicly contradicted a final ruling by stating that it was the State Treasury, not him personally, who was sued by Morawiec and that he was therefore allegedly not obliged to comply with the judgment.<sup>336</sup>

A report of February 2022 by the THEMIS Association of Judges and Open Dialogue Foundation entitled *Polish Public Prosecutor's Office: Selected cases of malicious prosecution and dereliction of duties since 2015* offers more examples<sup>337</sup> and also highlights also how state apparatus, including the Central Anticorruption Office and government-controlled public media have been involved in a campaign targeting the Speaker of the Senate, opposition

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332 See Article 1.1.1 of the Rules on the use of appropriations from budget item 400, adopted by the Bureau of the European Parliament on 30 June 2003 (as amended): [https://www.europarl.europa.eu/RegData/publications/reg/2015/0002/EP-PE\\_REG\(2015\)0002\\_EN.pdf](https://www.europarl.europa.eu/RegData/publications/reg/2015/0002/EP-PE_REG(2015)0002_EN.pdf)

333 See A. Bodnar, "The role of Polish civil society in supporting EU activities as regards protection of judicial independence and other elements of the rule of law" in K. Meier et al (eds.), *Rule of Law and the Judiciary*, Nomos, June 2023, pp. 167-180.

334 Porażka prokuratury ws. sędzi Morawiec. „Łapówką” miał być telefon komórkowy (Prosecutor's defeat in the case of Judge Morawiec. A mobile phone was supposed to be the "bribe."), *Rzeczpospolita*, 15 August 2022: <https://www.rp.pl/sady-i-trybunaly/art36871591-porazka-prokuratury-ws-sedzi-morawiec-lapowka-mial-byc-telefon-komorkowy>

335 See Judge Morawiec's pending complaint no. 46238/20 before the ECtHR which was communicated to Polish authorities on 4 July 2022.

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

337 The report is available online: <https://en.odfoundation.eu/a/190999/polish-public-prosecutors-office-selected-cases-of-malicious-prosecution-and-dereliction-of-duties/>

politician Tomasz Grodzki on account of alleged corruption acts committed during the course of his medical career.<sup>338</sup>

## 2.5 Practical consequence of the politicisation of Poland's prosecution services: No effective cooperation with OLAF and the EPPO

As a matter of principle, "non-effective or untimely cooperation with the EPPO and OLAF constitutes a ground for action under the Conditionality Regulation".<sup>339</sup> And while Poland is not a member of the EPPO, a non-participating Member State's refusal to cooperate with the EPPO regarding cross-border criminal investigations may still justify the activation of the Conditionality Regulation in respect of Poland. This situation is actually one of the hypothetical scenarios which, according to a study commissioned by the European Parliament, could plainly justify the activation of the Conditionality Regulation.<sup>340</sup> This hypothetical scenario reflects the current situation existing in Poland whose current authorities have consistently refused to take part in the enhanced cooperation on the establishment of the EPPO in addition to refusing to cooperate with it.

On 16 February 2022, this lack of cooperation led the European Chief Prosecutor to address a letter to the European Commission, in accordance with the Conditionality Regulation, to alert it as regards Polish authorities' systemic violation of their obligation to cooperate with the EPPO. In her letter, the European Chief Prosecutor emphasised that

Poland has conditioned the signature of a working arrangement with the EPPO to a prior approval of an amendment of the Polish Criminal procedure code that would allow recognition of the EPPO as competent authority. The practical consequence of Poland's refusal to recognise participating Member States' notifications of the EPPO as a competent authority without prior national law modification is *that Poland has been consistently rejecting the EPPO's requests for judicial cooperation* since the start of its operations. Given that whenever the EPPO is carrying out a criminal investigation of a cross-border nature, it is unable to obtain evidence located in Poland, *the EPPO's ability to counter criminality affecting the Union budget is systematically hindered*. The EPPO currently has 23 ongoing investigations involving Poland, which is the highest number of any non-participating Member State.<sup>341</sup> (emphasis added)

Most recently, the EPPO confirmed that Poland was involved in 31 EPPO cases, the second-highest number among the five EU member states not participating in the EPPO after Hungary.<sup>342</sup>

On 27 December 2022, the President of Poland signed into law an amendment to the Criminal Procedure Code aimed at facilitating collaboration between the Polish prosecutor's office and the EPPO.<sup>343</sup> However, Poland's centralised communication channels between the

338 Kilkadziesiąt osób z zarzutami ws. korupcji w szpitalu, którym kierował Grodzki (Several dozen individuals facing corruption charges in the hospital led by Grodzki.), polskie Radio 24, 7 December 2022: <https://polskieradio24.pl/5/1222/artykul/3083226,kilkadziesiat-osob-z-zarzutami-ws-korupcji-w-szpitalu-ktorym-kierowal-grodzki>

339 2022 Commission's Conditionality Regulation Guidelines, para. 21.

340 Rubio et al, op. cit., p. 70.

341 EPPO, Letter sent to European Commission regarding Poland's refusal to cooperate with the EPPO, 16 February 2022: <https://www.eppo.europa.eu/en/news/letter-sent-european-commission-regarding-polands-refusal-cooperate-eppo>

342 Ibid.

343 Ustawa z dnia 27 października 2022 r. o zmianie ustawy - Kodeks postępowania karnego oraz ustawy - Prawo o prokuraturze, Dz.U. 2022 poz. 2582.

prosecutors and the EPPO and the amendment entail that such contacts must go through the Polish Prosecutor General's Office.

As of 1 March 2023, when the EPPO annual report 2022 was published, the working arrangement between EPPO and Poland, which were described as being "finalised" at a "technical level", had not yet been signed.<sup>344</sup> In addition, it is worth stressing that according to the EPPO, the changes in domestic law in Poland were not necessary as the need for cooperation directly arises from EU law, that is, (i) the principle of sincere cooperation (Article 4(3) TEU); (ii) the obligation to ensure the proper protection of the financial interests of the Union (Article 325 TFEU); (iii) the primacy of EU law; and (iv) Article 105(3) of the regulation establishing the EPPO.

In a context where Polish authorities have persistently refused to effectively and timely cooperate with the EPPO, it is crucial that at the very least there is effective and timely cooperation with OLAF. Indeed, in the absence of membership of the EPPO, OLAF remains the sole EU investigative administrative body "competent to investigate allegations of fraud, corruption or any other illegal activity affecting the financial interests"<sup>345</sup> of the EU in Poland.

According to the Commission's guidelines relating to the Conditionality Regulation, the obligation to effectively and timely cooperate with OLAF includes:

the right for OLAF to carry out on-the-spot checks and inspections, with the assistance needed to carry them out effectively, and to have access to the relevant information, data and documents either to decide whether or not to open an investigation or to carry out investigations effectively and without undue delay.<sup>346</sup>

It also includes the related obligations for each Member State concerned to:

- (i) inform OLAF;
- (ii) provide OLAF with the assistance needed in order to carry out its tasks effectively in the conduct of such investigation;
- (iii) take appropriate precautionary measures, in particular measures to safeguard relevant evidence;
- (iv) take appropriate action on the basis of information provided by OLAF, before OLAF takes a decision whether or not to open an investigation, and;
- (v) ensure appropriate and timely follow-up to OLAF reports and recommendations upon completion of its investigations, reporting back to OLAF on the action taken.<sup>347</sup>

OLAF's recommendations take several forms, namely financial, judicial, disciplinary, and administrative recommendation. OLAF has no powers to enforce its recommendations in member states; however, it monitors the recommendation's implementation. Where OLAF finds sufficient grounds for investigating a criminal offence, it issues a judicial recommendation for the member state's authority to start criminal prosecution.

<sup>344</sup> EPPO, 2022 Annual Report, Publications Office of the EU, 2023, p. 96: [https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO\\_2022\\_Annual\\_Report\\_EN\\_WEB.pdf](https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO_2022_Annual_Report_EN_WEB.pdf)

<sup>345</sup> 2022 Commission's Conditionality Regulation Guidelines, para. 22.

<sup>346</sup> Ibid., para. 21.

<sup>347</sup> Ibid.

In Poland, OLAF has been monitoring criminal proceedings since 2006.

In 2021, OLAF conducted 10 investigations and closed seven with recommendations.<sup>348</sup> In this period, Italy and Bulgaria were the only EU member states with more ongoing OLAF investigations than Poland.

In 2022, OLAF conducted nine investigations in Poland, seven out of them closed with recommendations to national authorities to redress the situation.<sup>349</sup> In this period, Hungary and France were the only EU member states with more ongoing OLAF investigations than Poland.

From 1 January 2018 to 31 December 2022, national judicial authorities in Poland launched investigations 18 times following OLAF recommendations. Out of these 18 cases, only one case ended with indictment (criminal charges), seven were dismissed and 10 are pending.<sup>350</sup>

From 2017 to 2021, Polish authorities have not taken decisions on OLAF's 8 recommendations and acted on 10 of them (seven dismissed, three indictments).<sup>351</sup>

Overall, the number of investigations being pursued following OLAF's recommendation is low.

This is corroborated by available data covering earlier periods. From 2015 to June 2022, a total of 21 reports from OLAF investigations, together with recommendations to initiate criminal proceedings, were received by the National Public Prosecutor's Office. According to breakdown presented by the Deputy Prosecutor General and the National Prosecutor:

- one recommendation was sent in 2015.
- no report was sent in 2016.
- six in 2017.
- three in 2018.
- four in 2019.
- three in 2020.
- two in 2021; and
- two in 2022.

In the period from 2016 to 2021, three proceedings in this regard were concluded with the indictments, while the majority remain pending.<sup>352</sup>

348 OLAF 2021 report: [https://anti-fraud.ec.europa.eu/system/files/2022-09/olaf-report-2021\\_en.pdf](https://anti-fraud.ec.europa.eu/system/files/2022-09/olaf-report-2021_en.pdf)

349 OLAF's investigative performance and fraud trends in 2022: [https://ec.europa.eu/olaf-report/2022/investigative-activities/fraud-trends\\_en.html](https://ec.europa.eu/olaf-report/2022/investigative-activities/fraud-trends_en.html)

350 Statistical Annex, Monitoring OLAF impact between 2018 and 2022, Table 8 : [https://ec.europa.eu/olaf-report/2022/statistical-annexes/statistical-historical-data\\_en.html#OLAF-detection-in-TOR](https://ec.europa.eu/olaf-report/2022/statistical-annexes/statistical-historical-data_en.html#OLAF-detection-in-TOR)

351 OLAF 2021 Report, p. 53.

352 First Deputy Prosecutor General, National Prosecutor, response to Interpellation No. 33110 on the irregularities detected by the European Anti-Fraud Office (OLAF), 8 July 2022: <https://www.sejm.gov.pl/sejm9.nsf/interpelacja.xsp?typ=INT&nr=33110>

The number of cases being pursued in relation to OLAF's final reports is minuscule compared to the number of proceedings launched by Polish law enforcement bodies in relation to crime detrimental to the interests of the EU in the same period. From 2016 to 8 July 2022, 3,041 such proceedings were registered, of which 319 remained pending as of 8 July 2022. 2,765 cases were concluded, of which 971 were sent to court with a bill of indictment, an application for conditional discontinuance of proceedings or an application for a conviction. conviction. The number of persons accused in these cases was 2,755.<sup>353</sup>

An important area of OLAF's investigation in Poland in recent years are irregularities and fraud concerning the implementation of numerous software projects co-financed from the EU budget.<sup>354</sup> OLAF established that a group of companies had artificially created conditions for obtaining public funding and made false declarations to the national authorities. The case was closed in 2021 with financial, judicial and administrative recommendations being made.

As of August 2023, OLAF is conducting a probe in the National Centre for Research and Development (NCBiR) over its use of EU funds. The government has expressed its support to OLAF's investigation.<sup>355</sup>

In recent years, the prosecutor's office has been conducting an investigation following a recommendation from OLAF concerning a prominent politician from the governing majority, PiS MEP Ryszard Czarnecki over alleged irregularities concerning his travel expenses and daily allowance claims.<sup>356</sup> OLAF questioned the allocation of 100,000 EUR to Czarnecki for official travel between 2009 and 2018. The MEP was suspected of inflating the costs of commuting to the European Parliament from Poland. Based on the findings by EU investigators, the European Parliament asked Mr. Czarnecki to return the funds with OLAF sending its recommendations in May 2019 to the Polish authorities.<sup>357</sup> This case was then allocated to the Zamość Regional Prosecutor's Office for further investigation. Since 2019, the investigator in the case is prosecutor Artur Szykuła, who had been promoted earlier through a delegation to Zamość Regional Prosecutor's Office from the district prosecution office. Szykuła also took on the additionally remunerated position of spokesperson of the regional prosecutor's office. The Prosecutor General (Zbigniew Ziobro) and the National Prosecutor, the Prosecutor General's subordinate, are responsible for issuing prosecutor's delegations and have used it as a tool to harass independent prosecutors and reward loyal ones. Szykuła was promoted to Deputy District Prosecutor (July 2020), then Chief of the First Investigative Department (May 2021). In July 2021, his delegation formally ended and he was promoted to a prosecutor at the District Prosecutor's Office in Zamość. Despite the investigation regarding MEP Czarnecki lasting over three and a half years, in January 2023 Szykuła was promoted to a managerial position.<sup>358</sup> As of 12 August 2023, the investigation is

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353 Ibid., p. 2.

