CEELI INSTITUTE

ADVANCING THE RULE OF LAW

Navigating the Jurisdiction and Landmark Rulings of the European Court of Human Rights and the Court of Justice of the EU

A GUIDE TO PROTECTING THE RULE OF LAW IN EUROPEAN COURTS AMID DEMOCRATIC BACKSLIDING

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FOREWORD

Democratic backsliding in Central and Eastern Europe in the past decade has created unexpected institutional threats across the region. This is particularly true for the judiciary, where autocratic leaders have moved quickly to undermine judicial independence in an effort to silence judges who stand up for the rule of law. Without significant resources, a tradition of engagement with political actors, or a practice of making their case for support directly to the public – outside of rendering court decisions that are often not well understood by the non-legal community – the judiciary has a far smaller base of support to protect itself from domestic pressure.

Fortunately, at the European Union level, there is a slowly emerging jurisprudence at both the European Court of Human Rights and the Court of Justice of the European Union, which are taking important new steps toward protecting the rule of law as a fundamental EU principle. While still facing jurisdictional and remedial challenges, judges and judicial associations are helping to build a body of court decisions that are beginning to secure greater judicial independence through recognition and enforcement of rule of law norms. The impact of these developments can be directly seen in Poland, where they contributed to the restoration of the rule of law, and elsewhere, where they serve as a warning to deter political leaders from undermining the courts. But the threat remains ever-present.

The CEELI Institute is therefore delighted to present "Navigating the Jurisdiction and Landmark Rulings of the European Court of Human Rights and the Court of Justice of the EU: A Guide to Protecting the Rule of Law in the European Courts in a Time of Backsliding." The Guide not only charts this recently developing caselaw, but also provides the historical context of how the decisions of these two European courts have proved mutually supporting as they attempt to react to the rapid efforts to undermine national judiciaries. But more than describe these emerging trends, the Guide also provides a comprehensive review and analysis of both courts' recent rulings that will allow judges and judicial associations from member states to see and navigate paths for legal redress in a highly political atmosphere where European institutions are only cautiously catching up to the national attacks already underway. As such, the Guide will be an essential, timely, and practical tool to help maintain the rule of law in EU member states.

Robert R. Strang
Executive Director
The CEELI Institute

INTRODUCTION

This guide is primarily aimed at judges and prosecutors and pursues two main objectives: to (i) outline the different legal avenues available to them as individuals or via their representative bodies to challenge national judiciary-related measures or practices before the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU); and (ii) offer an overview of the general or guiding principles developed by the two European courts in the context of spreading rule of law backsliding in the past decade.[1]

Rule of law backsliding was first identified as a new type of threat within the EU legal order in 2013, when Viviane Reding, vice-president of the European Commission at the time, observed that the EU was facing unprecedented "rule of law crises" revealing new problems of a systemic nature.[2] Writing extra-judicially 10 years later, the CJEU president cautioned against seeing the rule of law being replaced with "rule of lawlessness" in the EU.[3] Looking beyond the EU, successive presidents of the ECtHR have similarly warned against "rule of law backsliding" in a broader context, where "some of the fundamental values enshrined in the Convention are under threat in different parts of Europe and beyond."[4]

These warnings have been made in a context where the number of rule-of-law-related cases may be said to have grown exponentially, especially as regards to the CJEU. As far as the EU is concerned, this is almost exclusively due to national requests for a preliminary ruling submitted by national judges – primarily from Poland – to the CJEU following the CJEU's 2018 formative ruling in *Portuguese Judges*. In this judgment, the CJEU clarified that the EU principle of effective judicial protection laid down in the second subparagraph of Article 19(1) TEU – "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" – must be understood as guaranteeing a *general* and *justiciable* obligation for every Member State to *guarantee* and *maintain* the independence of their national courts.[5]

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1 Rule of law backsliding may be defined as "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party" via the progressive establishment of an electoral autocracy. See L. Pech and K.L. Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU" (2017) 19 *Cambridge Yearbook of European Legal Studies* 3, p. 10. Electoral autocracy itself may be defined as a political regime where "multiparty elections for the executive exist" with however "insufficient levels of fundamental requisites such as freedom of expression and association, and free and fair elections." See V-Dem Institute, *Democracy Report 2024: Democracy Winning and Losing at the Ballot*, March 2024, p. 12: https://www.v-dem.net/publications/democracy-reports/

2 See D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review 512.*

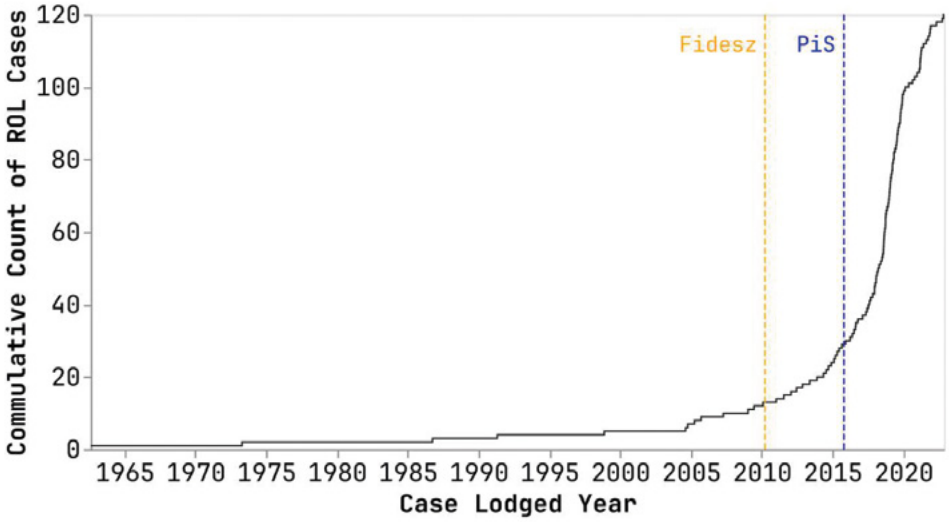
3 K. Lenaerts, "On Checks and Balances: The Rule of Law Within the EU" (2023) 29(2) *Columbia Journal of European Law* 25, p. 31 and 33.

4 S. O'Leary, Statement of the President of the Court, "70 years since the European Convention on Human Rights entered into force on 3rd September 1953", ECHR 238 (2023), 2 September 2023.

5 Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

The warnings do not reflect theoretical concerns in Brussels; the backsliding on the rule of law in some member states is both real and measurable. In Hungary, for example, the authoritarian policies of the government of Prime Minister Viktor Orbán has led to such a sharp decline in the constraints on government powers that according to one leading rule of law index Hungary is now on par with Bangladesh, Cameroon, and Afghanistan.[6] A strong response from all European institutions, including from European courts, is therefore required to preserve these fundamental European values.

Figure 1: The exponential rise of rule of law cases at the CJEU since 2010[7]

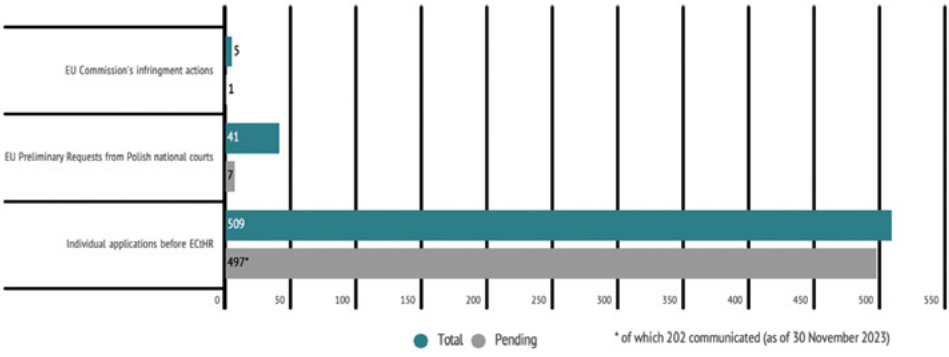


6 World Justice Project, *Rule of Law Index 2023*, p. 28. In this index, constraints on government as a benchmark does not simply measure whether government powers are effectively limited by the judiciary but also whether they are effectively limited by the legislature and independent auditing and review; whether they are subject to non-governmental checks; whether government officials are sanctioned for misconduct; and finally, whether transition of power is subject to law.

7 M. Mandujano Manriquez and T. Pavone, "Follow the leader: the European Commission, the European Court of Justice, and the EU's rule of law revolution" (2024) *Journal of European Public Policy* (published online on 12 April 2024), p. 11. As the authors note, "identifying the universe of ROL cases is more challenging than it seems," as the Court's database does not capture rule of law cases as such. Indeed, the CJEU tends to include this type of case under the subject-matter "principles of EU law" in its annual statistics. And while each judgment is preceded by keywords that may include "Rule of law" where relevant, these keywords are not easily searchable. It also possible to find judgments that one could connect to rule of law backsliding not mentioning "rule of law" in their keywords. These different limitations led the authors to adopt a "case selection strategy that triangulates between the expertise of a diverse cohort of EU legal scholars" (ibid., p. 10) resulting in a list of 120 cases, 96 of which lodged since 2010. For this manual, we have focused on CJEU cases that primarily relates to EU effective judicial protection requirements under the second subparagraph of Article 19(1) TEU.

Rule of law backsliding in several European countries has also had a major impact on the ECtHR's case load. To give a single but striking example concerning an EU member state, Poland's "rule of law crisis," which started in December 2015 with the irregular election of three individuals to Poland's Constitutional Tribunal following the parliamentary elections of October 2015 won by the Law and Justice Party (PiS),[8] has resulted in close to 500 complaints pending before the ECtHR by November 2023. The great majority of these complaints allege a violation of the right to an independent and impartial tribunal established by law. Poland's rule of law crisis also demonstrates how the Council of Europe (CoE) and EU systems may complement one another due to the different set of remedies they offer, and the different jurisdictional basis of the ECtHR compared to the CJEU's.

Figure 2: ECtHR and CJEU case load impact of Poland's rule of law crisis (December 2015-November 2023)[9]



Many of the 500+ applications mentioned above have been lodged by Polish judges as individual applicants. Of the 11 judgments on the merits issued to date by the ECtHR directly in relation to Poland's rule of law crisis, seven addressed applications lodged by 12 Polish judges. In each of these cases, the ECtHR found a violation of one or more provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention or ECHR).

Access to the ECtHR for "applicant judges" or "applicant prosecutors" is more straightforward than access to the CJEU. This explains both the historically more developed body of ECtHR rule of law-related case law addressing national measures affecting judges/prosecutors as well as the more significant number of cases involving judges/prosecutors decided by the ECtHR (compared to the CJEU) in a new context where "national judges are becoming more conscious of their human rights and fundamental freedoms and are finding the courage to challenge their own domestic institutions' decisions breaching their human rights and

8 Judgment of 15 March 2022 in Grzęda v. Poland [GC], no. 43572/18, CE:ECHR:2022:0315JUD004357218, para. 15.

9 Data compiled by L. Pech.

fundamental freedoms."[10] In addition, judicial associations have increasingly become more active and participated in proceedings before the Strasbourg Court as "third party interveners."

In the past few years, however, the CJEU rule of law-related case law is beginning to catch up. Almost all these cases lodged with the CJEU are national requests for a preliminary ruling submitted by national judges. In the rule of law field, these requests may themselves be connected to domestic proceedings where other national judges, prosecutors or indeed judicial associations are involved either as applicants or defendants. In addition, individual judges, prosecutors, or representative bodies may lodge annulment actions directly with the CJEU, but this means challenging EU measures rather than national measures (the latter being the focus of this guide). By contrast, the European Commission can directly challenge national measures by lodging infringement actions with the CJEU in a situation where the Commission is of the view that relevant national measures and/or practices are not compatible with EU rule of law requirements.

Part I of this guide will provide an overview of the different legal avenues available to national judges and prosecutors to challenge judiciary-related measures or practices whose compatibility with ECtHR and EU rule of law requirements is doubtful. In Part II, an overview of the general or guiding principles developed by Europe's two supranational courts will be offered. This overview will start with the case law following the ECtHR judgment in *Ástráðsson v. Iceland*[11] (informally known as *Icelandic Judges*) and the CJEU judgment in *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*[12] (informally known as *Portuguese Judges* or *AJSP*), as these two judgments provide a starting point of each court's response to rule of law backsliding developments, especially as they were then unfolding in Poland. Considering that the ECtHR and CJEU have now addressed several similar systemic rule of law issues, Part III will address a number of these issues by outlining the emerging case law of the ECtHR and CJEU with respect to the each of the selected systemic issues.

10 K. Aquilina, "The Independence of the Judiciary in Strasbourg Judicial Disciplinary Case Law: Judges as Applicants and National Judicial Councils as Factotums" in P. Pinto de Albuquerque and K. Wojtyczek (eds.), *Judicial Power in a Globalized World* (Springer, 2019), 1-32, p. 3. In his contribution focusing on judicial disciplinary cases, the author identified 20 cases where applicant judges won their ECHR complaint based on Articles 6(1) ECHR and/or 8 ECHR. Violations were found mainly in respect of two countries: Ukraine and the Former Yugoslav Republic of Macedonia, followed by Hungary and Türkiye.

11 Judgment of 1 December 2020 in *Ástráðsson v. Iceland*, no. 26374/18, CE:ECHR:2020:1201JUD002637418, para. 242.

12 Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

PART I – EUROPEAN COURTS' JURISDICTION OVER NATIONAL JUDICIARY-RELATED MEASURES OR PRACTICES

The ECtHR and CJEU's jurisdiction over national measures or practices relating to the organization of national judiciaries, including specific courts such as a national supreme court or judges, either individually or as a group, will start with how the rule of law is enshrined in the ECHR and EU Treaties. Next, the more difficult issue of the scope of application of ECHR and EU rule of law requirements will be covered. Finally, the different avenues available to individual judges, prosecutors and/or their representative bodies to challenge *national* measures or practices violating these requirements will be detailed. The main avenue to directly challenge *EU* measures will also be outlined in light of recent and new developments involving individual judges, prosecutors, or judicial associations acting as plaintiffs.[13]

1. European rule of law requirements

Notwithstanding some historical differences regarding how the rule of law was enshrined in the founding treaties of the EU and the Council of Europe (CoE), the rule of law has progressively but firmly established itself as a constitutional principle of cardinal importance in both the ECHR system of human rights protection and the EU legal order. To borrow from a former president of the ECtHR, the rule of law has been "the lodestar" guiding the development of both the case law of the ECtHR[14] and the CJEU,[15] with the result that its core meaning and requirements are understood in a similar manner in both ECHR and EU law.

1.1 ECHR rule of law requirements

The CoE was founded upon the rule of law. This is made explicit in several provisions of the CoE Statute signed on 5 May 1949, the most important of which is Article 3: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."

Article 3 is subsequently cross-referenced in several provisions addressing CoE membership. As recently made clear, any CoE member "which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw […] If such member does not comply with this request, the Committee may decide

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13 For a more comprehensive study focusing exclusively on the CJEU, see L. Pech, *The European Court of Justice's jurisdiction over national judiciary-related measures*, AFCO Committee, PE 747.368, April 2023. By contrast, this guide outlines and contrasts the jurisdiction of both the CJEU and the ECtHR and focus on the main legal avenues available to national judges, prosecutors or judicial associations as well as the most important cases they have brought to date as applicants as of 31 July 2024.

14 See R. Spano, "The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary" (2021) *European Law Journal* 1.

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

that it has ceased to be a member of the Council as from such date as the Committee may determine."[16]

In addition, the ECHR explicitly refers to the rule of law in its Preamble: "Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration" of Human Rights of 10 December 1948.

Despite the importance of the rule of law in the ECtHR's case law, there are not additional explicit references to it in either the ECHR or its protocols. This calls for three complementary remarks. First, governing in accordance with the rule of law must be understood as "a fundamental premise for any authoritative structure in a member state of the Council of Europe for it to be capable of living up to its obligations under the Convention."[17] Second, multiple provisions of the ECHR guarantee specific rule of law requirements, including Article 5 (right to liberty and security); Article 6 (right to a fair trial); Article 7 (no punishment without law); Article 13 (right to an effective remedy); and Article 46 (binding force and execution of judgments). It follows, as the ECtHR observed in its first judgment making an explicit reference to the rule of law in the 1975 case of *Golder v the United Kingdom*, that the rule of law must be understood as a legal principle that underlies the Convention as a whole:

> It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely „more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to „take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 (art. 6-1) according to their context and in the light of the object and purpose of the Convention.[18]

The rule of law has since been referred in an increasing number of judgments and a growing number of CoE texts. In respect of the latter, one may mention the Reykjavík Declaration of 16-17 May 2023, as it explicitly refers to the need to address ongoing processes of autocratisation and backsliding:

> We have a common responsibility to fight autocratic tendencies and growing threats to human rights, democracy and the rule of law […] We will also ensure the diligent respect for

16 Council of Europe (Committee of Ministers), 2.3 Situation in Ukraine – Measures to be taken, including under Article 8 of the Statute of the Council of Europe, CM/Del/Dec(2022)1426ter/2.3, 25 February 2022. See subsequently Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, CM/Res(2022)2, 16 March 2022.

17 R. Spano, "The rule of law as the lodestar of the European Convention on Human Rights", op. cit., p. 3.

18 Judgment of 21 February 1975 in *Golder v. the United Kingdom*, no. 4451/70, para. 34.

> the rule of law, benefitting every citizen and building a European legal community of shared values and dialogue between the jurisdictions of its member states, including by raising the profile of, and strengthening the Venice Commission by, for example, giving more visibility and status to its Rule of Law Checklist […] Finally, we commit to strengthening the institution of the Council of Europe's Commissioner for Human Rights, particularly in light of the need for principled and swift action to address backsliding and other evolving human rights challenges.[19]

In the face of then emerging autocratic challenges to the foundational principles on which the CoE is based, one aspect of which was to argue that the rule of law is merely a political slogan or an excessively vague concept, the Venice Commission (mentioned in the declaration above) was called upon by the Parliamentary Assembly of the Council of Europe (PACE) to clarify the core meaning and elements of the rule of law notwithstanding the diversity of Europe's legal systems and traditions. The Venice Commission obliged in 2011.

Table 1: Core meaning and components of the rule of law in the Council of Europe framework[20]

Core meaning: "[A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."
Core elements: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law.

The EU has since relied on the work the Venice Commission to formally codify a similar understanding, and one may note in this respect that the Venice Commission's Rule of Law Checklist of 2016 has since been referenced in several CJEU judgments[21] and AG opinions.[22]

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19 Council of Europe, *Reykjavík Summit of the Council of Europe: United around our values* (Reykjavík Declaration), 16-17 May 2023.

20 Venice Commission, *Report on the Rule of Law*, Study 512/2009, 4 April 2011, para. 41. See also Venice Commission, *Rule of Law Checklist*, Study No. 711/2013, 18 March 2016, para. 18 et seq.

21 See e.g. Judgment of 22 March 2018 in Case T242/16 *Stavytskyi v Council*, para. 69: "The case-law of the Court of Justice and of the European Court of Human Rights, and the work of the Council of Europe, by means of the European Commission for Democracy through Law, provide a non-exhaustive list of principles and standards which may fall within the concept of the rule of law."

22 See e.g. Opinion of AG Tanchev delivered on 27 June 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, AK *(Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:551. As subsequently clarified by AG Hogan with reference to a specific opinion of the Venice Commission relied upon by the applicant, "While such an opinion of the Venice Commission is obviously of great value when it comes to assessing the validity of a procedure for the appointment of judges with regard to the requirements of effective judicial protection, it cannot, nevertheless, be regarded as dispositive of the question of legality for the purposes of Article 19(1) TEU." See AG Hogan Opinion delivered on 17 December 2020 in Case C-896/19, *Repubblika*, EU:C:2020:1055, para. 88.

1.2 EU rule of law requirements

Following repeated amendments made to the EU Treaties since the 1990s, the Treaty on European Union (TEU) includes multiple direct or indirect references to the rule of law without providing a formal definition. This calls for two remarks. First, the lack of a treaty rule of law definition also applies to many other core legal concepts mentioned in the treaties and reflects a practice that also characterizes most national constitutions that explicitly refer to the rule of law.[23] Second, the rule of law has been the subject of multiple definitions in EU secondary instruments, the most important of which is arguably the one provided by EU's co-legislators when they adopted what is informally known as the Rule of Law Conditionality Regulation on 16 December 2020:

> '[T]he rule of law' refers to the Union value enshrined in Article 2 TEU. It 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. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.[24]

In addition, the EU's co-legislators outlined the core meaning of the rule of law as follows:

> The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights […] under the control of independent and impartial courts.[25]

As established by the CJEU, Article 2 TEU cannot be interpreted as a mere statement of policy guidelines or intentions, as it contains values that are given concrete expression in principles containing *legally binding obligations* and that, more broadly, form an integral part of the very identity of the EU as a common legal order.[26]

The TEU also includes a provision specifically directed at member states, which has proved decisive in a backsliding context. According to the second subparagraph of Article 19(1) TEU, "Member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." While this provision does not explicitly refer to the rule of law, the Court of Justice has since held that the second subparagraph of Article 19(1) TEU must be understood as giving "concrete expression to the value of the rule of law stated in Article 2 TEU."[27]

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23 For further analysis, see L. Pech, "The rule of law as a well-established and well-defined principle of EU Law" (2022) 14 *Hague Journal on the Rule of Law* 107.

24 Article 2 of Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2022 on a general regime of conditionality for the protection of the Union Budget [2020] OJEU L 433 I/1.

25 Recital 3 of Regulation 2020/2092, op. cit.

26 See Judgments of 16 February 2022 in Case C156/21, *Hungary v. Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v. Parliament and Council*, EU:C:2022:98.

27 Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para. 32.

In addition, the TEU *implicitly* refers to the rule of law in several provisions via the notion of EU values and references – but not always – to Article 2 TEU. Article 7(1) TEU, a provision aimed at existing member states has been activated twice to date with respect to Poland and Hungary in December 2017 and September 2018, respectively, on account on the potential existence of "a clear risk of a serious breach" of Article 2 values in these two countries. As regards to EU candidate countries, Article 49 TEU provides: "Any European state which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union." This explains why the EU may be said to be "composed of states which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU."[28]

The EU Charter of Fundamental Rights (CFR) similarly contains explicit references to the rule of law in addition to protecting "certain aspects"[29] of the rule of law in Articles 47 to 50 CFR and that guarantee, respectively, the right to an effective remedy and the right to a fair trial; the presumption of innocence and rights of the defense; the principles of legality and proportionality of criminal offences and penalties; and the right not to be tried or punished twice for the same criminal offence.

Finally, Article 47 CFR and Article 19 TEU similarly "guarantee, inter alia, the right to an effective remedy and the right to an independent and impartial tribunal previously established by law, as regards the protection of the rights and freedoms guaranteed by EU law."[30] As will be shown below, the scope of application of the second subparagraph of Article 19(1) TEU is however much *broader*, as this provision may apply *irrespective* of whether the member states are implementing EU law within the meaning of Article 51(1) CFR, which provides that CFR provisions apply "to the member states only when they are implementing Union law." The applicability of ECHR rule of law requirements will be outlined first so as to better delineate the type of national measures that may be challenged by judges/prosecutors as applicants under ECHR and/or EU law (for judges/prosecutors based in EU countries).

1.3. Scope of application

The scope of application of EU rule of law requirement has traditionally been narrower than the scope of application of the ECHR. EU rule of law requirements – similarly to EU law as a whole –generally apply to national measures implementing EU law. By contrast, the reach of the ECHR has a broader reach than its EU equivalent – the EU Charter of Fundamental Rights (CFR). However, in 2018, the CJEU considerably expanded the scope of application of the EU principle of effective judicial protection so that this principle is not constrained by Article 51(1) CFR.

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28 Judgment of 24 June 2019 in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2018:1021, para. 42.

29 Judgment of 16 February 2022 in Case C156/21, *Hungary v. Parliament and Council*, EU:C:2022:97, para. 160.

30 Ibid., para. 157.

1.3.1 Scope of application of ECHR rule of law requirements

The broader reach of the ECHR than that of EU law reflects the very purpose of the Convention: to better guarantee respect for human rights at the *national* level by obliging the "High Contracting Parties" to "secure to everyone within their jurisdiction the rights and freedoms" guaranteed under the ECHR.[31] This is why every decision of every national public body in countries that have ratified the ECHR, including national courts' rulings, must be compatible with the Convention, notwithstanding the fact that the ECHR "machinery for the protection of fundamental rights is supposed to be remain subsidiary to national systems."[32]

In the context of Poland's rule of law crisis, the ECtHR was recently forced to reiterate in this respect that

> the acceptance of the state's obligations under the Convention may not be selective and that the contracting state – including its highest courts – cannot, at their will, exclude the operation and application of the Convention provisions by […] "removing" them, together with the Court's final and binding judgments, from the legal system. Ratifying the Convention, the states take upon themselves, as stated in the Preamble to the Convention "the primary responsibility to secure the rights and freedoms defined in [the] Convention." While the Preamble recognizes the state's margin of appreciation in discharging that responsibility, that margin is subject to the Court's supervisory jurisdiction. As a consequence, the states must respect the Court's treaty-given power under Article 32 of the Convention to rule on all matters concerning the interpretation and application of the Convention. In the exercise of that power, in accordance with its case-law, the Court may review the domestic courts' decisions so as to ascertain whether those courts struck the requisite balance between the various competing interests at stake and correctly applied the Convention standards.[33]

ECHR case law provides concrete examples of national measures referred to the ECtHR by applicant judges or prosecutors. When it comes to individual judges or prosecutors, the most widely relied upon human right has been the right to a fair trial (Article 6(1) ECHR) and the subset of rights connected to it, including: the right of access to a court; the right to a tribunal established by law; the right to an independent and impartial tribunal; and the right to a fair hearing. In addition, judges and prosecutors have relied upon the right to respect for private and family life (Article 8 ECHR) and the right to freedom of expression (Article 10 ECHR). In a few instances, judges or prosecutors have alleged violations of the provision dealing with limitation on use of restrictions of rights (Article 18 ECHR) taken in conjunction with one of the

31 Article 1 ECHR.

32 Judgment of 15 January 2007, *Sisojeva and Others v. Latvia* [GC], no. 60654/00, CE:ECHR:2007:0115JUD006065400, para. 90.

33 Judgment of 23 November 2023 in *Wałęsa v. Poland*, no. 50849/21, CE:ECHR:2023:1123JUD005084921, para. 144. See also the judgment of 15 March 2022 in *Grzęda v. Poland* [GC], no. 43572/18, CE:ECHR:2022:0315JUD004357218, para. 324: "[T]he principle of subsidiarity imposes a shared responsibility between the States Parties and the Court […] In this connection, the Court would emphasise that the Convention system cannot function properly without independent judges. The contracting parties' task of ensuring judicial independence is thus of crucial importance."

rights previously mentioned. In more dramatic and exceptional circumstances, judges and prosecutors have also alleged violations of the right to liberty and security (Article 5 ECHR).[34]

Measures targeting specific courts or the judiciary through a new disciplinary regime and/or disciplinary body have also been raised by natural or legal persons in support of their own applications. In this situation, the key fundamental right relied upon has been the right to a fair trial. To give a single but striking example, Poland's rule of law crisis, which began at the end of 2015, led to more than 500 complaints lodged with the ECtHR by November 2023. The great majority of these complaints alleges a violation of the right to an independent and impartial tribunal established by law "on account of the applicants' cases having been heard by formations of the Supreme Court, ordinary courts or administrative courts including judges appointed to their office in the defective procedure involving" Poland's National Council of the Judiciary (NCJ) as re-established under a legislation adopted in 2017.[35] The great majority of these cases have furthermore been lodged by individuals, companies and associations, rather than judges or prosecutors in the context of administrative, civil, and criminal proceedings.

(i) Measures cognizable under Article 6(1) ECHR

Poland's rule of law crisis provided the ECtHR ample opportunity to clarify the applicability of Article 6(1) ECHR to a plethora of national measures targeting judges, such as decisions of a minister of justice prematurely ending judges' term of office as court vice-presidents; resolutions of a national council of the judiciary turning down judges' applications for judicial posts with appeals against these resolutions examined by a newly established chamber within a court of last resort; a legislation leading to the termination of a judge's membership of a national council of the judiciary while also preventing any possibility of judicial review of this termination; a decision to suspend a judge from his judicial duties and lower a judge's salary adopted by a body alleged not to be a lawful court; a decision to lift a judge's immunity and his concomitant suspension from his judicial duties adopted by a body alleged not to be a lawful court.

In these situations, the "applicant judges" have alleged infringements of their right to a fair trial in its different dimensions such as their right of access to a court. The most difficult issue in this context has arguably been whether an applicant judge before the ECtHR could rely on Article 6(1) ECHR under its civil limb: "In determination of his civil rights […] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

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34 A limited number of judgments have dealt with alleged violations of Article 5 ECHR (right to liberty and security) but a single judgment may relate to hundreds of applications such as in the judgment of 23 November 2021 in the case of *Turan and others v. Turkey,* no. 75805/16 et al., CE:ECHR:2021:1123JUD007580516. This case concerned the arrest and pre-trial detention of 427 sitting judges and prosecutors in the aftermath of the military coup attempt of 15 July 2016 on suspicious of being members of a specific organisation. While violations of Article 5(1) ECHR were found on account of the unlawfulness of the initial pre-trial detention of the applicants, this judgment is controversial. See e.g. B. Çalı, "No rule of law?: Ne venez pas à Strasbourg", VerfBlog, 8 December 2021, https://verfassungsblog.de/no-rule-of-law/ ("For the first time in its history, the Court uses the excuse for delays that may be caused in handling applications as a reason not to examine the very same applications.")

35 Judgment of 23 November 2023 in *Wałęsa v. Poland*, no. 50849/21, CE:ECHR:2023:1123JUD005084921, para. 323.

Among other conditions, there must be a dispute over a right recognized under domestic law, irrespective of whether that right is protected under the ECHR for the civil limb Article 6(1) ECHR to be applicable. With regard to the "civil" nature of the right in respect of public servants employed in the civil service, it follows from the Court's case law (the so-called *Eskelinen* criteria) that the respondent state cannot rely on the applicant's status as a civil servant to exclude the protection embodied in Article 6 ECHR unless two conditions are fulfilled: "Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question; Secondly, the exclusion must be justified on objective grounds in the State's interest. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive."[36]

The most pertinent aspect of the Court's post *Eskelinen* case law is that it has extended the scope of application of the principles above to various disputes regarding judges including those relating to recruitment/appointment, suspension, disciplinary proceedings, dismissal, salary reduction, and removal from post.[37] The Court has similarly held that the right to a fair trial is applicable to a dispute regarding the premature termination of the term of office of a chief prosecutor.

In practice, the application of these principles is not without challenges. For instance, in the Grand Chamber case of *Grzęda v. Poland*, the parties disagreed on whether Judge Grzęda had a cognizable "right" to serve his full term on Poland's National Council of the Judiciary (NCJ) and whether he had the possibility to judicially challenge the (premature) termination of his term of office.[38] As the Court itself noted, this case raised "a novel issue, namely the question whether Article 6 § 1 under its civil head is applicable to a dispute arising out of the premature termination of the applicant's term of office as a judicial member of the NCJ, while he still remains a serving judge."[39] In other words, the case did not concern the principal professional activity of the applicant judge, but rather the serving of his full term of office as an elected judicial member of the NCJ. The Court answered this question positively by expanding the *Eskelinen* criteria and interpreting it in light of a general context of deliberate and systemic weaking of judicial independence brought about by repeated legislative changes (see table 2 below).

In a subsequent "Polish case," the Court unsurprisingly held that the civil limb of Article 6(1) ECHR was also applicable to measures leading to the cessation of a judge's duties or premature termination of office without cessation of duties, whether for disciplinary reasons or as a result of new rules being implemented. This means that the applicants had been entitled to have their cases heard by a tribunal within the meaning of that provision.[40] In

36 Judgment of 19 April 2007 in *Eskelinen and others v. Finland* [GC], no. 63235/00, CE:ECHR:2007:0419JUD006323500, para. 62.

37 For an overview of the case law, see Judgment of 15 March 2022 in *Grzęda v. Poland* [GC], no. 43572/18, CE:ECHR:2022:0315JUD004357218, para. 257 et seq.

38 Ibid.

39 Ibid., para. 265.

40 Judgment of 24 October 2023 in *Pająk and others v. Poland*, nos. 25226/18 et al, CE:ECHR:2023:1024JUD002522618.

light of the case law relating to Poland's rule of law crisis, one may wonder "whether it is still possible to satisfy both *Eskelinen*-criteria when judges are concerned," considering the increased importance the Court "attaches to the principles of the rule of law, separation of powers and the independence of the judiciary," which led it "to be particularly attentive for the protection of judges when their status or career are concerned."[41]

As regards the applicability of the *criminal* limb of Article 6(1) ECHR to measures affecting judges or prosecutors, the legal situation is easier to summarize. In short, the protections afforded by Article 6 ECHR apply to any person subject to a "criminal charge," within the autonomous and broad Convention meaning of that term. The ECHR's established jurisprudence sets out three criteria (informally known as the *Engel* criteria) to be considered in determining whether or not there was a criminal charge: (i) the legal classification of the offence under national law; (ii) the very nature of the offence, and (iii) the degree of severity of the penalty that the person concerned risks incurring. In the context of Poland's rule of law crisis, for example, the Court held that the criminal limb of Article 6(1) ECHR was applicable to the proceedings concerning the lifting of Judge Igor Tuleya's immunity even though the Polish judge had not yet been formally charged in the criminal proceedings (see table 2 below). The Court however declined to decide whether Article 6 ECHR applies to procedures for lifting judicial immunity in general.

Table 2: Applicability of Article 6(1) ECHR to disputes involving individual judges as parties

Applicability of Article 6(1) ECHR under its civil limb to disputes involving individual judges as parties	Applicability of Article 6(1) ECHR under its criminal limb to disputes involving individual judges as parties
Judgment of 15 March 2022 in *Grzęda v. Poland [GC]*	Judgment of 6 July 2023 in *Tuleya v. Poland*
The civil limb of Article 6(1) ECHR was applicable to the situation of Judge Grzęda as (i) there was a genuine and serious dispute over a "right," namely to serve a full term of four years as a judicial member of the NCJ, which the applicant could claim on arguable grounds under domestic law; and (ii) Judge Grzęda's exclusion from access to a court was not justified on objective grounds in the state's interest.	The criminal limb of Article 6(1) ECHR was applicable to the immunity proceedings in Judge Tuleya's case as (i) the offence in respect of which the prosecutor sought to have the judge's liability established (allegedly unauthorized disclosure of information from pre-trial proceedings) is a criminal offence under domestic law; (ii) the very nature of the offence was aimed at the public in general; and (iii) the relevant offence was punishable by a fine, restriction of liberty or imprisonment for up to two years.

41 M. Leloup, "Too little, too late: The ECtHR judgment Broda and Bojara on the premature termination of Polish court (vice) presidents", *VerfBlog*, 29 June 2021, https://verfassungsblog.de/too-little-too-late-2/

(ii) Measures cognizable under Article 8 ECHR

As a general starting point, the ECtHR has refused to exclude in principle employment-related disputes from the scope of "private life" within the meaning of Article 8 ECHR. Instead, each applicant must demonstrate that Article 8 ECHR is applicable because of the underlying reasons for the measure being challenged on this basis (the reason-based approach) or because of the measure's very serious consequences on the applicant's private life (the consequence-based approach). In the latter scenario, Article 8 may still be excluded in cases where the negative effects complained of are limited to the foreseeable consequences of the unlawful conduct.

The right to respect for private life has been found applicable to measures such as individual suspensions or decisions to lift a judge's immunity to the extent that these measures call into question a judge's integrity and professional reputation and prevent a judge from exercising their judicial duties over a significant period of time (see Table 3 below for an example). The ECtHR has also found Article 8 ECHR applicable to laws lowering the retirement age for judges and making the continuation of a judge's duties after reaching retirement age conditional upon authorization by the minister of justice and the national council of the judiciary in a situation where no legal remedy was available to judges forced to retire early on the basis of these laws.[42]

Table 3: Applicability of Article 8 ECHR to disputes involving individual judges as parties

Judgment of 6 July 2023 in *Tuleya v. Poland*
Applying the "consequence-based approach," the Court found Article 8 ECHR applicable in relation to preliminary disciplinary inquiries related to the exercise of judicial duties by the applicant judge, namely the inquiry into his alleged unauthorized disclosure of information from the investigation and the inquiry into his making a request for a preliminary ruling to the CJEU which itself amounts to a manifest violation of EU law. Having regard to the nature and the duration of the various negative effects stemming from the initiation of these preliminary inquiries as well as from the lifting of his immunity and the ensuing suspension, the Court found that these measures affected Judge Tuleya's private life to an extent sufficient to trigger the applicability of Article 8.

In the situation where the laws lowering the retirement age for judges had introduced a difference in treatment on the ground of sex, the Court held applicable the prohibition of discrimination (Article 14 ECHR) in conjunction with the right to respect for private life.[43] In another instance where a judge was suspended by a body that could not be considered a court, the Court also held applicable the limitation on use of restrictions of rights (Article

42 Judgment of 24 October 2023 in *Pająk and others v. Poland*, nos. 25226/18 et al, CE:ECHR:2023:1024JUD002522618.

43 Ibid.

18 ECHR) in conjunction with the right to respect for private life.[44] Similar to Article 14 ECHR, Article 18 ECHR is said to have no independent existence. This means it can only be applied in conjunction with another provision of the Convention or the Protocols thereto. Due to Article 18 ECHR's potential to sanction backsliding authorities in situations where the right to privacy or freedom of expressions are applicable, its additional applicability to disputes involving judges or prosecutors will be further detailed after the scope of application of Article 10 ECHR is explained.

(iii) Measures cognizable under Article 10 ECHR

The leading case when it comes to the applicability of Article 10 ECHR to members of the judiciary directly arose out the EU's first case of steep rule of law backsliding at member state level and is known as *Baka v. Hungary*.[45] In cases concerning disciplinary proceedings against judges/prosecutors or their removal or appointment, the applicability of the ECHR right to freedom of expression is reviewed on a case-by-case basis with the ECtHR first deciding "whether the measure complained of amounted to an interference with the exercise of the applicant's freedom of expression – in the form of a "formality, condition, restriction or penalty" – or whether the impugned measure merely affected the exercise of the right to hold a public post in the administration of justice, a right not secured in the Convention."[46] Should the Court find "that the measures complained of were exclusively or principally the result of the exercise by an applicant of his or her freedom of expression,"[47] the Court will find that there was an interference with the right under Article 10 ECHR. In cases where the Court "has, by contrast, considered that the measures were mainly related to the applicant's capacity to perform his or her duties, it found that there had been no interference under Article 10."[48]

Since the *Baka* case, the right to freedom of expression has been found applicable to measures such as preliminary disciplinary inquiries initiated in connection to a judge's interview to a television news channel and participation in public meetings to discuss issues concerning the independence of the judiciary (see Table 4 below), and sanctions such as the premature termination of a chief prosecutor's mandate following her criticism of legislative changes relating to corruption and the dismissal of a judge as spokesperson for a regional court.

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44 Judgment of 6 October 2022 in *Juszczyszyn v. Poland*, no. 35599/20, CE:ECHR:2022:1006JUD003559920.

45 Judgment of 23 June 2016 in *Baka v. Hungary* [GC], no. 20264/12, CE:ECHR:2016:0623JUD002026112.

46 Judgment of 16 June 2022 in *Żurek v. Poland*, no. 39650/18, CE:ECHR:2022:0616JUD003965018, para. 201.

47 Ibid., para. 202.

48 Ibid.

Table 4: Applicability of Article 10 ECHR to disputes involving individual judges as parties

Judgment of 6 July 2023 in *Tuleya v. Poland*
The Court found Article 10 ECHR applicable in relation to the preliminary disciplinary inquiries initiated against Judge Tuleya as it is evident that those measures were principally the result of the exercise by the applicant of his freedom of expression as they concerned the applicant's public statements respectively on the television news channel and during two public meetings. As regards other measures, such as the decision lifting his immunity and suspending him from his judicial duties, the Court found there is prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and these measures. Accordingly, Article 10 ECHR was applicable as regards each of the impugned measures and the interference with the exercise of the Polish judge's right to freedom of expression had therefore to be justified by the respondent State.

(iv) Measures cognizable under Article 18 ECHR

In addition to Articles 6(1), 8 and 10 ECHR, there is an increasing reliance on Article 18 ECHR as "human rights restrictions under false pretenses present a clear danger to the rule of law, and Article 18 presents a powerful tool to address such backslides."[49]

Less known than the other ECHR provisions addressed above, Article 18 provides that "the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." The primary object and purpose of this provision is, simply put, "to prohibit the misuse of power."[50]

Article 18 ECHR can only be applied in conjunction with other provisions of the ECHR that set out or qualify the rights and freedoms guaranteed under the Convention.[51] In addition, a separate examination of a complaint under Article 18 ECHR is "only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case."[52]

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49 F. Tan, "The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?" (2018) 9 *Goettingen Journal of International Law* 109, p. 140.

50 Judgment of 6 October 2022 in *Juszczyszyn v. Poland*, no. 35599/20, CE:ECHR:2022:1006JUD003559920, para. 312.

51 This is why the court has refused to apply Article 18 in combination with Article 6 as the latter provision does not contain any express or implied restrictions that may form the subject of the court's examination under Article 18. For a critique, T. Mortier, "Miroslava Todorova v. Bulgaria: Bulgaria joins list of serious rule of law offenders", *Strasbourg Observers*, 8 December 2021: https://strasbourgobservers.com/2021/12/08/miroslava-todorova-v-bulgaria-bulgaria-joins-list-of-serious-rule-of-law-offenders/

52 Judgment of 6 October 2022 in *Juszczyszyn v. Poland*, no 35599/20, CE:ECHR:2022:1006JUD003559920, para. 309.

In practice, this provision has only rarely been successfully relied upon by applicants. As regards individual judges based in EU member states,[53] the Court appears to have only found Article 18 ECHR applicable (and violated) in respect of one Bulgarian judge and one Polish judge. In this context, the Court has indicated that it will have regard to the national situation as regards judicial independence and will "be particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial independence and autonomy" when assessing a judge's complaint under Article 18 ECHR.[54]

In the case of *Todorova v. Bulgaria*,[55] the Court held Article 18 ECHR applicable in conjunction with Article 10 ECHR in the context of a dispute involving a judge who had been president of the main professional association of judges in Bulgaria. Following her criticism of the Supreme Judicial Council and the executive, the Bulgarian judge was subject to disciplinary proceedings and sanctions. Having regard to all the facts of the case, the Court found Article 18 ECHR both applicable and violated as the predominant ulterior purpose of the disciplinary proceedings and subsequent sanctions against the Bulgarian judge had not been to ensure compliance with the time-limits for concluding cases, but rather to penalise and intimidate her on account of her criticism of Bulgaria's Supreme Judicial Council and government's actions as regards judicial independence. In the context of Poland's rule of law crisis, the Court also found Article 18 ECHR applicable and violated in the case of *Juszczyszyn v. Poland*.[56]

Table 5: Applicability of Article 18 ECHR to disputes involving individual judges as parties

Judgment of 6 October 2022 in *Juszczyszyn v. Poland*
Having regard to all the facts, including CJEU findings in respect of the rule of law situation in Poland and reference to a disciplinary decision concerning Polish Judge Juszczyszyn, the ECtHR found Article 18 ECHR both applicable and violated as the predominant purpose of the disciplinary measures taken against the Polish judge was to sanction and dissuade him from assessing the status of judges appointed upon the recommendation of the recomposed NCJ by applying the relevant legal standards, including those stemming from Article 6(1) ECHR. As this ulterior purpose is incompatible with the Convention, the Court found a violation of Article 18 ECHR taken in conjunction with Article 8 ECHR.

53 Beyond the EU, see the judgment of 12 January 2023 in the case of *Ovcharenko and Kolos v. Ukraine*, nos 27276/15 and 33692/15, CE:ECHR:2023:0112JUD002727615, for an example of unsuccessful reliance on Article 18 ECHR in conjunction with a successful reliance on Article 8 ECHR by (constitutional) judges dismissed from their posts following Ukraine's Maidan Revolution as there was "there is no indication that the applicants' dismissal was based on anything other than an interpretation of the relevant law aimed at sanctioning judges for "breach of oath" or that it otherwise pursued a hidden agenda" (para. 135).

54 Judgment of 6 October 2022 in *Juszczyszyn v. Poland*, no 35599/20, CE:ECHR:2022:1006JUD003559920, para. 333.

55 Judgment of 19 October 2021, no 40072/13.

56 Judgment of 6 October 2022 in *Juszczyszyn v. Poland*, no 35599/20, CE:ECHR:2022:1006JUD003559920, para. 317.

1.3.2 Scope of application of EU rule of law requirements

According to the first subparagraph of Article 19(1) TEU, "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the treaties the law is observed." The second subparagraph of Article 19(1) TEU further provide, "Member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

In line with Article 19(1) TEU, the CJEU has been conferred a wide jurisdiction not only as regards EU institutions but also EU member states as the rule of law, to quote the current President of the CJEU, essentially means that "neither the EU institutions nor the member states are above EU law."[57] In practice, the Court's wide jurisdiction does not, however, always guarantee that potential violations of EU rule of law requirements are reviewed by the CJEU due to a number of exceptions to its jurisdiction; onerous legal standing rules for natural and legal persons (including therefore individual judges or association of judges) seeking to directly challenge EU measures; numerous conditions governing when and how national judges may refer questions to the CJEU; and the costs of bringing a legal action.

When it comes to challenging *national* measures, the main obstacle has been the limited scope of application of EU law, including EU rule of law requirements. National measures undermining core components of the (EU) rule of law, such as judicial independence, were traditionally understood as normally falling *outside* the scope of EU law, which means they could not be judicially challenged in light of EU law. The Court of Justice addressed this problem in its *Portuguese Judges* judgment of 27 February 2018[58] that the second subparagraph of Article 19(1) TEU may be used as a self-standing ground for the review of the compatibility of national measures with the EU principle of effective judicial protection "whenever a [national] jurisdiction may be required to rule upon cases 'in fields covered by Union law.'"[59]

By contrast, the scope of application of other EU provisions such as Article 47 CFR, which also constitutes a reaffirmation of the principle of effective judicial, is much more limited. Indeed, Article 47 CFR may be relied upon by a natural or legal person only where the member states implement EU law/act within the scope of EU law. Article 47 CFR *also* presupposes that the person invoking Article 47 CFR is relying on rights or freedoms guaranteed by EU law. If these conditions are not met, Article 47 CFR is not applicable.

If one has to summarize the main practical and far-reaching impact of the Court's *Portuguese Judges* judgment is that private parties, in particular judges when *acting as plaintiffs*, have been empowered to rely upon the second subparagraph of Article 19(1) TEU directly to

57 K. Lenaerts, "On Checks and Balances", op. cit., p. 28.

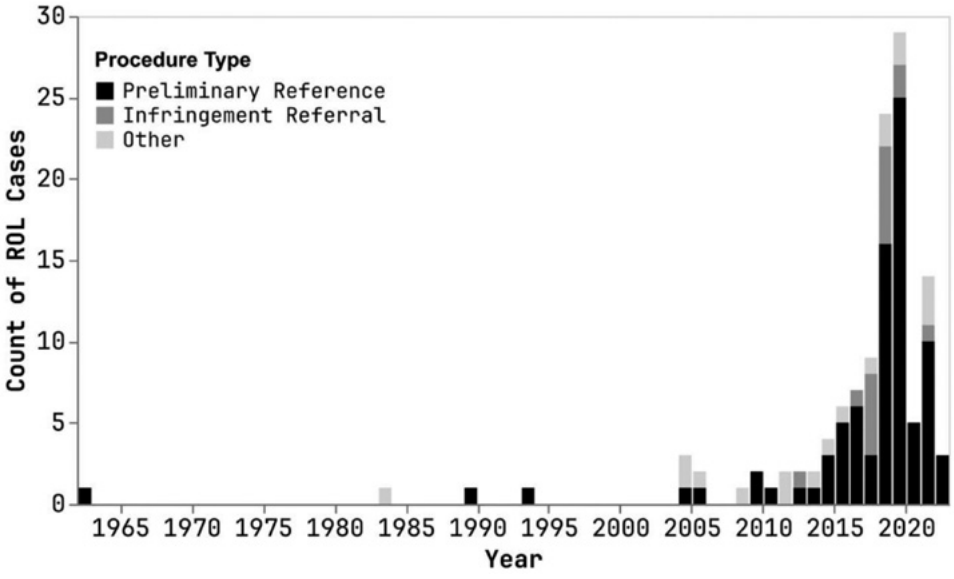
58 Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para. 32.

59 Opinion of AG Collins delivered on 15 December 2022 in Joined C-181/21 and C-269/21, *G. and Others (Appointment of judges to the ordinary courts in Poland)*, EU:C:2022:990, para. 34.

challenge, in the context of *national* proceedings, *national* measures that can be considered to undermine the independence of any national court or tribunal that may apply or interpret EU law.

In turn, this has encouraged judges, *acting in their professional capacity*, to make an increasing use of the EU's preliminary ruling procedure (Article 267 TFEU) and refer an increasing number of questions to the CJEU regarding the compatibility of national measures with the EU principle of effective judicial protection. National judges have done so increasingly soon after the *Portuguese Judges*. The European Commission, but to a far less extent that then ECJ as reflected in the figure below, has also understood the Court's judgment as an encouragement to bring infringement actions (Article 258 TFEU) to challenge *national* measures, which used to be considered as falling outside the scope of application of EU law.

Figure 3: Yearly rule of law cases lodged with the CJEU, by procedure type[60]



1.4 Challenging measures violating rule of law requirements

The ECHR and EU systems offer different avenues to challenge national measures. The jurisdiction of the CJEU is much wider and multifaceted than the ECtHR's. This should not surprise considering the much larger set of objectives, competences and powers allocated to the EU compared to the CoE (which remains first and foremost an international human rights organization).[61] This explains the more complex EU system of legal remedies and procedures.

60 Source: M. Mandujano Manriquez and T. Pavone, op. cit., p. 12.

61 A. Drzemczewksi, "Human Rights in Europe: an insider's views" (2017) *EHRLR* 134, p. 144.

In this respect, the EU's judicial architecture is understood to include "not only the EU courts (the Court of Justice and the General Court) but also the courts of the member states, which are the courts of general jurisdiction for the application and enforcement of EU law."[62] It is because of this critical EU role played by national courts that Article 19(1) TEU requires member states to provide "remedies sufficient to ensure effective legal protection in the fields covered by Union law."

Table 6: ECtHR's jurisdiction compared to CJEU's jurisdiction

ECtHR Jurisdiction	CJEU Jurisdiction
Article 32 (Jurisdiction) 1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto, which are referred to it as provided in Articles 33, 34, 46 and 47. 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide. Article 33 (Inter-State case) Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party. Article 34 (Individual applications) The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.	Article 19 TEU 1. The Court of Justice […] shall ensure that in the interpretation and application of the Treaties the law is observed. Member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. […] 3. The Court of Justice of the European Union shall, in accordance with the Treaties: (a) rule on actions brought by a member state, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the member states, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties.

By contrast to the CJEU, the jurisdiction of the ECtHR remains more limited as it primarily consists of reviewing allegations of violations of the ECHR committed by states that have ratified it on the basis of applications directly lodged with it either by natural or legal persons. In addition, the ECHR recognises the states' margin of appreciation in discharging the

62 Judgment of 23 November 2023 in *Wałęsa v. Poland*, no. 50849/21, CE:ECHR:2023:1123JUD005084921, para. 144.

responsibility to secure ECHR rights and freedoms subject however the Court's supervisory jurisdiction. This means inter alia that the ECtHR "may review the domestic courts' decisions so as to ascertain whether those courts struck the requisite balance between the various competing interests at stake and correctly applied the Convention standards."[63]

Due to the dual dimension of the CJEU jurisdiction over EU and national measures and the fact that the EU system offers both direct and indirect access to the CJEU from the point of view of natural and legal persons, the EU system of remedies is more complex. This guide will attempt to outline while focusing on the different avenues available to individual judges (or judicial associations) to challenge *national* measures relating to the organisation of national judiciaries on account of their potential incompatibility with EU rule of law requirements. Challenges directed at *EU* measures will also be briefly outlined due to recent and unprecedented challenges brought by individual judges, prosecutors and judicial associations. Prior to this, the ECHR right of individual application and its use by applicant judges or prosecutors, particularly in a backsliding context, will be examined.

1.4.1 Challenging national measures via individual applications to the ECtHR

Individual judges, like any individual, may lodge a complaint with the ECtHR alleging a violation of their ECHR rights. The ECHR system provides easier access to the ECtHR by comparison to the EU system of remedies. However, this does not entail the absence of admissibility requirements to satisfy such as the requirement to meet the ECHR definition of "victim" and the requirement to first exhaust domestic remedies before lodging a complaint with the Strasbourg Court within six months following the last judicial decision in the case, which typically means a judgment by the highest court in the country concerned. These requirements, particularly the latter one, have proved problematic in challenging backsliding efforts.

(i) Admissibility criteria

As regards the notion of victim within the meaning of the ECHR, the judgment of 6 July 2023 in *Tuleya v. Poland* provides a recent reinstatement of the general principles governing the interpretation. In this case, the Polish government submitted that Judge Tuleya had lost his victim status when the successor of the (unlawful) Disciplinary Chamber (DC) known as the Chamber of Professional Liability (CPL), "unsuspended" him in November 2022 after 741 days of suspension.

For the Polish government, the fact that Judge Tuleya remained subject to criminal prosecution should be disregarded on account of the possibility for the judge to ask the CPL to reverse the relevant decision of the DC under a new procedure. For the Court, having regard to the applicable principles, "the CPL resolution can be regarded as affording the applicant appropriate and sufficient redress in so far as his suspension was concerned."[64] It follows that

64 Judgment of 6 July 2023 in *Tuleya v. Poland*, nos. 21181/19 and 51751/20, CE:ECHR:2023:0706JUD004641221, para. 262.

Judge Tuleya must be considered as having lost his victim status in respect of that aspect of his complaint under Article 6(1) ECHR.

As regards the question of the applicant's victim status in so far as the lifting of his immunity is concerned, the Court accepted that the fact that Judge Tuleya refused to make a request to the new CPL "does not have any decisive bearing on his victim status."[65] Considering that adverse consequences for Judge Tuleya continued to persist despite a finding that the judge did not commit a criminal offence, and the existence of some legal deficiencies in relation to the scheme adopted by Polish authorities in June 2022, which may have been used by Judge Tuleya, the ECtHR held that Judge Tuleya did *not* lose his victim status in respect of the lifting of his immunity.

The requirement to exhaust domestic remedies has proved even more problematic for those residing in hybrid regimes as it imposes an obligation on applicants to make normal use of national remedies that are available and sufficient in respect of their ECHR grievances. This obligation may be used by national authorities to prevent or significantly delay applications from reaching Strasbourg either by capturing courts of last resort or creating new but deliberately ineffective remedies. To put it differently, "if an authoritarian government (relatively) quickly takes over the apex courts, then this gives them the possibility to stop, slow down, or otherwise influence the "pre-process" to Strasbourg."[66]

One may give the example of Hungary's (manifestly captured) Constitutional Court (CC). Hungary itself is no longer recognized as a democracy meeting basic EU membership requirements by the European Parliament.[67] It is also furthermore subject to the exceptional monitoring procedures of both the EU and the Council of Europe due to the systemic undermining of democracy and the rule of law in Hungary since 2010.[68] Yet the Hungarian government has been able to convince the ECtHR that constitutional complaints may still be considered an effective remedy. One may for instance mention the Court's judgment in the case of *Mendrei v. Hungary*,[69] a judgment which has been criticised for completely ignoring "the context in which the Hungarian Constitutional Court (CC) operates" with the Court pretending."[70]

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65 Ibid., para. 268.

66 I. Cameron, *The European Court of Human Rights and Rule of Law Backsliding*, SIEPS European Policy Analysis 2023:4, p. 15.

67 European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P9_TA(2022)0324, para. 2.

68 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8_TA(2018)0340; PACE, The honouring of membership obligations to the Council of Europe by Hungary, Resolution 2460(2022).

69 Judgment of 19 June 2018 in *Mendrei v. Hungary*, no. 54927/15, CE:ECHR:2018:0619DEC005492715

70 D. Karsai, "Role of the constitutional courts in the system of the effective domestic remedies – a new approach on the horizon? Criticism of the Mendrei v. Hungary decision", *Strasbourg Observers*, 15 October 2018, https://strasbourgobservers.com/2018/10/15/role-of-the-constitutional-courts-in-the-system-of-the-effective-domestic-remedies-a-new-approach-on-the-horizon-criticism-of-the-mendrei-v-hungary-decision/

Similarly, the Court has ignored the authoritarian reality in Türkiye by inter alia refraining from engaging in the substantive review of justiciable cases through strike-out rulings or inadmissibility decisions. Notwithstanding the obvious ineffective nature of Türkiye's constitutional complaint mechanism and "despite having found Article 5 violations in prolonged pre-trial detentions of several journalists and over 400 judges and prosecutors, the ECtHR has not declared that Türkiye's legal system does not offer any real remedies for victims" of the post 2016 coup purges.[72] Another example concerns the Court's assessment of the Turkish State of Emergency Inquiry Commission set up in 2017 to review appeals from those affected by emergency measures adopted following the coup attempt of 2016 and which led inter alia to the mass dismissals of Turkish judges and prosecutors. Because of the existence of this ad hoc commission, thousands of applications were struck out by the Court due to the non-exhaustion of domestic remedies. Since then, this commission has functioned as arbitrarily and ineffectively as possible.[73]

Even in the context of Poland's rule of law crisis and the unprecedented "unconstitutionalisation" of Article 6(1) ECHR by Poland's captured Constitutional Tribunal (CT), the ECtHR has refused to accept that this irregularly composed body, *according to the Court's own findings*, cannot provide an effective remedy in every situation. Instead, a case-by-case assessment is still required. The Court, however, did accept that a suspended judge's failure to lodge a constitutional complaint contesting the rules governing the procedure of appointment to the Supreme Court cannot be held to be effective.[74] The Court dismissed therefore the objection of non-exhaustion of domestic remedies raised by the Polish government.

(ii) Responding to backsliding: new case-processing strategy prioritising judicial independence cases in 2021

Largely because of the domestic remedies rule and the excessive length of proceedings before the ECtHR itself, "the ECtHR is not a quick mechanism for dealing with rule of law backsliding."[75] For instance, it took "five years before the judgment in the Baka case" and "four and a half years for a judgment in the first Polish case, *Xero Flor*."[76] This delay has proved especially damaging in the context of complaints submitted by judges and prosecutors as by the time the ECtHR may find a violation of their rights, facts on the ground may have irremediably changed and irreparable damage done to the rule of law.