354 OLAF 2021 Report, p. 20.

355 "Poland vows to support EU probe into suspected fraud at gov't agency", *Polskie Radio*, 8 May 2023: <https://www.polskieradio.pl/395/7786/artykul/3164599,poland-vows-to-support-eu-probe-into-suspected-fraud-at-gov%E2%80%99t-agency>

356 Z. Wanat, J. Barigazzi, "Top Polish MEP under investigation over travel expenses", *Politico*, 3 August 2020: <https://www.politico.eu/article/top-polish-mep-under-investigation-over-travel-expenses/>

357 See M. Pankowska, Śledztwo ws. 100 tys. euro Czarneckiego w martwym punkcie. A prokurator dostał awans [UJAWNIAMY] (Investigation into the 100,000 euros concerning Czarnecki at a standstill. And the prosecutor received a promotion), *OKO.press*, 26 January 2023: <https://oko.press/sledztwo-czarnecki-awans-prokuratora/>

358 Ibid.

still ongoing, after more than four years.<sup>359</sup> It is yet uncertain if MEP Czarnecki will stand in Poland's parliamentary elections scheduled for 15 October 2023.

OLAF also investigated another PiS MEP Janusz Wojciechowski and the current Commissioner for Agriculture. Mr Wojciechowski was forced to account for irregularities in his travel expenses when applying for his current position.<sup>360</sup> He was ultimately asked to return 11,000 EUR to the European Parliament.

As previously mentioned, Mr. Ziobro, the current MoJ/PG has himself been facing allegations of criminal misuse of EU funding in relation to the financial support sought from the MELD (Movement for a Europe of Liberties and Democracy) party, which received funding from the European Parliament. The MELD party footed the bill (40,000 EUR) for a climate congress organised by Solidarna Polska, claiming the event took place on 30 June 2013 in Krakow. On the very same day, however, the Solidarna Polska party happened to host a convention under the banner of "A New State, A New Constitution". There was only one banner reading "Stop the Climate Convention" to express opposition to any Green Deal in Europe.

OLAF has been conducting an investigation into the Solidarna Polska congress since 2015. In 2016, Members of the Nowoczesna party filed a criminal complaint and in January 2017, the Regional Prosecutor's Office in Warsaw opened an investigation of the case. The prosecutor's office however decided to investigate not only the EU funded event organised by Solidarna Polska but also events organised by opposition parties as well as the ruling Law and Justice party (PiS). In 2019, following the general elections won by PiS, the prosecutor's office terminated the investigation.<sup>361</sup> According to information obtained from the prosecutor's office by the media, Ziobro was not even questioned as the prosecutor's office was of the view that the conference met the criteria of a "climate congress". The Warsaw prosecutor's office furthermore claimed that "the issue of assessing the justification for the expenditure of these funds falls within the purview of the supervisory bodies of the European Parliament and the EU, including OLAF, which has been conducting an investigation in this regard for four years, but it has not yet been concluded with the formulation of final conclusions".<sup>362</sup> As of April 2021, OLAF's investigation was still ongoing.<sup>363</sup> The current status of this investigation is unclear.

In 2017, OLAF conducted an investigation into the National Fund for Environmental Protection (Narodowy Fundusz Ochrony Środowiska)'s competition for EU-funded projects on environment education. The audit concerned a competition and a project submitted by

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359 B. Mikołajewska, Kilometrówki i asystenci. Śledztwo, czy Czarnecki wyludził pieniądze z PE, trwa (Expense reports and assistants. The investigation into whether Czarnecki embezzled money from the European Parliament is ongoing.), *Wirtualna Polska*, 20 July 2023: <https://wiadomosci.wp.pl/kilometrowki-i-asystenci-sledczy-nadal-badaja-czy-czarnecki-wyludzil-pieniadze-z-pe-6921348382571072a>

360 E. Schaart, "Polish commissioner candidate under investigation by EU anti-fraud agency", *Politico*, 7 September 2019: <https://www.politico.eu/article/janusz-wojciechowski-polish-commissioner-candidate-under-investigation-by-eu-anti-fraud-agency/>

361 M. Baczyński, "Zbigniew Ziobro nadzorował śledztwo w sprawie nielegalnego finansowania własnej partii. Zostało umorzone. Znany oficjalne uzasadnienie", *Onet*, 28 August 2020: <https://wiadomosci.onet.pl/tylko-w-onecie/zbigniew-ziobro-nadzorawal-sledztwo-w-sprawie-nielegalnego-finansowania-wlasnej/z9p4gwp>

362 Ibid.

363 D. Wielowieyska, "Partyjna konwencja za dotację na klimat? Solidarna Polska wciąż pod lupą unijnych urzędników", *Gazeta Wyborcza*, 2 April 2021: <https://wyborcza.pl/7,75398,26252621,prokuratura-umarza-sledztwo-w-sprawie-partii-ziobry-i-przemilcza.html>

the Fundacja Mediów Narodowych (Independent Media Foundation), presided over by a media mogul who was friendly to the PiS governing majority, which aimed to secure 6 million PLN (approximately 1.35 million EUR) in funding for a building and running a multi-media portal. The Ministries of Development and Environment have suspended the disbursement of funds.<sup>364</sup>

More recently, OLAF conducted an investigation into “serious irregularities” in the finances of one of the political groups in the European Parliament in 2021. OLAF identified contracts for fictitious services at inflated prices and for services that cannot be funded by the European Parliament. Due to the confidentiality of the proceedings, the identity of the group in question is still formally unknown. Media in Poland have, however, reported on the contracts between the European Conservatives and Reformists (ECR) and entities owned by friends of MEP Patryk Jaki who at the same time ended up donating to the party.<sup>365</sup> Media have also published a list of contracts for media and PR services signed between the ECR and various pro-government entities in Poland, including private media who are friendly towards the governing majority.<sup>366</sup>

## 2.6 Concluding remarks

As outlined above, the capture of Poland’s investigation and public prosecution services has led to the instrumentalisation of these services. In short, this has led to criminal investigation and prosecution of individuals in the absence of any objective reason to do so and the failure to investigate and prosecute those for whom there are objective reasons to believe they may have committed a crime. In the latter situation, there are multiple examples of individuals or organisations associated with Poland’s ruling coalition where prosecutors refuse to investigate, conduct superficial investigations or proceed at snail’s pace compared to factually similar cases involving individuals or organisations not associated with Poland’s ruling coalition.

The malfunctioning of Poland’s investigation and public prosecution services poses a serious risk to the protection of the EU’s financial interests. This is not only because various crimes, not limited to those directly related to fraud, corruption or other breaches of EU law can jeopardise these interests. In the case of Poland’s prosecution services, the concern lies not in the nature of the crimes committed but in who may have committed them. As demonstrated by various examples, when a member of the ruling coalition or connected individual is potentially a suspect, there is a legitimate risk that such a person will receive more lenient treatment.

This assessment is supported by the different changes made since 2016, including the merging of the roles of Minister of Justice and Prosecutor General; the extensive discretionary powers granted to those holding managerial positions within the prosecution services over

364 Po artykułach OKO.press 6 mln zł nie trafi do fundacji naczelnego “Gazety Polskiej” Tomasza Sakiewicza (Po artykułach OKO.press 6 mln zł nie trafi do fundacji naczelnego “Gazety Polskiej” Tomasza Sakiewicza), *Gazeta Wyborcza*, 12 December 2018: <https://wyborcza.pl/7,75398,23016368,po-artykulach-okO-press-6-mln-zlotych-nie-trafi-do-fundacji.html>

365 S. Klauziński, M. Pankowska, “Jak koledzy Patryka Jakiego zarabiają na EU [UJAWNIAMY]” (How Patryk Jaki’s colleagues earn money from the EU [WE REVEAL]), *OKO.press*, 17 July 2023: <https://oko.press/patryk-jaki-kontrakty-ue/>

366 M. Pankowska, S. Klauziński, “Rydzik, Sakiewicz, Srebrna... Ujawniamy, do kogo płyną miliony z budżetu UE” (Rydzik, Sakiewicz, Srebrna... We reveal who receives millions from the EU budget), *OKO.press*, 18 July 2023: <https://oko.press/przyjaciele-pis-zlecenia-ekr-ue/>

subordinate prosecutors; the practice of immediate secondments, transfers, and other disciplinary proceedings against prosecutors who do not adhere to management methods of their superiors; and the practice of discretionary promotions, often bypassing official procedures, for prosecutors who share the leadership's views on how proceedings should be conducted. All of these changes and practices justify the conclusion that this state of affairs amounts to multiple breaches of the rule of law which at the very least seriously risks affecting the protection of the EU's financial interests in a sufficiently direct way.

This conclusion can only be but strengthened by the multiple examples of malfunctioning of the prosecution services, particularly in cases of high-level corruption or cases relating to the misuse of state or EU financial resources in a broader context where the MoJ/PG is a politician proactively engaged in the systemic violation of national and European legally binding requirements, including the violation of ECJ and ECtHR's orders and judgments, in a twofold way: an "active" way such as when the PG lodges cases with the captured and irregularly composed "Constitutional Tribunal" to give a veneer of "constitutionality" to these violations or publicly present ECJ and ECtHR's orders and judgments as illegal;<sup>367</sup> and a "negative" way such as when the PG refuses to cooperate with OLAF and the EPPO.

This means that the European Commission has more than enough reasonable grounds to activate the Conditionality Regulation on account of (i) the lack of proper functioning of Poland's public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of EU law relating to the implementation of the EU budget or to the protection of the EU's financial interests; (ii) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of and EU law relating to the implementation of the EU budget or to the protection of the EU's financial interests; and (iii) the lack of effective and timely cooperation with OLAF and the EPPO.

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<sup>367</sup> See most recently Poland's National Prosecutor's Office on the CJEU judgment of 5 June 2023, published on 5 June 2023: <https://www.gov.pl/web/prokuratura-krajowa/oswiadczenie-prokuratury-krajowej-w-sprawie-wyroku-tsue-z-5-czerwca-2023-r>

### **3. Systemic violation of effective judicial protection requirements resulting in the neutralisation of effective judicial review by independent courts of the actions or omissions of all relevant authorities**

According to the Conditionality Regulation, “endangering the independence of the judiciary” may be indicative of breaches of the principles of the rule of law. The Conditionality Regulation also explicitly mentions “limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law” as another situation indicative of breaches of the rule of law.

As will be shown below, these two situations may interconnect in practice and indeed characterise the situation in Poland where the authorities controlled by the current ruling coalition, including the judicial bodies they have captured (e.g., the Constitutional Tribunal) or established (e.g., the Extraordinary Control and Public Affairs Chamber), have been engaged in the sustained and systemic endangerment of the Polish judiciary’s independence since the end of 2015 as established, inter alia, by the ECtHR:

*[T]he whole sequence of events in Poland vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the [National Council for the Judiciary] and setting up new chambers in the Supreme Court, while extending the Minister of Justice’s control over the courts and increasing his role in matters of judicial discipline [...] As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened. The applicant’s case is one exemplification of this general trend.<sup>368</sup> (emphasis added)*

This deliberately engineered top-down process of rule of law backsliding has been accompanied by the increasing undermining of the availability and effectiveness of legal remedies, in particular, by making “unconstitutional” EU requirements relating to the right to effective judicial protection and the EU preliminary ruling procedure; by engaging in the systemic violation of “inconvenient” domestic but also judgments from both the ECJ and the ECtHR; and by organising the systemic harassment via arbitrary disciplinary and/or criminal proceedings and/or sanctions against judges and prosecutors seeking to investigate, prosecute or sanction breaches of rule of law principles within the meaning of Article 3 of the Conditionality Regulation.

However, as previously outlined, the systemic violation of EU principles of the rule of law leading to the absence of effective judicial review by independent courts does not, in and of itself, suffice to justify the activation of the Conditionality Regulation. As provided for by Article 4.2(d), breaches of the principles of the rule of law which concern “the effective judicial review by independent courts” must relate to the “actions or omissions” by (a) national authorities implementing the EU budget; (b) national authorities carrying out financial control, monitoring and audit; and (c) investigation and public prosecution services

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<sup>368</sup> *Grzęda v. Poland*, Grand Chamber Judgment of 15 March 2022, CE:ECHR:2022:0315JUD004357218, para. 348.

in relation to national breaches of EU law relating to the implementation of the EU budget or to the protection of the EU's financial interests.