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71 D. Kurban, "Authoritarian Resistance and Judicial Complicity: Turkey and the European Court of Human Rights" (2024) European Journal of International Law (published online on 24 April 2024).

72 Ibid.

73 A. Donald, "Time for Strasbourg to Open its Doors to Turkey's Purged Public Servants," *VerfBlog*, 4 December 2019, https://verfassungsblog.de/time-for-strasbourg-to-open-its-doors-to-turkeys-purged-public-servants/

74 Judgment of 6 October 2022 in *Juszczyszyn v. Poland*, no. 35599/20, CE:ECHR:2022:1006JUD003559920, paras 148-156.

75 I. Cameron, *The European Court of Human Rights and Rule of Law Backsliding*, SIEPS European Policy Analysis 2023:4, pp. 14-15.

76 Ibid.

To address its own backlog challenge, the Court adopted a number of changes as part of the Interlaken reform process, which "enabled the Court to reduce its backlog from 160,000 pending cases in 2011 to 65,000" in 2021.[77] The same year, fully aware of increasing rule of law backsliding and the concomitant increasing disregarding of its own judgments identifying systemic rule of law issues, the ECtHR decided to embrace a paradigm shift. As explained by the ECtHR president at the time, the Court decided to "identify and process expeditiously cases that raise the most important issues, the so-called impact cases," such as "cases that raise an issue implicating the rule of law or the independence of the judiciary".[78]

This prioritization of rule of law-related cases makes perfect sense considering that the Court considers judicial independence to be a prerequisite to the rule of law. As such, the Court has repeatedly emphasized that it ought to "be particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial independence and autonomy" as "the Convention system cannot function properly without independent judges."

(iii) Responding to backsliding: The first interim measures to protect Polish judges in 2022

In addition to the prioritization of judicial independence cases, the most significant procedural development in relation to individual judges has arguably been the first set of interim measures adopted by the ECtHR to address the situation of Polish judges facing manifestly arbitrary disciplinary proceedings and sanctions on an industrial scale.[80]

This was done on the basis of Rule 39 of the Rules of the Court, which provides that interim measures may be adopted in exceptional circumstances to address a situation where there is an imminent risk of irreparable harm to a Convention right. In other words, interim measures may be indicated by the ECtHR "where there is a risk that the absence of such measures would lead to a situation in which *restitutio in integrum* and other forms of reparation would not be possible if the Court were to consider them warranted at the end of the proceedings before it."[81]

Until Poland's rule of law crisis, however, successful reliance on Rule 39 by judges even where subject to manifestly arbitrary disciplinary proceedings was considered not realistic, leading to calls for the Court to not only review its policy on priorities but also its practice

77 ECtHR, "The European Court of Human Rights is launching a new case processing strategy," Press release ECHR 092 (2021), 17 March 2021.

78 R. Spano, President of the European Court of Human Rights, Speech at the 131st session of the Committee of Ministers, Hamburg, 21 May 2021.

79 Judgment of 6 October 2022 in *Juszczyszyn v. Poland*, no. 35599/20, CE:ECHR:2022:1006JUD003559920, para. 333.

80 See M. Fisicaro, "Safeguarding Judicial Independence (and Subsidiarity) Through Interim Measures: The New ECtHR's Strategy at the Height of the Polish Constitutional Crisis" (2022) 16 *Dirriti umani e diritto internazionale* 637.

81 Practice Direction: Requests for interim measures, Rules of Court, 28 March 2024, para 6.

concerning interim measures[82] considering the systemic damage done to the rule of law by Polish authorities in a broader context where Article 6(1) ECHR had been neutralized. This led the Court to adopt in February 2022, for the very first time, an interim measure in the case of Judge Wróbel, a sitting judge of the Criminal Chamber of Poland's Supreme Court. This interim measure required the Polish government to ensure that the proceedings concerning the lifting of judicial immunity of Judge Wróbel comply with Article 6(1) ECHR requirements and that no decision in respect of his immunity be taken by the Disciplinary Chamber until the final determination of his complaints by the ECtHR.[83] Only two years earlier, the ECtHR had by contrast refused to freeze the adoption of constitutional amendments that effectively terminated the term of office of the applicants, i.e., three judges of the Constitutional Court (CC) of Armenia and its president.[84] For the Court, their request fell outside the scope of application of Rule 39 since it did not involve a risk of serious and irreparable harm of a core right under the ECHR.

In the context of Poland's rule of law crisis, the ECtHR quickly followed up its first interim decision of February 2022 with further interim measures to prevent Polish judges from being suspended or having their judicial immunity lifted by the Disciplinary Chamber and its post July 2022 replacement, the Chamber of Professional Liability or indeed, any court competent under Polish law to deal with cases of judges at risk of imminent suspension from their judicial functions for applying ECHR and EU case law in their rulings.[85] Another significant development took place by the end of 2022 when the ECtHR decided to request the Polish government to suspend the forced (and prima facie unlawful) transfer of three Court of Appeal judges from the Criminal Division to the Labour and Social Security Division of the Warsaw Court of Appeal.[86]

In a broader context where the Court had close to 500 pending applications relating to Poland's rule of law crisis (with more than 200 communicated) as of November 2023, the number of granted interim decisions in relation to Polish judges remains relatively small with a total of 17 successful requests for interim measures out of 60 requests in 29 cases concerning disciplinary and waiving of judicial immunity cases.[87]

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82 R. Lawson, A Living Instrument: The Evolutive Doctrine, Speech at the Opening of the Judicial Year, European Court of Human Rights, 31 January 2020.

83 Case of *Wróbel v. Poland*, no. 6904/22 (pending). See ECtHR press release, Interim measures in the case of Polish Supreme Court judge's immunity, ECHR 042 (2022), 8 February 2022.

84 Case of *Gyulumyan and Others v. Armenia*, no. 25240/20. See ECtHR press release, The European Court refuses urgent measure in case concerning constitutional reform in Armenia, ECHR 209 (2020), 8 July 2020. In a judgment of 21 December 2023, the Court rejected as inadmissible the complaints brought by the four Constitutional Court judges and President about the termination of their terms of office. For the Court, their exclusion from access to a court had been justified on objective grounds as their terms of office was ended via a constitutional amendment which formed part of broader reforms not directed against them specifically.

85 ECtHR Press release, Interim measures amended in cases concerning judges' immunity, ECHR 254 (2022), 17 August 2022.

86 Decision of 6 December 2022 on interim measure in the cases of Judge Leszczyńska-Furtak, Judge Gregajtys and Judge Piekarska-Drążek, pending ECHR applications nos. 39471/22; 39477/22 and 44068/22.

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

Considering the situation at the start of 2022, these numbers are nothing short of remarkable. In the face of non-compliance with its interim decisions on account of their alleged unconstitutionality, the ECtHR was not able to respond with financial sanctions unlike the CJEU when faced with non-compliance from Polish authorities in respect of its interim orders. Non-compliance with ECtHR interim decisions, however, is bound to affect the Strasbourg Court's judgment on the merits although the ECHR system does not also provide for financial sanctions even in a situation of deliberate/systemic disregard of ECtHR judgments unlike what is possible in the EU system.[88] Indeed, ECtHR judgments are

> essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment […] However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned. In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate a specific measure.[89]

These specific measures may be general and/or individual measures. In a case where the ECtHR found "serious systemic problems"[90] as regards the functioning of a national judiciary when it comes to the disciplinary regime of judges, the Court required the adoption of specific general measures as well as a specific individual measure: the applicant judge's "reinstatement to the post of judge of the Supreme Court at the earliest possible date."[91] In addition, a general state of non-compliance with ECtHR rulings may exceptionally lead the Court to apply the pilot-judgment procedure which the Court did in respect of Poland in November 2023.

(iv) Responding to backsliding: Pilot-judgment approach to systemic rule of law violations

On its own motion or at the request of one or both parties, "the Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting State concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications."[92] Within this framework, the Court will indicate remedial measures to be adopted by the relevant state. In addition, it may decide to adjourn "the examination of all similar applications pending the

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88 See *infra* Section 1.3.2(ii).

89 Judgment of 9 January 2013 in *Volkov v. Ukraine*, no. 21722/11, CE:ECHR:2013:0109JUD002172211, paras 194-195.

90 Ibid., para. 199.

91 Ibid., para. 208.

92 ECtHR, Rule 61 of the Rules of Court (inserted by the Court on 21 February 2011), Pilot-judgment procedure, para. 1.

adoption of the remedial measures required by virtue of the operative provisions of the pilot judgment."[93]

It took about eight years for the Court to make use of the pilot-judgment procedure in the context of Poland's rule of law crisis. When it did so, in *Wałęsa v. Poland*, the Court justified the application of this procedure on three main grounds:[94]

(i) The existence of a "serious systemic situation, capable of continually affecting numerous persons" due to interrelated rule of law "systemic problems in the domestic law and practice" which "entail repeated breaches of the fundamental principles of the rule of law, separation of powers and the independence of the judiciary" in a context where Poland's Constitutional Court is furthermore perpetuating a "state of continued non-compliance with the Convention."

(ii) "The rapid and continued increase in the number of applications concerning the independence of the judiciary in Poland and alleging, in particular, a breach of the right to an "independent and impartial tribunal established by law" since 2022.

(iii) "The gravity of the impugned situation, commonly referred to as 'the rule of law crisis,' as a result of which numerous yet unidentified persons may be adversely affected," and which the Court considers as having the potential to aggravate further quickly.

Considering the above, the Court provided further details on the general measures required to put an end to the systemic violations of the requirements of an "independent and impartial tribunal established by law" and the principle of legal certainty in Poland. In addition, the Court decided to adjourn for one year all similar cases of which notice has not yet been given pending the adoption of general measures by the Polish state. This shows that the Court may exceptionally go beyond finding individual violations of the ECHR on a case-by-case basis and identify systemic problems which the respondent state is under an obligation to correct via legislative and other general measures.

The case of *Yüksel Yalçınkaya v. Türkiye*, however, appears to indicate that the Court will reject broad allegations concerning the lack of independence and impartiality of a national judiciary as a whole. In this case, after noting "the legislative changes introduced in Türkiye in recent years" and "the findings made by various international bodies regarding the perceived erosion of the independence of the Turkish judiciary," the Court stressed that "it is not called upon to make general findings about the Turkish judicial system in the abstract or to rule on the permissible limits of relations and interaction between the various state powers, but to determine, on the facts of the specific case before it, whether the requirements of the right to a fair trial have been met." The Court further added that the arguments advanced by the applicant "entail a criticism of the judiciary in a general manner, *without any specific allegations* [emphasis added], either during the domestic proceedings or before the Court,

93 Ibid., para. 6.

94 Judgment of 23 November 2023 in *Wałęsa v. Poland*, no. 50849/21, CE:ECHR:2023:1123JUD005084921, paras. 323-327.

95 Judgment of 26 September 2023, *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, CE:ECHR:2023:0926JUD001566920, para. 363.

relating to the judges who participated in the examination of his case and producing concrete consequences in his individual trial."[96] Accordingly, the Court refused to engage in an examination of what may be labelled Türkiye's "rule of law crisis" following the *coup d'etat* attempt of 15 July 2016 but it did identify a systemic problem regarding the national courts' approach to the use of an encrypted messaging application known as "ByLock." A country connected to 8,000 ECHR applications solely in relation to convictions for membership of an armed terrorist organisation based on the alleged use of "ByLock"[97] and viewed as an electoral autocracy by democracy experts[98] may however require a more forceful answer from the ECtHR and the Council of Europe more broadly beyond the activation of the Council's special (but legally ineffective) monitoring procedure.[99]

1.4.2 Challenging EU measures

As far as EU measures are concerned, following the entry into force of the Treaty of Lisbon, the CJEU "enjoys jurisdiction *by default* with regard to all acts adopted by EU institutions, at least those which are intended to have legal effects. It follows that it is only when the Treaties lay down express exclusions that the Court has no jurisdiction."[100] The CJEU having jurisdiction does not however mean unrestricted access to it as multiple admissibility requirements govern (direct and indirect) access to the CJEU. Indeed, while the CJEU has jurisdiction to review the legality of EU acts within the framework of the EU's annulment procedure (Article 263 TFEU), this does not necessarily guarantee *effective* judicial review for natural and legal persons as will be briefly shown below by looking at annulment actions brought by a former advocate general, a national prosecutor and several organisations of European judges.

(i) The main direct avenue to challenge EU measures: The EU's annulment procedure

It was in the context of an annulment action that the Court of Justice first referred to what was then the European Community (EC) as "a community based on the rule of law" inasmuch as neither the member states nor the EC institutions could avoid review of the conformity of their acts with the EC's 'constitutional charter,' the EC Treaty.[101] In practice, in *Les Verts*, the Court reinterpreted what is now Article 263 TFEU to not exclude actions brought against measures adopted by the European Parliament intended to have legal effects vis-à-vis third

96 Ibid., para. 364.

97 ECtHR press release, European Court gives notification to Türkiye of third batch of 1,000 applications concerning convictions for terrorism offences based on use of ByLock messaging application, EHCH 179 (2024), 8 July 2024.

98 See e.g. V-Dem Institute, *Democracy Report 2024: Democracy Winning and Losing at the Ballot*, March 2024.

99 Parliamentary Assembly of the Council of Europe, The functioning of democratic institutions in Turkey, Resolution 2156 (2017).

100 Opinion of Advocate General Bobek of 3 December 2020 in Case C-650/18, *Hungary v Parliament*, EU:C:2020:985, para. 35.

101 Case 294/83, *Les Verts v. Parliament*, EU:C:1986:166, para. 23.

parties. By contrast, the Court has adopted a less "generous and dynamic interpretation"[102] of the conditions governing the admissibility of annulment actions brought by natural and legal persons (known as "non-privileged" applicants). Notwithstanding several changes made to the Treaty provision detailing the EU's annulment procedure, most recently by the Treaty of Lisbon, the issue of legal standing requirements for private applicants in annulment actions remains problematic. In addition, the CJEU has found itself lacking jurisdiction in the leading case to date raising the issue of CJEU's *own* independence following the *premature* termination of Advocate General Eleanor Sharpston's mandate on account of the UK's withdrawal from the EU (see Table 7 below).[103] As observed by a former advocate general, the risk with this approach is that it allows "Member States to do in the appointments to the CJEU what the Court does not allows them to do with respect to their national courts."[104]

Table 7: Lack of CJEU jurisdiction over EU member states' decision to prematurely end CJEU Advocate General Sharpston's mandate

Order of the Court of Justice of 16 June 2021 in C-684/20 P, *Sharpston v Council and Conference of the Representatives of the Governments of the Member States*
45. Consequently, the General Court did not err in pointing out […] that it is clear from Article 263 TFEU that acts adopted by representatives of the governments of the Member States, acting not in their capacity as members of the Council of the European Union or of the European Council but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the EU Courts. […] 50. Consequently, the General Court cannot be criticized for not having considered itself to have jurisdiction to assess the legality of a purported decision by the representatives of the governments of the Member States finding that the appellant's mandate had ended prematurely.

Even where the EU courts have jurisdiction to review the legality of EU acts, their strict interpretation of legal standing conditions creates almost insurmountable obstacles for individual judges and prosecutors or associations representing them wishing to challenge measures raising the most serious rule of law issues. Two recent annulment cases are illustrative: a case concerning the independence of European prosecutors appointed to the

102 A.G. Jacobs Opinion in Case C-50/00 P *UPA v. Council*, EU:C:2002:462, para. 71. Referring to *Les Verts* and other cases dealing with the rights of "privileged applicants" in annulments proceedings, Jacobs describes the Court's interpretation in these cases as "generous and dynamic" or even "contrary to the text" and explains it by the need "to ensure that the evolution in the powers of the Community institutions does not undermine the rule of law and the institutional balance."

103 See Orders of the Court of Justice in C-684/20 P, *Sharpston v Council and Conference of the Representatives of the Governments of the Member States*, EU:C:2021:486 and C-685/20 P, *Sharpston v Council and Conference of the Representatives of the Governments of the Member States*, EU:C:2021:485.

104 M.P. Maduro, "General Report on the Rule of Law in the EU", in FIDE, *Mutual Trust, Mutual Recognition and the Rule of Law*, XXX FIDE Congress in Sofia 2023, Vol. 1, p. 61.

European Public Prosecutor's Office (EPPO) brought by a Portuguese prosecutor who was not appointed by the Council despite being ranked first by the relevant independent panel;[105] and a second case brought by several association of judges against the Council for disregarding CJEU rule of law judgments when it approved Poland's Recovery Plan.[106]

As regards the EPPO related case, notwithstanding the Council's admission that it acted based on false information provided by the Portuguese government that unsurprisingly favoured the Portuguese government's preferred candidate, the "General Court adopted and extremely formal and deferential approach to the council decision."[107] This approach allowed the Court not to review the decision.

As regards the unprecedented set of annulment actions brought by several organisations of judges, the General Court dismissed them as inadmissible.[108] The General Court did not even deem Polish judges directly affected by the decisions of the Disciplinary Chamber directly concerned by a procedure mandated by the Council in respect of these decisions, which recognise them as producing legal effects in manifest disregard of the case law from Polish courts and the CJEU.[109] The end result is that EU funding is being disbursed on the basis of "rule of law milestones," which even some European commissioners thought incompatible with CJEU rulings.[110] The General Court's approach also does not sit well with the ECtHR's approach set out in the *KlimaSeniorinnen* judgment of 9 April 2024. In this case, the Grand Chamber of the ECtHR found that the applicant association had legal standing to bring a complaint regarding "the threats arising from climate change in the respondent state […] on behalf of those individuals who may arguably claim to be subject to specific threats or adverse effects of climate change on their life, well-being and quality of life as protected under the Convention."[111] In this light, the CJEU's insistence that the right to an effective remedy "cannot have the effect of setting aside the conditions expressly laid down" in Article 263 TFEU is "besides the point" at least in the area of climate change as "those conditions must also be interpreted in the light of other provisions of EU law, including Articles 7, 47 and 53 of the EU Charter."[112] We would add that the *KlimaSeniorinnen*'s line of reasoning could easily be extrapolated to rule of law litigation brought by associations of judges/prosecutors.

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105 See Order of 8 July 2021 in Case T-75/21, *Ana Carla Mendes de Almeida v Council*, EU:T:2021:425 upheld on appeal by the Court of Justice: See Order of 20 October 2022 in Case C-576/21 P, EU:C:2022:826.

106 See Order of 4 June 2024 in Joined Cases T530/22 to T533/22, *Medel et al*, EU:T:2024:363.

107 M.P. Maduro, "General Report on the Rule of Law in the EU", op. cit., p. 62.

108 Order of 4 June 2024 in Joined Cases T530/22 to T533/22, *Medel et al*, EU:T:2024:363. This order is currently subject to an appeal before the Court of Justice: see Case C-555/24 P (pending).

109 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/I *Giornale di Storia Costituzionale* 103.

110 L. Pech, "The European Union's rule of law crisis: From rule of law to rule of lawlessness in Europe" (2023) 70 *Irish Jurist* 10.

111 *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, no. 53600/20, para. 524.

112 P. Eeckhout, "From Strasbourg to Luxembourg? The KlimaSeniorinnen judgment and EU remedies," *VerfBlog*, 5 June 2024, https://verfassungsblog.de/from-strasbourg-to-luxembourg/

Due to the CJEU's current strict interpretation of legal standing rules for natural and legal persons, the rule of law can be most effectively defended when a privileged applicant – such as EU member states, the European Parliament, the Council and the Commission – lodges an annulment action as they do not have to satisfy legal standing requirements. For political reasons, however, privileged applicants have traditionally shown a great reluctance to do so in a situation where EU institutions such as the Commission and/or the Council may have arguably failed to uphold EU rule of law requirements. A rare exception to this tendency is provided by the recent annulment action lodged by the European Parliament with the CJEU on 25 March 2024 following the controversial decision of the Commission of 13 December 2023 to unlock previously suspended EU funding in respect of Hungary on account of alleged judicial reforms.[113] For the European Parliament, however, the measures adopted by Hungarian authorities "do not ensure sufficient safeguards against political influence" in a broader context where Hungary continues not to "meet the standard of judicial independence set out in the Charter."[114]

(ii) Other avenues to challenge EU measures: The EU's preliminary ruling and failure to act procedures

When it comes to challenging EU measures on EU rule of law grounds, the EU's preliminary ruling procedure (Article 267 TFEU) is barely used by comparison to the EU's annulment action.[115] By contrast, following the Court of Justice's ruling in *Portuguese Judges*, the EU's preliminary ruling procedure has been increasingly used to challenge the compatibility of *national* measures with the principle of effective judicial protection.

Actions for failure to act (Article 265 TFEU) are even rarer and as far as EU inaction relating to the rule of law is concerned, the only example to date is the European Parliament's failure to act against the European Commission lodged with the Court of Justice on 29 October 2021. For the European Parliament, the Commission was in breach of its Treaty obligations by failing to apply the Rule of Law Conditionality Regulation 2020/2092 following another "controversial" episode, which saw the Commission agreeing with the European Council in December 2020 not to apply this regulation until the Court would confirm the legality of this new tool. This (political) agreement disregarded the fact that the regulation was formally due to take effect on 1 January 2021 and ignored Article 278 TFEU which provides that actions before the CJEU do not have suspensory effect. Following the first activation of the regulation in respect of Hungary in April 2022, the European Parliament withdrew its action in June 2022.[116]

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113 See Case C-225/24 (pending).

114 European Parliament resolution of 18 January 2024 on the situation in Hungary and frozen EU funds (2024/2512(RSP)), para. 6.

115 For a rare example of a national court asking the CJEU to review the validity of an EU act on account of a potential incompatibility with core EU rule of law provisions, one may refer to the *Melloni* case where the Spanish Constitutional Court asked the Court of Justice to rule whether a specific provision of the 2022 EU Framework Decision on the European Arrest Warrant is compatible with the requirements deriving from Article 47 CFR (the right to an effective judicial remedy and to a fair trial) and Article 48(2) CFR (rights of the defence). See Judgment of 26 February 2013 in Case C-399/11, *Melloni*, EU:C:2013:107.

116 Order of 8 June 2022 in Case C-657/21.

1.4.3. Challenging national measures falling within the "fields covered by EU law"

As far as national measures or practices[117] that may not be compatible with EU rule of law requirements, one may distinguish between two main avenues to challenge them before the CJEU: the EU's infringement procedure (Article 258 TFEU) and the EU's preliminary ruling procedure (Article 267 TFEU). As regards the key differences between the main task of the CJEU under Article 258 TFEU versus its main task under Article 267 TFEU, as regularly emphasized by the Court of Justice itself:

> Whereas, in an action for failure to fulfil obligations, the Court must ascertain whether the national measure or practice challenged by the Commission or another Member State contravenes EU law in general, without there being any need for there to be a corresponding dispute before the national courts, the Court's function in proceedings for a preliminary ruling is, by contrast, to help the referring court to resolve the specific dispute pending before that court.[118]

In both situations, natural and legal persons do *not* have direct access to the CJEU and are dependent on the Commission bringing infringement actions or national judges referring questions to the CJEU.

While only these two procedures will be further outlined, "numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a member state."[119] Indeed, the EU's so-called "rule of law toolbox" has been significantly expanded in the last decade. However, the jurisdiction of the CJEU varies significantly depending on the EU rule of law tool or procedure being considered.[120] Furthermore, the scope of application of the different tools and procedures also varies.

One such example is the preventive and sanctioning procedures laid down in Article 7 TEU which are supposed to address exceptional situations in the form of systemic threats to or

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117 In the great majority of cases, the CJEU tends to be seized of national measures rather than national *practices* raising rule of law issues. See however for a recent example of a national practice whose potential incompatibility with EU rule of law requirements was raised by a Croatian referring court: Judgment of 11 July 2024 in Joined Cases C554/21, C622/21 and C727/21, *Hann-Invest*, EU:C:2024:594, para. 69 ("a practice such as that at issue in the main proceedings, according to which the judicial decision adopted by the judicial panel responsible for the case may be regarded as final and sent to the parties only if its content has been approved by a registrations judge who does not form part of that judicial panel, is incompatible with the requirements inherent in the right to effective judicial protection").

118 Judgment of 20 April 2021 in Case C-896/19, *Repubblika*, EU:C:2021:31, para. 29.

119 Judgment of 16 February 2022 in Case C156/21, *Hungary v. Parliament and Council*, EU:C:2022:97, para. 159.

120 The Court of Justice has no jurisdiction over EU "soft law" mechanisms such as the Council's annual rule of law dialogue, the Commission's Justice Scoreboard or the Commission's Annual Rule of Law Report do not provide for the adoption of any legally binding measures. This does not mean, however, that findings to be found in EU reports or indeed, non-EU reports (e.g. Venice Commission opinions), cannot be referred to by parties in support of their positions or by national courts when they submit a request for a preliminary ruling. For further analysis, see 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.

violations of the rule of law/EU's foundational values at member state level. While the scope of the EU's (exceptional) Article 7 TEU procedures is not confined to areas covered by EU law – they may be activated to monitor and assess actions/inactions of national authorities *in any area*, including in areas *not* connected to EU law – the CJEU's jurisdiction is strictly limited.[121] While the added-value of Article 7 TEU is theoretically significant as it may in principle be used to examine any national development in any member state – in the case of Poland, the Council has regularly discussed developments in relation to Poland's Constitutional Tribunal, the National Council for the Judiciary, the Supreme Court as well as ordinary courts – natural or legal persons cannot activate Article 7 TEU procedures or compel relevant actors (one third of the member states, the European Parliament or the Commission) to do so. And while there have been attempts to challenge refusals from the Commission to activate 7 TEU procedures, the General Court has rejected all of the annulment applications from natural or legal persons lodged with it due to the primarily political nature of these procedures and legal standing rules.[122] There is furthermore no obligation for relevant EU institutions to involve or receive input from experts or relevant stakeholders, such as associations of judges in a backsliding member state, while Article 7 proceedings are ongoing although the European Parliament has done so in practice.[123]

In practice, therefore, the only two main EU avenues to *judicially* challenge national measures remain the infringement procedure and the preliminary ruling procedure. For reasons outlined below, the preliminary ruling procedure has been the one which has been mostly used in practice to bring to the attention of the CJEU national measures targeting courts and judges although the infringement procedure is arguably the most effective to address this type of national measures and prevent irreparable (rule of law) damage from being done.

(i) Challenging national measures under the EU's infringement procedure post Portuguese Judges ruling

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 CJEU via an action for failure to fulfil obligations more widely known under the label of infringement action.

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121 Article 269 TFEU: "The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article." See however Case C-650/18, *Hungary v. Parliament*, EU:C:2021:426 where the Court held admissible Hungary's Article 263 TFEU action directed at the Parliament Article 7(1) activating resolution of 12 September 2018.

122 See e.g. Order of 23 January 2019 in Case T-304/18, *MLPS v. Commission*, EU:T:2019:34 (action dismissed regarding application seeking annulment of a Commission decision refusing to institute Article 7 TEU proceedings against France).

123 See e.g. *Interim report 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*, 20 July 2020, Rapporteur: Juan Fernando López Aguilar, Annex: List of entities or persons from whom the rapporteur has received input: https://www.europarl.europa.eu/doceo/document/A-9-2020-0138_EN.html

From the point of view of judges in backsliding countries or natural and legal persons seeking EU action via infringement actions, there are two main problems to highlight. First, natural and legal persons may lodge individual complaints with the Commission without having the need to demonstrate a formal interest but at the same time, they cannot force the Commission to launch a formal infringement procedure. Second, the Commission's orthodox position is that infringement actions can be launched "only where these concerns constitute, at the same time, a breach of a specific provision of EU law."[124] This narrow understanding proved particularly problematic as regards national measures undermining judicial independence in a systemic way. The CJEU indirectly addressed the merits of this narrow interpretation in the *Portuguese Judges* ruling in which the Court made it clear that infringement actions are possible beyond national measures/practices falling within the scope of EU law as traditionally understood. In other words, infringement actions are possible regarding any national measure and/or practice undermining inter alia the independence of any national court and tribunal that may be called upon to rule on questions relating to the application or interpretation of EU law. This is enough to trigger the application of the EU principle of effective judicial protection.

To date and notwithstanding the Court's clear encouragements to do so, the European Commission has made an extremely parsimonious use of the infringement procedure to protect judicial independence.[125] As of 31 July 2024, we have five infringement actions lodged with the CJEU since 2018. These five actions involve only Poland, notwithstanding evidence of systemic undermining of judicial independence in other EU Member States:

- Case C-192/18, *Commission v Poland (Independence of ordinary courts)* was lodged on 15 March 2018
- Case C-619/19, *Commission v Poland (Independence of the Supreme Court)* was lodged on 2 October 2018
- Case C-791/19, *Commission v Poland (Disciplinary regime for judges)* was lodged on 25 October 2019
- Case C-204/21, *Commission v Poland (Independence and private life of judges)* was lodged on 1 April 2021
- Case C-448/23, *Commission v Poland (Captured Constitutional Tribunal)* was lodged on 17 July 2023 and is still pending as of 31 July 2024

These infringement actions decided to date have resulted in the CJEU finding multiple violations of the second subparagraph of Article 19(1) TEU (effective judicial protection in the fields covered by EU law). The CJEU also found additional provisions of EU law violated by Poland's so-called "judicial reforms" and in particular, Poland's "muzzle law," which was also found in breach of the principle of primacy of EU law, as well as Article 267 TFEU (preliminary ruling procedure), Article 7 (respect for private and family life), Article 8(1) (protection of personal data) of the Charter, as well as several provisions of the EU General Data Protection Regulation.

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

125 For further analysis and references, see K.L. Scheppele, "The Treaties Without a Guardian: The European Commission and the Rule of Law" (2023) 29(2) *The Columbia Journal of European Law* 93.

In addition to Article 258 TFEU, two additional provisions empower the Commission to protect the rule of law while an infringement action is pending before the Court (Article 279 TFEU) and after an infringement action has concluded (Article 260 TFEU).

(ii) Suspending national measures under the EU's infringement procedure

Shortly prior to its *Portuguese Judges* ruling, the Court sought to "nudge" the Commission into adopting a rule of law-enhancing interpretation of Article 279 TFEU, which provides that the CJEU "may in any cases before it prescribe any necessary interim measures."

This new phase began with the Court's order of 27 July 2017 in the *Białowieża Forest* infringement case,[126] 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 order. This subsequently led the Commission on 2 October 2018 to request the Court to order *for the first time* the provisional suspension of the national provisions organising what amounted to a de facto purge of Poland's Supreme Court via an arbitrary retroactive lowering of the Supreme Court judges' retirement age.

A second application for interim measures was subsequently submitted on 23 January 2020 in relation to Poland's infamous 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.

Finally, on 1 April 2021, the Commission belatedly applied for interim measures in relation to Poland's Muzzle Law of 20 December 2019. The Court's order of 14 July 2021 having been openly ignored by Polish authorities, the Commission was left with no choice but to request on 7 September 2021, for *the first time* in relation to national measures relating to judicial independence matters, the imposition of a daily penalty payment of €1,000,000 per day. The Court agreed on 27 October 2021[127] 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 if it fails to do so, until the date of delivery of the judgment closing the proceedings in Case C-204/21.

Poland's government at the time publicly indicated that it would refuse to pay the daily penalty payment which forced the Commission to begin deducting in 2022 the unpaid amounts from EU funding allocated to Poland. Polish authorities subsequently claimed to have complied with the Court's order, but the Court still found in a subsequent order of 21 April 2023 that that the measures put forward by Polish authorities were not sufficient to fully comply with its order of 14 July 2021. The vice-president however reduced the amount of the periodic penalty payment to €500,000 per day on account of some degree of compliance such as the abolition of the Disciplinary Chamber.[128] In the absence of full compliance, Polish

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

127 Case C-204/21 R, EU:C:2021:878.

128 Case C-204/21 R-RAP, EU:C:2023:334.

authorities accumulated close to €570,000,000 in unpaid penalty payment by the time the Court of Justice issued its judgment on the merits on 5 June 2023 regarding the "Muzzle Law."

In the most recent judgment to date connected to Poland's non-compliance with CJEU orders imposing periodic penalty payments, the General Court held that the Commission is entitled to offset amounts payable in respect of the periodic penalty payment accumulated by Poland on account of its violation of a Court's order relating to mining activities in Turów (total of €68.5m) against amounts owed to Poland by the EU.[129] In the same judgment of 29 May 2024, the General Court recalled that "the purpose of imposing a periodic penalty payment to ensure compliance with the interim measures adopted by the court hearing the application for interim measures is to guarantee the effective application of EU law, such application being an essential component of the rule of law."[130]

From the point of view of natural and legal persons, the Commission has full discretion whether to launch infringement actions and if so, whether to apply for interim measures. This should not prevent judges, judicial associations or indeed anyone from requesting the Commission to do so through an individual infringement complaint – most recently, multiple complaints have been lodged with the Commission by judges and court staff in Hungary regarding their low level of remuneration[131] – or lobby MEPs to request the Commission to do so but even where the Parliament has formally done so via resolutions, the Commission has more often than not ignored the Parliament's requests. When it comes to sanctioning non-compliance with infringement rulings, the Commission has similarly full discretion whether to lodge a case with the CJEU under Article 260 TFEU in a situation where a member state is disregarding CJEU rulings.

(iii) Sanctioning non-compliance with CJEU infringement rulings

Under Article 260(1) TFEU, the Commission may bring a case before the CJEU and request the Court to impose a lump sum and/or penalty payment should the Court agree with the Commission that the relevant member state has failed to comply with a previous judgment or judgments of the Court of Justice. It is for the Commission to propose a financial amount but for the Court to decide on the final amount.

Notwithstanding evidence of increasing systemic non-compliance with CJEU orders and judgments and the European Parliament's repeated calls for more decisive action under both Articles 258 and 260 TFEU, the Commission has also made an extremely parsimonious use of this avenue. A recent CJEU judgment issued on the basis of Article 260 TFEU must however be noted (see Table 8 below). While the subject-matter of the litigation is not directly about judicial independence matters, the case concerns *deliberate* and *systemic* non-compliance with CJEU judgments – a basic yet crucial rule of law issue – by Hungarian authorities over

129 Judgment of 29 May 2024 in Joined Cases T200/22 and T314/22, *Poland v. Commission*, EU:T:2024:329.

130 Ibid., para. 31.

131 See Res Judicata, Multiple complaints from Hungarian judiciary received by the European Commission, 8 August 2024: https://resiudicata.hu/en/multiple-complaint-from-hungarian-judiciary-received-by-the-european-comission/

a sustained period of time. As the Court held, "a prolonged failure to comply with a ruling of the Court of Justice in itself seriously undermines the principle of legality and the principle of *res judicata* in a Union based on the rule of law."[132] The judgment shows not only the untapped potential of this provision to sanction backsliding in the form of deliberate and systemic disregard of CJEU judgments but also the Court's readiness to use its wide discretion to remedy the Commission's cautious approach when it comes to calculating financial penalties in this respect.

Table 8: Financial penalties ordered by the CJEU on account inter alia of an explicit and prolonged refusal to comply with prior CJEU judgment

Judgment of 13 June 2024 in Case C-123/22, *Commission v. Hungary (Reception of applicants for international protection II)*	
Commission's calculation of the financial penalties to be imposed on Hungary: (i) a minimum lump sum of EUR 1,044,000 (ii) a penalty payment of EUR 16,393 per day until full compliance with the previous judgment of the Court in Case C-808/18	Court's calculation of the financial penalties to be imposed on Hungary: 132. In the light of the foregoing considerations, and in particular the exceptional seriousness of the infringements at issue and Hungary's failure to cooperate in good faith to bring them to an end, the Court considers it appropriate to impose a lump sum, the amount of which must be set at EUR 200,000,000. 142. In the present case […] the Court considers it appropriate to impose a penalty payment of EUR 900,000 per day in respect of Article 6 and Article 46(5) of Directive 2013/32, and to impose a penalty payment of EUR 100,000 per day in respect of Articles 5, 6, 12 and 13 of Directive 2008/115.

This judgment is particularly striking as the Court ordered a record lump sum payment, which is "over 191 times what the Commission had sought"[133] and a record-equaling daily penalty payment which is "over 61 times what the Commission had sought." This judgment also represents "a significant precedent both in the willingness the Court showed to see repeated breaches of directives as symptomatic of wider violations of more fundamental EU norms, and its willingness to impose genuinely significant penalties in a rule of law case."[134]

132 Judgment of 13 June 2024 in Case C-123/22, *Commission v Hungary (Reception of applicants for international protection II)*, EU:C:2024:493, para. 102.

133 G. Barett, "Rule of Law Chickens Coming Home to Roost: The Ruling in Case C-123/22 European Commission v Hungary", *VerfBlog*, 6 June 2024: https://verfassungsblog.de/rule-of-law-chickens-to-roost/

134 Ibid.

By comparison, the ECHR system may appear less well-equipped to address deliberate and systemic non-compliance with ECtHR judgments, which are essentially declaratory in nature. It is furthermore primarily up to the respondent state, subject to the Council of Europe's Committee of Ministers' supervision, to choose the means to be used in its domestic legal order to discharge its obligation to comply with ECtHR judgments provided that such means are compatible with the conclusions set out in the Court's judgments.[135] The only "exceptional" option available to the Court is to indicate specific measures to put an end to violations it has found to exist. This means that at the end of the day, a country whose authorities have decided to openly disregard ECtHR judgments may suffer no financial consequences whatsoever. After 8 years of deliberate non-execution of the ECtHR *Baka* judgment which concerns the undue and premature termination of the then president of the Hungarian Supreme Court,[136] the Committee of Ministers of the Council of Europe was not able to go beyond reiterating its "utmost concern" about the continued "absence of progress" and "send a letter to the Hungarian authorities conveying the Committee's deep concern about the present situation".[137]

In light of the above, it is more understandable why the European Parliament decided to bring an annulment action against the Commission for finding last December that notwithstanding all evidence to the contrary, Hungarian authorities had taken relevant steps to remedy deficiencies in judicial independence in that country.[138] The EU's system of remedies however one key additional avenue to bring to the CJEU's attention this type of deficiencies.

(iv) Challenging national measures under the EU's preliminary ruling procedure post *Portuguese Judges* ruling

While the CJEU has no jurisdiction to directly decide national disputes, the Court can answer a request for a preliminary ruling if EU law applies to the national case in the main proceedings. In the rule of law field, the EU's preliminary ruling procedure (Article 267 TFEU) has proved to be the procedure that has been more regularly used to challenge the compatibility of national measures or practices with EU rule of law requirements.[139] By contrast, while the ECHR system also "provides for a right for the apex national courts to refer interpretative questions to the ECtHR" in a way reminiscent of the EU's preliminary ruling procedure,[140] to date, none of the

135 Judgment of 9 January 2013 in *Volkov v. Ukraine*, no. 21722/11, CE:ECHR:2013:0109JUD002172211, para. 194.

136 Judgment of 23 June 2016 in *Baka v. Hungary* [GC], no. 20264/12, CE:ECHR:2016:0623JUD002026112.

137 Council of Europe's Committee of Ministers, Decision regarding the non-execution of the ECtHR judgment in *Baka v. Hungary* (application no. 20261/12), 13 June 2024, CM/Del/Dec(2024)1501/H46-15. To understand how Hungarian authorities have organised systemic non-compliance with ECtHR judgments, see more generally, U.A. Kos, "Controlling the Narrative: Hungary's Post-2010 Strategies of Non-Compliance before the European Court of Human Rights" (2023) *European Constitutional Law Review* 195.

138 See pending Case C-225/24.

139 From 1 October 2024, the General Court will have jurisdiction to answer requests for a preliminary ruling in six areas such as the common system of VAT. The CJEU has justified this transfer on account inter alia of the "increase in the complexity and sensitivity of cases concerning, in particular, matters of a constitutional nature or related to fundamental rights". By sensitive issues, one must understand cases concerning inter alia the preservation of the rule of law at Member State level. See CJEU Press Release No 125/24, 12 August 2024.

140 Cameron, op. cit., p. 16.

few requests for an advisory opinion received by the ECtHR raised rule of law backsliding matters.[141]

In the EU legal order, reliance on Article 267 TFEU to address potential violations of EU rule of law requirements at member state level did not materialise until after the CJEU's ruling of 2018 in *Portuguese Judges*. In short, this judgment proved decisive as it enabled private parties – *including national judges but also prosecutors acting as plaintiffs* – to directly rely upon the second subparagraph of Article 19(1) TEU to challenge, in the context of domestic proceedings, national measures or practices on account of their alleged violation of the EU requirements of effective judicial protection in situations where Article 47 of the Charter could not be relied upon. In turn, this has allowed national courts to ask the CJEU to interpret these EU requirements with the view of enabling them to subsequently decide whether relevant national rules are compatible with EU law as it is up to the national referring courts to disapply, if necessary, the national rules they held to be incompatible with EU law.

The first significant preliminary ruling delivered by the CJEU post *Portuguese Judges* concerned Poland's infamous, and now defunct, Disciplinary Chamber. In its *AK* judgment, the Court reiterated that "although the organisation of justice in the member states falls within the competence of those member states, the fact remains that, when exercising that competence, the member states are required to comply with their obligations deriving from EU law."[142] The Court further recalled that the second subparagraph of Article 19(1) TEU is applicable whenever the national court called on to dispose of relevant national cases is "required to rule on questions concerning the application or interpretation of EU law and thus falling within the fields covered by EU law within the meaning of the second subparagraph of Article 19(1) TEU."[143]

Since then, the CJEU has received a rapidly increasing number of national requests for a preliminary ruling asking the Court to interpret second subparagraph of Article 19(1) TEU in relation to a variety of rule of law related national measures or practices. To date, most of these requests have originated from Polish courts with more than 40 requests raising questions directly related to the potential incompatibility of different Polish measures or practices with the principle of effective judicial protection. In connection to Poland's rule of law crisis, more than a dozen of additional requests for a preliminary ruling have also been submitted by judges in other EU member states, and in particular the Netherlands,[144] in respect of European arrest warrants issued by potentially compromised Polish courts. In addition, Romanian courts have also been particularly active with a total of 16 request for a preliminary ruling decided to date by the CJEU in seven judgments on the merits in relation

141 The possibility to request advisory opinions from the ECtHR is to be found in Protocol 16 which came into force on 1 August 2018. As of 1 July 2024, 7 advisory opinions have been delivered and 3 requests for an advisory opinion rejected: https://www.echr.coe.int/advisory-opinions

142 Judgment of 19 November 2019 (GC) in Joined Cases C585/18, C624/18 and C625/18, *AK and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, para. 75.

143 Ibid., para. 84.

144 See e.g. Judgment of 22 February 2022 (GC), Joined Cases C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*, EU:C:2022:100.

to national measures or practices whose compatibility with EU rule of law requirements were doubtful.[145]

However, not every request has been held admissible. The Court will normally find national references for a preliminary ruling admissible in a situation where one of the parties to a national dispute is a judge subject to national measures whose compatibility with EU law is being challenged. By contrast, in a situation where the judge(s) hearing a national dispute may be the subject of proceedings adopted on the basis of national legal provisions whose compatibility with EU effective judicial protection requirements is doubtful, the references will be held inadmissible if the dispute in the main proceedings pending before the national referring judge(s) are *not* connected with EU law. Two examples below to help distinguish between these two situations.

Judgment of 2 March 2021 (GC) in Case C-824/18, A.B. et al (Appointment of judges to the Supreme Court – Actions)	**Judgment of 26 March 2020 (GC) in Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny***
Subject-matter: Legislative amendments to the Polish law on the National Council of the Judiciary (NCJ) with these amendments having the effect of preventing any effective judicial review of the decisions adopted by this body proposing (or not proposing) candidates for the office of judge to the Polish president. Parties: Five judges lodged appeals against NCJ resolutions deciding not to present to the president proposals for their appointments to the Supreme Court and proposing instead other candidates for those positions. Outcome: Two requests held admissible as the arguments put forward by the Polish government as regards the scope of application of Article 19(1) TEU and Article 47 CFR and whether they may be relied upon to review national rules governing the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures, relate to the substance of the question referred and cannot therefore lead to the inadmissibility of the questions submitted by the Polish referring judges.	Subject-matter: The first case concerns a request for payment of public funding and the second case concerns criminal proceeding brought against three persons. Following the submission of their requests for a preliminary ruling, the two Polish judges were subject to disciplinary proceedings on account of their referrals. Parties: In the first case, a Polish town brought proceedings against the state treasury. In the second, the Polish state brought criminal proceedings against three individuals for kidnappings. Outcome: Two requests held inadmissible on account of the lack of a connecting factor between the disputes pending before the referring judges and EU law and in particular the second subparagraph of Article 19(1) TEU to which the questions referred by the two Polish judges relate. While the Court does establish that the mere prospect of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is not compatible with EU law, disciplinary action against a referring judge does not make the reference admissible if the dispute itself is not connected to EU law.

145 Judgment of 18 May 2021 (GC) in Joined Cases C83/19, C127/19 and C195/19, Cases C291/19, C355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' et al*, EU:C:2021:393; Judgment of 21 December 2021 (GC) in Joined Cases C357/19, C379/19, C547/19, C811/19 and C840/19, *Euro Box Promotions and Others*, EU:C:2021:1034; Judgment of 22 February 2022 (GC) in Case C430/21, RS *(Effect of the decisions of a constitutional court)*, EU:C:2022:99; Judgment of 11 May 2023 in Case C-817/21, *Inspecția Judiciară*, EU:C:2023:391; Judgment of 7 September 2023 in Case C216/21, *Asociația 'Forumul Judecătorilor din România'*, EU:C:2023:628; Judgment of 24 July 2023 (GC) in Case C-107/23 PPU, *Lin*, EU:C:2023:606; Judgment of 8 May 2024 in Case C-53/23, *Asociația 'Forumul Judecătorilor din România'*, EU:C:2024:388.

An important exception to the second situation outlined above relates to *procedural difficulties* faced by the referring judges regardless of the subject-matter of the dispute pending before them. In a situation where the national dispute is *not* connected to EU law in a substantive way, the reference for a preliminary ruling may still be found admissible if the referring judges are faced, in the context of the main proceedings before them, with questions of a *procedural nature*, which must be settled in *limine litis* and whose solution is dependent on an interpretation of provisions and principles of EU law with which the questions referred are concerned.

This explains why notwithstanding the fact that the national dispute pending before Polish Judge Igor Tulya was *not* connected to EU law in Case C-615/20 – it concerned criminal proceedings brought by the Regional Public Prosecutor's Office against multiple defendants for various offences – his questions were held admissible in this instance (contrary to his reference in Case C-563/18 above) as they sought to determine in light of EU law whether he "is still justified in continuing the examination of the case in the main proceedings notwithstanding the resolution at issue which suspended him from his duties."[146] As explained by the Court, "questions referred for a preliminary ruling which seek in that way to enable a referring court to settle, *in limine litis*, procedural difficulties such as those relating to its own jurisdiction to hear and determine a case pending before it, or which concern the legal effects which must or must not be conferred on a judicial decision which potentially precludes the continuation of the examination of such a case by that court, are admissible under Article 267 TFEU."[147]

1.4.4 Overview of national judiciary-related measures and practices examined by the CJEU to date

To illustrate the national measures and practices related to judges, specific courts, and national judiciaries that might come before the CJEU, a list of examples will be provided below. First, examples of national legislation found incompatible with the second subparagraph of Article 19(1) TEU in infringement actions will be given:

- National legislation concerning the lowering of the retirement age of judges of a Supreme Court and granting the president of the country the power to authorize affected judges to continue in active judicial service beyond the new retirement age on a case-by-case basis.[148]

- National legislation establishing a disciplinary regime applicable to judges of Supreme Court and to judges of the ordinary courts which, inter alia, established a new disciplinary chamber; allowed the content of judicial decisions adopted by judges of the ordinary courts to be classified as a disciplinary offence; and also allowed the right of courts and

146 Judgment of 13 July 2023 in Joined Cases C-615/20 and C-671/20, *YP and Others (Lifting of a judge's immunity and his or her suspension from duties)*, EU:C:2023:562, para. 46.

147 Ibid., para. 47.

148 Judgment of 24 June 2019 in Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531.

tribunals to submit requests for a preliminary ruling to the Court of Justice to be restricted by the possibility of triggering disciplinary proceedings.[149]

- National legislation amending rules on the organization of ordinary courts and Supreme Court and limiting or excluding the possibility for a national court to ensure that individuals claiming rights under EU law have access to an independent and impartial tribunal previously established by law.[150]

Within the framework of the preliminary ruling procedure, the Court found it had jurisdiction to interpret the second subparagraph of Article 19(1) TEU in an increasingly diverse types of national proceedings such as:

- National proceedings between a Spanish judge and the Spanish Ministry of Justice concerning the reduction of his remuneration in the context of the Spanish State's budgetary policy guidelines.[151]

- National proceedings between a Maltese association dedicated to the protection of the rule of law and Malta's prime minister concerning, inter alia, the conformity with EU law of the provisions of the Constitution of Malta governing the procedure for the appointment of members of the judiciary.[152]

- National proceedings between a Romanian association of judges and the national Judicial Inspectorate concerning the latter's refusal to provide information of public interest relating to its activity.[153]

- National appeal brought by a Polish judge before the Supreme Court accompanied by an application for the recusal of all judges sitting in the Chamber of Extraordinary Control and Public Affairs which is to examine that appeal follow the rejection by the National Council of the Judiciary of his challenge against the decision ordering his forced transfer.[154]

- National proceedings brought against several private individuals and pending before adjudicating panels of a Polish Regional Court which include judges seconded in accordance with a decision of the Minister for Justice pursuant the law on the organization of the ordinary courts.[155]

- National proceedings brought by a private individual who was the subject of criminal proceedings in Romania, at the end of which he was convicted, seeking to challenge the

149 Judgment of 15 July 2021 in Case C-791/19, *Commission v. Poland (Disciplinary Regime of Judges)*, EU:C:2021:596.

150 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.

151 Judgment of 7 February 2019 in Case C-49/18, *Escribano Vindel*, EU:C:2019:106.

152 Judgment of 20 April 2021 in Case C-896/19, *Repubblika v Il-Prim Ministru*, EU:C:2021:31.

153 See Case C83/19 in the judgment of 18 May 2021 in Joined Cases C83/19, C127/19, C195/19, C291/19, C355/19 and C-397/19, *Asociaţia 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393.

154 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.

155 Judgment of 16 November 2021 in Joined Cases C748/19 to C754/19, *Criminal proceedings against WB and Others*, EU:C:2021:931.

duration of criminal proceedings instituted in response to a complaint lodged by his wife against a prosecutor and two judges involved in these proceedings.[156]

In providing the CJEU with the opportunity to interpret the second subparagraph of Article 19(1) TEU in an extremely varied set of domestic proceedings, national referring courts have enabled the Court to clarify inter alia that this provision (on its own or in conjunction with other provisions such as Article 2 TEU or other principles such as the principle of primacy of EU law):

- *precludes* national provisions relating to the organisation of justice which are such as to constitute a reduction, in the Member State concerned, in the protection of the value of the rule of law, particularly the guarantees of judicial independence.[157]

- *precludes* rules applicable to transfers without consent of judges from one court to another or between two divisions of the same court present, like the rules governing disciplinary matters, which do not provide the necessary guarantees to prevent any risk of judicial independence being jeopardized by direct or indirect external interventions.[158]

- *precludes* provisions of national legislation pursuant to which the Minister for Justice may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.[159]

- *precludes* rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability but does not preclude rules or a practice under which the decisions of the national constitutional court are binding on the ordinary courts, provided that the national law guarantees the independence of that constitutional court.[160]

- *does not preclude* a piece of national legislation pursuant to which the scheme for the promotion of judges to a higher court is based on an assessment, carried out by a board composed of (i) the president of that higher court and (ii) members of that court, of the work and conduct of the persons concerned, *provided* that the substantive conditions and procedural rules governing the adoption of decisions relating to effective promotion are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been promoted.[161]

156 Judgment of 22 February 2022 in Case C-430/21, *RS (Effects of a constitutional court rulings)*, EU:C:2022:99.

157 Judgment of 20 April 2021 in Case C-896/19, *Repubblika v Il-Prim Ministru*, EU:C:2021:31.

158 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.

159 Judgment of 16 November 2021 in Joined Cases C748/19 to C754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, EU:C:2021:931.

160 Judgment of 22 February 2022 in Case C-430/21, *RS (Effects of a constitutional court rulings)*, EU:C:2022:99.

161 Judgment of 7 September 2023 in Case C216/21, *Asociația 'Forumul Judecătorilor din România'*, EU:C:2023:628.

The *non-exhaustive* list of examples above shows that referring courts have asked the CJEU to provide them with an interpretation of the second subparagraph of Article 19(1) TEU in the context of very diverse proceedings of an *administrative, civil or criminal* nature. The most recent example of preliminary ruling judgment on this legal basis – and the first one originating from Croatian courts – is also the first example of the CJEU addressing judicial independence matters in the context of *commercial* proceedings.[162] In its judgment in this case, the Court clarified for the first time that Article 19(1):

- *precludes* national law from providing for a mechanism internal to a national court pursuant to which (i) the judicial decision adopted by the judicial panel responsible for the case may be sent to the parties for the purpose of closing the case concerned only if its content has been approved by a registrations judge who is not a member of that judicial panel; (ii) a section meeting of that court has the power to compel, by putting forward a 'legal position', the judicial panel responsible for a case to alter the content of the judicial decision which it previously adopted, even though that section meeting also includes judges other than those belonging to that judicial panel and, as the case may be, persons from outside the court concerned, before whom the parties do not have the opportunity to put forward their arguments.

To date, however, most of the national proceedings that led to preliminary rulings concerning the interpretation of Article 19(1) TEU have directly involved individual judges or associations dedicated to the defence of the rule of law as *plaintiffs*.[163]

Poland's rule of law crisis also led to multiple requests originating from *adjudicating* Polish judges in relation to disciplinary proceedings and/or sanctions imposed against them; in relation to disciplinary proceedings and/or sanctions imposed against other judges; or in relation to the presence of irregularly appointed "judges" on the adjudicating panels on which the regularly appointed judges sit.

Subsequently, there have been an increasing number of references requests (from Romanian courts) arising out of proceedings where the judges or prosecutors are *defendants* following *private* complaints regarding judges or prosecutors on account of their judicial activities.

A pending reference request – the first from Bulgaria requesting an interpretation of the second subparagraph of Article 19(1) TEU to the best of our knowledge – offers a rare example of domestic proceedings between a *public* body and judges as *defendants*. In this instance, the Inspectorate of the Supreme Judicial Council applied to the referring court for access to the banking data of several judges and prosecutors, which led, in turn, the referring court to ask the CJEU whether EU law precludes such requests from being made by a body whose constitutionally stipulated term of office had come to an end?[164]

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162 Grand Chamber Judgment of 11 July 2024 in Joined Cases C554/21, C622/21 and C727/21, *Hann-Invest*, EU:C:2024:594.

163 On this aspect, see most recently S. Doroga and R. Bercea, "The Role of Judicial Associations in Preventing Rule of Law Decay in Romania: Informal Communication and Strategic Use of Preliminary References" (2023) 24 *German Law Journal* 1393.

164 Case C-313/23 (pending).

Notwithstanding the ever-increasing number of references for a preliminary ruling asking the CJEU to clarify the type of national measures or practices that are precluded by the second subparagraph of Article 19(1) TEU, it "does not seek to redesign national judiciaries" but rather "limits itself to examining whether rules that concern the organization and functioning of national courts"[165] comply with core EU rule of law requirements which are themselves enshrined in ECHR law and in the national law of each of the EU member states.

165 K. Lenaerts, "New Horizons for the Rule of Law Within the EU" (2020) 21 *German Law Journal* 29, p. 33.

PART II – GENERAL PRINCIPLES DEVELOPED BY THE EUROPEAN COURTS TO ADDRESS RULE OF LAW BACKSLIDING

Writing extra-judicially in 2021, Robert Spano, then President of the ECtHR, explained that due to backsliding developments in the legal space of the Council of Europe,

> the normative impact of the rule of law has been increasing in the case-law of the Court, in particular in cases dealing with the independence and impartiality of the judiciary. However, judicial independence is only one of the prominent manifestations of a broader development towards a more robust enforcement of the rule of law which is now permeating the Court's jurisprudence. It is, and will continue to be, an important function of the Strasbourg Court to give concrete and effective expression to the principle of the rule of law under the Convention.[166]

Poland's rule of law crisis has similarly led the CJEU to address what the CJEU president has described as authoritarian tendencies[167] in an increasingly number of cases. Writing extra-judicially in 2023, the CJEU president emphasized that the Court has now "developed and consolidated a line of case law that clarifies, in general, the meaning of the rule of law within the EU and, in particular, that of judicial independence."[168]

Rather than offering a chronological overview of both courts' case law, an overview of the general or guiding principles developed by Europe's two supranational courts will be offered instead. This overview will be limited to the case law post the ECtHR judgment in *Ástráðsson v. Iceland*[170] (informally known as *Icelandic Judges*) and the CJEU judgment in *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*[171] (informally known as *Portuguese Judges or AJSP*). These two judgments provide a starting point for each court's answer to rule of law backsliding developments especially as they were then unfolding in Poland.[172] In fact, the *Portuguese Judges* ruling made reference to the first ruling issued by the second section of the ECtHR in *Icelandic Judges*.[173] Since then, there are multiple examples of the ECtHR and

166 Spano, "The rule of law as the lodestar of the European Convention on Human Rights", op. cit., p. 2.

167 Lenaerts, "On Checks and Balances", op. cit., p. 33.

168 Ibid., p. 61.

169 See annexes I and II for a chronological overview of the most important orders and judgments from the CJEU post *Portuguese Judges* and the ECtHR post *Icelandic Judges*.

170 Judgment of 1 December 2020 in *Ástráðsson v. Iceland*, no. 26374/18, CE:ECHR:2020:1201JUD002637418, para. 242.

171 Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

172 As noted by experts at the time. See e.g. L. Pech and S. Platon, "Rule of Law backsliding in the EU: The Court of Justice to the rescue?", *EU Law Analysis*, 13 March 2018: http://eulawanalysis.blogspot.co.uk/2018/03/rule-of-law-backsliding-in-eu-court-of.html ("The Court's ruling in Case C-64/16 may be understood as the Court's answer to the worrying process of 'rule of law backsliding' first witnessed in Hungary and now being seen in Poland"); H. P. Graver, 'A New Nail in the Coffin for the 2017 Polish Judicial Reform: On the ECtHR judgment in the case of Guðmundur Andri Ástráðsson v. Iceland', *Verfblog*, 2 December 2020: <https://verfassungsblog.de/a-new-nail-in-the-coffin-for-the-2017-polish-judicial-reform/> ("The significance of the judgement must be assessed on the background of the ongoing changes in the relationship between the judiciary and the legislative and executive powers in notably Hungary and Poland").