The situation in Poland satisfies this requirement as judicial independence has been repeatedly violated across the board, meaning that all national courts have been affected, including those with jurisdiction over actions and omissions by the national authorities mentioned in Article 4(2) of the Conditionality Regulation. It is worth referring in this respect to the ECJ's most recent infringement judgment to date regarding Poland's rule of law crisis and in which the Court emphasised that compliance with the requirements arising from the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, themselves described by the Court as provisions of both a constitutional and procedural nature, must "be guaranteed *across all the substantive areas* of application of EU law and *before all national courts* seised of cases falling within those areas" (emphasis added).<sup>369</sup>

The key aspects of Polish authorities' multi-faceted endangerment of judicial independence resulting in a lack of effective judicial review by independent courts of the actions/ omissions of the authorities mentioned in the Conditionality Regulation and beyond may be summarised as follows:

- Capture of Poland's Constitutional Tribunal: This has resulted in an irregularly composed CT (which will be referred therefore from now on as "neo-CT") unable to provide effective constitutional review and created a situation where all Polish judges are formally prohibited from assessing compliance with EU effective judicial requirements following two decisions of the neo-CT which found several provisions of the EU Treaties incompatible with Poland's Constitution, including the second subparagraph Article 19(1) TEU which requires a system of effective and independent courts and remedies and following two additional decisions which found Article 6(1) TEU unconstitutional in several aspects leading the Secretary General of the Council of Europe to conclude in November 2022 that Poland's obligation to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction is no longer "fulfilled" across the board, including therefore cases relating to the sound financial management of the EU budget or the protection of the EU's financial interests.
- Capture of Poland's National Council for the Judiciary: This has resulted in the establishment of an unconstitutional body (which will be referred therefore from now on as "neo-NCJ") lacking any independence which has, in turn, enabled current Polish authorities to interfere in all judicial appointment procedures. This means that any Polish court composed of individuals appointed or promoted in a procedure involving the neo-NCJ (so-called neo-judges) ought to be considered *systematically compromised*. As this has already materialised at all court levels, Polish courts with jurisdiction to review the actions or omissions of the authorities implementing the Union budget or carrying out financial control, monitoring and audit as well as the actions or omissions of public prosecution services ought to be already considered compromised or at the serious risk of being compromised in a context where about Polish courts include about 30-40% of neo-judges who cannot lawfully adjudicate and where Polish authorities have furthermore refused to take any remedial action as regards the neo-NCJ as ordered by the European Court of Human Rights.
- Capture of Poland's Supreme Court: This was initially attempted via the establishment of two new chambers and a purge of existing Supreme Court judges via a retroactive lowering of their retirement age. Following the failure of the latter due to the Court of Justice's orders and judgment in Case C-619/18, Polish authorities have instead decided to multiply grossly defective appointments to the Supreme Court to outnumber the lawful judges. In 2023, more than half of the members of the Supreme Court are "neo-judges" who cannot lawfully adjudicate with the Supreme Court furthermore also irregularly presided by a neo-judge and continuing to include two chambers masquerading as lawful courts (the Extraordinary Review and Public Affairs Chamber and the Professional Liability Chamber, which formally replaced the

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<sup>369</sup> Case C204/21, para. 268.

Disciplinary Chamber in 2022) as they plainly violate effective judicial protection requirements under Article 19(1) TEU.

- Capture of Poland's Supreme Administrative Court: The 2023 law providing for the transfer of disciplinary proceedings regarding judges from the recently established Chamber of Professional Responsibility to the Supreme Administrative Court (SAC) has brought to the fore the irregular composition of this additional Polish court of last resort. By comparison to the Supreme Court, Poland's SAC is not yet under the effective control of Poland's ruling coalition as neo-judges remain a minority in each chamber, yet it means that each chamber of the SAC is also currently irregularly composed. Thus, a substantial portion of the SAC judges consist of "neo-judges" who cannot lawfully adjudicate as per the case law of the ECtHR.
- Instrumentalisation of new disciplinary regime for judges: According to the European Commission itself, the combination and simultaneous introduction of various legislative changes targeting Polish courts "have given rise to a structural breakdown" with the changes made to the disciplinary regime for judges creating a "systemic rupture" with Poland's pre-2015 disciplinary regime. Following the changes, which have been found to violate, inter alia, the EU's effective judicial protection requirements and the preliminary ruling procedure, Polish authorities have been able to use the new disciplinary regime for judges, in addition to criminal proceedings as a system of political control of the content of judicial decisions and as an instrument of pressure and intimidation against judges across the board. To date, unlawful disciplinary investigations, proceedings and sanctions against judges, most recently in the form of forced transfers, continue to be launched and adopted, including for applying EU effective judicial protection requirements as interpreted by the Court of Justice.
- Last but not least, Polish authorities continue to openly violate an increasing number of rule of law related orders and judgments from both the ECtHR and ECJ, including ECJ orders imposing daily penalty payments for non-compliance with previous orders. Polish authorities' systemic non-compliance with ECtHR and ECJ orders and judgments is leading inter alia to an exponential number of applications being lodged with the ECtHR. As of 6 July 2023, there are 397 applications pending before the ECtHR relating to Poland's rule of law crisis, with more to be expected as these applications mostly relate to changes made to the organisation of Poland's judiciary under laws that mainly entered into force in 2017 and 2018.

To summarise, current Polish authorities have created a situation where there is no longer any effective judicial review in Poland across the board due to a legal framework precluding compliance with EU effective judicial protection requirements *in all situations*. Meanwhile, an increasing number of inherently defective judicial appointments continue to be made *at all court levels* in a broader context, with *all of Poland's top courts* now composed of neo-judges who cannot lawfully adjudicate and where Polish authorities no longer recognise as binding the rule of law related orders and judgments of the ECJ while they continue to harass judges on the basis of provisions of national law found incompatible with EU law by the ECJ, most recently in a judgment of 5 June 2023 with respect of Poland's 'Muzzle Law'

In light of the above, Polish authorities' transversal and sustained violation of EU effective judicial protection requirements necessarily create, by definition and at a minimum, serious risks for the sound financial management of the EU budget and the protection of the EU's financial interests.

In addition to Article 4.2(d), the breaches of the rule of law repeatedly committed by Polish authorities since the end of 2015 also arguably concern "the imposition of effective and dissuasive penalties on recipients by national courts" (Article 4.2(e)) in cases involving recipients connected to Poland's ruling coalition due, inter alia, to the adoption of disciplinary regime for judges incompatible with EU law and which has been illegally used as a system of political control of the content of judgments and punishment when the content of judgments is not to the Polish authorities' liking.

Following the capture of the Constitutional Tribunal and the decisions irregularly issued by the neo-CT which have organised the transversal violation of the EU right to effective judicial protection and the EU general principles of autonomy, primacy, effectiveness, uniform application of EU law as well as the binding effect of ECJ rulings, one may further argue that the activation of the Conditionality Regulation could also be justified on the basis of Article 4(2)(h): “other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union”. This situation may be understood as putting at serious risks the correct application of EU primary law and secondary legislation relevant to the implementation, sound financial management and protection of the Union budget as well as the protection of the financial interests of the EU, and compliance with ECJ judgments in that regard.

More broadly speaking, one may also argue that by considering EU effective judicial protection requirements guaranteed under Article 19(1) TEU and connected ECJ orders judgments “unconstitutional”, Polish authorities have rendered compliance impossible with EU law across the board resulting in a situation where breaches of the rule of law concern every single one of the situations laid down in Article 4.2 of the Conditionality Regulation.

The existence of serious risks to the EU budget/financial interests stemming from Polish authorities’ sustained endangerment of judicial independence is easy to evidence at this stage following the multiple judgments issued by Polish and European courts on most of the so-called “reforms” adopted by Polish authorities since the end of 2015. By contrast, evidencing the existence of a sufficient direct link between Polish authorities’ endangerment of judicial independence and the effect or serious risk of effect on the EU budget/financial interests in Poland is less straightforward. As observed by the authors of a study on the Conditionality Regulation:

Article 4 explicitly indicates that the action endangering judicial independence must result in either a lack of effective judicial review of actions of public authorities relevant to the protection of the EU financial interests or problems with the application of effective sanctions to EU fraudsters [...] one can imagine different ways of interpreting the requirements of a ‘sufficiently direct link’. Under an extensive interpretation, it could be argued that strong evidence of a total absence of independence in the judiciary – i.e., evidence of repeated political interference in judicial decisions or decisions concerning the appointment or reassignment of judges – inevitably affects the judges’ ability to take independent decisions and thus entails a real and serious risk of political interference in all judicial decisions, including those related to cases of corruption with the use of EU funds. Under a restrictive interpretation, it will be necessary for the Commission to provide evidence of political interference in judicial decisions concerning offences against the EU financial interests.<sup>370</sup>

What is referred to above as “extensive interpretation” is arguably not an extensive but rather the correct interpretation of the Conditionality Regulation in a situation where the EU is confronted with breaches of the rule of law which do not yet affect but rather “seriously risk affecting” the sound financial management of the EU budget/ the protection of the EU’s financial interests “in a sufficiently direct way” due to the different elements mentioned above and in particular, the “unconstitutionalisation” of EU effective judicial protection requirements across the board in addition to the already established existence of systemic dysfunctions regarding all judicial appointment procedures, including to courts with jurisdiction to review the actions or omissions of the authorities implementing the EU budget

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370 Rubio et al, p. 71.

or carrying out financial control, monitoring and audit as well as the actions/omissions of public prosecution services.

As correctly noted by the Commission itself, the notion of risk within the meaning of the Conditionality Regulation must be understood as having a:

high probability of occurring, in relation to the situations or to the forms of conduct of the authorities referred to in Article 4(2) of the Conditionality Regulation. For instance, if certain acts of national authorities implementing Union funds through public procurement, or collecting the Union's own resources, or carrying out financial control, monitoring and audit of Union funds, or investigating allegations of fraud, corruption or other breaches of Union law in the implementation of Union funds or revenue, cannot be effectively reviewed by fully independent courts, this may entail a serious risk insofar as the Union funds and the financial interests of the Union are concerned.<sup>371</sup>

In the case of Poland, as will be evidenced below, we are not dealing with breaches of the rule of law creating serious risks on the sound financial management of the EU budget or on the protection of the EU's financial interests of a merely hypothetical, uncertain or vague nature. Instead, they are repeated breaches which have affected *all* Polish courts and judges and have been established not only by Polish and European courts in dozens and dozens of judgments.

The transversal nature of these breaches also satisfies the requirement of a sufficiently direct link as the lack of effective judicial review concerns *all courts* with jurisdiction to adjudicate cases concerning actions or omissions by (a) national authorities implementing the EU budget; (b) national authorities carrying out financial control, monitoring and audit and (c) investigation and public prosecution services. In other words, there is at the very least a manifest, serious risk that the effectiveness and impartiality of judicial proceedings on cases related to the irregularities in the management of the EU budget may be affected, which creates, in turn, a serious risk to the protection of the EU's financial interests in a sufficiently direct way.

Lastly, the Conditionality Regulation may be considered the most effective instrument as compared to other existing instruments to protect the EU's financial interests. As observed by the Commission itself, the Conditionality Regulation may be considered more effective in situations:

where the Union budget is or risks being affected in a wide manner, due for instance to national law precluding effective judicial review of administrative decisions to implement the Union budget or obstructing referrals of relevant cases to the Court of Justice of the European Union, or due to lack of independence of national courts. In such cases, suspensive or prohibitive measures under the Conditionality Regulation imposed cumulatively until the relevant breach of the principles of the rule of law is brought to an end, might protect the Union budget more effectively as they could prevent adverse effects on the sound financial management of the Union budget and on the financial interests of the Union.<sup>372</sup>

This is exactly the situation currently existing in Poland as will be shown in more details below and one which may be expected to worsen should the current ruling coalition be reconducted in office considering that the most recent pronouncement by the leader of the

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371 2022 Commission's Conditionality Regulation Guidelines, para. 31.

372 2022 Commission's Conditionality Regulation Guidelines, para. 43.

“Law and Justice” party who announced the full takeover of Polish courts after the elections of October 2023.<sup>373</sup>

### 3.1 Capture of Poland’s Constitutional Tribunal and ensuing findings of unconstitutionality regarding EU and ECHR rule of law requirements

Poland’s “rule of law crisis”<sup>374</sup> began at the end of 2015 with the irregular elections of three individuals to the CT. Fast forward to the situation in 2023, following a judgment of the ECtHR in May 2021, it can be concluded that the neo-CT is no longer a tribunal established by law when deciding cases in formations including any of the three individuals (also informally known as “stand-in judges”) improperly occupying the seats of the properly elected judges due to the grave irregularities committed by Poland’s ruling coalition in December 2015.<sup>375</sup> The year following the ECtHR judgment in *Xero Flor*, Poland’s Supreme Administrative Court held that the whole neo-CT is no longer a court as it is “infected” with unlawfulness and has therefore lost “its ability to adjudicate in accordance with the law.”<sup>376</sup>

As for the European Commission, after first concluding in its Article 7(1) TEU reasoned proposal of December 2017 that the capture of the CT meant the lack of any effective constitutional review in Poland and failing to decisively act for years afterwards, however, the Commission at long last decided to refer Poland to the Court of Justice in February 2023. To justify its (belated) infringement action, the Commission reiterated that the neo-CT “no longer meets the requirements of an independent and impartial tribunal previously established by law” on account of “the irregularities in the appointment procedures of three judges in December 2015 and in the selection of its President in December 2016.”<sup>377</sup>

Most recently, in an unprecedented development as far as a national court is concerned, the European Parliament has (rightly) decided to use quotation marks when referring to the neo-CT:

Recalls its position that Poland’s current ‘Constitutional Tribunal’ is illegitimate, lacks legal validity and independence and is unqualified to interpret the country’s constitution, and that its opinion on the amendments to the Act on the Supreme Court and certain other laws should therefore be considered null and void; calls on the Commission to progress with its litigation as soon as possible and to also apply to the CJEU for interim measures in the pending case regarding the ‘Constitutional Tribunal’<sup>378</sup>

373 M. Jałoszewski, “Kaczyński announces the takeover of the courts after the elections. He threatens: ‘No one will stop us’”, *Rule of Law in Poland*, 29 August 2023: <https://ruleoflaw.pl/kaczynski-takeover-of-the-courts-after-the-elections-poland/>

374 *Tuleya v Poland*, Applications nos. 21181/19 and 51751/20, CE:ECHR:2023:0706JUD004641221, para. 262.