173 Judgment of 12 March 2019 in *Ástráðsson v. Iceland*, no. 26374/18, CE:ECHR:2019:0312JUD002637418.

the CJEU relying on each other's findings – so much so that a former president of the ECtHR has invoked "a symbiotic relationship between the two courts"[174] in the field of judicial independence – which further warrants the guide of ECtHR and CJEU general principles de concert.

CJEU reliance on ECtHR case law is not new, including in its early rulings on judicial independence,[175] but CJEU references to ECtHR judgments have been particularly noticeable in the context of its judgments addressing different aspects of Poland's rule of law crisis. This should not surprise as "an ECtHR judgment can be used by national judges as part of the basis for requesting a preliminary ruling from the European Court of Justice (ECJ) or invoked by the European Commission to initiate infringement proceedings, or as evidence that an infringement has occurred. ECtHR case law also serves to legitimize ECJ intervention. It can be used by the ECJ to back up its factual and legal conclusions in different ways."[176] Similarly, applicants and/or third-party interveners in cases pending before the ECtHR – also the Court itself – have relied upon CJEU rulings as well as relevant EU law developments more broadly to guide its analysis and support its factual and legal conclusions similarly to what the CJEU has done.

This process of mutual reliance and interactions is welcome although the CJEU has in some circumstances abstained from taking full account of the ECtHR's rule of law findings even when directly relevant to the subject-matter of the EU case.[177] The CJEU appears to have done so whenever ECtHR findings would force it to more forcefully confront systemic rule of law issues which may have detrimental systemic consequences on the functioning of the EU legal order from its point of view.[178] On the other hand, the CJEU has essentially subcontracted to

174 Spano, "The rule of law as the lodestar of the European Convention on Human Rights", op. cit., p. 13.

175 In so far as the EU Charter sets out rights corresponding to rights guaranteed under the ECHR, Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed under the ECHR. This means inter alia as the CJEU must ensure that the interpretation which it gives to Article 47 of the Charter safeguards a level of protection which does not fall below the level of protection established in Article 6(1) ECHR, as interpreted by the ECtHR.

176 I. Cameron, *The European Court of Human Rights and Rule of Law Backsliding*, SIEPS European Policy Analysis 2023:4, p. 1.

177 See e.g. Poland's "muzzle law" infringement judgment of the Court of Justice in Case C204/21, *Commission v. Poland* where the Court does not make a single reference to ECtHR case law notwithstanding the Commission's reliance on the ECtHR judgment of 22 July 2021 in *Reczkowicz v. Poland* which found that Poland's Disciplinary Chamber did not constitute a tribunal established by law.

178 See e.g. the example of the ECtHR's finding in relation to Poland's captured NCJ. According to the ECtHR, the procedure for judicial appointments involving the "neo-NCJ" is *inherently deficient*. For the ECtHR, this amounts to a "systemic defect" which affects all judges so appointed which means inter alia that the legitimacy of any court composed of "neo-judges" is *systematically compromised*. See Judgment of 23 November 2023 in *Wałęsa v. Poland*, no. 50849/21, CE:ECHR:2023:1123JUD005084921, para. 324. The CJEU has ignored this finding and continues to require national courts to decide for themselves on a case-by-case basis whether the involvement of the neo-NCJ may give rise to any doubt as regards the independence of the neo-judges by taking account of all relevant factors and conditions. See e.g. Judgment of 21 December 2023 in Case C-718/21, *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*, EU:C:2023:1015, para. 64. For a broader critique of the CJEU, see D. Kochenov and P. Bárd, "Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe" (2022) 60 *Journal of Common Market Studies* 150.

the ECtHR the task of deciding when a national court ceases to be a court within the meaning of Article 267 TFEU so as to avoid deciding this issue for as long as possible.[179]

1. General principles in the jurisprudence of the ECtHR post *Icelandic Judges* judgment of 1 December 2020[180]

On 12 March 2019, the Second Section of the ECtHR issued a judgment, by five votes to two, that there had been a violation of Article 6(1) as regards the right to a tribunal established by law on account of grave breaches committed by Icelandic authorities in relation to the appointment of a judge to the Icelandic Court of Appeal.[181] A Grand Chamber referral request submitted by the Icelandic government was subsequently accepted leading to the Grand Chamber judgment of 1 December 2020.

In this judgment, the Grand Chamber of the ECtHR largely upheld the "logic and the general substance of the test" introduced by the Second Section to determine when irregularities in a judicial appointment procedure must be considered as sufficiently serious to entail a violation of the right to a tribunal established by law.[182] According to this revised threshold test designed to help national courts decide (assuming there are independent courts left) when irregularities are of such gravity that they impair the very essence of the right to a tribunal established by law, three steps must be distinguished: Step 1) Has there been a manifest breach of domestic law? Step 2) If so, was the breach (or breaches) of domestic law pertaining to any *fundamental* rule of the judicial appointment procedure? and Step 3) was the alleged violation (or violations) of the right to a tribunal established by law effectively reviewed and remedied by the domestic courts in a Convention-compliant manner?[183]

By solemnly confirming that that the concept of "established by law" encompasses by its very nature the process of appointing judges, the Grand Chamber not only sent an implicit but unmistakable warning to Polish authorities which by then were forcing through hundreds of irregular judicial appointments, but also decisively paved the way for CJEU judges following suit, starting with a case where irregularities were raised in relation to an EU judicial appointment procedure rather than a national one.[184]

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179 See e.g. B. Grabowska-Moroz, "Judicial dialogue about judicial independence in times of rule of law backsliding: Getin Noble Bank" (2023) 60 *Common Market Law Review* 797.

180 For an overview of the key principles reaffirmed or developed by the Court pre-*Icelandic Judges* in cases involving applicant judges, see Aquilina, *op. cit.*, p. 16 et seq. To give an example of a new general principle developed by the Court in this period, one may refer to the principle that law "directed against a specific person are contrary to the rule of law". See Judgment of 23 June 2016 in *Baka v. Hungary* [GC], no. 20264/12, CE:ECHR:2016:0623JUD002026112, para. 154.

181 Judgment of 12 March 2019 in *Ástráðsson v. Iceland*, no. 26374/18, CE:ECHR:2019:0312JUD002637418.

182 Judgment of 1 December 2020 in *Ástráðsson v. Iceland*, no. 26374/18, CE:ECHR:2020:1201JUD002637418, para. 242.

183 Ibid., paras 243-252.

184 Judgment of 26 March 2020 in Joined Cases C542/18 RX-II, *Simpson* and C543/18 RX-II, HG, EU:C:2020:232.

1.1 New or refined general principles as regards the "established by law" requirement as laid down in *Icelandic Judges*

Looking beyond this backsliding, which motivated new tests to assess irregular judicial appointments, the *Icelandic Judges* judgment is also significant for the broader considerations in relation to the notion of "tribunal established by law" offered by the Court. This includes the new or refined general principles mentioned by the Court in addition to the general principles the Court reiterated in the same judgment which is primarily about the meaning to be given to the concept of a "tribunal established by law" and its relationship with the other "institutional requirements" under Article 6(1) ECHR, namely, those of independence and impartiality.

As regards the notion of a tribunal established by law, the Court made clear that it "reflects the principle of the rule of law which is inherent in the system of protection established by the Convention and its Protocols, and which is expressly mentioned in the preamble to the Convention."[185]

As regards the notion of "tribunal" and in addition to the requirements outlined in the Court's settled case-law, the Court clarified several aspects as follows:

> "[I]t is inherent in the very notion of a 'tribunal' that it be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law."[186]
>
> "[T]he higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be."[187]
>
> A "merit-based selection not only ensures the technical capacity of a judicial body to deliver justice as a "tribunal", but it is also crucial in terms of ensuring public confidence in the judiciary and serves as a supplementary guarantee of the personal independence of judges."[188]

As regards the notion of "established," the Court observed that:

> This requirement "reflects the principle of the rule of law and seeks to protect the judiciary against unlawful external influence, from the executive in particular, although it is not excluded that such unlawful interference may also emanate from the legislature or from within the judiciary itself."[189]

185 Judgment of 1 December 2020 in *Ástráðsson v. Iceland*, no. 26374/18, CE:ECHR:2020:1201JUD002637418, para. 211.

186 Ibid., para. 220.

187 Ibid., para. 222.

188 Ibid., para. 222.

189 Ibid., para. 226.

> This requirement also "encompasses any provision of domestic law – including, in particular, provisions concerning the independence of the members of a court – which, if breached, would render the participation of one or more judges in the examination of a case "irregular."[190]
>
> It furthermore "calls for strict scrutiny" when it comes to the process of appointment of judges with the Court adding that "breaches of the law regulating the judicial appointment process may render the participation of the relevant judge in the examination of a case "irregular."[191]
>
> "[H]aving regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law", the Court finally considered "that the process of appointing judges necessarily constitutes an inherent element of the concept of "establishment" of a court or tribunal "by law", and an interpretation to the contrary would defy the purpose of the relevant requirement."[192]

As regards the notion of "by law," the Court held that domestic law on judicial appointments must be "couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive."[193]

As regards the interrelationship between the requirements of "independence," "impartiality," and "tribunal established by law," the Court observed that:

> "[W]hile they each serve specific purposes as distinct fair trial guarantees", "a common thread running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers."[194]
>
> "[T]he examination under the 'tribunal established by law' requirement must not lose sight of this common purpose and must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned fundamental principles and to compromise the independence of the court in question. "Independence" refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision making, and it is thus a prerequisite for impartiality."[195]

Finally, as regards the meaning of the rule of law and the interrelationship between this principle and the right to "a tribunal established by law," the Court held that:

> The right to a tribunal established by law "is a reflection of this very principle of the rule of law and, as such, it plays an important role in upholding the separation of powers and the independence and legitimacy of the judiciary as required in a democratic society. That said,

190 Ibid., para. 226.

191 Ibid., para. 226.

192 Ibid., para. 227.

193 Ibid., para. 230.

194 Ibid., para. 233.

195 Ibid., para. 234.

> the principle of the rule of law also encompasses a number of other equally important principles, which, although interrelated and often complementary, may in some circumstances come into competition" such as the principle of legal certainty and the principle of the irremovability of judges during their term of office."[196]
>
> "That said, upholding those principles at all costs, and at the expense of the requirements of "a tribunal established by law", may in certain circumstances inflict even further harm on the rule of law and on public confidence in the judiciary. As in all cases where the fundamental principles of the Convention come into conflict, a balance must therefore be struck in such instances to determine whether there is a pressing need – of a substantial and compelling character – justifying the departure from the principle of legal certainty and the force of *res judicata* and the principle of irremovability of judges, as relevant, in the particular circumstances of a case."[197]
>
> "[W]ith the passage of time, the preservation of legal certainty will carry increasing weight in relation to the individual litigant's right to a "tribunal established by law" in the balancing exercise that must be carried out."[198]

1.2 New or revised case-law principles post *Icelandic Judges*

As the ECtHR's rule of law related case law was already extensive or at least, significantly more developed pre-*Icelandic Judges*[199] than the CJEU's case law pre-*Portuguese Judges*, the development of new or adjusted general principles by the ECtHR has been less all-encompassing in comparison to the similar endeavour undertaken by the CJEU starting with its *Portuguese Judges* ruling.

This may be explained by several reasons. Following its judgment of 21 February 1975 in the case of *Golder v. UK*, the ECtHR has used the rule of law as an interpretative tool for the development of substantive guarantees set forth in the Convention."[200] This means that the principle of the rule of law has long provided "for a methodological point of departure in the examination of any arguable Convention complaint whilst at the same time creating a frame of reference when the Court interprets and applies the rights and freedoms provided for by the Convention."[201] In addition, due to the wider membership of the Council of Europe, the Strasbourg Court had to address multiple complaints *from judges* acting as *individual*

196 Ibid., para. 237.

197 Ibid., para. 240.

198 Ibid., para. 252.

199 See e.g. this assessment from 2008 made in a study submitted to the Council of Europe's Committee of Ministers by the Secretariat, "The Council of Europe and the Rule of Law – An Overview", CM(2008)170, para. 34: "Today, there exists such an impressive body of case-law on rule of law-related requirements that it is not exaggerated to state that the ECHR and the Court are not only instruments for the protection of human rights but also tools for the protection of the rule of law and the collective enforcement of its requirements". See also ECtHR, *Factsheet on Independence of the Justice System*, Press Unit, August 2023: https://prd-echr.coe.int/documents/d/echr/FS_Independence_justice_ENG. The factsheet is 33p long and the great majority of the judgments referred in it precede the *Icelandic Judges* Grand Chamber judgment of 1 December 2020.

200 S. O'Leary, "Europe and the Rule of Law" in M. Bobek and J. Prass (eds.), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020), 37, p. 60.

201 Spano, "The rule of law as the lodestar of the European Convention on Human Rights", op. cit., p. 5.

applicants[202] raising judicial independence violations in a backsliding context prior to 2020, including in one EU member state,[203] although the concept of rule of law backsliding was not yet widely used. By comparison, the rule of law related case law of the CJEU was very limited until its *Portuguese Judges* ruling. This may be explained inter alia by the traditionally more limited scope of application of EU law and a concomitant lack of infringement or preliminary ruling actions lodged with the CJEU even after Hungary's progressive descent into authoritarianism.[204]

As regards the ECtHR, all the new or adjusted general principles can almost exclusively be found in a series of judgments connected to Poland's "rule of law crisis," a description the ECtHR itself has endorsed.[205] The fact that "the case law has so far mainly been about Poland"[206] does not mean that it has no implication for several other states. A recent guide for instance mentioned the relevance of this case law as to Hungary, Croatia, Spain, Romania and Bulgaria.[207]

(i) General principles relating to Article 6(1) ECHR

Post *Icelandic Judges*, the Court has added or further clarified a number of general principles in respect of access to court, the scope of application of judicial independence and removal of judges from a national judicial council in the case of *Grzęda v. Poland*.[208]

The Court emphasized the need to interpret judicial independence in an inclusive manner for the first time: "[T]he need to safeguard judicial independence" is "a prerequisite to the rule of law" and "judicial independence should be understood in an inclusive manner and apply not only to a judge in his or her adjudicating role, but also to other official functions that a judge may be called upon to perform that are closely connected with the judicial system."[209]

On the general issue of judicial reform, the Court stated the obvious, in itself a stark reminder that backsliding strategies pursued by the authorities of some contracting parties led to violations of the most basic foundations of which the ECHR system is founded, in this instance, an independent judiciary: "[T]he Convention does not prevent States from taking

202 See K. Aquilina, "The Independence of the Judiciary in Strasbourg Judicial Disciplinary Case Law: Judges as Applicants and National Judicial Councils as Factotums" in P. Pinto de Albuquerque and K. Wojtyczek (eds.), *Judicial Power in a Globalized World* (Springer, 2019), 1.

203 Judgment of 23 June 2016 in *Baka v. Hungary* [GC], no. 20264/12, CE:ECHR:2016:0623JUD002026112.

204 See e.g. L. Pech and K.L. Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU" (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

205 Judgment of 23 November 2023 in *Wałęsa v. Poland*, no. 50849/21, CE:ECHR:2023:1123JUD005084921, para. 327.

206 I. Cameron, *The European Court of Human Rights and Rule of Law Backsliding*, SIEPS European Policy Analysis 2023:4, p. 13.

207 Ibid.

208 Judgment of 15 March 2022 in *Grzęda v. Poland* [GC], no. 43572/18, CE:ECHR:2022:0315JUD004357218.

209 Ibid., para. 303.

legitimate and necessary decisions to reform the judiciary […] However, any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies."[210]

As regards national judicial councils in general and the right of access to a court for their members in a situation where they are dismissed or removed more specifically, one may emphasise the Court's following general considerations:

> While the Convention does not require to put in a put in place a judicial council as a body responsible for selection of judges, "whatever system is chosen by member States, they must abide by their obligation to secure judicial independence. Consequently, where a judicial council is established, the Court considers that the State's authorities should be under an obligation to ensure its independence from the executive and legislative powers in order to, *inter alia*, safeguard the integrity of the judicial appointment process. […] States are free to adopt such a model as a means of ensuring judicial independence. What they cannot do is instrumentalise it so as to undermine that independence."[211]
>
> Considering the role of national judicial councils "and the link between the integrity of the judicial appointment process and the requirement of judicial independence", "similar procedural safeguards to those that should be available in cases of dismissal or removal of judges should likewise be available where […] a judicial member of the NCJ has been removed from his position."[212]
>
> Considering "the need to protect a judicial council's autonomy, notably in matters concerning judicial appointments, from encroachment by the legislative and executive powers, and its role as a bulwark against political influence over the judiciary", when it comes to "assessing any justification for excluding access to a court with regard to membership of judicial governance bodies", "the strong public interest in upholding the independence of the judiciary and the rule of law" must be taken into account.[213]

Prior to the judgment in *Grzęda v. Poland*, the Court also made an important clarification regarding whether judges owe a special bond of loyalty and trust to the State in *Bilgen v. Turkey*:[214]

> While the employment relationship between a civil servant and the State can traditionally be defined as one based on trust and loyalty to the executive branch in so far as employees of the State are required to implement government policies, the same does not hold true for the members of the judiciary, who play a different and more independent role because of their duty to provide checks on government wrong-doing and abuse of power. Their employment relationship with the State must therefore be understood in the light of the specific guarantees essential for judicial independence. Thus when referring to the special trust and loyalty that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between

210 Ibid., para. 323.

211 Ibid., para. 307.

212 Ibid., para. 345.

213 Ibid., para. 346.

214 Judgment of 9 March 2021, no. 1571/07, CE:ECHR:2021:0309JUD000157107.

> a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can render decisions *a fortiori* based on the requirements of law and justice, without fear or favour.[215]

Accordingly, the Court held that members of the judiciary cannot be deprived of the protection of Article 6 ECHR concerning the conditions of their employment based on the special bond of loyalty and trust to the State.

(ii) General principles relating to Article 8 ECHR

The case of *Tuleya v. Poland* offers the most recent and noteworthy example of a judgment in which the Court was asked by a judge to assess whether the disciplinary inquiries and sanctions he faced violated his right to respect for his private life.[216] In this context, the Court primarily reiterated and applied previously well-established general principles governing the applicability of Article 8 to employment-related disputes, including disputes involving judges.

The Court's judgment in *Tuleya* highlights the following new general principles in the context of a dispute raising apparently for the first time a potential violation of Article 8 ECHR in connection to a preliminary disciplinary inquiry targeting a judge following his request for a preliminary ruling under Article 267 TFEU:

> The mere "threat of imposition of disciplinary liability in connection with the giving of a judicial decision must be seen as an exceptional measure and be subject to restrictive interpretation, having regard to the principle of judicial independence."[217]
>
> The mere "threat of imposition of criminal liability in connection with an act related to the exercise of judicial functions must be seen as an entirely exceptional measure and be subject to restrictive interpretation, having regard to the principle of judicial independence."[218] and
>
> In its assessment of a judge's "complaint under Article 8 the Court must have regard to judicial independence, which is a prerequisite to the rule of law"[219] and the judge's individual circumstances "must be seen against the general context" concerning any eventual reorganisation of the judiciary in the judge's country.[220]

In *Tuleya*, the Court held that the initiation of a disciplinary preliminary inquiry, on the suspicion that a judge's judicial act such as a preliminary ruling request submitted to the CJEU might have amounted to disciplinary misconduct, is "capable of adversely affecting" a judge's "judicial integrity and his professional reputation […] to an extent sufficient

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215 Ibid., para. 79.

216 Judgment of 6 July 2023, *Tuleya v. Poland*, nos. 21181/19 and 51751/20, CE:ECHR:2023:0706JUD004641221.

217 Ibid., para. 437.

218 Ibid., para. 447.

219 Ibid., para. 451.

220 Ibid., para. 452.

to trigger the applicability of Article 8"[221] even if the inquiry has not led to disciplinary proceedings *stricto sensu*.

(iii) General principles relating to Article 10 ECHR

Prior to Poland's rule of law crisis, the Court had dealt with multiple applications arising from judges alleging violations of their freedom of expression. The case of *Baka* provides an overview of the general and well-established principles concerning the freedom of expression of judges.[222] While this case is connected to Hungary's initial backsliding phase and led to a judgment that Hungarian authorities never complied with,[223] the Court had yet to acknowledge and adjust to this new reality where national authorities deliberately aim to dismantle checks and balances in a systemic way. A few years later, the Court however did so in a context which has seen, according to the Court itself, "various reforms undertaken by the Polish government" resulting "in the weakening of judicial independence and adherence to rule-of-law standards,"[224] the Court established a new general principle in relation to the general right to freedom of expression of judges when the rule of law and judicial independence are under threat in the case of judge *Żurek*:

> "[T]he general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat."[225]

In addition, the Court clarified that judges who are speaking on behalf of a judicial council, association or any other representative body may expect a higher degree of protection as a matter of principle:

> When a judge makes statements "with a view to defending the rule of law, judicial independence or other similar values falling within the debate on issues of general interest", "not only in his or her personal capacity, but also on behalf of a judicial council, judicial association or other representative body of the judiciary, the protection afforded to that judge will be heightened."[226]

Interestingly, the CJEU also had to address the extent to which EU law protects freedom of expression of judges not in relation to individual measures but in relation to several general legislative restrictions imposed by Poland's "muzzle law." The CJEU's general principles in this area, and indeed in most areas, are like the ECtHR's ones.

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221 Ibid., para. 379.

222 Judgment of 23 June 2016 in *Baka v. Hungary* [GC], no. 20264/12, CE:ECHR:2016:0623JUD002026112, paras 163-167.

223 Council of Europe's Committee of Ministers, Decision regarding the non-execution of the ECtHR judgment in *Baka v. Hungary* (application no. 20261/12), CM/Del/Dec(2024)1501/H46-15, 13 June 2024.

224 Judgment of 16 June 2022 in *Żurek v. Poland*, no. 39650/18, CE:ECHR:2022:0616JUD003965018, para. 148.

225 Ibid., para. 222.

226 Ibid., para. 222.

2. General principles in the case law of the CJEU post *Portuguese Judges* judgment of 27 February 2018

CJEU President Koen Lenaerts has recognized in extra-judicial interventions the importance of the Court's Grand Chamber judgment in *Portuguese Judges*,[227] which he described as a judgment of the same order as *"Van Gend en Loos, Costa/ENEL, Simmenthal or ERTA."* [228]

The most significant legal outcome of *Portuguese Judges* is the Court's clarification that the second subparagraph of Article 19(1) TEU ("Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law") must be understood as guaranteeing a *general* and *justiciable* obligation for every Member State to *guarantee* and *maintain* the independence of their national courts. To borrow from President Lenaerts again, by virtue of Article 19(1) TEU but also Article 267 TFEU, national judges are indeed not only protected in their individual capacity but also

> protected as members of the courts of general jurisdiction for the application and enforcement of EU law. They are protected as the 'arm of EU law'. Any national judge from the four corners of the EU may say 'iudex europeus sum' and benefit from that institutional protection stemming from the upholding of the rule of law within the EU. This means, inter alia, that a national measure that is repugnant to the principle of judicial independence is to be set aside. Since that institutional protection aims to prevent the EU's constitutional structure from collapsing, it must operate at all times in the fields covered by EU law and may not be made conditional upon finding that the national measure at issue is implementing EU law.[229]

Since then, the CJEU has rapidly developed a particularly rich body of general principles to help further clarify what national measures or practices may be held compatible with or, on the contrary, precluded by the second subparagraph of Article 19(1) TEU. The common thread underlying the entirety of the Court's case law ever since *Portuguese Judges* was delivered is that "authoritarian tendencies at national level have simply no room in the EU legal order."[230]

2.1 Well-established general principles prior to Portuguese Judges

Prior to the Court of Justice's judgment in *Portuguese Judges*, the Court had made clear the EU is established on a number of fundamental and common values as stated in Article 2 TEU and that its legal order is based on the fundamental premises that EU member states share and comply with the values laid down in Article 2 TEU. As regards the rule of law, the Court recalled in *Portuguese Judges* the well-established general principles which can be derived

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227 Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

228 Quoted by A. von Bogdandy and L.D. Spieker, "Transformative Constitutionalism in Luxembourg" (2023) 29(2) *The Columbia Journal of European Law* 65, p. 72.

229 Lenaerts, "On checks and balances", op. cit., p. 62.

230 Ibid., p. 33.

from its previous case law starting with another landmark judgment known as *Les Verts*:[231]

(i) The rule of law in the EU essentially means that individuals have the right to judicially challenge EU measures but also *national* measures which relate to EU law.

(ii) Responsibility for ensuring judicial review is entrusted not only to the EU courts but also to *national* courts and tribunals.

(iii) The independence of *national* courts and tribunals is essential to the proper working of the EU judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU.

(iv) The factors to be taken into account in assessing whether a national body is a court or tribunal within the meaning of EU law include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

(v) The concept of independence, which is inherent in the task of adjudication, has two key dimensions to it: an external dimension, which primarily requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever; and an internal dimension, which is linked to impartiality and primarily requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.

(vi) *National* authorities are under an obligation by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law and this includes an obligation to establish a system of legal remedies and procedures ensuring effective judicial review in the fields covered by EU law as provided for by the second subparagraph of Article 19(1) TEU.

(vii) The principle of the effective judicial protection of individuals' right under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR and which has been reaffirmed by Article 47 of the Charter.

(viii) The very existence of effective judicial review designed to ensure compliance with EU law is the essence of the rule of law.

2.2 The interpretation of these general principles in *Portuguese Judges*

These broad and well-established guiding principles were subsequently relied upon by the Court of Justice in *Portuguese Judges* to guide its interpretation of the second subparagraph

231 Judgment of 23 April 1986 in Case 294/83, *Les Verts v. Parliament*, EU:C:1986:166. One may note that the juge rapporteur in this case was René Joliet for whom Koen Lenaerts worked as a référendaire during that time. See Lenaerts, "On checks and balances", op. cit., p. 27.

of Article 19(1) TEU, which was introduced by the Lisbon Treaty.[232] The judgment's legal "added value" may be summarized as follows:

(i) For the first time, the Court connected Articles 2 and 19 TEU and made clear that Article 19 TEU must be understood as giving concrete expression to the value of the rule of law affirmed in Article 2 TEU.

(ii) For the first time, the Court clarified that as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to "the fields covered by Union law", *irrespective* of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter.

(iii) For the first time, the Court also clarified that the second subparagraph of Article 19(1) TEU imposes an obligation on every Member State to ensure that the bodies which are called upon, as courts or tribunals within the meaning of EU law, to rule on questions related to the application or interpretation of EU law and thus come within its judicial system in the fields covered by EU law, meet the requirements of effective judicial protection, including, in particular, that of independence. This obligation includes not merely an obligation to *respect* but also an obligation to maintain the independence of national courts or tribunals.

(iv) For the first time with regards the measures in dispute in *Portuguese Judges*, the Court held that as a matter of principle, the receipt by judges of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.

2.3 The development of new general principles in the Court of Justice's post *Portuguese Judges* case law

As explained by CJEU President Lenaerts, ever since the Court delivered its landmark judgment Portuguese Judges in which "it indicated the path towards defending the values contained in Article 2 TEU", the CJEU "has developed and consolidated a line of case law that clarifies, in general, the meaning of the rule of law within the EU and, in particular, that of judicial independence."[233] When doing so, the Court did not merely derive from Article 2 TEU and/or Article 19 TEU additional and broad general principles of a constitutional nature but also developed principles in relation as to how Member States can exercise their exclusive competence over the organisation of their judiciaries. The general principles of a constitutional nature will be presented first before the more specific principles developed in relation to national courts and national rules governing judges and prosecutors are outlined.

(i) General principles of a constitutional nature

As regards the importance of the rule of law in the EU legal order, the Court stated that "the rule of law is a value common to the European Union and the member states which forms

232 In doing so, the Lisbon Treaty merely codified the Court's case law. See in particular Judgment of 25 July 2002 in Case C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462, para. 41 ("it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection").

233 Lenaerts, "On Checks and Balances", op. cit., p. 61.

part of the very foundations of the European Union and its legal order."[234] When it comes to Article 2 TEU more generally speaking, the Court made clear that:

> The values contained in Article 2 TEU define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.[235]
>
> Compliance by a member state with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that member state.[236] and
>
> Compliance with those values cannot be reduced to an obligation which a candidate state must meet in order to accede to the European Union and which it may disregard after its accession.[237]

As regards compliance with the rule of law, the Court further clarified that the effective application of EU law must be considered an essential component of the rule of law and that "prolonged" non-compliance with CJEU rulings "in itself seriously undermines the principle of legality and the principle of *res judicata* in a union based on the rule of law." In addition, compliance with the "obligation to apply in full any provision of EU law with direct effect must be regarded as essential in order to ensure the full application of EU law in all member states, as is required by Article 19(1) TEU."[240]

When it comes to the exclusive competence of member states over the organisation of national judiciaries, the Court further established in its post *Portuguese Judges* case law that:

> While the organisation of justice in the member states falls within the competence of those member states, the member states are required to comply with their obligations deriving from EU law and, in particular, from Articles 2 and the second subparagraph of 19 TEU, when exercising that competence.[241]

The Court further made clear that requiring compliance with EU rule of law requirements does not mean compliance with a particular constitutional model and that national identity, constitutional or otherwise, cannot exempt a member state from complying these requirements either:

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234 Judgments of 16 February 2022 in Case C156/21, *Hungary v. Parliament and Council*, EU:C:2022:97, para. 128.

235 Ibid., para. 127.

236 Ibid., para. 126.

237 Ibid.

238 See most recently, Judgment of 29 May 2024 in Joined Cases T200/22 and T314/22, *Poland v. Commission*, EU:T:2024:329, para. 31.