375 ECtHR judgment of 7 May 2021 in *Xero Flor v Poland* App No 4907/18, CE:ECHR:2021:0507JUD000490718.

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

377 European Commission, “The European Commission decides to refer POLAND to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal”, Press release, IP/23/842, 15 February 2023.

378 European Parliament resolution of 11 July 2023 on the electoral law, the investigative committee and the rule of law in Poland (2023/2747(RSP)), para 4. Prior to this, see European Parliament resolution of 9 June 2022 on the rule of law and the potential approval of the Polish national recovery plan (RRF) (2022/2703(RSP)), para 9, where the European Parliament also used quotation marks in respect of the “illegitimate ‘National Council of the Judiciary’”.

One cannot overemphasise the serious nature of the consequences which have flowed from the capture of Poland's CT such as the neutralisation of EU but also ECHR effective judicial protection requirements via four "decisions" issued in 2021-2022:

On 14 July 2021, in a "decision" issued by an irregularly composed bench and in manifest violation of Poland's Constitution and the EU Treaties, the neo-CT held that Article 4(3) second subparagraph TEU read in connection with Article 279 TFEU (ECJ's power to prescribe interim measures) are unconstitutional to the extent that they oblige Poland to abide by interim measures orders issued by the ECJ that affect the organisation and functioning of Polish courts and the procedure before such courts and that by adopting the order of 8 April 2020 in Case C-791/19 which concerns the organisation and jurisdiction of the Polish courts, as well as the procedure before them, the ECJ ruled *ultra vires*;

On 7 October 2021, in another "decision" issued by an irregularly composed bench and again in manifest violation of Poland's Constitution and the EU Treaties, the neo-CT held *inter alia* that the second subparagraph of Article 19(1) TEU is unconstitutional in so far as – to ensure effective legal protection in the fields covered by EU law – it confers on national courts the power to bypass, in the course of adjudication, provisions of the Polish Constitution, and to rule on the basis of provisions which are not binding, repealed or declared unconstitutional. Moreover, in the same decision, the CT declared the unconstitutionality of Article 19(1), second subparagraph, and Article 2 TEU, in so far as – to ensure effective legal protection in the fields covered by EU law and to ensure judicial independence – these provisions empower national courts to rule on issues regarding the judiciary;

On 24 November 2021, in another irregularly composed bench and in manifest violation of Poland's Constitution and the ECHR, the neo-CT held that Article 6(1) ECHR is incompatible with the Polish Constitution as far as it is interpreted to include the neo-CT in its definition of a court and held the *Xero Flor* judgment of the ECtHR to be 'inexistent' in Poland's legal order;

On 10 March 2022, in another case yet again decided by an unlawful bench, the neo-CT held Article 6(1) ECHR incompatible with the Polish Constitution in so far as (i) the concept of 'civil rights and obligations' includes a subjective right for a judge to hold an administrative post in the judiciary; (ii) it allows the ECtHR or national courts, on the basis of the requirement of a "tribunal established by law", to disregard the provisions of the Constitution, statutes and judgments of the Polish Constitutional Tribunal and establish independent standards regarding the nomination procedure of judges of national courts; (iii) it allows the ECtHR or national courts to assess the compatibility with the Polish Constitution and the ECHR of laws concerning the organisation of the judiciary, the jurisdiction of courts and the law specifying the framework, scope of activities, working methods and rules governing the election of the members of the National Council of the Judiciary.

On 9 November 2022, the Secretary General of the Council of Europe, in her report issued on the basis of Article 52 ECHR and regarding the decisions of the neo-CT of 24 November 2021 and 10 March 2022, formally acknowledged that the "ensuing obligation of Poland to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction *is not, at this stage, fulfilled*" (emphasis added).<sup>379</sup>

The same general legal conclusion can be adopted in relation to the second subparagraph of Article 19(1) TEU. Indeed, according to the Commission itself, the two decisions of the neo-CT of 14 July and 7 October 2021 violate this Treaty provision "because the Constitutional Court interpreted the Constitution of the Republic of Poland in relation to the EU law requirements of effective judicial protection by an independent and impartial tribunal previously established by law *too narrowly, incorrectly, and in a manner that manifestly disregards the case-law of the Court of Justice of the European Union*" (emphasis added).<sup>380</sup>

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

380 Action brought on 17 July 2023 – European Commission v Republic of Poland (Case C-448/23), OJEU 2023/C 304/20.

In addition, the Commission has requested the ECJ to find these decisions of the neo-CT in violation of “the principles of primacy, autonomy, effectiveness and uniform application of EU law and the binding effect of judicial decisions of the Court of Justice of the European Union, as the Constitutional Court [...] unilaterally disregarded the principles of primacy and effectiveness of Articles 2, 4(3) and 19(1) TEU and Article 279 TFEU, as consistently interpreted and applied by the Court of Justice of the European Union, and *ordered all Polish authorities to disapply those Treaty provisions*” (emphasis added).<sup>381</sup>

Almost seven years after the capture of Poland’s CT, the situation is worse than ever with a majority of “rulings” now being issued by irregular benches (see table below) in a context where the CT has lost all credibility while it has become increasingly unable to function due to internal dysfunctions, which is resulting in fewer “rulings” overall.

**Table 15:** Number of “rulings” issued by irregular benches of Poland’s “Constitutional Tribunal” per year since 2017

YEAR	RULINGS ISSUED WITH THE INVOLVEMENT OF STAND-IN JUDGES <sup>41</sup>	TOTAL RULINGS ISSUED	PERCENT [%]
2017	17	36	47
2018	13	36	36
2019	19	31	31
2020	13	24	54
2021	14	19	74
2022	9	14	64

Source: Wolne Sądy, “Business as usual? Not anymore...”, Warsaw, May 2023, p. 31: <https://wolnesady.org/files/Rule-of-law-business-report-Wolne-Sa%CC%A8dy.pdf>

In its latest ARoLR country chapter for Poland, the Commission has continued to acknowledge the gravity of the situation and summarised the latest steps involving the neo-CT and taken by Polish authorities and their captured bodies with the view of further undermining judicial independence and formalising the violation of national and European courts’ rulings under the guise of “defending” the supremacy of Poland’s Constitution:<sup>382</sup>

- 15 December 2022: Request from the ECPA Chamber (which is not a court established by law) to the neo-CT to assess the constitutionality of the lack of judicial review of NCJ resolutions related to transfers of judges carried out without their consent (this would enable Polish authorities to claim they can continue to violate the ECJ judgment of 6 October 2021 in Case C-487/19 as it would allegedly not be compatible with Poland’s Constitution);

<sup>381</sup> Ibid.

<sup>382</sup> 2023 ARoLR Poland’s Country Chapter, pp. 9-10.

- 14 March 2023: Request from Poland's President to the neo-CT to get it to find that the Supreme Administrative Court does not have jurisdiction to review the appointment acts of judges adopted by the Polish President (this would enable Polish authorities to claim they can continue to violate the judgments of the Supreme Administrative Court applying the ECJ judgment of 2 March 2021 in Case C-824/21 as it would allegedly not be compatible with Poland's Constitution);
- March 2023: Request from the neo-CT to get the case files from the Supreme Court in multiple cases concerning judicial independence following a prior motion of the irregularly appointed First President of the Supreme Court to the neo-CT so as to prevent Supreme Court's lawful judges to issue rulings in these cases concerning individuals appointed to the Supreme Court on the back of grossly defective appointment procedures (see Sections 2 and 3 below for additional details)
- Forthcoming: Neo-CT is due to decide additional cases concerning the constitutionality of EU Treaty provisions and in particular, the ECJ's power to impose penalty payments for non-compliance with its orders in judicial independence cases as the ECJ did within the framework of the infringement case relating to Poland's 'Muzzle Law' (pending Case K 8/21).

### 3.2 Capture of Poland's National Council for the Judiciary (NCJ) and ensuing systemic dysfunction regarding every judicial appointment procedure involving the neo-NCJ

The second key body used to pave the way for Poland's ruling coalition's political control of Poland's judicial system is known as the neo-NCJ. Following the capture of the NCJ in 2018 in manifest breach of Poland's Constitution, Poland's ruling coalition has been able to interfere in all judicial appointment procedures. This has, in turn, led the ECtHR to hold that the neo-NCJ lacks any independence and to conclude that any court composed of individuals (so-called neo-judges) appointed in a procedure involving the neo-NCJ is *systematically compromised*.<sup>383</sup>

Notwithstanding the ECtHR demanding rapid remedial action from Polish authorities and Poland's Supreme Court holding the neo-NCJ to be an unconstitutional body, nothing has been done to date.<sup>384</sup> One may therefore expect a continuous flow of ECtHR judgments finding against Poland. On this front, notwithstanding repeated calls to the European Commission to launch an infringement action as regards the neo-NCJ, most recently by the European Parliament in July 2023,<sup>385</sup> the European Commission is yet to do so. Instead, the Commission has euphemistically described the situation in its latest ARoLR country chapter for Poland while also misrepresenting the ECtHR's findings to date by downplaying them:

**Serious concerns related to the independence of the National Council for the Judiciary remain to be addressed.** The Court of Justice and the ECtHR confirmed that there are legitimate doubts as to the independence of the National Council for the Judiciary ('NCJ'), which continues to play an active role in the judicial appointment procedures by evaluating candidates for judiciary posts and submitting proposals for judicial appointments to the President of the Republic.<sup>386</sup>

383 See ECtHR judgment of 8 November 2021 in the cases of Judges *Dolińska-Ficek and Ozimek v Poland*, applications nos. 49868/19 and 57511/19, CE:ECHR:2021:1108JUD004986819.

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

385 See European Parliament resolution of 11 July 2023, para 4: "call on the Commission to urgently launch an infringement procedure regarding the illegitimate National Council of the Judiciary (NCJ) and all judges appointed by it, in particular those appointed to the Extraordinary Control and Public Affairs Chamber of the Supreme Court, which examines electoral disputes".

386 2023 Poland's ARoLR Country Chapter, pp. 5-6.

In reality, the case law of the ECtHR is much more damning and cannot accurately be described as just confirming the existence of “legitimate doubts as to the as to the independence” of the neo-NCJ. Rather, and as previously alluded above, the ECtHR has repeatedly held that:

- The independence of the NCJ is no longer guaranteed following the adoption in December 2017 of the Act Amending the Act on the NCJ whose main objective was to enable the legislative and the executive powers to achieve a decisive influence over the composition of the NCJ which, in turn, has enabled those powers to interfere directly or indirectly in the judicial appointment procedure;<sup>387</sup>
- The deficiencies of the judicial appointment procedure involving the neo-NCJ ‘have already adversely affected existing appointments and are capable of systematically affecting the future appointments of judges, not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative court’ and the legitimacy of any court composed of judges appointed in a procedure involving the neo-NCJ is ‘systematically’ compromised;<sup>388</sup>
- A rapid remedial action on the part of the Polish State is therefore required as the continued operation of the neo-NCJ ‘and its involvement in the judicial appointments procedure perpetuates the systemic dysfunction’ established by the Court and ‘may in the future result in potentially multiple violations of the right to an “independent and impartial tribunal established by law”, thus leading to further aggravation of the rule of law crisis in Poland’.<sup>389</sup>

The Commission did, however, accurately emphasise how the neo-NCJ was continuing to proactively undermine judicial independence in Poland by, for instance, adopting resolutions in 2022 and 2023 alleging “the unconstitutionality of Article 6 ECHR as determined by the Constitutional Tribunal, as well as the unlawfulness of certain interim measures ordered by the ECtHR”<sup>390</sup> or requesting “the prosecution services to open a criminal investigation against judges that had implemented the interim measures order of the Court of Justice of 14 July 2021”.<sup>391</sup>

The continuing use of disciplinary but also criminal proceedings against Polish judges seeking to apply EU law and/or to comply with ECJ orders and judgments will be further outlined after the capture of Poland’s Supreme Court and Supreme Administrative Court is described.

### **3.3 Capture of Poland’s Supreme Court via irregular appointments and the establishment of chambers lacking the attributes of courts established by law within it**

The capture of Poland’s Supreme Court was initially attempted via the establishment of two new chambers and a purge of existing Supreme Court judges via a retroactive lowering of their retirement age. Following the failure of the latter due to the Court of Justice’s orders and judgment in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, Polish authorities instead decided to multiply grossly defective appointments to the Supreme Court to outnumber the lawful judges.

387 See ECtHR, *Reczkowicz*, para. 274; *Advance Pharma sp. z o.o.*, para. 344; and *Grzęda*, para. 322.

388 ECtHR, *Advance Pharma sp. z o.o v. Poland*, paras 364-365.

389 ECtHR, *Advance Pharma sp. z o.o.*, para. 365.

390 2023 Poland’s ARoLR Country Chapter, p. 6.

391 *Ibid.*

These grossly defective appointments were initially concentrated at the level of the two chambers created by Polish authorities to, on the one hand, enable disciplinary sanctions against independent judges and prosecutors via the new Disciplinary Chamber (DC) and defend its own irregularly appointed “neo-judges” via the new Extraordinary Control and Public Affairs Chamber (ECPAC), which has led to a Kafkaesque situation in which unlawfully appointed “judges” can review the status of other unlawfully appointed “judges” but also the status of lawful judges. Polish authorities have since then irregularly appointed neo-judges to every single chamber of Poland’s Supreme Court. In the meantime, the ECtHR has established that the DC and the ECPAC are not lawful courts and confirmed that every Supreme Court bench which includes a neo-judge is not a court established by law regardless of the Chamber where the bench is located:

- The DC is not a tribunal established by law due to the undue influence of the legislative and executive powers in the procedure for appointing its members made possible by the Amending Act on the NCJ of 8 December 2017, which amounts to a fundamental irregularity that adversely affected the whole procedure for judicial appointments;<sup>392</sup>
- The ECPAC is not a tribunal established by law for the same reason as above with an additional manifest breach of domestic law found by the ECtHR in respect of this Chamber because, ‘in blatant defiance of the rule of law’, the President of Poland carried out judicial appointments despite a final court order staying the implementation of the neo-NCJ’s resolution recommending judges to the ECPAC;<sup>393</sup>
- The Civil Chamber is not a tribunal established by law when consisting of individuals appointed post Amending Act on the NCJ of 8 December 2017 due to the fundamental irregularity that adversely affected their appointments with the ECtHR also finding an additional manifest breach of domestic law found in respect of this Chamber because, in ‘blatant defiance of the rule of law’, the President of Poland carried out judicial appointments despite a final court order staying the implementation of the neo-NCJ’s resolution recommending judges to the Civil Chamber.<sup>394</sup>

In addition to the ECtHR, multiple Polish and ECJ rulings have established that the DC is not a lawful court. This explains why the lawful judges of Poland’s Supreme Court ruled in January 2020 that all of the DC resolutions must be held null and void. This aspect was disregarded by the Commission when it endorsed Poland’s Recovery Plan. The Court of Justice has since (indirectly) confirmed that the Commission erred in law in doing so by holding on 13 July 2023 that Polish judges must disregard the decisions of the now abolished DC to ensure the primacy of EU law, in particular effective judicial protection obligations, without that being precluded by any consideration relating to the principle of legal certainty or the alleged finality of a decision as the DC was never a lawful court to begin with.<sup>395</sup>

As regards the ECPAC, the ECJ is yet to plainly confirm that it is not a court established by law in the absence of an infringement action directly challenging this aspect. The Commission did, however, request the ECJ to suspend in part the operations of the ECPAC which the ECJ did in July 2021.<sup>396</sup> The European Commission has since challenged the unlawful nature of the “Extraordinary Chamber” within the framework of its infringement action relating to

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392 *Reczkowicz*.

393 *Dolińska-Ficek and Ozimek*.

394 *Advance Pharma sp. z o.o.*

395 *Joined Cases C-615/20 YP and Others and C-671/20 M. M. (Lifting of a judge’s immunity and his or her suspension from duties) EU:C:2023:562.*

396 ECJ order of 14 July 2021 in *Case C-204/21 R Commission v Poland (Independence and respect for private life of judges) EU:C:2021:593.*

Poland's 'muzzle law' as well as – and this is significant – the unlawful nature of the new chamber which has replaced the DC and is known as the Chamber of Professional Liability (CPL):

89. The Commission is of the view that the Professional Liability Chamber and the Extraordinary Review and Public Affairs Chamber do not satisfy the guarantees laid down in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C585/18, C624/18 and C625/18, EU:C:2019:982).

90. It observes, in that regard, that 14 of the 17 members of the Extraordinary Review and Public Affairs Chamber and four of the 11 members of the Professional Liability Chamber were appointed members of the Sąd Najwyższy (Supreme Court) in circumstances regarded by the European Court of Human Rights as entailing infringement of the right of access to a tribunal previously established by law.

91. In the Commission's view, the fact that those judges were appointed on a proposal from a body no longer offering sufficient guarantees of independence vis-à-vis the legislature or the executive combined with the fact that those appointments were made despite the suspension, by an administrative court, of the proposal adopted by that body gives rise to genuine doubts that the two chambers in question satisfy the requirements of independence under Article 19(1) TEU.<sup>397</sup>

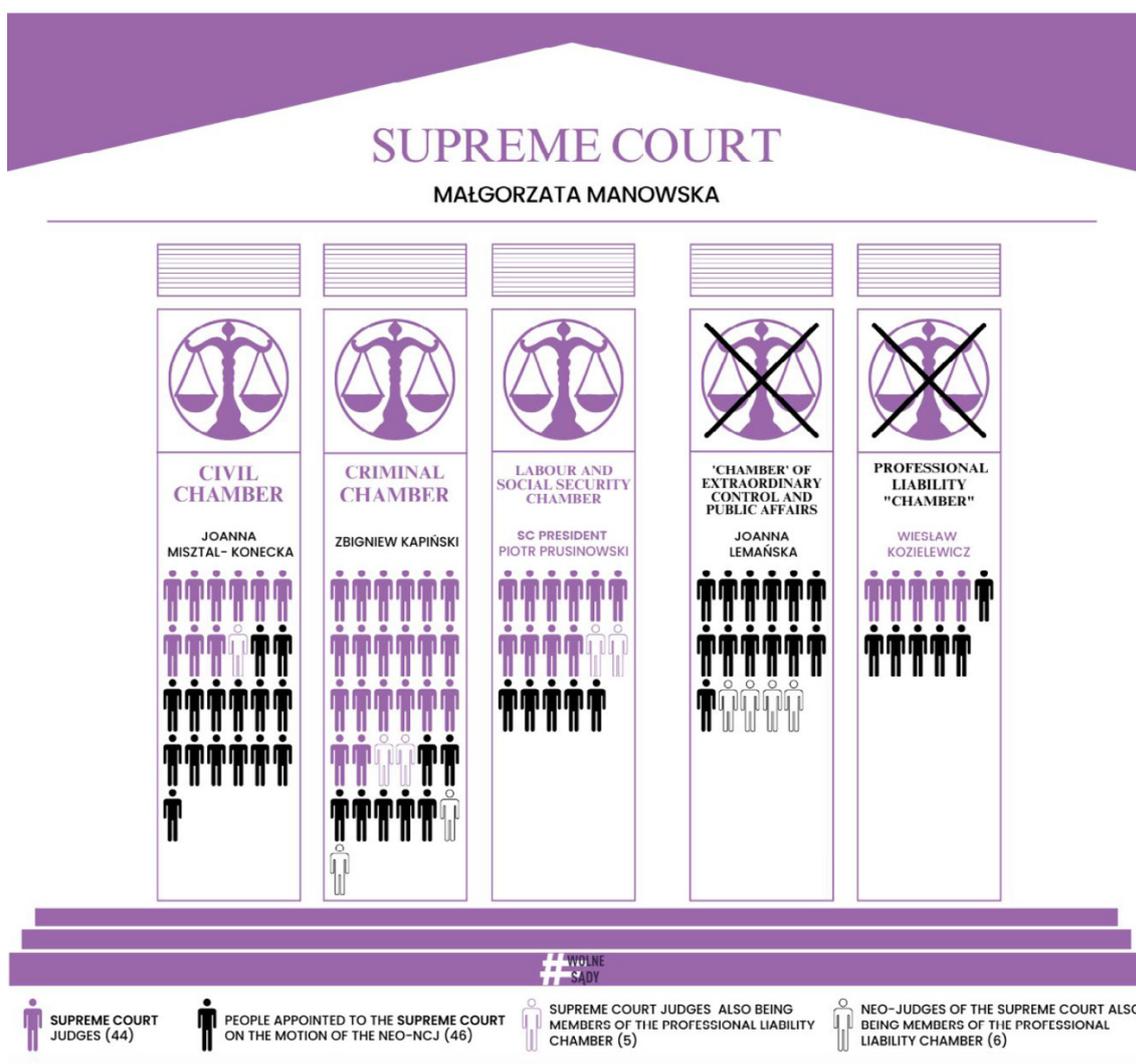
Disappointingly, however, the Commission raised the grossly irregular composition and lack of independence of these two chambers too late in the procedure for the ECJ to be able to address these crucial points. In its judgment of 5 June 2023 (further examined in Section 5 below), the Court did nevertheless make clear that since all national courts must be able to ascertain whether they or other courts meet EU effective judicial protection requirements, a Member State cannot give exclusive jurisdiction to a single body such as the "Extraordinary Chamber", especially when said body cannot review the legality of judicial appointments. With reference, inter alia, to Poland's specific rule of law context, the Court concluded that the exclusive jurisdiction given to the "Extraordinary Chamber" was liable to contribute to weakening even further the fundamental right to effective judicial protection.<sup>398</sup>

Be that as it may, the Commission is yet to directly challenge all of the irregular appointments made to the Supreme Court, but the case law of the ECtHR has already established that any Supreme Court bench consisting of "neo-judges" must be considered an irregular bench in breach of Article 6(1) ECHR. This is particularly problematic from a rule of law point of view as of 1 May 2023, *more than half of the members of the Supreme Court are "neo-judges" who cannot lawfully adjudicate* with the Supreme Court furthermore also irregularly presided by a neo-judge.

<sup>397</sup> ECJ order of 21 April 2023 Case C-204/21 R-RAP *Commission v Poland (Independence and respect for private life of judges)* EU:C:2023:334.

<sup>398</sup> See L. Pech, "Doing Justice to Poland's 'Muzzle Law': The Latest ECJ Judgement on Poland's Rule of Law Breakdown", *VerfBlog*, 11 June 2023: <<https://verfassungsblog.de/doing-justice-to-polands-muzzle-law/>>

**Table 16:** Irregularly appointed members of Poland’s Supreme Court as of May 2023



Source: Wolne Sądy, “Business as usual? Not anymore...”, Warsaw, May 2023, p. 49: <https://wolnesady.org/files/Rule-of-law-business-report-Wolne-Sa%CC%A8dy.pdf>

In its latest ARoLR country chapter for Poland, the Commission has highlighted, however somewhat euphemistically considering its own submission in Case C-204/21 and the severity of the ECtHR’s findings, the capture of Poland’s Supreme Court via multiple irregular appointments by noting that:

**There are serious doubts whether a number of Supreme Court judges, including its First President, comply with the requirement of a tribunal established by law.** [...] Fourteen out of seventeen judges of the Chamber of the Extraordinary Control and Public Affairs and four out of eleven judges of the Professional Liability Chamber have been appointed to the Supreme Court in conditions considered by the ECtHR as violating the right to a court established by law. These doubts also apply to the status of the First President of the Supreme Court itself. Furthermore, a preliminary ruling of the Court of Justice related to a judicial appointment to the Chamber of Extraordinary Control has so far not been implemented. The President of the Labour Chamber of the Supreme Court raised concerns about the handling of case files by the First President of the Supreme Court

in sensitive cases concerning judicial independence, alleging that the Supreme Court can no longer administer justice.<sup>399</sup>

It is worth noting that the Commission has also failed to bring an infringement action in relation to the sustained and deliberate violation of this Court of Justice's preliminary ruling mentioned above and issued in Case C-487/19, nor has it made it a condition aka milestone to release EU recovery funding. Most recently, in the absence of any forceful answer by the EU, the Supreme Court's "neo-judges" have sought for the first time to interfere with judicial proceedings in another Member State – the Netherlands – seemingly to seek "revenge" following a number of preliminary ruling requests submitted by Dutch judges in relation to EAW requests originating from Poland.<sup>400</sup> Meanwhile, Polish authorities have also began a process of capturing Poland's Supreme Administrative Court on the back of grossly irregular judicial appointments made to it without the Commission similarly doing anything about it to date.

### **3.4 Ongoing capture of Poland's Supreme Administrative Court (SAC) via grossly irregular judicial appointments**

Less attention has been paid to the capture of Poland's SAC than the capture of Poland's Supreme Court due to Polish authorities' own focus on the Supreme Court and the establishment within it of two unconstitutional chambers and in particular the infamous DC. It is mostly in light of the 2022-23 proposed transfer disciplinary proceedings regarding judges from the recently established Chamber of Professional Responsibility (CPL) to the SAC<sup>401</sup> – following the European Commission's belated realisation that the CPL is not, similarly to the DC, a lawful court – that the issue of the irregular composition of the SAC has been finally raised.

In addition to being *unconstitutional* and potentially amounting to the *third time* that Polish authorities have changed the body in charge of deciding disciplinary and/or waiving of judicial immunity proceedings as regards judges since 2018, the transfer would be legally problematic as the SAC consists of an increasing number of irregularly appointed neo-judges due to the involvement of the neo-NCJ which, as noted above, was held to be an unconstitutional body by the lawful judges of the Criminal Chamber of Poland's Supreme Court.