239 Judgment of 13 June 2024 in Case C-123/22, *Commission v Hungary (Reception of applicants for international protection II)*, EU:C:2024:493, para. 102.

240 Judgment of 22 February 2022 in Case C430/21, *RS (effects of the decisions of a constitutional court)*, EU:C:2022:99, para. 54.

241 Judgment of 24 June 2019 in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2018:1021, para. 52.

> While neither Article 2 TEU nor the second subparagraph of Article 19(1) TEU, nor any other provision of EU law, requires member states to adopt a particular constitutional model governing the relationships and interaction between the various branches of the state, in particular as regards the definition and delimitation of their competences, the member states are required to comply, inter alia, with the requirement that the courts be independent stemming from Article 2 TEU and second subparagraph of Article 19(1) TEU.[242]
>
> National identity of a member state, within the meaning of Article 4(2) TEU, cannot exempt member states from the obligation to comply with the requirements arising stemming from Article 2 TEU and second subparagraph of Article 19(1) TEU as the member states adhere to a concept of the rule of law which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.[243]

(ii) General principles relating to judicial independence

With respect of judicial independence, the Court complemented its pre–*Portuguese Judges* case law, itself largely and directly inspired by the ECtHR's case law, by setting out the following general principles:

> In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the courts must be ensured in relation to the legislature and the executive.[244]
>
> The purpose of the phrase 'previously established by law', which reflects, inter alia, the principle of the rule of law, is to prevent the organisation of the judicial system from being left to the discretion of the executive and to ensure that that matter is governed by a law. Nor, moreover, in codified law countries, can the organisation of the judicial system be left to the discretion of the judicial authorities, which does not, however, rule out conferring on them a certain power to interpret the relevant national legislation.[245]
>
> While the "external" aspect of independence is intended essentially to preserve the independence of the courts from the legislature and the executive in accordance with the principle of the separation of powers which characterises the operation of the rule of law, that aspect must also be understood as aiming to safeguard judges against undue influence from within the court concerned.[246]
>
> The requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the member

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242 Judgment of 21 December 2021 in Joined Cases C357/19, C379/19, C547/19, C811/19 and C840/19, *Euro Box Promotion and Others*, EU:C:2021:1034, para. 229.

243 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, paras 72-73.

244 Judgment of 19 November 2019 in Joined Cases C585/18, C624/18 and C625/18, *AK and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982.

245 Judgment of 11 July 2024 in Joined Cases C554/21, C622/21 and C727/21, *Hann-Invest*, EU:C:2024:594, para. 56.

246 Ibid., para. 54.

> states set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.[247]
>
> The guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial.[248]
>
> The right to a fair trial means that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. That check is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the court's own motion.[249]
>
> The guarantees of judicial independence and judicial impartiality as well as that of access to a tribunal previously established by law also presuppose, inter alia, the existence of rules concerning the composition of judicial panels which are transparent and known to litigants and which are such as to preclude any undue interference in the decision-making process relating to a given case by persons from outside the judicial panel responsible for that case before whom the parties have not been able to put forward their arguments.[250]
>
> The power to do everything necessary, when applying EU law, to disregard national rules or a national practice which might prevent directly effective EU rules from having full force and effect is an integral part of the role of a court of the European Union which falls to the national court responsible for applying, within its jurisdiction, those EU rules and, therefore, the exercise of that power constitutes a guarantee that is essential to judicial independence as provided for in the second subparagraph of Article 19(1) TEU.[251]

With respect of threats to the independence of national supreme courts, the Court set out the following principle:

> Any threat to the independence of a national supreme court must be considered as likely to affect the entirety of the judicial system of the member state concerned as national supreme courts play a crucial role, within the judicial systems of the member states of which they form part, in the implementation, at national level, of EU law.[252]

Maintaining the independence of national courts of last resort must therefore be understood as particularly essential from the point of view of EU law. In addition, the CJEU has set out that

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247 Judgment of 25 July 2018 in C216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, para. 48. In its judgment of 11 July 2024 in Joined Cases C554/21, C622/21 and C727/21, at para. 49, the Court added that the requirement that courts be independent also forms part of the essence of the fundamental right to a fair hearing.

248 Judgment of 26 March 2020 in Joined Cases C542/18 RX-II, *Simpson* and C543/18 RX-II, HG, EU:C:2020:232, para. 57.

249 Ibid.

250 Judgment of 11 July 2024 in Joined Cases C554/21, C622/21 and C727/21, *Hann-Invest*, EU:C:2024:594, para. 59.

251 Judgment of 22 February 2022 in Case C-430/21, *RS (Effects of a constitutional court rulings)*, EU:C:2022:99, para. 62.

252 Order of 17 December 2018 in Case C-619/18 R, *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2018:1021, para. 69.

as a matter of principle, national judges may consider themselves bound by the judgments of national constitutional courts only insofar as those courts remain independent:

> EU law does not preclude national rules or a national practice under which the decisions of the constitutional court are binding on the ordinary courts, provided that national law guarantees the independence of that constitutional court from, in particular, the legislature and the executive. However, if national law does not guarantee such independence, EU law precludes such national rules or such a national practice, since such a constitutional court is not in a position to ensure the effective judicial protection required by the second subparagraph of Article 19(1) TEU.[253]

That said, the Court also stated that as a matter of principle, EU law does *not* require "member states to adopt a particular constitutional model governing the relationships and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences".[254] What EU law does require, as previously outlined in relation to the organisation of justice in the member states, is that member states comply with EU rule of law requirements when "choosing their respective constitutional model."[255]

(iii) General principles relating to the remuneration of judges

It follows from the Court's *Portuguese Judges* ruling that the receipt by judges of a level of remuneration commensurate with the importance of the functions they carry out must be considered a guarantee essential to judicial independence.[256] In this case, the Court made for the first time "a direct link between judges' security of tenure and their material security".[257] However, the principle of judicial independence was interpreted as *not* precluding member states taking measures to reduce judges' remuneration in certain circumstances as long as relevant national measures do not target or single out members of the judiciary for special treatment.

Pending Joined Cases C-146/23 and C-374/23 will provide the CJEU with an opportunity to revisit and expand on its existing case-law on judges' remuneration pursuant to the second subparagraph of Article 19(1) TEU in respect of national measures which have a broader scope than those considered by the Court in its case law to date. In other words, the Court will have for the first time the opportunity to "evaluate the role of the legislature and the executive in the process of determining judges' remuneration and any possible reduction thereof."[258]

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253 Judgment of 22 February 2022 in Case C-430/21, *RS (Effects of a constitutional court rulings)*, EU:C:2022:99, para. 44.

254 Ibid.

255 Ibid., para. 43.

256 See also judgment of 7 February 2019 in Case C49/18, *Escribano Vindel*, EU:C:2019:106, para. 66.

257 Opinion of AG Collins delivered on 13 June 2024 in (pending) Joined Cases C-146/23, *Sąd Rejonowy w Białymstoku* and C-374/23, *Adoreikė*, EU:C:2024:507, para. 3.

258 Ibid., para. 5.

(iv) General principles relating to rules governing the appointment, promotion, length of service and grounds for abstention, rejection and dismissal of judges

The guarantees of independence and impartiality under EU law have long been interpreted by the CJEU as requiring rules that dispel any reasonable doubt in the minds of individuals as to the imperviousness of courts to external factors and their neutrality with respect to the interests before them. This is particularly the case when it comes to rules governing the composition of courts and rules governing the appointment, length of service and grounds for abstention, rejection and dismissal of judges.[259]

Appointment of judges

Post *Portuguese Judges*, the Court has complemented these broad general principles starting with what the guarantees of independence and impartiality under EU law require when it comes to rules governing the appointment of judges:

> As regards appointment decisions specifically, the substantive conditions and detailed procedural rules governing the adoption of those decisions must be such that they cannot give rise to such reasonable doubts with respect to the judges appointed and those conditions and detailed procedural rules must be drafted in a way such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.[260]

> An irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the state, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system.[261]

> The fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic but the situation is different in circumstances in which all the relevant factors characterising such a process in a specific national legal and factual context are such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process. This may be particularly

259 See judgment of 19 September 2006 in Case C-506/04, *Wilson*, EU:C:2006:587, para. 53 and the case-law cited.

260 Judgment of 19 November 2019 in Joined Cases C585/18, C624/18 and C625/18, *A. K.*, EU:C:2019:982, paras 134-135.

261 Judgment of 26 March 2020 in Joined Cases C542/18 RX-II, *Simpson* and C543/18 RX-II, HG, EU:C:2020:232, para. 75.

> the case where the independence of the body responsible for the appointment of judges from the legislature and executive is open to doubt.[262]
>
> In a context characterized by general reforms of the judicial system restricting the independence of the judiciary, the absence of sufficient guarantees by a body responsible for the appointment of judges could make it necessary for there to be a judicial remedy available to unsuccessful candidates, albeit restricted, in order to help safeguard the process of appointing the judges concerned from direct or indirect influence and, ultimately, to prevent legitimate doubts from arising, in the minds of individuals, as to the independence of the judges appointed at the end of that process.[263]

Promotion of judges

In answer to a request submitted by a Romanian court for a preliminary ruling regarding the compatibility of a new promotion scheme with judicial independence, the CJEU confirmed "that the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the Charter, must be interpreted as meaning that national legislation relating to the scheme for the promotion of judges is required to ensure compliance with the principle of the independence of judges."[264] In its judgment, the Court additionally laid down the following three principles:

> The independence of judges must be guaranteed and safeguarded not only at the stage of their appointment but also throughout their career, including in the context of promotion procedures, since procedures for the promotion of judges form part of the rules applicable to the status of judges.[265]
>
> The substantive conditions and procedural rules governing the adoption of decisions to promote judges must be as such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been promoted.[266]
>
> While the involvement, in the procedure for the effective promotion of judges, of a body such as an assessment board composed of the president and judges of a higher court may, in principle, be such as to contribute to rendering that procedure more objective, it is also necessary that that body itself provide guarantees of independence, meaning that it is necessary to examine specifically the conditions under which its members are appointed and the way in which it actually performs its role.[267]

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262 Judgment of 2 March 2021 in Case C-824/18, *A.B. et al (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, paras 129-130.

263 Judgment of 8 May 2024 in Case C-53/23, *Asociația 'Forumul Judecătorilor din România'*, EU:C:2024:388, para. 56.

264 Judgment of 7 September 2023 in Case C216/21, *Asociația 'Forumul Judecătorilor din România'*, EU:C:2023:628, para. 67.

265 Ibid., para. 65.

266 Ibid., para. 66.

267 Ibid., para. 75.

Dismissal of judges

When it comes to rules governing the dismissal of judges, the CJEU outlined the following four general principles:

> The principle of the irremovability of judges is essential to their independence[268] and requires inter alia that judges may remain in post, provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term.[269]
>
> While the principle of irremovability is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Judges may therefore be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed.[270]
>
> The guarantee of irremovability of the members of a court or tribunal therefore also requires that dismissals of members of the body concerned should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal.[271]

Transfer of judges without consent

In addition to rules governing the dismissal of judges, the Court has been confronted with a case where a national judge was transferred without his consent from one division to another of the court to which he is assigned. In this context, and considering the case law of the ECtHR, the CJEU laid down the following three principles in respect of transfers without consent:

> Transfers without consent of a judge to another court or the transfer without consent of a judge between two divisions of the same court are potentially capable of undermining the principles of the irremovability of judges and judicial independence and may constitute a way of exercising control over the content of judicial decisions because they are liable not only to affect the scope of the activities allocated to judges and the handling of cases entrusted to them, but also to have significant consequences on the life and career of those persons and, thus, to have effects similar to those of a disciplinary sanction.[272]
>
> The requirement of judicial independence requires that the rules applicable to transfer without the consent of such judges present, like the rules governing disciplinary matters, in particular the necessary guarantees to prevent any risk of that independence being jeopardized by direct or indirect external interventions. It follows that the rules and principles

268 Judgment of 24 June 2019 in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2018:1021, para. 96.

269 Ibid., para. 76.

270 Ibid.

271 Judgment of 21 January 2020 in Case C-274/14, *Banco de Santander*, C274/14, EU:C:2020:17, para. 60.

272 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, paras 114-115.

> relating to the disciplinary regime applicable to judges must, *mutatis mutandis*, also apply so far as concerns such rules concerning transfers.[273]

Secondment of judges

The CJEU has similarly clarified the general principles applicable to the secondment of judges following a reference for a preliminary ruling concerning a Polish law which provided the possibility for the Minister for Justice to second a judge to another criminal court for a fixed or indefinite period and, at any time, by way of a decision that does not contain a statement of reasons, to terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period:[274]

> Compliance with the requirement of independence means that the rules governing the secondment of judges must provide the necessary guarantees of independence and impartiality in order to prevent any risk of that secondment being used as a means of exerting political control over the content of judicial decisions.[275]
>
> In order to avoid arbitrariness and the risk of manipulation, the decision relating to the secondment of a judge and the decision terminating that secondment, in particular where a secondment to a higher court is involved, must be taken on the basis of criteria known in advance and must contain an appropriate statement of reasons.[276]
>
> The termination of the secondment of a judge without that judge's consent is liable to have effects similar to those of a disciplinary penalty, the second subparagraph of Article 19(1) TEU requires that the regime applicable to such a measure provide all the necessary guarantees to prevent any risk of such a regime being used as a means of exerting political control over the content of judicial decisions, which means, inter alia, that it must be possible for that measure to be legally challenged in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter.[277]

Disciplinary regime governing judges

The CJEU built on its pre-*Portuguese Judges* case law when it comes to the general principles derived from the second subparagraph of Article 19(1) TEU regarding disciplinary regimes governing judges. In this context and primarily in relation to developments in Poland and Romania, the Court laid down the following principles:

> Any disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which

273 Ibid., para. 117.

274 Ibid., para. 71.

275 Judgment of 16 November 2021 in Joined Cases C748/19 to C754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, EU:C:2021:931, para. 73.

276 Ibid., para. 78.

277 Ibid., para. 83.

provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.[278]

All member states must ensure that the disciplinary regime applicable to the judges of national courts within their judicial system in the fields covered by EU law complies with the principle of judicial independence, in particular by ensuring that decisions given in disciplinary proceedings brought against the judges of those courts are reviewed by a body which itself satisfies the guarantees inherent in effective judicial protection, including that of independence.[279]

The mere prospect for judges of being exposed to the risk of a disciplinary procedure capable of leading to proceedings being brought before a body whose independence is not guaranteed is liable to affect their own independence;[280]

The mere prospect of opening a disciplinary investigation is, as such, liable to exert pressure on those who have the task of adjudicating in a dispute.[281]

The mere prospect for judges of being the subject of disciplinary proceedings as a result of making to the Court of Justice for a preliminary ruling or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion entrusted to national courts by Article 267 TFEU and the functions of the courts responsible for the application of EU law.[282]

The safeguarding of judicial independence cannot have the effect of totally excluding the possibility that the disciplinary liability of a judge may, in certain very exceptional cases, be triggered as a result of judicial decisions adopted by that judge. Such a requirement of independence is clearly not intended to support any serious and totally inexcusable forms of conduct on the part of judges.[283]

Disciplinary and personal liability of judges

Considering the general principles above, the Court further laid down a subset of general principles as regards the disciplinary and personal liability of judges:

The triggering of the disciplinary liability of a judge as a result of a judicial decision should be limited to entirely exceptional cases and be governed by objective and verifiable criteria,

278 Judgment of 25 July 2018 in C216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice*), EU:C:2018:586, para. 67.

279 Order of 8 April 2020 in Case C791/19 R, *Commission v. Poland (Disciplinary Regime of Judges)*, EU:C:2020:277, para. 35.

280 Ibid., para. 90.

281 Judgment of 18 May 2021 in Joined Cases C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19, *Asociaţia 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393, para. 199.

282 Joined Cases C558/18 and C563/18, paras 58-59.

283 Judgment of 15 July 2021 in Case C-791/19, *Commission v. Poland (Disciplinary Regime of Judges)*, EU:C:2021:596, para. 137.

> arising from requirements relating to the sound administration of justice, and also by guarantees designed to avoid any risk of external pressure on the content of judicial decisions and thus helping to dispel, in the minds of individuals, any reasonable doubts as to the imperviousness of the judges concerned and their neutrality with respect to the interests before them.[284]
>
> National legislation regarding the personal liability of judges must provide clearly and precisely the necessary guarantees ensuring that neither the investigation to determine whether the conditions and circumstances which may give rise to such liability are satisfied nor the action for indemnity appears capable of being converted into an instrument of pressure on judicial activity.[285]
>
> In order to ensure that such legislation cannot have a chilling effect on judges in the performance of their duty to adjudicate with complete independence, the authorities empowered to initiate and conduct the investigation to determine whether the conditions and circumstances which may give rise to the personal liability of a judge are satisfied and to bring an action for indemnity must be themselves authorities which act objectively and impartially in the performance of their duties and that the substantive conditions and detailed procedural rules governing the exercise of those powers are such as not to give rise to reasonable doubts concerning the impartiality of those authorities.[286]
>
> Finally, the body with jurisdiction to rule on the personal liability of a judge should be a court.[287]

Functioning of bodies with disciplinary powers in respect of judges and prosecutors

As regards the bodies competent to conduct investigations and bring disciplinary proceedings against judges, the CJEU established inter alia that:

> They should act objectively and impartially in the performance of its duties and, to that end, be free from any external influence.[288]
>
> Since those occupying management positions within such bodies are likely to exert a decisive influence on their activities, the rules governing the procedure for appointment to those positions must be designed in such a way that there can be no reasonable doubt that the powers and functions of that body will not be used as an instrument to exert pressure on, or political control over, judicial activity.[289]
>
> However, the mere fact that the senior officers of the body entrusted with conducting disciplinary investigations and bringing disciplinary proceedings in respect of judges

284 Ibid., para. 139.

285 Judgment of 18 May 2021 in Joined Cases C83/19, C127/19, C195/19, C291/19, C355/19 and C-397/19, *Asociaţia 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393, para. 235.

286 Ibid., para. 236.

287 Ibid., para. 237.

288 Ibid., para. 199.

289 Ibid., para. 200.

> and prosecutors are appointed by the government of a member state is not such as to give rise to doubts such as those referred above.[290]
>
> By contrast, national legislation is likely to give rise to doubts such as those referred above where, even temporarily, it has the effect of allowing the government of the member state concerned to make appointments to the management positions of the body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, by disregarding the ordinary appointment procedure laid down by national law.[291]

When it comes to *criminal* proceedings against judges and prosecutors, the Court set out the following principle:

> Where a member state lays down specific rules governing criminal proceedings against judges and prosecutors, such as the rules relating to the establishment of a special section of the Public Prosecutors' Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors, those rules must – in accordance with the requirement of independence, and in order to dispel any reasonable doubt in the minds of individuals such as that referred to in the preceding paragraph – be justified by objective and verifiable requirements relating to the sound administration of justice and must, like the rules on the disciplinary liability of judges and prosecutors, provide the necessary guarantees ensuring that those criminal proceedings cannot be used as a system of political control over the activity of those judges and prosecutors and fully safeguard the rights enshrined in Articles 47 and 48 of the Charter.[292]

(v) General principles relating to prosecutors[293]

The general principles above means that EU law now significantly constrains what member states can do when it comes to the rules governing the appointment of prosecutors competent to conduct criminal prosecutions against judges *and* prosecutors. EU law furthermore constrains how these prosecutions may be conducted as the CJEU now requires that these prosecutors must act "within a framework of effective rules which fully comply with the requirement of the independence of the judiciary."[294]

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290 Ibid., paras 202-203.

291 Ibid., para. 205.

292 Ibid., para. 213.

293 Looking beyond the requirements connected to the principle of effective judicial protection, EU law also applies to and protects national prosecutors in a variety of ways including via the EU obligations relating to the protection of the EU's financial interests (Article 325 TFEU) and deriving from Directive 2014/41 on the European Investigation Order. Regarding the former, one may also mention the Rule of Law Conditionality Regulation which provides for the possibility of adopting financial sanctions against member states in a situation where breaches of the principles of the rule of law concern 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." For further analysis, see P. Wachowiec, "Independence of prosecutors: EU law to the rescue" in A. Wójcik (ed), *Unleashing the Power of EU Law* (The Wiktor Osiatyński Archive, Warsaw, 2023), 41.

294 Judgment of 8 May 2024 in Case C-53/23, *Asociația 'Forumul Judecătorilor din România'*, EU:C:2024:388, para. 57.

The requirement of the independence of the judiciary, according to the CJEU, "cannot however be interpreted, in a general manner, as obliging the member states to permit professional associations of judges to bring" an action for annulment to challenge decisions relating to the appointment of prosecutors competent to conduct criminal prosecutions against judges.[295] National legislation may therefore subject such actions "to the existence of a legitimate private interest" which "excludes, in practice, such an action from being brought by professional associations of judges seeking to defend the principle of the independence of the judiciary."[296]

295 Ibid., para. 58.

296 Ibid., para. 59.

PART III – SPECIFIC SYSTEMIC RULE OF LAW PROBLEMS ADDRESSED BY THE EUROPEAN COURTS IN A BACKSLIDING CONTEXT

Given the emergence of systemic threats to and violations of the rule of law across several member states of the CoE and EU in the past decade, the ECtHR and CJEU have had to address a number of similar systemic issues, six of which will be covered below:

1. The irregular composition, lack of independence and/or violations of rule of law requirements by a constitutional court.
2. The lack of independence of a national council for the judiciary.
3. Systemic dysfunction in a country's procedure for judicial appointments.
4. Disguised collective dismissal of judges via a lowering of the retirement age.
5. Systemic non-compliance with orders and/or judgments.
6. Systemic misuse of disciplinary and/or criminal proceedings against judges.

The courts' jurisprudence in respect of each issue will be detailed with the view of briefly identifying the courts' approaches and key findings, the potential limitations of their rulings, and areas of convergence and mutual reinforcement.

1. Irregular composition, lack of independence and/or violations of rule of law requirements by a constitutional court

The capture of apex courts and in particular constitutional courts, as the principal bodies entrusted with the power to oversee the preservation of the constitutional legal order in a constitutional democracy, is usually a top item on the to-do list of any aspiring would-be autocrat. As such, the European courts have faced a growing number of cases over the composition and/or actions of constitutional courts.

Within the EU, the situation in three countries is demonstrative. The most dramatic example of capture of a constitutional tribunal is Poland's Constitutional Tribunal. Second, while Romania's Constitutional Court was not subject to similar fundamental irregularities, it has played a role in the backsliding episode this country experienced in 2017-19 before a majority of this body actively engaged in the systematic violation of the Court of Justice's rule of law case law, leading Romanian judges to submit multiple references for a preliminary ruling. Finally, Hungary's Constitutional Court was one of the first judicial bodies targeted by the Fidesz government, which modified appointment rules to ensure that the parliamentary majority controlled by the ruling party would be able to select judges without having to consult the opposition and expanded the number of posts and years in office to further allow for court packing by the government.

In the absence of Commission's meaningful action until the belated lodging of an infringement action in respect of Poland's politically captured and irregularly composed Constitutional Tribunal, the CJEU has, to date, only had the opportunity to address issues relating to

constitutional courts via preliminary ruling requests stemming from Poland and Romania. Prior to the CJEU's preliminary rulings outlined below, the ECtHR addressed the irregular composition of Poland's Constitutional Tribunal in its first judgment concerning Poland's rule of law crisis in May 2021. The key principles and findings from the most important CJEU and ECtHR rulings to date are briefly presented below.

ECtHR judgment of 7 May 2021 in *Xero Flor v. Poland*[297]

The irregular composition of Poland's Constitutional Tribunal (CT) was first established in *Xero Flor* based on the test previously developed by the Strasbourg Court in the *Icelandic Judges* case.[298] In this instance, the Court found a violation of the right to a fair hearing and the right to a tribunal established by law. Regarding the latter violation, the Court ruled that Polish authorities and in particular the actions of the Polish President and Polish legislature, amounted to manifest breaches of domestic law when it comes to the appointment of three individuals to the Tribunal, with the view of usurping the Tribunal's role as the ultimate interpreter of the Constitution. This judgment set an important precedent for all subsequent judgments issued by the ECtHR in relation to Poland's rule of law crisis.

In its first pilot judgment in respect of the rule of law situation in Poland, the ECtHR furthermore observed that the current Constitutional Tribunal has deliberately perpetuated a "state of continued non-compliance" not only with the ECHR but also with EU law with the aim of undermining and preventing the execution of ECtHR and CJEU judgments.[299] And in its most recent judgment to date where the irregular composition of the Constitutional Tribunal played an incidental role, the ECtHR confirmed that the mere presence of any irregularly appointed individual in any adjudicatory formation of the Tribunal "is by itself capable of vitiating the legal force to be attached to that judgment."[300] However, the ECtHR did not deem it necessary to examine "the allegations that the appointment of Judge J. Przyłębska, the President of Constitutional Court, was open to challenge"[301] considering that it had already concluded the bench that adopted the decision in dispute was "not issued by a body compatible with the rule of law requirements."[302]

The CJEU is yet to take account of the ECtHR judgment of 7 May 2021 in Xero Flor and has instead continued to treat the judgments from the current irregularly composed and presided Tribunal as if they were issued by a proper court. At the same time, the CJEU has indirectly paved the way to a finding whereby Poland's Constitutional Tribunal will eventually be formally held not to constitute a tribunal established by law considering its irregular composition following several preliminary judgments relating to the Romanian Constitutional Court.

297 No. 4907/18, CE:ECHR:2021:0507JUD000490718.

298 Judgment of 1 December 2020 in *Ástráðsson v. Iceland*, no. 26374/18, CE:ECHR:2020:1201JUD002637418.

299 Judgment of 23 November 2023 in *Wałęsa v. Poland*, no. 50849/21, CE:ECHR:2023:1123JUD005084921, para. 325.

300 Judgment of 14 December 2023 in *M.L. v. Poland*, no. 40119/21, CE:ECHR:2023:1214JUD004011921, para. 173.

301 Ibid., para. 174.

302 Ibid., para. 175.

CJEU judgment of 21 December 2021 in *Euro Box Promotion*[303]

The Luxembourg court ruled that a constitutional court must respect the principle of judicial independence under EU law to fulfil the requirement of effective judicial protection. Decisions of a constitutional court may only bind lower courts if they have been issued by a constitutional court whose independence and impartiality from the legislative and executive powers is not in doubt. As such, rules on appointment and composition, as well as those for abstention, rejection and dismissal of judges, and the length of terms in service, must ensure that there can be no reasonable doubt as to the imperviousness of the relevant constitutional court to external factors as well as neutrality with respect to the interests before it and in the outcome of proceedings.

The Romanian Constitutional Court in this instance was ultimately found to meet the test for independence. That said, the CJEU further clarified that in the event of such criteria not being satisfied, the body would be precluded from ruling on matters of EU law and national courts would be an under a legal obligation to disregard and set aside its rulings. In respect of the latter, the CJEU further held that judges cannot be subject to disciplinary measures for disapplying a ruling issued by a court that does not comply with EU standards of judicial independence.

CJEU judgment of 22 February 2022 in *RS*
(Effect of the decisions of a constitutional court)[304]

In the 2022 judgment in RS, the Court first made clear that EU law does not preclude national rules or national practices under which the decisions of the constitutional court are binding on the ordinary courts *provided* that national law guarantees the independence of that constitutional court from the legislature and the executive. However, in a situation where the national constitutional court is no longer independent and therefore no longer able to ensure the effective judicial protection required by the second paragraph of Article 19(1) TEU, EU law would preclude such national rules or practices.

With this approach, the CJEU has provided a way to quarantine any apex courts that openly disregards EU law. In addition, the CJEU unambiguously held that any national rule or practice that prevents ordinary courts from assessing the compatibility with EU law of national legislation that the constitutional court of that member state has found to be consistent with a national constitutional provision is not compatible with EU law. This means inter alia that national law cannot force a national court to follow a decision of a national constitutional courts that it considers to be contrary to EU law. This is particularly the case in a situation where the rulings of a national constitutional court refuse to give effect to a CJEU judgment. In such a situation, national courts are required to disregard the rulings of the national constitutional court and any attempt to engage the disciplinary liability of national judges for failing to comply with the decisions of the national constitutional court would itself be in breach of EU law.

303 Case C-357/19, EU:C:2021:1034.

304 Case C-430/21, EU:C:2022:99.

Forthcoming CJEU judgment in *Commission v. Poland (Captured Constitutional Tribunal)*[305]

On 22 December 2021, the Commission launched a fifth infringement procedure in relation to Poland's rule of law crisis then in its sixth year. The Commission lodged its infringement case with the CJEU on 17 July 2023. For the Commission, two decisions issued in July and October 2021 by Poland's captured and irregularly composed Constitutional Tribunal violate *inter alia* Article 19(1) TEU by giving this Treaty provision "an unduly restrictive interpretation."[306] In addition, the Commission considers that Poland's Constitutional Tribunal itself violates Article 19(1) TEU as it no longer satisfies "the requirements of an independent and impartial tribunal previously established by law as a result of irregularities in the procedures for the appointment of three judges to that court in December 2015 and in the procedure for the appointment of its president in December 2016."[307] It follows that Poland's current Tribunal is no longer able to ensure effective judicial protection as required by Article 19(1) TEU, with respect to individual cases that concern the interpretation and application of EU law. This is the first time the Commission has launched an infringement action on account of a national court of law resort having stopped being considered 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.