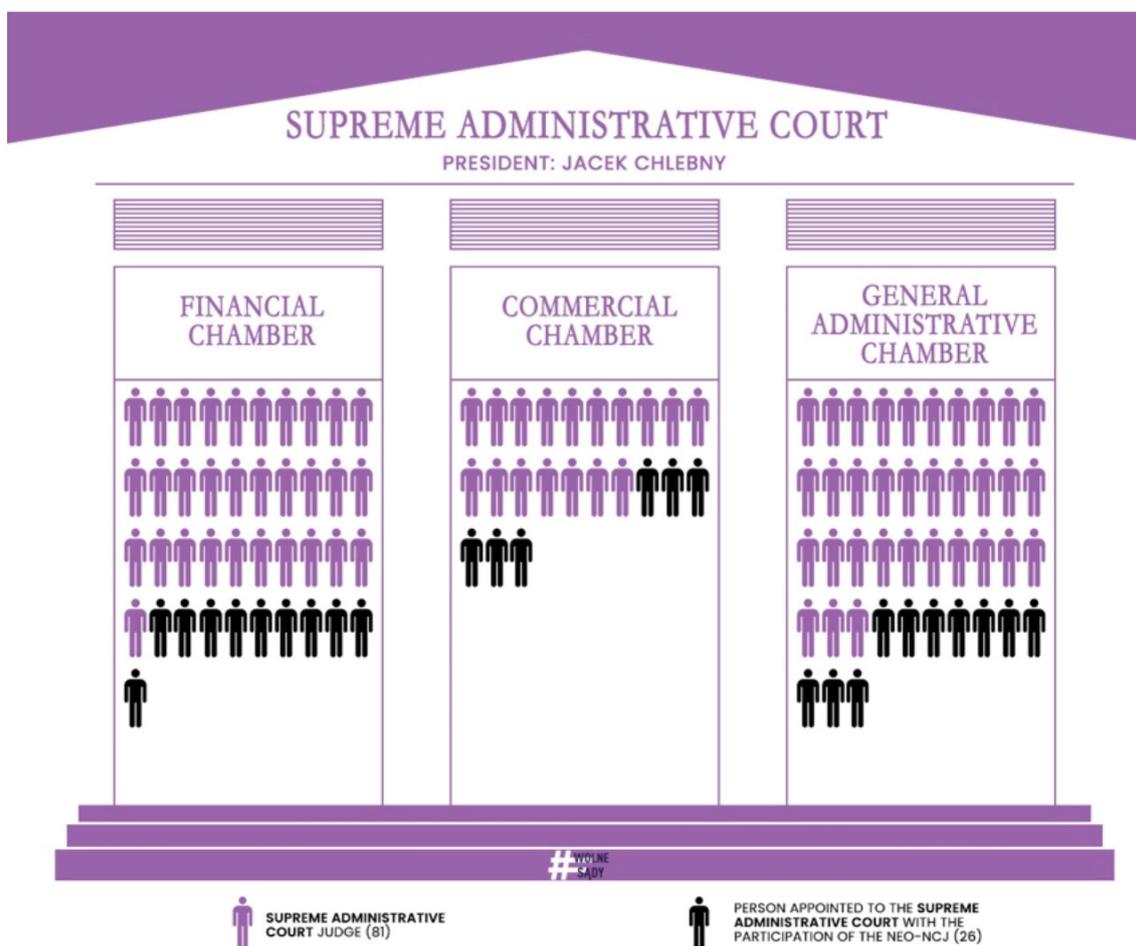
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399 2023 Poland's ARoLR Country Chapter, p. 7.

400 "Poland's Supreme Court asks if Dutch court meets EU rule-of-law standards", *Notes from Poland*, 3 July 2023: <https://notesfrompoland.com/2023/07/03/polands-supreme-court-asks-if-dutch-court-meets-eu-rule-of-law-standards/>

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

**Table 17:** Irregularly appointed members of Poland’s Supreme Administrative Court as of November 2022



Source: Wolne Sądy, *2500 Days of Lawlessness*, 5 November 2022, p. 49: <https://wolnesady.org/files/2500-days-of-lawlessness-2000-days-report-update-EN-.pdf>

In comparison to the Supreme Court, Poland’s SAC is not yet under the effective control of Poland’s ruling coalition as neo-judges remain a minority in each chamber yet it means that *each* chamber of the SAC is also currently *irregularly* composed. To the best of our understanding, as of 1 September 2023, the SAC now consists of 80 lawful judges and 27 individuals who cannot lawfully adjudicate.

To this day, the European Commission is yet to act in this respect. As regards the ECtHR, there have been no judgments yet regarding the irregular composition of the SAC, but one is likely as there has been at least four ECHR complaints relating to administrative proceedings decided in the last instance by the SAC communicated to Polish authorities.

This first complaint was communicated in July 2022 relating to cases which were examined by ordinary civil, criminal and *administrative* courts on account of the presence on neo-

judges on adjudicating benches.<sup>402</sup> In all of these pending cases, the parties were asked by the Court to submit their observations in relation to the following question:<sup>403</sup>

Was the court which dealt with the applicants' cases an "independent and impartial tribunal established by law" as required by Article 6 § 1 of the Convention?

The Court further clarified that the parties were expected to focus on the issue of neo-judges in this respect:

Reference is made to the fact that the applicants' cases were examined by a formation of ordinary courts composed of judges appointed in the procedure established by the Law of 8 December 2017 Amending the Act on the National Council of the Judiciary. In their replies, the parties are asked to refer to the Court's judgments in *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022 and *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 205-290, 1 December 2020.

As regards the administrative case, it concerns a request for compensation denied by the State treasury which was denied, in the last instance, by the SAC on 8 December 2020 which then sat in a formation of two lawful judges and one neo-judge appointed to that court by the Polish President on recommendation of the neo-NCJ on 3 April 2019.<sup>404</sup>

The other complaints (total of three) concerning Poland's SAC were communicated on 10 July 2023.<sup>405</sup> In short, all of the applications were parties to proceedings before the SAC and had their cases examined by SAC benches which includes neo-judges. This led the ECtHR to similarly request the parties to answer the following question:

Was the formation of the Supreme Administrative Court which dealt with the applicants' cases an "independent and impartial tribunal established by law" as required by Article 6 § 1 of the Convention?

Reference is made to the fact that the applicants' cases were examined by a formation of the Supreme Administrative Court composed of judges appointed in the procedure established by the Law of 8 December 2017 Amending the Act on the National Council of the Judiciary. In their replies, the parties are asked to refer to the Court's judgments in *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022 and *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 205-290, 1 December 2020.

At least one of these three complaints directly raise matters governed by EU law as it concerns a judgment of the SAC's rejection of a company's complaint against an administrative decision to dismiss its claim for compensation for a delayed flight. The other two applications concern a company's complaint against an administrative decision related to its operation on the market of fruits and vegetables and a complaint against an administrative decision refusing to grant the applicant a security clearance necessary for the continuation of his work.

Considering the ECtHR's well established case law regarding the Supreme Court's neo-judges, one may expect the Strasbourg Court to hold that the SAC is not a tribunal established by law when consisting of neo-judges due to the fundamental irregularities that adversely affected their appointments.

402 ECtHR, Notification of 37 applications concerning judicial independence in Poland, Press release ECHR 248 (2022), 25 July 2022.

403 ECtHR, *Julita Zielińska v. Poland*, Application no. 48534/20, and 11 other applications communicated on 4 July 2022, Subject matter of the cases, published on 25 July 2022: <https://hudoc.echr.coe.int/eng?i=001-218737>

404 ECtHR, *Lubomirska and Puzyra v. Poland*, Application no. 18422/21 (pending).

405 ECtHR, *Owoce i Warzywa Podlasia sp. z o.o. v. Poland*, Application no. 29320/22, and 2 other applications, Subject matter of the Case, published on 28 August 2023: <https://hudoc.echr.coe.int/eng?i=001-226246>

### 3.5 Continuing use of the post-2015 disciplinary regime for judges as a system of political control of the content of judicial decisions and systemic harassment of judges seeking to apply European law

Broadly speaking, it has already been established by the ECtHR with respect of the overall context and main aim pursued by Polish authorities that the so-called judicial reforms adopted since the end of 2015 have been:

*aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, the remodelling of the NCJ and the setting up of new chambers of the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline [...] As a result of these successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislature powers and thus substantially weakened.*<sup>406</sup> (emphasis added)

To facilitate this deliberate weakening or endangerment – to use the Conditionality Regulation's phrasing – of judicial independence, Poland's current ruling coalition introduced, as alluded to in the paragraph quoted above, a new disciplinary regime for judges. According to the European Commission itself, in its submissions to the Court of Justice in Case C-791/19 and Case C-204/21, the combination and simultaneous introduction of various legislative changes targeting Polish courts "have given rise to a structural breakdown"<sup>407</sup> with the changes made to the disciplinary regime for judges creating a "systemic rupture" with Poland's pre-2015 regime:

The Commission considers that an overall assessment of a number of elements concerning the composition and jurisdiction of the Disciplinary Chamber, the conditions under which its members were appointed, in particular the role of the KRS, the constitutional body responsible for ensuring the independence of courts and judges, and the fact that the measures were simultaneously adopted under Polish law, reveal a 'systemic rupture' with the previous regime. [...] <sup>408</sup>

The Court of Justice has since confirmed that every key change made to Poland's disciplinary regime for judges is not compatible with EU law and in particular Article 19(1) TEU.

As regards the main findings from the ECJ infringement judgment of 15 July 2021 with respect of Poland's new disciplinary regime for judges of the Supreme Court and of the ordinary courts introduced by the Law on the Supreme Court in its initial version of 8 December 2017 and which entered into force on 3 April 2018 (i.e., a situation *before* Poland's 'Muzzle Law' of 20 December 2019), one may mention the following:

- There is evidence of disciplinary investigations being initiated because of the content of the judicial decisions without it appearing that the judges concerned had committed breaches of their duties:<sup>409</sup>
- There is evidence that disciplinary proceedings have been initiated, *inter alia*, because of judicial decisions whereby requests for a preliminary ruling had been submitted to the Court of Justice seeking clarification

406 *Grzęda v. Poland*, CE:ECHR:2022:0315JUD004357218, para. 348.

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

408 Opinion of AG Collins in Case C-204/21, *Commission v Poland (Independence and respect for private life of judges)*, EU:C:2022:991, para 192.

409 Case C-791/19 *Commission v Poland (Disciplinary regime for judges)*, EU:C:2021:596, para. 154.

- as to the compatibility of certain provisions of national law with the provisions of EU law relating to the rule of law and the independence of judges.<sup>410</sup>
- The definitions of disciplinary offence contained in Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court do not help to avoid that *disciplinary regime 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, which are likely to influence the content of their decisions*. Those provisions thus undermine the independence of those judges and do so, what is more, at the cost of a *reduction in the protection of the value of the rule of law in Poland*, in breach of the second subparagraph of Article 19(1) TEU.<sup>411</sup> (*emphasis added*)
- The new '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*, 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, in breach of the second subparagraph of Article 19(1) TEU<sup>412</sup> (*emphasis added*)

As regards the main findings from the ECJ judgment of 5 June 2023 with respect of Poland's 'Muzzle Law' of 20 December 2019 and which entered into force on 14 February 2020, one may mention the following:

- The Court reiterated that the DC is not a proper court as it is not a body which itself satisfies the guarantees inherent in effective judicial protection, including that of independence,<sup>413</sup> with the Court stressing in this context that the legal order of any Member State must include guarantees capable of preventing any risk of rules or decisions relating to the status of judges and the performance of their duties being used as a system of political control of the content of judicial decisions or as an instrument of pressure and intimidation against judges;<sup>414</sup>
- The 'Muzzle Law' amounts to an attempt to "influence the judicial decisions"<sup>415</sup> from Polish courts by dissuading Polish judges from applying the Court's preliminary ruling in AK (Judgment of 19 November 2019 in Joined Cases C585/18, C624/18 and C625/18), which was delivered shortly before the Muzzle Law was adopted, and prevent them from also applying (at the time of the adoption of the 'Muzzle Law') forthcoming preliminary rulings relating to the interpretation of the provisions of the second subparagraph of Article 19(1) TEU, by making it possible to subject Polish judges to disciplinary proceedings and penalties for doing so;<sup>416</sup>
- The 'Muzzle Law' also amounts to an attempt to dissuade Polish judges from assessing whether a court or a judge meets the requirements relating to effective judicial protection, where appropriate, by referring questions to the Court for a preliminary ruling as there is a "risk" they may be subject to disciplinary proceedings and penalties for doing so,<sup>417</sup> whereas there is already evidence that "investigations prior to the initiation of any disciplinary proceedings relating to decisions by which ordinary Polish courts had sent requests for a preliminary ruling to the Court concerning, inter alia, the interpretation of the second subparagraph of Article 19(1) TEU, have in fact already been carried out";<sup>418</sup>
- The 'Muzzle Law' similarly violates EU law by introducing a disciplinary offence which undermines the independence of the Supreme Court judges since the relevant national provision "does not help to avoid

410 Ibid., para. 154.

411 Ibid., para. 157.

412 Ibid., para. 188.

413 Case C-204/21, *Commission v Poland (Independence and respect for private life of judges)*, EU:C:2023:442, para. 102.