Prior to this infringement action, the Commission previously acted in respect of a properly composed and independent national constitutional court when it launched an infringement action on 9 June 2021 against Germany following a judgment of 5 May 2020 of the German Federal Constitutional Court which, in manifest violation of the EU Treaties, declared a CJEU judgment *ultra vires*.[308] This action was however closed on 2 December 2021 following a formal declaration by the German government recognising the values laid down in Article 2 TEU, the authority of the CJEU, and the legality of EU acts cannot be reviewed via constitutional complaints before German courts.[309] To date, however, the Commission has failed to react via infringement actions to the repeated violations of CJEU judgments committed by Romania's Constitutional Court and the lack of effective constitutional review in Hungary due to the ruling party's capture of the Constitutional Court whose activities over a decade may therefore give rise at the very least to reasonable doubts in the minds of individuals as to the impartiality of this body and its imperviousness to external factors.

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305 Case C-448/23 (pending).

306 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.

307 Action brought on 17 July 2023, European Commission v. Republic of Poland (Case C-448/23), [2023] C/304 OJ 17.

308 European Commission, Primacy of EU law: Commission sends letter of formal notice to GERMANY for breach of fundamental principles of EU law, Press release, INF/21/6201, 9 June 2021.

309 European Commission, Primacy of EU law: Commission closes infringement procedure based on formal commitments of GERMANY clearly recognising the primacy of EU law and the authority of the Court of Justice of the European Union, Press release, INF/21/6201, 2 December 2021.

Some key points

Notwithstanding the CJEU's reluctance to take account of the ECtHR judgment of 7 May 2021 in Xero Flor to date, the judgments issued by both courts may be said to be mutually reinforcing when it comes to finding that irregularities in the procedures for the appointment of judges to constitutional courts may constitute a breach of the principle of effective protection and associated rights to an independent and impartial tribunal established by law and to a fair hearing. In particular, the ECtHR's case law makes clear that the decisions of Poland's Constitutional Tribunal finding "unconstitutional" the CJEU's interpretation of Article 19(1) TEU were issued by a body which cannot be considered a court and cannot therefore claim the legal force attached to a judgment. More broadly speaking, under EU law, both the composition and the decisions of a constitutional court may be reviewed by other national courts and the decisions of the constitutional court eventually set aside. This is true whether the constitutional court has been found to be captured, through for instance court packing, or otherwise, if it in any way undermines compliance with ECHR and/or EU rule of law requirements. The general principles laid down in the case law outlined above may also be useful beyond backsliding contexts as they may inter alia encourage stricter compliance with appointment procedures, their eventual depoliticization as well as dissuade political actors from instrumentalising constitutional courts as the legal costs of doing so have been increased.

2. Lack of independence of a national council for the judiciary

An increasingly common phenomenon that has been dealt with by the European courts in recent years pertains to the political capture of national councils for the judiciary, the normally independent bodies with inter alia powers over the appointment and career progression of judges.

The most dramatic example of this is Poland where, in 2018, the ruling majority captured the National Council for the Judiciary (NCJ) on the back of an amending piece of legislation that prematurely ended the four-year mandates of the previous 15 judge-members. This was problematic on several levels: the new or neo-NCJ was established in manifest breach of Poland's Constitution; recommendations from the European Commission to retain the appointment of NCJ members by their peers were disregarded; and the entire election process of new judges-members was marred by gross irregularities and conflicts of interest. As a result of these developments, the European Parliament called on the Commission – a rare occurrence – to launch an infringement action targeting Poland's neo-NCJ and request the suspension of its the activities by way of interim measures to be obtained from the CJEU.[310] To this day, however, the European Commission has refused to do so. This has not prevented the CJEU and the ECtHR to be seized of cases raising inter alia the lack of independence of Poland's neo-NCJ.

310 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 (COM(2017)0835 — 2017/0360R(NLE)), P9_TA(2020)0225, para. 24.

CJEU judgment of 19 November 2019 in *A.K.*
(Independence of the Disciplinary Chamber of the Supreme Court)[311]

The CJEU set out the criteria to assess the independence of the newly formed NCJ to ascertain whether the judges it selected for appointment, in this case to the infamous Disciplinary Chamber of Poland's Supreme Court, would themselves be capable of meeting the requirements of independence and impartiality under Article 47 CFR. The judgment affirmed the importance of national councils for the judiciary in general as they provide for checks and balances in the process of judicial appointment. However, this presumption is only valid if the body itself also satisfies the criteria for independence, especially vis-à-vis the other branches of power. To assess this, national courts must look at the composition of the judicial council, how it was formed, what competences it has and how it has exercised those competences in the past. If the comprehensive analysis of these different factors exposes legitimate doubts over the imperviousness of a judicial council to influence from the legislative and executive branches, then it follows that it cannot be considered independent for the purposes of Article 47 CFR and courts whose judges have been appointed by it cannot be considered independent and impartial tribunals.

CJEU judgment of 15 July 2021 in *Commission v Poland*
(Disciplinary regime for judges)[312]

Applying its case law in A.K., the CJEU ruled that there existed and persisted legitimate doubts over the independence of the NCJ, which affected the judicial independence of the new Disciplinary Chamber. The Court further held for the first time that, as a result of the shortcomings of the NCJ, its role in the appointment of judges to other judicial bodies amounts to a reduction in the protection of the rule of law in violation of the principle of non-regression first established in the CJEU judgment of 20 April 2021 in the *Repubblika* case.[313] This finding ought to have paved the way to an infringement action but as noted above, the Commission has failed to do so even after the ECtHR found that Poland's neo-NCJ amounts to a systemic rule of law problem which entails repeated breaches of the fundamental principles of the rule of law, separation of powers and the independence of the judiciary.

ECtHR judgment of 22 July 2021 in *Reczkowicz v. Poland*[314]

In this case, the applicant – a barrister – was suspended due to a breach of the professional ethical code in 2017. Her cassation appeal was eventually dismissed by Poland's Disciplinary Chamber in 2019. In its judgment of 22 July 2021, the Strasbourg Court found a breach of her Article 6(1) right to access to a court or tribunal established by law. In reaching this conclusion, the ECtHR primarily stressed the fundamental issues in the judicial appointment procedure

311 Case C-585/18, EU:C:2019:982.

312 Case C-791/19, EU:C:2021:596.

313 Case C-896/19, EU:C:2021:311.

314 No. 43447/19, CE:ECHR:2021:0722JUD004344719

due to the lack of independence of the NCJ, which therefore had a ripple effect on the Disciplinary Chamber, itself entirely composed from "neo-judges," i.e., judges appointed via the neo-NCJ, leaving it "inherently tarnished." This judgment paved the way to an exponential number of challenges to every "neo-judge" starting with those irregularly appointed to Poland's courts of last resort.

ECtHR judgment of 15 March 2022 in *Grzęda v. Poland*[315]

Sitting as a Grand Chamber, the ECtHR found a violation of the right to a fair trial with respect to a Polish judge's removal from the NCJ before his term had ended in a broader context where he was furthermore unable to obtain judicial review of that decision. In its judgment, the ECtHR held that Poland's "judicial reforms," including that of the NCJ, were adopted with the deliberate aim of weaking judicial independence whereas there is an obligation for all public authorities to ensure the independence of any judicial council from the executive and legislative powers in order to, *inter alia*, safeguard the integrity of the judicial appointment process in countries that have decided to establish judicial councils. As far as Poland's neo-NCJ was concerned, it could not be considered an independent body as prescribed by Poland's Constitution. As regards the one-off statutory amendment that terminated *ex lege* the constitutionally prescribed tenure of the NCJ's judicial members, the ECtHR furthermore found that it was akin to laws which are directed against specific persons and must therefore be understood as contrary to the rule of law.

ECtHR Judgment of 23 November 2023 in *Wałęsa v. Poland*[316]

This is the ECtHR's first pilot-judgment in relation to Poland's rule of law crisis in which the Court speaks for the first time of rule of law interrelated systemic problems created by Polish authorities. As regards the neo-NCJ, the Court describes the defective procedure for judicial appointments involving the neo-NCJ as Poland's primary rule of law problem insofar as it inherently and continually affects the independence of judges and in particular, the independence of the individuals defectively appointed to the Supreme Court and who cannot by definition meet the requirements of an "independent and tribunal established by law." More broadly, the ECtHR found that appointments of judges not only to the Supreme Court but also to the ordinary, military and administrative courts were all affected by the systemic defect, that is, the involvement of the neo-NCJ as established under the 2017 Amending Act.

Some key points

The ECtHR has established that: (i) the deficiencies of the judicial appointment procedure stemming from the involvement of the neo-NCJ have already adversely affected existing appointments and are capable of systematically affecting all future appointment of judges unless the irregularities are fixed; (ii) the legitimacy of any court composed of judges appointed with the involvement of the neo-NCJ is systematically compromised; and (iii) these

315 No. 43572/18 CE:ECHR:2022:0315JUD004357218.

316 No. 50849/21, CE:ECHR:2023:1123JUD005084921.

elements furthermore perpetuate a systemic dysfunction potentially resulting in widespread violations of the right to an independent and impartial tribunal established by law under Article 6(1) ECHR.

By contrast, in part due to the absence of an infringement action *directly* asking it to consider the composition and activities of the neo-NCJ, the CJEU has limited itself to holding that (i) the degree of independence of Poland's NCJ may become relevant when ascertaining whether the judges it selects will themselves be capable of meeting EU requirements of independence and impartiality,; and (ii) the changes made to the selection of judge-members of the NCJ under the 2017 Amending Act are liable to create a risk of the independence of the neo-NCJ being undermined in a broader context where a number of changes made to the organisation of Poland's judiciary may give rise to legitimate doubts as to the independence of the neo-NCJ. In short, the CJEU did not go further than holding that the neo-NCJ's independence from political authorities is questionable and refrained from adopting for itself the ECtHR's findings and conclude that every Polish judge appointed (or promoted) via the neo-NCJ cannot ensure effective judicial protection as required under EU law.

While this may be explained by the limits of the CJEU's preliminary ruling jurisdiction, it is difficult not to detect a pattern whereby the CJEU abstains from taking full account of ECtHR's findings whenever this would mean having to confront difficult systemic consequences which would flow from doing so. From this point of view, Poland's rule of law crisis shows the crucial importance for those in EU backsliding countries of being able to rely on the ECtHR in addition to the CJEU. On the other hand, the example of disguised collective dismissals of judges via a lowering of the retirement age shows the greater effectiveness of the CJEU, assuming it is seized of properly designed applications promptly, at preventing irreparable damage, neutralising general legislative measures in one go and eventually subjecting non-compliance to significant financial penalties. Prior to outlining the mutually reinforcing case law of the CJEU and ECtHR in this area, an issue closely connected to the capture of a NCJ will be first detailed: the issue of systemic deficiencies of in a country's judicial appointment procedure.

3. Systemic dysfunction in a country's procedure for judicial appointment

Systemic dysfunctions in the procedure for judicial appointments are bound to result in a snowball effect that hinders public trust in judicial institutions, due inter alia to the potential for undue interference from the executive and legislative branches. Mainly as a result of Poland's rule of crisis again – where about a quarter of all the country's judges (informally known as "neo-judges") have been irregularly appointed due to the involvement of *unconstitutional* and captured body presenting itself as Poland's NCJ (informally known as the "neo-NCJ" as explained above) – both the ECtHR and the CJEU have had to step in and in particular address the issue of when individual irregularly appointed to judicial offices cannot lawfully adjudicate.

Judgment of 26 March 2020 in *Simpson and HG*[317]

In this landmark judgment, the CJEU held that the right to a tribunal established by law encompasses the process of appointing judges and the guarantees that determine what constitutes a court and how it is composed represent the cornerstone of the right to a fair trial. As a matter of EU law, everyone must, in principle, have the possibility of invoking an infringement of the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law. This implies that the CJEU, but also national courts of EU member states, must be able to check whether an irregularity vitiating the appointment procedure in dispute could lead to an infringement of that fundamental right. Finally, having had regard to the case law of the ECtHR, the CJEU set out the following key question to help decide where an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the right to be judged by a tribunal established by law: Is the irregularity of such a kind and of such gravity as to create a real risk that other branches of the state, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned? For the CJEU, this is the case where there are irregularities concerning the fundamental rules forming an integral part of the establishment and functioning of that judicial system.

ECtHR judgment of 1 December 2020 in *Ástráðsson v. Iceland*[318]

In this judgment, the ECtHR clarified the legal test to apply to determine when irregularities in a judicial appointment procedure must be considered as sufficiently serious to entail a violation of the right to a tribunal established by law.[319]

CJEU judgment of 20 April 2021 in *Repubblika*[320]

In this case, the referring court asked the Court whether Article 19(1) TEU and Article 47 CFR may be interpreted as precluding Maltese judicial appointment rules. This preliminary ruling's key added value is to be found in the Court's recognition of a non-regression principle which precludes a Member State from amending its legislation, particularly regarding the organisation of justice "in such a way as to bring about a reduction in the protection of the value of the rule of law." As regards the situation existing in Malta, the Court however did not identify any regression and the Court interpreted the second subparagraph of Article 19(1) TEU as not precluding "national provisions which confer on the Prime Minister of the member state concerned a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body responsible

317 Joined Cases C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232.

318 Ibid., paras 243-252.

319 No. 26374/18, CE:ECHR:2020:1201JUD002637418. See *supra* Part II for further details.

320 Case C-896/19, EU:C:2021:311

for, inter alia, assessing candidates for judicial office and giving an opinion to that prime minister."[321]

ECtHR judgment of 7 May 2021 in *Xero Flor v. Poland*[322]

Applying the Icelandic Judges three-step test, the Strasbourg court found that Polish authorities had committed multiple irregularities amounting to manifest breaches of domestic law in the appointment of three judges to Poland's Constitutional Tribunal (CT) with the view of usurping the CT's role as the ultimate interpreter of Poland's Constitution. In the present case, the ECtHR found therefore a violation of the applicant company's right to a tribunal established by law owing to the presence on the adjudicating bench which dismissed its constitutional complaint of an individual irregularly appointed to the CT. This judgment was the first to establish the irregular composition of Poland's captured CT in the absence of an infringement action raising the same issue lodged with the CJEU until July 2023.[323]

ECtHR judgment of 22 July 2021 in Reczkowicz v. Poland[324]

Applying the Icelandic Judges three-step test once more, the Court found inter alia that Poland's ruling majority through its control of the legislative and executive branches was able to interfere directly or indirectly in the appointment of judges to the newly established Disciplinary Chamber (DC). This fundamental irregularity did not merely affect the individuals irregularly appointed to the DC but adversely affected the whole process, which led to the establishment of the DC and compromised the legitimacy of the DC. This is the first judgment of the ECtHR finding that the DC was never a lawful court, which shows that the ECtHR may move beyond irregularities concerning the appointment of specific individuals to assess the new body these individuals were appointed to in the light of the right to a tribunal established by law.

CJEU judgment of 6 October 2021 in *W.Ż.*
(Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)[325]

In this preliminary judgment concerning a transfer without consent of a (lawful) Polish judge, and for the first time in a case concerning a decision of a "neo-judge" of a chamber that is not a lawful court (the Chamber of Extraordinary Control and Public Affairs of Poland's Supreme Court), the Court established the following test to help national courts decide when to consider actions from "neo-judges" null and void: Does it follow from all the conditions and circumstances in which the process of the appointment of the "neo-judge" took place that (i) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds

321 Ibid., para. 73.

322 No. 4907/18, CE:ECHR:2021:0507JUD000490718.

323 Case C-448/23 (pending).

324 No. 43447/19, CE:ECHR:2021:0722JUD004344719.

325 Case C-487/19, EU:C: 2021:798.

of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law.

ECtHR judgment of 8 November 2021 in *Dolińska-Ficek and Ozimek v. Poland*[326]

In line with its judgment in *Reczkowicz v. Poland*, the Strasbourg Court found that the other newly established chamber within the Supreme Court by Poland's ruling majority at the time had been similarly made up of irregularly appointed individuals on the back of a procedure unduly influenced by the legislative and executive powers. As such, the legitimacy of the Chamber of Extraordinary Review and Public Affairs (CERPA) as a whole had been affected and it could not therefore be considered a tribunal established by law. Looking beyond the case, the ECtHR demanded rapid remedial action on the part of the Polish state as any court composed of judges appointed via the neo-NCJ was held to be systematically compromised.

ECtHR judgment of 3 February 2022 in *Advance Pharma*[327]

In line with its judgments in *Reczkowicz and Dolińska-Ficek and Ozimek*, the ECtHR held that the Civil Chamber of Poland's Supreme Court cannot be considered an independent and impartial tribunal established by law when it consists of "neo-judges." The Court repeated its call for rapid remedial action. It also added that as regards the legal and practical consequences for final judgments delivered by neo-judges and the effects of such judgments in the Polish legal order, a possible way forward would be to "incorporate into the necessary general measures the Supreme Court's conclusions regarding the application of its interpretative resolution of 23 January 2020 in respect of the Supreme Court and other courts and the judgments given by the respective court formations."[328]

ECtHR Judgment of 23 November 2023 in *Wałęsa v. Poland*[329]

As previously mentioned, when summarising the case law relating to Poland's neo-NJC, this is the ECtHR's first pilot-judgment in relation to Poland's rule of law crisis. The Court reiterated its previous finding in relation to the procedure of appointment to the CERPA – a procedure "inherently tarnished" by breaches of the domestic law – and its previous more general findings regarding the systemic incompatibility of the whole judicial appointment procedure involving the neo-NCJ with Article 6(1) ECHR. The Court once more warned that this may result in all existing and future appointments "not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts."[330] By contrast, the CJEU is yet to hold that every appointment of a neo-judge suffers from a systemic defect and that the legitimacy of every court composed of "neo-judges" is systematically compromised. The CJEU

326 Nos. 49868/19 and 57511/19, CE:ECHR:2021:1108JUD004986819.

327 No. 1469/20, CE:ECHR:2022:0203JUD000146920.

328 Ibid., para. 365.

329 No. 50849/21, CE:ECHR:2023:1123JUD005084921.

330 Ibid., para. 321.

will however take into account ECtHR judgments when assessing whether a body making a request for a preliminary ruling originates from a lawful court/judge.

CJEU judgment of 21 December 2023 in *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*[331]

After repeatedly refusing to dismiss requests for a preliminary ruling from irregularly appointed "neo-judges," including after ECtHR judgments finding that the "neo-judges" appointed to the Supreme Court cannot lawfully adjudicate, the CJEU finally held that an adjudicating panel of the CERPA does not constitute an independent and impartial tribunal previously established by law. In support of this conclusion, the CJEU considered the findings and assessments made by the ECtHR in *Dolińska-Ficek and Ozimek* and by Poland's Supreme Administrative Court in its judgment of 21 September 2021. However, the CJEU's reasoning continues to differ from the ECtHR as regards the systemic root of the problem, that is, the involvement of Poland's neo-NJC with the CJEU instead relying primarily on the concepts of appearance and doubts as opposed to accepting that the legitimacy of every Polish court composed of "neo-judges" is systematically compromised due to the systemic dysfunction in Poland's judicial appointments procedure since 2018.

Some key points

As seen above, Poland's rule of law crisis in its irregular judicial appointments dimension has led to an increasingly higher number of disputes, which in turn provided an opportunity to both the ECtHR and the CJEU to clarify when irregularities in a judicial appointment procedure may be considered as sufficiently serious to entail a violation of the right to a tribunal established by law. In the absence of infringement actions directly asking the CJEU to decide whether the judicial procedure for judicial appointments involving the neo-NCJ is incompatible with EU law and whether Poland's "neo-judges" can be considered judges who may provide effective judicial protection notwithstanding their irregular appointments, the CJEU's case law has proved more ambiguous than the ECtHR's case law with the CJEU primarily laying down broad general principles to be applied by national courts. Both courts have also provided limited guidance in respect to the legal and practical consequences for judgments delivered by bodies masquerading as courts and the effects of such judgments in a domestic legal order. And while the CJEU has shown its readiness to rely on ECtHR's findings and assessments, it is difficult not to detect the CJEU's selective approach when it does so with the CJEU seemingly omitting any systemic finding which may produce knock-on effects on the functioning of the EU legal order beyond the country affected by a rule of law crisis.

4. Disguised collective dismissals of judges via a lowering of the retirement age

Court packing is a commonly used strategy by aspiring autocratic governments to gain control over the judiciary. In recent years in Europe, this process has most prominently taken place in Hungary and Poland, where the retroactive lowering of the retirement age of judges was

331 Case C-718/21, EU:C:2023:1015.

used to hide politically motivated "purges" and free up positions to be filled by politically compatible "judges." The first major example of this tactic dates from 2011 and resulted in the removal and replacement of about 8% of Hungary's ordinary judges (out of a total of about 2,900 judges), 27% of Supreme Court judges, and more than 50% of appeal court presidents. As the European Commission failed to apply for interim measures, Hungarian authorities were left with ample time to fill nearly all of positions made unlawfully available. And while the Commission did launch a successful infringement action, it did not do so on the basis of Article 19(1) TEU but on the basis of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[332] Furthermore, the Commission accepted that the forcibly retired Hungarian judges could be offered compensation in lieu of prompt reinstatement to their previous posts. In addition, the Commission did not legally react to the measures specifically adopted to remove certain judges, such as András Baka, who was then the president of the Hungarian Supreme Court, forcing Judge Baka to lodge a complaint with the ECtHR.[333] Yet even in this case, the ECtHR did not explicitly require the reinstatement of the applicant as President of the Supreme Court for the entire duration of his interrupted mandate. Following the CJEU's landmark judgment in *Portuguese Judges*, the Commission did however react appropriately and prevented a successful repeat of Orbán's retirement purge trick in Poland.

CJEU judgment of 24 June 2019 in *Commission v. Poland (Independence of the Supreme Court)*[334]

Prior to this judgment and in the same case, the Commission enabled the CJEU to prevent a *fait accompli* outcome by applying for interim measures. This allowed the CJEU to provisionally restore Poland's Supreme Court to its situation *before* the date of the entry into force of the challenged legislation and on the basis inter alia of Article 19(1) TEU, the Commission was able to obtain from the Court of Justice a subsequent judgment, which prevented a purge of the Supreme Court to borrow the language used by the then First President of Poland's Supreme Court.[335] Indeed, and to put it briefly, the CJEU ruled that the new retirement age, applicable to all current judges including the First President of the Supreme Court, as well as the discretionary powers that the President of the Republic to extend the period of judicial activity of a judge requesting as much, violated not only the principle of judicial independence, but also the principle of irremovability of judges.

332 Judgment of 6 November 2012 in Case C-286/12, *Commission v. Hungary*, EU:C:2012:687.

333 See ECtHR judgment of 27 May 2014 in *Baka v. Hungary*, application no. 20261/12 (the ECtHR found against Hungary on Articles 6(1) and 10 ECHR on grounds, but by then, the damage was done and the Supreme Court fully captured).

334 Case C-619/18, EU:C:2019:531.

335 Judge Gersdorf quoted by C. Davies, "Head of Polish supreme court defies ruling party's retirement law," *The Guardian*, 4 July 2018.

CJEU judgment of 5 November 2019 in Commission v. Poland (Independence of ordinary courts)[336]

Similarly to the previous case, the reduction of the retirement age of ordinary female judges to 60 years and that of male judges to 65, with potential prorogation at the discretion of the Minister of Justice with no clear criteria and no possibility for judicial review, was deemed by the CJEU to constitute a breach of the principles of judicial independence, irremovability of judges, and additionally, of non-discrimination based on sex under Article 157 TFEU of the "equal pay for equal work" Directive 2006/54, and of the principle of effective legal protection under Article 19(1) read in conjunction with Article 47 CFR on the right to fair trial.

ECtHR judgment of 24 October 2023 in *Pajak and others v. Poland*[337]

This case echoed the infringement action brought before the CJEU in Case C-192/18, which is indeed extensively relied upon by the ECtHR, with the applicant judges having been forcibly retired before the end of their term following their unsuccessful petition to remain in office before the Minister of Justice and the unconstitutional and captured neo-NCJ. In its judgment, the ECtHR found that Poland had violated three provisions of the Convention: Articles 6(1), 8 and 14. As pertains to Article 6(1), the Court found that the legislation which made any extension of tenure of judges past the new retirement age dependent on the NCJ and the Minister of Justice breached the applicants' right to access to court, due to the process and the NCJ itself being subordinated to the executive and failing to meet the requirement of a court established by law. The second issue that was tied to the general preservation of judicial independence in this case was the right to private life under Article 8 ECHR. Although no explicit mention to the judges' private life was mentioned as a reason for dismissal, the Court held that the dispute measures still fell under the scope of Article 8 as the lowering of the retirement age negatively impacted the professional career and development prospects of the applicants. Furthermore, the ECtHR also found that the measures in question had constituted a breach of gender equality under Article 14 ECHR in differentiating between the new retirement age of female and male judges, as well as in demanding that female judges (but not their male counterparts) present a medical certificate to prove their fitness to hold their post. In this respect, it is worth noting that the ECtHR explicitly concluded that it saw no reason to arrive at a different conclusion from that of CJEU in its judgment of 5 November 2019, and furthermore explicitly noted that, despite the delivery of that judgment, the applicants' circumstances had not changed and, where they were concerned, the discrimination complained of remained firmly in place. This may be the first time the ECtHR concludes that a judgment of the CJEU continues to be disregarded at a time where the European Commission was claiming the contrary and indeed never acted to remedy the continuing violation of the CJEU judgment of 5 November 2019 by Polish authorities.

336 Case C-192/18, EU:C:2019:924.

337 No. 25226/18, CE:ECHR:2023:1024JUD002522618.

Key points

Both the ECtHR and CJEU have now laid down general principles and tests that should prevent any successful attempt to purge the senior echelons of national judiciary on the back of disingenuous legislation lowering of the retirement age by backsliding authorities. In this area, the ECtHR has extensively relied on the CJEU's judgments and in doing so, paved the way to a mutually reinforcing line of judgments where the two courts can support and reaffirm each other's findings. Having taken on Poland's retirement "reforms" early, the CJEU relies on future ECtHR's judgments relating to Poland's rule of law crisis, but the CJEU could positively rely on an Opinion of the Venice Commission to support its finding that it was seriously doubtful that the "reform" of the retirement age of serving Supreme Court judges was not made "with the aim of side-lining a certain group of judges of that court."[338]

In the absence of any infringement action challenging the multiple and grossly irregular appointments made to the Supreme Court via the neo-NCJ, however, the CJEU was not provided with an opportunity to prevent the capture of the Supreme Court via a different route. This shows inter alia that systemic challenges to judicial independence will succeed unless they are met with systemic answers to these attacks, which entails bringing properly built cases to the CJEU and ECtHR as soon as possible, requests for interim measures wherever possible, and prompt processing by both the CJEU and ECtHR. In this respect, the ECtHR was willing to unambiguously state that Polish authorities had continuously failed to fully comply with the CJEU judgment of 5 November 2019 insofar as the applicants were concerned and extremely regrettable to see the Commission failing to do so.[339] The EU system of remedies needs to be revisited as currently only the Commission has the power to request the CJEU to impose financial sanctions against a member state in a situation where it views that a previous judgment of the CJEU is not complied with. Should the Commission fail to do for political or any other reasons, non-compliance with CJEU judgments (or indeed orders) will remain legally unsanctioned.

5. Systemic non-compliance with ECtHR and CJEU orders and judgments

Increased systemic non-compliance with orders (also known as interim decisions for the ECtHR) and rulings of both the ECtHR and CJEU is happening not only in countries subject to autocratization processes but also in countries where populism is on the ascendency. In a resolution of 28 February 2024, the European Parliament noted that this has resulted in a growing trend of "open and unashamed non-compliance of several Member States with EU law in various fields, such as the right to effective judicial protection."[340] This trend goes hand in hand with increasing non-compliance with CJEU judgments following a longer standing

338 Judgment of 24 June 2019 in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2018:1021, para. 82.

339 Commission Communication, *Enforcing EU law for a Europe that delivers*, COM(2022) 518 final, 13 October 2022, p. 23: "As a result, [Poland] repealed its retirement rules for judges and reinstated the judges that had been forced to retire."

340 European Parliament resolution of 28 February 2024 report on the Commission's 2023 Rule of Law report (2023/2113(INI)), para. 76.

and "persistent problem" of non-compliance or "incomplete implementation of ECtHR judgments."[341]

The most recent dramatic example of systemic non-compliance by an EU state with the rule of law decisions of both the CJEU and ECtHR has been Poland until December 2023. In this case, systemic non-compliance was organized primarily via the captured Constitutional Tribunal acting de concert with the captured Supreme Court and the systemic harassment of any judge seeking to apply EU and/or ECHR law. It culminated with the "unconstitutionalization" of EU and ECHR requirements of effective judicial protection and associated CJEU and ECtHR orders and judgments. To borrow the language from the ECtHR, Polish authorities methodically organized a general state of non-compliance with EU and ECHR rule of law requirements. In response, the CJEU was forced to "nudge" the Commission into requesting financial sanctions whenever the Court's prior interim orders were disregarded and most recently, making clear to the Commission that it needs to more drastically react to deliberate and sustained disregard of CJEU judgments, including by asking the CJEU to impose significantly dissuasive financial penalties in situations of protracted and bad-faith non-compliance.

In the absence of procedures allowing for the imposition of financial penalties, the ECtHR has radically reinterpreted its previous approach regarding interim decisions in 2022 to better protect judges facing arbitrary disciplinary suspensions, lifting of judicial immunity and/or transfers without their consent. Another interesting and positive development has seen the ECtHR not shying away from noting when CJEU orders or judgments continue to be violated. This has made any eventual inaction by the EU Commission as guardian of the EU Treaties less tenable.