414 Ibid., para. 99.

415 Ibid., para. 152.

416 Ibid., paras 141-152.

417 Ibid., paras 153-154.

418 Ibid., paras 160.

the disciplinary regime applicable to those judges from being used to create pressure and a deterrent effect likely to influence the content of their decisions” and furthermore enables the obligation of the Supreme “to refer questions to the Court of Justice for a preliminary ruling to be restricted by the possibility of triggering a disciplinary procedure against judges of that national court”,<sup>419</sup>

- The ‘Muzzle Law’ also violates EU law by introducing broad and imprecise provisions which may in particular lead to disciplinary proceedings and penalties against Polish judges who seek to determine, as required by EU law, whether they or the judges their adjudication formation is composed of, “or other judges or courts, called upon to rule on cases concerning EU law or which have ruled on them, satisfy the requirements arising from the second subparagraph of Article 19(1) TEU and Article 47 of the Charter relating to the independence, impartiality and previous establishment by law of the courts and judges concerned”,<sup>420</sup>
- The ‘Muzzle Law’ likewise violates EU law and in particular Article 267 TFEU by as “the very fact of conferring on a single body, namely, in the present case, the Extraordinary Review and Public Affairs Chamber, exclusive jurisdiction to settle certain questions relating to the application of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter is such as to prevent or, at the very least, discourage other courts, which have thus been deprived of any internal jurisdiction to rule on those questions themselves, from making a reference to the Court for a preliminary ruling in that regard”,<sup>421</sup>
- Furthermore, there is evidence that “the attempts by the Polish authorities to discourage or prevent national courts from referring questions concerning interpretation to the Court of Justice for a preliminary ruling regarding the second subparagraph of Article 19(1) TEU and Article 47 of the Charter in relation to the recent legislative reforms that have affected the judiciary in Poland have recently increased”.<sup>422</sup>

Notwithstanding these two infringement judgments and a number of preliminary rulings from the ECJ and judgments from the ECtHR making repeatedly clear that Poland’s post-2015 disciplinary regime for judges is not compatible with EU, not to forget the activation of Article 7(1) TEU procedure coupled with the activation of special monitoring procedure of the Council of Europe,<sup>423</sup> numerous Polish judges have been subjected to threats of and/or actual disciplinary investigations, disciplinary and/or criminal proceedings, and/or have been suspended for seeking to uphold the rule of law, including for the “offence” of applying ECtHR and CJEU rulings relating to the right to an independent tribunal established by law.

Since 2022, however, the repression against Polish judges has evolved. Seemingly to make the violations of relevant rulings of the ECtHR and CJEU less apparent, we have seen an increasing number of one-month unlawful suspensions and the emergence of a new type of administrative repression in the form of forced transfers. The ECtHR did address, for the first time, this latter dimension when it ordered the suspension of the forced transfer of three Court of Appeal judges on 6 December 2022. However, the individual then freshly appointed President of the Court of Appeal of Warsaw by the Minister of Justice has formally refused to comply with the ECtHR’s order on account of the (alleged) unconstitutionality of these measures. He had previously made clear that the forced transfers were connected to the three judges’ rulings taken in application of the ECtHR and CJEU’s case law.<sup>424</sup> This individual has since been accused of “gross breaches of legal and ethical norms” by 43 Court

419 Ibid., paras 166 and 168.

420 Ibid., para. 200.

421 Ibid., para. 290.

422 Ibid., para. 291.

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

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

of Appeal judges who also recalled that “Contrary to the position of the President of the Court of Appeal in Warsaw, the ECtHR’s interim measures are binding on the state ... Despite the passage of more than four months and numerous requests from the legal community, the court president has not implemented the interim measure”.<sup>425</sup>

Due to space constraints, one may refer to a previous study co-written by one of the present authors for more details regarding Polish judges who have (i) secured interim measures from the ECtHR as regards disciplinary and/or lifting of judicial immunity proceedings taken against them; (ii) been suspended indefinitely until relevant proceedings are concluded primarily on account of applying CJEU/ECtHR rule of law related judgments; (iii) been suspended for one month for applying CJEU and/or ECtHR rule of law related rulings; and (iv) faced disguised sanctions in the form of unlawful forced transfers following application of CJEU/ECtHR rulings and/or defending the rule of law in extra-judicial interventions.

What may be emphasised here is that the instrumentalisation of disciplinary proceedings (or threats thereof) and the use of disguised sanctions in the form of forced transfers has continued unabated in 2022-23 as noted by the Commission in its latest ARoLR country chapter for Poland:

**A number of judges continue to be subject to disciplinary investigations and proceedings related to the content of their judicial decisions and forced transfers.** In spite of the interim measures order issued by the Vice-President of the Court of Justice, a number of judges continued being subject to disciplinary investigations due to the content of judicial decisions they rendered, on the basis of provisions that should have been suspended pursuant to the interim measures ordered by the Court of Justice [...] Several judges reinstated in office were transferred without their consent to another division in their courts, upon a decision by court presidents appointed by the Minister of Justice [...].<sup>426</sup>

What the Commission did not report in its ARoLR as this emerged after the ECJ 'Muzzle Law' judgment of 5 June 2023 is that the 'Muzzle Law' continues to be illegally relied upon to launch new disciplinary investigations and proceedings against judges for applying, *inter alia*, EU effective judicial protection requirements as interpreted and applied by the ECJ. One may mention the following examples:

- Judge Dorota Tyrała (Court of Appeal in Warsaw) has been notified of disciplinary charges on 18 June 2023 on account of her application of ECJ and ECtHR rule of law related judgments in relation to neo-judges;<sup>427</sup>
- Judges Waldemar Żurek, Wojciech Maczuga, Katarzyna Wierzbicka, Anna Głowacka and Maciej Ferk were similarly notified of disciplinary charges or the launch of disciplinary investigations in July 2023 primarily on account on their application of ECJ and ECtHR rule of law related judgments or for other official reasons hiding what amounts to a form of retaliation for defending the rule of law,<sup>428</sup> and in August 2023, more disciplinary charges were brought against Judge Waldemar Żurek for applying the judgment of the ECJ

425 Ł. Woźnicki, “Illegal interference with final rulings. 43 judges of the Court of Appeal in Warsaw protest”, *Rule of Law in Poland*, 24 May 2023: <https://ruleoflaw.pl/illegal-interference-with-final-rulings-43-judges-of-the-court-of-appeal-in-warsaw-protest/>

426 2023 Poland’s ARoLR Country Chapter, pp. 10-11.

427 M. Jałoszewski, “Skandaliczne zarzuty dla sędzi Tyrały za stosowanie prawa UE. To już jawne uderzenie w relacje z KE” (Scandalous accusations against Judge Tyrała for applying EU Law. This is a clear attack on relations with the EC), *Oko.press*, 5 July 2023: <https://oko.press/skandaliczne-zarzuty-dla-sedzi-tyraly>

428 M. Jałoszewski, “Ludzie Ziobry idą na zwanie z Brukselą. Ścigają kolejnych sędziów z Krakowa za prawo UE” (Ziobro’s people are going to clash with Brussels. They are pursuing more judges from Krakow for EU law), *Oko.press*, 22 July 2023: <https://oko.press/ludzie-ziobry-scigaja-kolejnych-sedziow>

regarding judges seconded by the MoJ;<sup>429</sup>

- Judge Paweł Juszczyzyn was also notified of a disciplinary charge in July 2023 on the basis of the 'Muzzle Law' for attending a conference in Norway dedicated to judicial independence with disciplinary proceedings also initiated against the same judge for seeking the enforcement of a court ruling regarding his unlawful forced transfer;<sup>430</sup>
- Further harassment in the form of a disciplinary summons may be mentioned in relation to two Court of Appeal judges, Judge Beata Kozłowska and Judge Joanna Wiśniewska-Sadomska, who have been asked to explain themselves in relation to a ruling that was unfavourable to the PG Zbigniew Ziobro in a family law case decided in accordance with EU law, and in a relation to a ruling that was unfavourable to PiS Senator Grzegorz Bierecki respectively.<sup>431</sup>

According to the data compiled by a Polish journalist specialising in legal matters and published on 10 September 2023, the following Polish judges have been facing recent disciplinary proceedings "for applying European Law":<sup>432</sup>

- Judges Marek Szymanowski and Sławomir Bagiński from the Court of Appeal in Białystok, Judge Paweł Juszczyzyn from the District Court in Olsztyn;
- Judges Anna Głowacka, Edyta Barańska, Katarzyna Wierzbicka and Wojciech Maczuga from the District Court in Krakow; and
- Judges Dorota Tyrała and Anna Kalbarczyk from the Court of Appeal in Warsaw.

In addition, disciplinary proceedings have also been initiated against the following judges "inter alia for rulings and for the execution of judgments - including [judgments from] the European Tribunals":<sup>433</sup>

- Judges Krzysztof Krygielski from Olsztyn;
- Judge Maciej Ferek from the Regional Court in Kraków;
- Judges Bożena Więckowska, Karolina Lubińska and Dorota Wiese-Stefanek from the District Court in Bydgoszcz;
- Judges Beata Kozłowska and Joanna Wiśniewska-Sadomska from the Court of Appeal in Warsaw;

429 M. Jałoszewski, "Akcja wykończyć sędziego Żurka. Człowiek Ziobry łamiąc prawo UE postawił mu 6 zarzutów" (The action to finish off judge Żurek. Ziobro's man brings 6 charges against him in breach of EU law), *Oko.press*, 10 September 2023: <https://oko.press/sedzia-zurek-scigany-dyscyplinarki>

430 M. Jałoszewski, "Polowanie na sędziego Juszczyzyna. Ludzie Ziobry straszą go nowymi zarzutami i chcą usunąć z zawodu" (The hunt for Judge Juszczyzyn. Ziobro's people are threatening him with new accusations and want to remove him from his profession), *Oko.press*, 24 July 2023: <https://oko.press/polowanie-na-sedziego-juszczyzyna-ludzie-ziobry-strasza-go-nowymi-zarzutami-i-chca-usunac-z-zawodu>

431 M. Jałoszewski, "Dwie sędziowie apelacyjne z Warszawy są ścigane za orzeczenia niepodobające się ludziom władzy PiS" (Two appellate judges from Warsaw are being prosecuted for rulings that PiS people do not like), *Oko.press*, 23 July 2023: <https://oko.press/dwie-sedzie-apelacyjne-z-warszawy-sa-scigane-za-orzeczenia-niepodobajace-sie-ludziom-wladzy-pis>

432 M. Jałoszewski, "Akcja wykończyć sędziego Żurka. Człowiek Ziobry łamiąc prawo UE postawił mu 6 zarzutów" (The action to finish off judge Żurek. Ziobro's man brings 6 charges against him in breach of EU law), *Oko.press*, 10 September 2023: <https://oko.press/sedzia-zurek-scigany-dyscyplinarki>

433 Ibid.

- Judge Piotr Gąciarek from the Regional Court in Warsaw; and
- Judge Marzanna Piekarska-Drażek from the Court of Appeal in Warsaw.

Last but not least, a large group of judges of the District Court in Krakow are also facing disciplinary proceedings “for refusing to adjudicate with neo-judges”:<sup>434</sup>

- Judge Edyta Barańska;
- Judge Maciej Czajka;
- Judge Grzegorz Dyrka;
- Judge Maciej Ferek;
- Judge Jarosław Gaberle;
- Judge Janusz Kawalek;
- Judge Joanna Makarska;
- Judge Dariusz Mazur;
- Judge Beata Morawiec (President of the Association of Judges “Themis”);
- Judge Ewa Szymańska; and
- Judge Katarzyna Wierzbicka.

This renewed disciplinary harassment against judges who apply EU and ECHR law, defend the rule of law and/or issue rulings against members of the ruling coalition pushed 44 Court of Appeal judges to publicly denounce in an open letter dated 22 August 2023 the continuing illegal harassment orchestrated by the current Minister of Justice/Prosecutor General’s “associates” (informally known as “Ziobro’s enforcers”) and whose own disciplinary and criminal liability could be sought for their actions which deliberately violate inter alia the ECJ judgment of 5 June 2023.<sup>435</sup>

Continued reliance on the ‘Muzzle Law’ should not be surprising as Polish authorities have called for the ECJ judgment of 5 June 2023 finding the ‘Muzzle Law’ incompatible with EU law to be ignored. One may for instance mention the official position of the captured National Prosecutor’s Office according to which the ECJ would have violated not only Poland’s Constitution but also the EU Treaties...<sup>436</sup>

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434 Ibid.

435 M. Jałoszewski, “Ważny list 44 sędziów do Ziobry. Domagają się ścigania rzecznika dyscyplinarnego Lasoty” (An important letter from 44 judges to Ziobro. They demand the prosecution of Lasota’s disciplinary spokesman), *Oko.press*, 25 August 2023: <https://oko.press/wazny-list-44-sedziow-do-ziobry-domagaja-sie-scigania-rzecznika-dyscyplinarnego-lasoty>

436 Poland’s National Prosecutor’s Office on the CJEU judgment of 5 June 2023, published on 5 June 2023: <https://www.gov.pl/web/prokuratura-krajowa/oswiadczenie-prokuratury-krajowej-w-sprawie-wyroku-tsue-z-5-czerwca-2023-r>

Another Rubicon was crossed this summer with the first Polish judge forcibly dismissed following the adoption of a manifestly unconstitutional ad hominem law known as Lex Raczkowski. Judge Piotr Raczkowski (Military Regional Court in Warsaw) has been targeted by Polish authorities for some time “because when he was deputy-chair of the old, legal NCJ, he was defending the rule of law and criticising the seizure of control over the courts by the authorities. And, since then, the authorities have been doing everything to get rid of him.”<sup>437</sup>

**Table 18:** Unconstitutional dismissal of a specific Polish judge via an ad hominem law in 2023 - (“Lex Raczkowski”)<sup>438</sup>

Judge Piotr Raczkowski “was suspended for almost six years, in a lawless void caused by a delay on the part of President Andrzej Duda in issuing a decision on the transfer of the Judge Raczkowski to the ordinary judiciary (the Judge did not perform his official duties, because he could not adjudicate in a military court as a result of the inability to perform military service that had been declared whereas, on the other hand, he was still waiting for a response from President Andrzej Duda). It was only in 2021 that Judge Raczkowski received the President’s refusal. The case is pending before the ECtHR.

Shortly afterwards, while amending the Civil Code (regarding the provisions on inheritance and donations), a provision was introduced by the ruling party according to which a military court judge who is dismissed from military service is to automatically retire. This is a direct attack on Judge Raczkowski, who is the only person in Poland in such a situation – which is why the law is sometimes referred to as ‘Lex Raczkowski.’ President Andrzej Duda signed the Act on 4 August 2023, it was published in the Journal of Laws on 14 August 2023. The Act will become effective three months from the date of its promulgation.

According to lawyers and representatives of the judicial community, this provision is in direct breach of the constitutional principle of irremovability of judges (Article 180 of the Polish Constitution).

Viewed in this light, the Commission’s broadly positive preliminary assessment of the ruling coalition’s laws of 15 July 2022 and 13 January 2023 in its latest ARoLR country chapter for Poland seems particularly misplaced:

**Poland adopted legislation to raise the standard of certain aspects of judicial independence and engaged in a further reform of the disciplinary regime for judges** [...] On 15 July 2022, a new law entered into force, with the aim of strengthening the independence of the judiciary in Poland [...] On 13 January 2023, a new law was adopted by the Polish parliament to reinforce the provisions protecting judges against disciplinary liability based on the content of their judicial decisions, including if they assess, also ex officio, compliance of other courts with the requirements stemming from Article 19(1) TEU.<sup>439</sup>

437 M. Jałoszewski, “PiS will not remove Judge Raczkowski in silence. An application will be filed with the European Commission and the ECtHR”, *Rule of Law in Poland*, 9 August 2023: <https://ruleoflaw.pl/lex-raczkowski-judge-poland-harassment/>

438 Free Courts newsletter (August 2023), 4 September 2023, p. 5: <https://wolnesady.org/en/>

439 2023 Poland’s ARoLR Country Chapter, pp. 8-9.

'The Commission's summary shows a particularly selective reading of the changes brought by the law of 15 July 2022 and could be brought about by this law of 13 January 2023. One may for instance quote here the more accurate legal assessment offered by the Council of Europe's Committee of Ministers which is surprisingly not mentioned in the ARoLR country chapter (bold added):

The Deputies [...] 6. noted with deep regret that the legislative reform of January 2023, which is pending constitutional review, **did not address** the main requirements for the execution of the *Reczkowicz* group; in particular that the transfer of disciplinary cases concerning judges from the Chamber of Professional Liability in the Supreme Court (SC) to the Supreme Administrative Court (SAC) **does not prevent** risks of a violation of the right to a tribunal established by law, as a substantial part of the judges of the SAC have also been appointed on the motion of the NCJ after March 2018; noted also that the above reform **did not introduce** an adequate framework for examining the legitimacy of judicial appointments and **did not remove** all risks of disciplinary liability for judges applying the requirements of Article 6 of the Convention [...]

8. recalled the European Court's findings in the *Reczkowicz* group that the main underlying problem leading to the violation of Article 6 was the appointment of judges upon a motion of the NCJ as constituted under the impugned 2017 framework, which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled interference by the executive and the legislature in judicial appointments; and that this **problem has systematically affected appointments of judges of all types of courts**, which may potentially result in multiple violations of the right to an "independent and impartial tribunal established by law"; thus deplored the position of the **Polish authorities rejecting the need for remedial action** regarding the composition of the NCJ and the status of deficiently appointed judges and their decisions.<sup>440</sup>

In light of the above, it would seem ill-advised to present the latest set of rushed through "judicial reforms" (in violation, one may add, of Poland's law-making recovery milestone<sup>441</sup>) as positive steps, yet this is the Commission's current position. This position may also be viewed as irresponsible when one considers the sustained and continuing systemic violation of all rule of law related ECJ and ECtHR orders and judgments and which the Polish laws of 15 July 2022 and 13 January 2023 do not even attempt to pretend to remedy.

### 3.6 Systemic violation of all ECJ and ECtHR rule of law related orders and judgments

After years of rule of law backsliding in Poland, we have arguably reached a rule of law breakdown stage as the fundamental right to an independent court established by law under the Polish Constitution, the ECHR and the EU Treaties is *systemically* violated, with Polish authorities also casually and openly violating an increasing number of rule of law related orders and judgments from both the ECtHR and ECJ. Without claiming to be exhaustive, one may mention the following orders and judgments (listed in chronological order):

440 Committee of Ministers of the Council of Europe, Ministers 'Deputies' decision of 7 June 2023, H46-18 *Reczkowicz group* (Application No 43447/19), *Broda and Bojara* (Application No 26691/18) and *Grzeda* (Application No 43572/18) v *Poland*, 1468<sup>th</sup> meeting 5-7 June 2023 (DH), CM/Notes/1468/H46-18 <[https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2023\)1468/H46-18E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2023)1468/H46-18E)> accessed 1 July 2023.

441 To unlock EU recovery funds, Polish authorities have to comply with a number of "rule of law milestones", one of which requires them to improve the process of law-making by introducing a mandatory impact assessment and public consultation for draft laws proposed by deputies and senators and limit the use of fast-track procedure by the end of September 2022. Prior to this, in its Article 7(1) TEU reasoned proposal, the Commission included the following recommendation (d): "The Council recommends that the Republic of Poland [...] ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties, including the Venice Commission". Both this recommendation and the more recent law-making milestone have been openly and repeatedly violated by Polish authorities.

- ECJ judgment of 19 November 2019 in joined Cases C-585/18, C-624/18 and C-625/18 *AK (Independence of the DC of the Supreme Court)* EU:C:2019:982;
- ECJ judgment of 2 March 2021 in C-824/18 *AB (Appointment of judges to the Supreme Court – Actions)* EU:C:2021:153;
- ECtHR judgment of 7 May 2021 in the case of *Xero Flor v Poland* App No 4907/18, CE:ECHR:2021:0507JUD000490718;
- ECtHR judgment of 29 June 2021 in the cases of *Judges Broda and Bojara v Poland* App No 26691/18, CE:ECHR:2021:0629JUD002669118;
- ECJ order of 14 July 2021 in Case C-204/21 R, *Commission v Poland (Independence and respect for private life of judges)* EU:C:2021:593;
- ECJ judgment of 15 July 2021 in Case C-791/19 *Commission v Poland (Disciplinary regime for judges)* EU:C:2021:596;
- ECtHR judgment of 22 July 2021 in the case of *Judge Reczkowicz v Poland* App No 43447/19, CE:ECHR:2021:0722JUD004344719;
- ECJ judgment of 6 October 2021 in Case C-487/19 *W Ż (Chamber of Extraordinary Control and Public Affairs of the Supreme Court-Appointment)* EU:C:2021:798;
- ECJ order of 27 October 2021 in Case C-204/21 R, *Commission v Poland* EU:C:2021:878;
- ECtHR judgment of 8 November 2021 in the cases of *Judges Dolińska-Ficek and Ozimek v Poland* App Nos 49868/19 and 57511/19 CE:ECHR:2021:1108JUD004986819;
- ECJ judgment of 16 November 2021 in Joined Cases C-748/19 to C-754/19, *Criminal proceedings against WB and Others* EU:C:2021:931;
- ECtHR judgment of 3 February 2022 in the case of *Advance Pharma v Poland* App No 1469/20 CE:ECHR:2022:0203JUD000146920;
- ECtHR judgment of 15 March 2022 in the case of *Judge Grzęda v Poland* App No 43572/18 CE:ECHR:2022:0315JUD004357218;
- ECtHR judgment of 16 June 2022 in the case of *Judge Żurek v Poland* App No 39650/18 CE:ECHR:2022:0616JUD003965018;
- ECtHR judgment of 6 October 2022 in the case of *Judge Juszczyzyn v Poland* App No 35599/20 CE:ECHR:2022:1006JUD003559920;
- ECtHR interim measure of 6 December 2022 in the cases of *Judges Leszczyńska-Furtak, Gregajtys and Piekarska-Drązek v Poland* App Nos 39471/22, 39477/22 and 44068/22;
- ECJ judgment of 5 June 2023 in Case C-204/21, *Commission v Poland (Independence and respect for private life of judges)* EU:C:2023:442;
- ECtHR judgment of 6 July 2023 in the case *Judge Tuleya v Poland* Application Nos 21181/19, 51751/20, CE:ECHR:2023:0706JUD002118119;
- ECJ judgment of 13 July 2023 in Joined Cases C-615/20, *YP and Others* and C-671/20 *M M (Lifting of a judge's immunity and his or her suspension from duties)* EU:C:2023:562

One should not expect any change in the short-term as Polish authorities have also continued to publicly denounce CJEU and ECtHR rule of law related orders and judgements as politically

motivated while also denying their legally binding nature. One may for instance quote a Deputy Minister in Poland's government who called the ECJ ruling of 5 June 2023 "meaningless" and criticised the "politicised judges of the CJEU" for (allegedly) violating the EU Treaties and the Polish Constitution so as to support Poland's opposition.<sup>442</sup> Not to be undone, the individual masquerading as the President of the neo-CT described the Commission's infringement referral to the Court of Justice (pending Case C-448/23) as "clearly unlawful".<sup>443</sup>

Due to the Commission's extremely parsimonious and belated use of its infringement powers, the extremely narrow and in part *contra legem* rule of law milestones agreed with Polish authorities and its refusal to activate the Conditionality Regulation, in a broader context where the Commission and the Council do not project any sense of urgency when it comes to the systemic violation of CJEU and ECtHR rule of law related orders and judgements, the rule of law situation in Poland continues to worsen.

The EU's failure to at the very least contain the problem is jeopardising the ECHR system which is facing an unprecedented and growing number of applications primarily in relation to a problem the EU has irresponsibly failed to tackle, such as the systemic dysfunction in the judicial appointments procedure due to the involvement of an unconstitutional body lacking any independence since 2018. As of 6 July 2023, there are 397 applications pending before the ECtHR relating to Poland's rule of law crisis, with more to be expected as these applications mostly relate to changes made to the organisation of Poland's judiciary under laws that mainly entered into force in 2017 and 2018.<sup>444</sup> More than 100 of these applications have been communicated to the Polish government with the ECtHR having issued nine judgments regarding a total of 11 applications to date. In addition, in yet another unprecedented development, as of 16 February 2023, the ECtHR has received a total of 60 requests for interim measures from Polish judges in 29 cases concerning the disciplinary and waiving of judicial immunity cases against them and granted these requests in 17 cases.<sup>445</sup>

### 3.7 Concluding remarks

Writing extra-judicially earlier this year, the CJEU President cautioned against "authoritarian drifts" which could lead to a situation where the rule of law is being replaced with "rule of lawlessness".<sup>446</sup> In light of the above, one may consider that this is not merely a hypothetical scenario. Indeed, we have reached a stage in Poland where, inter alia, current authorities consider both EU and ECHR effective judicial protection requirements "unconstitutional". This, in turn, has been used as a justification to violate the exponential number of rule of law-related judgments of both the ECJ and ECtHR and disregard the multiple rule of law

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442 Quoted in A. Ptak, "Polish courts must ignore "unlawful" suspension of judge critical of government reforms, rules EU court", *Notes from Poland*, 13 July 2023: <https://notesfrompoland.com/2023/07/13/polish-courts-must-ignore-unlawful-suspension-of-judge-critical-of-government-reforms-rules-eu-court/>

443 Quoted in A. Ptak, "Complaint against Poland to CJEU is "unlawful," says president of Poland's top court", *Notes from Poland*, 3 August 2023: <https://notesfrompoland.com/2023/08/03/complaint-against-poland-to-cjeu-is-unlawful-says-president-of-polands-top-court/>

444 See ECtHR, Multiple violations in case concerning disciplinary regime for judges in Poland, ECHR 212 (2023), 6 July 2023.

445 See ECtHR, Non-compliance with interim measures in Polish judiciary cases, ECHR 053 (2023), 16 February 2023.

446 K. Lenaerts, "On Checks and Balances: The Rule of Law Within the EU" (2023) 29(2) *The Columbia Journal of European Law* 25, p. 31 and p. 33.

related orders the ECJ and ECtHR have adopted in the past few years. While the systemic “endangering” of judicial independence and associated limitation of the availability and effectiveness of legal remedies (Article 3 of the Conditionality Regulation) has taken many dimensions in Poland as previously detailed, the mere act of considering “unconstitutional” EU effective judicial protection requirements should have been considered the crossing of a legal Rubicon which ought to have led the Commission to swiftly activate the Conditionality Regulation. As already formally stated by the Secretary General of the Council of Europe, Poland’s obligation to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction is no longer “fulfilled”.<sup>447</sup> What else is the Commission waiting for to finally take appropriate measures within the meaning of the Conditionality Regulation? Polish authorities have by now run out of rule of law principles left to be systemically violated. It would be irresponsible to act only after Poland has also run out of lawfully appointed independent judges.<sup>448</sup>

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

448 M. Jałoszewski, “PiS pisze czarno na białym: przejmujemy sądy, zlikwidujemy SN, idziemy po TSUE” (PiS writes in black and white: we will take over the courts, abolish the Supreme Court, we will go after the CJEU), *Oko.press*, 10 September 2023: <https://oko.press/pis-idzie-po-sady-wybory>.

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