CJEU order of 8 April 2020 in *Commission v Poland (Disciplinary regime for judges)*[342]

Pending the delivery of the judgment on the merits, the Court ordered Polish authorities to immediately suspend the activities of the Disciplinary Chamber as regards disciplinary proceedings concerning judges on account inter alia of the fact that its continuing activities were likely to cause serious and irreparable harm to the EU legal order. This application for interim measures by the Commission was rendered necessary by Poland's failure to comply with the CJEU's previous preliminary ruling in A.K. and left no doubt that the Disciplinary Chamber was not lawful court. This order, however, was not fully complied with as noted by the ECtHR in a judgment of 15 March 2022: "On 8 April 2020 the CJEU in its interim decision ordered Poland to suspend the application of the provisions on the powers of the Disciplinary Chamber with regard to disciplinary cases concerning judges pending the resolution of the case (C791/19 R, EU:C:2020:277). Despite the CJEU's interim decision, the Disciplinary Chamber has continued to operate and has decided, for example, to lift immunity from prosecution in cases against judges."[343] The European Commission, however, did not return

341 Ibid., para. 79.

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

343 *Grzęda v. Poland* [GC], no. 43572/18 CE:ECHR:2022:0315JUD004357218, para. 23.

to the CJEU to ask for the imposition of financial penalties and instead waited for the CJEU's judgment on the merits.

CJEU orders of 14 July 2021 and 21 April 2023 in *Commission v Poland (Independence and private life of judges)*[344]

Pending the delivery of the judgment on the merits, the Court ordered Polish authorities to suspend immediately relevant provisions of the "muzzle law" national rules regarding ordinary courts and the Supreme Court following a Commission's application for interim measures lodged on 1 April 2021. This time, the Commission reacted to the manifest disregard of the CJEU order, which resulted in the Commission securing from the CJEU on 14 July 2021 a second order, which imposed a daily penalty payment of €1,000,000 until full compliance. This amount represented a record-breaking amount but one that was fully justified considering Polish authorities' non-compliance record. It was also the first time the CJEU imposed a daily financial penalty in relation in relation to national measures relating to judicial independence matters. By order adopted on 21 April 2023, the CJEU Vice-President ordered a reduction of the amount of the periodic penalty payment to €500,000 per day on account of some degree of compliance such as the abolition of the Disciplinary Chamber. In the absence of full compliance, however, Polish authorities accumulated close to €570,000,000 in unpaid penalty payment by the time the CJEU issued its judgment on the merits on 5 June 2023 regarding the "muzzle law."

ECtHR interim decision of 8 February 2022 in *Wróbel v. Poland* (application no. 6904/22)

This interim decision was unprecedented as it was the first interim measure adopted by the ECtHR to prevent a sitting judge – in this instance, a sitting judge of the Criminal Chamber of Poland's Supreme Court – from having his judicial immunity lifted until the final determination of his complaints by the ECtHR. Multiple interim decisions of a similar nature were subsequently adopted by the ECtHR to prevent Polish judges from being suspended or having their judicial immunity lifted by the Disciplinary Chamber and its post July 2022 replacement, the new Chamber of Professional Liability. In addition, the ECtHR began requesting to be systematically informed of the composition of the panel due to examine the judges' cases and the manner in which members of that panel were appointed to judicial office. On 6 December 2022, the ECtHR further expanded the scope of its interim decisions by suspending a forced transfer of three court of appeal judges which was based on their application of ECtHR and CJEU's case law.[345]

344 Case C-204/21 R, EU:C:2021:593 and C-204/21 R-RAP, EU:C:2023:334.

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

CJEU judgment of 21 December 2023 in *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*[346]

In this judgment, the CJEU rejected for the first time a request for a preliminary ruling submitted by one of the two new chambers established by Polish authorities as part of their plan to weaken judicial independence. For the CJEU, the relevant adjudicating panel of the Extraordinary Review and Public Affairs Chamber of Poland's Supreme Court did not constitute an independent and impartial tribunal previously established by law. This finding was inter alia justified on account of the ECtHR's own findings and assessment in its judgment of 8 November 2021 *Dolińska-Ficek and Ozimek v Poland*. This CJEU judgment shows that a sustained failure to comply with an ECtHR judgment finding that a national body is not a lawful court may in due course produce consequences in the EU legal order. Indeed, it also follows from this CJEU judgment that national courts, in cases governed by EU law, must also disregard both the jurisdiction and decisions of whatever bodies found by the ECtHR not to constitute an independent and impartial tribunal previously established by law. This is another example where the ECtHR and the CJEU mutually reinforce each other by taking full account of one another's case law.

CJEU judgment of 13 June 2024 in *Commission v Hungary (Reception of applicants for international protection II)*[347]

This judgment is directly connected with a basic attack on the rule of law, deliberate and sustained non-compliance with a previous CJEU judgment of 17 December 2020 in Case C-808/18, *Commission v Hungary (Reception of applicants for international protection)*. The Court underlined that prolonged non-compliance with one of its judgments represents a serious attack to the principle of legality and the authority of *res judicata* in a European Union governed by the rule of law. Consequently, the Court saw fit to impose a record-breaking lump sum payment of €200,000,000 and a daily fine of €1,000,000. In setting these amounts, the Court dramatically departed from the amounts sought by the Commission. This judgment therefore sets an important precedent that ought to encourage the Commission to address the growing issue of systemic non-compliance with more forceful judgments.

Key points

Systemic non-compliance with judgments of the European courts related to rule of law and judicial independence matters is a hallmark of backsliding states, most notably in Poland and Hungary in recent years. Within the ECHR system, addressing non-compliance with ECtHR judgments has become increasingly identified as a priority, but in the absence of a procedure similar to Article 260 TFEU and meaningful prioritisation by most political actors, authorities in a number of countries have disregarded ECtHR judgments in a systemic way at little cost. The ECtHR's new readiness to adopt interim decisions to better protect judges facing arbitrary proceedings before bodies masquerading as courts is however a major and positive step. Failure to comply with ECtHR judgments and interim decisions may in any event be considered

346 Case C-718/21, EU:C:2023:1015.

347 Case C-123/22, EU:C:2024:493.

by the CJEU, which indirectly increases the legal costs of non-compliance for EU member states.

The CJEU's broad interpretation of its power to impose financial penalties both where a Member State fails to comply with its interim orders and judgments is welcome. However, the CJEU cannot do so on its own motion, which further proves the importance of having an active guardian of the Treaties. In this respect, the CJEU judgment of 13 June 2024 mentioned above sent a clear message to the Commission to take non-compliance with the Court's judgments more seriously. Poland's rule of law crisis has also shown the need to correct a gap in the EU's system of remedies by which national authorities can violate CJEU preliminary rulings without the risk of seeing financial penalties adopted against them unless the Commission launches an infringement action. In practice, this may only result in financial penalties after years of deliberate non-compliance.

6. Systemic misuse of disciplinary and/or criminal proceedings against judges

Another key feature of backsliding countries is the systemic misuse of disciplinary and/or criminal proceedings against judges and prosecutors usually on the back of a revised disciplinary regime for judges and prosecutors and/or via new disciplinary bodies. This does not have to be done an industrial scale as a significant chilling effect may follow from the abusive targeting of a selected number of the most prominent and/or senior judges and prosecutors. Poland's rule of law crisis has provided many such examples and there have been similar developments in Türkiye, Bulgaria and Romania. Poland's rule of law crisis has however provided the most straightforward and repeated examples of abusive proceedings against judges for merely attempting to apply EU and ECHR rule of law requirements. In this area, the CJEU and ECtHR have developed a mutually reinforcing jurisprudence and built an extremely dense set of general principles leaving little room for the abusive use of disciplinary proceedings as long as the relevant legal system is not past the point of no-return and can still rely on independent courts to self-correct and relevant supranational actors to promptly and forcefully react when domestic and European judgments are systematically disregarded.

CJEU judgment of 12 February 2019 in *RH*[348]

In this preliminary ruling case, a Bulgarian judge asked the CJEU to clarify whether EU law precludes disciplinary proceedings on account of a national judge deciding to make a request for a preliminary ruling and stay of domestic proceedings regarding the legality of pre-trial decisions. For the CJEU, the answer is positive. Accordingly, any national legislation which obliges national courts to adjudicate on the legality of a pre-trial detention decision without the opportunity to make a request for a preliminary ruling or to wait for its reply is not compatible with EU law. The Court added that not being exposed to disciplinary sanctions for exercising a choice, such as sending a request for a preliminary ruling to the Court or choosing to wait for the reply to such a request before adjudicating on the substance of a dispute before them, constitutes a guarantee essential to judicial independence.

348 Case C-8/19 PPU, EU:C:2019:110.

CJEU judgment of 19 November 2019 in *A.K.*
(Independence of the Disciplinary Chamber of the Supreme Court)[349]

The CJEU further expanded on the meaning and obligations connected to EU rule of law requirements in this preliminary ruling, which offered the CJEU with its first opportunity to address Poland's rule of law crisis. In answer to questions regarding Poland's Disciplinary Chamber, the CJEU confirmed that disputes concerning the application of EU law must not fall within the exclusive jurisdiction of a court which is not an independent and impartial tribunal. If they do, the principle of primacy of EU law requires national courts to disapply the relevant provision of national law so that these cases may be examined by a proper court which, would otherwise have jurisdiction in the relevant field. Although it was left to the referring court to apply these principles, the CJEU left no doubt that Poland's Disciplinary Chamber could not be considered a court established by law.

CJEU judgment of 26 March 2020 in *Miasto Lowicz and Prokurator Generalny*
(Régime disciplinaire concernant les magistrats)[350]

Although this judgment held inadmissible the two requests for a preliminary ruling it received from two Polish judges facing disciplinary investigations for making the requests, the CJEU unambiguously established that the mere prospect of being the subject of disciplinary proceedings as a result of making such a reference to the CJEU or deciding to maintain that reference after it was made amounts to a breach of EU law. This judgment is significant as it recognises the need to be mindful of the chilling/deterrent effect that the mere act of launching disciplinary inquiries or investigations against judges may create.

ECtHR judgment of 9 March 2021 in *Eminağaoğlu v. Turkey*[351]

Notwithstanding domestic law, which provided that a disciplinary sanction (post relocation) imposed on the applicant – then a member of the public prosecutor's office and the chairman of an association of judges and prosecutors – could not be subject to judicial review, the ECtHR found such exclusion to be in breach of the Convention. The reasoning behind safeguarding judges' access to court in the case of disciplinary actions is that they affect the status and career of judges, and thereby threaten their judicial independence and autonomy. In addition, a violation of the judge's right to private life and right to freedom of expression were found due respectively to the use of telephone conversations recorded for a different purpose and a failure to adopt sanctions on the basis of a procedure providing effective and adequate safeguards against abuse.

349 Case C-585/18, EU:C:2019:982.

350 Joined Cases C-558/18 and C-563/18, EU:C:2020:234.

351 No. 76521/12, CE:ECHR:2021:0309JUD007652112.

CJEU judgment of 18 May 2021 in *Asociaţia 'Forumul Judecătorilor din România'*[352]

This judgment, which may be informally referred to as Romanian Judges I, answered a grand total of six requests for a preliminary ruling from Romanian regional courts and courts of appeal. These multiple requests primarily concerned the Romanian Judicial Inspectorate, the Supreme Council of the Judiciary (SCJ) and the special section within the Public Prosecutor's Office (SIIJ) following the entry into force of legislative amendments adopted between 2017 and 2019. The primary aim of the amendments was to undermine judicial independence in a context where the Romanian Constitutional Court, in a manner reminiscent of Poland's captured Constitutional Tribunal, had been seeking to neutralise the legal effects of EU rule of law requirements.

In response, the CJEU clarified several aspects: (i) the creation of a disciplinary body must be justified by objective and verifiable reasons connected with the sound administration of justice; (ii) this body must include safeguards to prevent political control over judges and prosecutors; and (iii) the right to fair trial and effective remedies must be respected. Moreover, similar safeguards should also be applied when imposing civil liability on judges. Finally, the Court underlined that in compliance with the principle of supremacy, judges cannot be subject to disciplinary liability for applying EU law by submitting requests for a preliminary ruling or applying CJEU judgments that may result in the disapplication of national rules previously upheld as constitutional by a national constitutional court.

CJEU judgment of 15 July 2021 in *Commission v. Poland (Disciplinary regime for judges)*[353]

In this third infringement judgment regarding Poland's rule of law crisis, the CJEU held that Poland had violated Article 19(1) TEU on multiple grounds, as the new disciplinary regime for judges (i) fails to guarantee the independence and impartiality of the Disciplinary Chamber; (ii) allows the content of judicial decisions to be classified as a disciplinary offence; (iii) confers on the president of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning ordinary court judges; (iv) fails to guarantee that disciplinary cases are examined within a reasonable time; and (v) refuses to give suspensory effect to the appointment of defence counsel and the taking up of the defence by that counsel despite the justified absence of the notified accused judge or his/her defence counsel.

ECtHR judgment of 22 July 2021 in *Reczkowicz v. Poland*[354]

As previously outlined, this is the first ECtHR judgment establishing that Poland's Disciplinary Chamber as a whole cannot be considered a tribunal established by law, which means that every decision it took and will take in the future is not compatible with the right to a fair trial.

352 Joined Cases C-83/19 et al, EU:C:2021:393.

353 Case C-791/19, EU:C:2021:596.

354 No. 43447/19, CE:ECHR:2021:0722JUD004344719.

ECtHR judgment of 19 October 2021 in *Todorova v. Bulgaria*[355]

Although the ECtHR found no breach of the applicant judge's right to a fair hearing in relation to the disciplinary proceedings that she was subject to, the imposition of sanctions was still held problematic as it was closely related to the applicant's criticism of national courts and judges (including of the Supreme Administrative Court that conducted the disciplinary proceedings). Therefore, the disproportionate nature of the sanctions compared to the applicant's statements – who was the president of the Bulgarian Union of Judges at the time – were found to have a chilling effect and could not be deemed necessary in a democratic society. In addition, the Court found a rare violation of Article 18 (limitation on use of restrictions on rights) read in conjunction with Article 10 (freedom of expression) as the main and hidden aim of the disciplinary proceedings against the judge applicant and the sanctions imposed on her was to intimidate the judge on account of her criticism of the country's Supreme Judicial Council and government.

CJEU judgment of 22 February 2022 in *RS*
(Effect of the decisions of a constitutional court)[356]

In this preliminary ruling, the CJEU clarified inter alia that EU law precludes national rules or national practices under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the CJEU, thereby departing from case-law of the constitutional court of the member state concerned.

ECtHR judgment of 6 October 2022 in *Juszczyszyn v. Poland*[357]

Polish Judge Juszczyszyn was one of the first judges to be sanctioned with an extremely lengthy period of suspension, during which his salary had been reduced by 40%. For the ECtHR, Polish authorities violated the judge's right to a fair trial, right to respect for private and family life, and Article 18 ECHR, as the predominant and hidden purpose of the disciplinary measures taken against him had been to sanction him and to dissuade him from assessing the status of neo-judges appointed in a procedure involving the neo-NCJ.

CJEU Judgment of 11 May 2023 in *Inspecţia Judiciară*[358]

This preliminary ruling case looked at the role of the Romanian chief inspector, who held large power over the entire inspectorate and over the initiation of disciplinary investigations and proceedings. Due to the chief inspector's potential misuse of powers and influence over the deputies who may also be tasked with conducting disciplinary proceedings, the Court made clear that the national legislation lacked sufficient safeguards for preventing the proceedings from being used as an instrument of political control over judges' activities.

355 No. 40072/13.

356 Case C-430/21, EU:C:2022:99.

357 No. 35599/20, CE:ECHR:2022:1006JUD003559920.

358 Case C-817/21, EU:C:2023:391.

CJEU Judgment of 5 June 2023 in *Commission v Poland (Independence and private life of judges)*[359]

In this infringement ruling regarding Poland's "muzzle law," the Court found multiple violations of EU law and confirmed inter alia that national judges cannot ever be disciplined for reviewing whether a court is established by law or referring questions under the EU's preliminary ruling procedure. For the first time, the CJEU had the opportunity to review national provisions requiring judges to submit a declaration indicating any past or present membership in an association, non-profit foundation, or political party, and the placement of such information on a publicly accessible online platform. For the Court, these provisions violate the rights to protection of personal data and the right to a private life of those judges. The Court underlined that these provisions amount to disguised attempts by the ruling majority to harass and stigmatise judges.

ECtHR judgment of 6 July 2023 in *Tuleya v. Poland*[360]

The Court held that the applicant's right to fair trial, right to respect for private life, and right to freedom of expression were violated by the imposition of disciplinary sanctions by a body that was not a tribunal established by law. As a consequence of irregularities in the system of disciplinary liability for judges, the measures against the applicant had no lawful basis, had a significant impact on his right to private life, and could be characterized as a strategy aimed at intimidating him for the views that he had expressed, given his status as an outspoken critic of judicial changes in Poland.

CJEU judgment of 13 July 2023 in the *YP and M.M. (Lifting of a judge's immunity and his or her suspension from duties)*[361]

In this preliminary ruling, the CJEU unambiguously held that national courts are required as a matter of EU law to disapply any act ordering a judge's suspension from his/her duties in breach of EU law. Judges setting aside any such act or indeed any provision of national law deemed in breach of EU law cannot see their disciplinary liability being triggered. The CJEU also made clear that this means that national courts must not apply resolutions of the Disciplinary Chamber and disregard any consideration relating to the principle of legal certainty or the alleged finality of those resolutions. It held irrelevant whether the case law of the country's constitutional court prohibits the disapplication of those resolutions.

CJEU judgment of 24 July 2023 in *Lin*[362]

This request for a preliminary ruling, which was dealt with under the urgent procedure, allowed the Court to, inter alia, assess the compatibility with EU law of the updated Romanian disciplinary system for judges following its previous preliminary ruling in RS. The revised rules

359 Case C-204/21, EU:C:2023:442.

360 Nos. 21181/19 and 51751/20, CE:ECHR:2023:0706JUD004641221.

361 Joined Cases C-615/20 and C-671/20, EU:C:2023:562.

362 Case C-107/23 PPU, EU:C:2023:606.

on disciplinary liability provided that judges could be subject to disciplinary proceedings if they perform their duties "in bad faith or with gross negligence." However, disapplying national case law because of its incompatibility with EU law was deemed to satisfy the new requirements, and therefore still expose judges to potential sanctions. Unsurprisingly, the CJEU ruled that in accordance with the doctrine of supremacy, ordinary courts cannot be forced to follow the case law of a constitutional or supreme court that ordinary courts consider, in the light of a judgment of the CJEU, contrary to provisions of EU law having direct effect. As a result, no disciplinary liability can be sought on this basis.

Key final points

The large body of jurisprudence dealing with the systemic misuse of disciplinary proceedings against judges developed in recent years by the European courts highlights the gravity and prevalence of the growing threat posed by these practices to judicial independence. A few common threads emerge from this case law. Both courts have stressed the requirement that disciplinary bodies satisfy the requirements of a court or tribunal established by law. In this context, the courts have underlined that disciplinary rules cannot be used as a system of pressure or political control over the activity of judges and prosecutors and the need for any disciplinary regime to preserve their procedural rights, in particular the rights of the defence. Moreover, the ECtHR and subsequently the CJEU have both sought to prevent the misuse of disciplinary proceedings and sanctions, including the lifting of judicial immunity, against judges but also prosecutors who express critical opinions toward the government or ruling party by making an increasing use of the concept of chilling/deterrent effect. Finally, both the ECtHR and the CJEU have had to state the obvious: judges cannot be subject to disciplinary measures, including disguised ones such as transfers without consent, by virtue of applying EU and/or ECHR law even in a situation where a national constitutional/supreme court makes it a violation of national law to do so. Thanks to the growing and for the most part, mutually reinforcing case law from the ECtHR and CJEU, national judges in EU member states can draw increased protection from both EU and ECHR law at a time where authoritarian tendencies are visible in an increasing number of jurisdictions.

CONCLUSION

Independent judiciaries represent a major obstacle to would-be autocrats seeking to implement backsliding strategies. It should come therefore "as no surprise that undermining the judiciary is on page one"[363] of the authoritarian playbook. If national judiciaries are captured, other institutions constraining the exercise of government powers can then be systematically hollowed out or dismantled, leading to unconstrained arbitrary rule. This is not a theoretical concern.

In practice, would-be autocrats seek to achieve this outcome by implementing multifaceted strategies relying on formal and informal means. A recent report dedicated to the strategies that have been used to weaken constitutional democracies offers a helpful summary of the set of tactics that have been used in relation to a country's judicial branch.[364] These tactics include:

- Lowering the judicial retirement age
- Restricting jurisdiction or access to court
- Adding quorum requirements
- Expanding the court
- Reassigning jurisdiction to another tribunal
- Changing judicial appointment procedures
- Failing to appoint or vote on judicial nominees
- Adjusting judicial administration (assignment of cases)
- Adjusting oversight of the judiciary
- Selective non-removal of judges
- Replacing judges
- Nullifying judicial decisions
- Reinstating powers and wielding the judiciary[365]

To this list, one could add the selective promotion, secondment, or forced transfers of judges and prosecutors, as well as informal forms of pressure on judicial actors such as threats of disciplinary proceedings, criminal proceedings, or indirect retribution in the form of public smear campaigns in the press or social media or other forms of attacks against individual judges, prosecutors or their representative bodies.

After a decade of rule of law backsliding, the CJEU and ECtHR have been able to address most of these tactics in their respective case law as outlined in Part III of this guide. Both courts have clarified the meaning and the scope of application of European rule of law requirements in addition to laying down new general principles (Part II of this guide) that may be relied

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363 Council of Europe (Annual report by the Secretary General), *State of Democracy, Human Rights and the Rule of Law: Populism – How Strong are Europe's Checks and Balances?* (Council of Europe, 2017), p. 15.

364 International IDEA (S. Bisarya and M. Rogers), *Designing Resistance. Democratic Institutions and the Threat of Backsliding*, 27 October 2023.

365 Ibid., p. 38.

upon by applicant judges, prosecutors, or judicial associations to challenge judiciary-related measures or practices whose compatibility with ECHR and EU rule of law requirements is doubtful.

Access to the CJEU and/or the ECtHR for individual judges, prosecutors or judicial associations as applicants remains however subject to demanding and at times, problematic requirements for those based in a backsliding country as detailed in Part I of this guide. Within the EU legal framework at least, European institutions and first and foremost, the European Commission, have all the tools needed to defend the rule of law and make legal actions by the individual judges, prosecutors, or judicial associations unnecessary. Unfortunately, notwithstanding strong rhetoric, inaction is the default setting.

This has led to a new, and to date, unaddressed issue: increasing non-compliance with CJEU judgments following a more ancient and "persistent problem" of non-compliance or "incomplete implementation of ECtHR judgments."[366] This is why the European Parliament has repeatedly asked the European Commission to take stronger enforcement action and not merely content itself with issuing an increasing number of rule of law reports on the back of which rule of law progress is claimed without evidence or worse, by ignoring all evidence to the contrary.[367] In the absence of meaningful enforcement action by those with the power to do so[368] in a broader context within which both the CoE and the EU have shown an extreme reluctance to sanction their autocratizing member states – or indeed, acknowledge that some member states are no longer democracies – judges, prosecutors, and their representative bodies will have to continue to engage in individual and public interest litigation as well as pursue non-litigation strategies to uphold the rule of law.

366 European Parliament resolution of 28 February 2024 report on the Commission's 2023 Rule of Law report (2023/2113(INI)), para. 79.

367 B. Lobina, "Does Freezing Funds Work? Taking Stock of the 2023 Annual Rule of Law Report", *EU Law Live*, 29 July 2023: https://eulawlive.com/op-ed-does-freezing-funds-work-taking-stock-of-the-2023-annual-rule-of-law-report-by-benedetta-lobina/; Civil Liberties Union for Europe, *European Commission's Rule of Law Report 2023. Gap Analysis*, 2024, p. 23 et seq.

368 See in particular B. Çalı, and E. Demir-Gürsel, "The Council of Europe's Responses to the Decay of the Rule of Law and Human Rights Protections: A Comparative Appraisal" (2021) 2(2) *European Convention on Human Rights Law Review*, 165 and R.D. Kelemen and T. Pavone, 'Where have the Guardians gone? Law enforcement and the politics of supranational forbearance in the European Union' (2023) 75(4) *World Politics* 779-825.

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ANNEX I

Chronological overview of the main CJEU rule of law-related orders and judgments since *Portuguese Judges*[369]

Judgment of 27 February 2018 (Grand Chamber), ***Case C-64/16, Associação Sindical dos Juízes Portugueses (Portuguese Judges or ASJP)***, EU:C:2018:117	EU Member States have a justiciable obligation to ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection under the second subparagraph of Article 19(1) TEU. In this instance, the Court ruled that the principle of judicial independence does not preclude salary reductions being applied to the judges of the Tribunal de Contas in Portugal as these measures, adopted in the context of EU financial assistance to that Member State, affected, in a general and temporary nature, various public office holders and employees performing duties in the public sector.
Judgment of the Court of 6 March 2018 (Grand Chamber), ***Case C-284/16, Achmea***, EU:C:2018:158	An arbitration tribunal created as part of an intra-EU bilateral investment treaty does not ensure sufficient judicial protection for the purposes of Article 19(1) TEU and Articles 344 and 267 TFEU. In view of the characteristics of EU law, such as its autonomy with respect to national laws and international law, its primacy over national laws, and the direct effect of a whole series of its provisions for citizens of the Union and for the Member States, a court falling outside the scope of Article 19(1) would not be able to ensure its effectiveness and is therefore incompatible with EU law.
Judgment of 13 March 2018 (Grand Chamber), ***Case C-244/16 P, Industrias Químicas del Vallés v Commission***, EU:C:2018:177 and Judgment of 13 March 2018 (Grand Chamber), ***Case C384/16 P, European Union Copper Task Force***, EU:C:2018:176	In denying the standing of individuals to challenge a Regulation which does not contain implementing measures before the CJEU, the Court ruled that 19(1) TEU serves to guarantee the right to judicial review and effective judicial protection. Instead of directly challenging a Regulation before the CJEU, individuals can challenge implementing acts passed by the Member States before national courts, and cause that court to refer questions to the CJEU pursuant of Article 267 TFEU.
Judgment of 25 July 2018 (Grand Chamber), ***Case C-216/18 PPU, Minister for Justice and Equality (Deficiencies in the system of justice)***, EU:C:2018:586	A judicial authority called upon to execute a European arrest warrant must refrain from giving effect to it if it considers that there is a real risk that the individual concerned would suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial on account of deficiencies liable to affect the independence of the judiciary in the issuing Member State.

369 This table was compiled with the view of offering a rapid chronological overview of the main orders and judgments delivered by the CJEU in relation to the principle of effective judicial protection as guaranteed under the second subparagraph of Article 19(1) TEU using the CJEU judgment of 27 February 2018 in Case C-64/16 as a starting point.

Judgment of 13 September 2018 (Fifth Chamber), ***Case C-358/16, UBS Europe and Others***, EU:C:2018:715	It is for the competent national authorities and courts to weigh up the interest of a person in having access to the information necessary to exercise fully his rights of defence and the interests in maintaining the confidentiality of the information covered by the obligation of professional secrecy, in compliance with Article 19(1) TEU and Article 47 CFR, which protects against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities.
Judgment of 7 February 2019 (Second Chamber), ***Case C-49/18, Escribano Vindel***, EU:C:2019:106	In this case concerning the reduction of remuneration for judges as part of budgetary cuts, the Court ruled that according to Article 19(1)(2) TEU, the principle of judicial independence does not preclude the application of national legislation that provides for different percentage reductions for the basic salary and additional remuneration of members of the judiciary, provided that the level of remuneration received by the applicant after the salary reduction is commensurate with the importance of the duties he performs and, accordingly, guarantees his independent judgment, which is a matter for the referring court to ascertain.
Judgment of 12 February 2019 (First Chamber), ***Case C-8/19 PPU, RH***, EU:C:2019:110	Being exposed to disciplinary sanctions for sending a preliminary ruling request or waiting for a reply from the CJEU on said request before adjudicating on the substance of the domestic case constitutes a breach of an essential guarantee for judicial independence.
Judgment of 27 May 2019 (Grand Chamber), ***Joined Cases C-508/18 OG (Public Prosecutor's office of Lübeck)*** and ***C-82/19 PPU PI (Public Prosecutor's office of Zwickau)*** and ***Case C-509/18 PF (Prosecutor General of Lithuania)***, EU:C:2019:456	The concept of an 'issuing judicial authority', within the meaning of a European Arrest Warrant, does not include public prosecutor's offices of a Member State, such as those of Germany, which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a EAW. However, that concept includes the Prosecutor General of a Member State, such as that of Lithuania, who, whilst institutionally independent of the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position affords him a guarantee of independence from the executive in connection with the issuing of an EAW.
Judgment of 24 June 2019 (Grand Chamber), ***Case C-619/18, Commission v Poland (Independence of the Supreme Court)***, EU:C:2019:531	The application of the measure lowering the retirement age of the judges of the Supreme Court is not justified by a legitimate objective and undermines the principle of irremovability of judges, which is essential to their independence. Lack of independence of a national court is likely to cause serious damage to the EU legal order and thus the rights that individuals derive from EU law.
Judgment of 5 November 2019 (Grand Chamber), ***Case C-192/18, Commission v Poland (Independence of ordinary courts)***, EU:C:2019:924	The measure consisting in conferring upon the Minister for Justice the power to decide whether or not to authorise judges of the ordinary courts to continue to carry out their duties beyond the new retirement age, as lowered by the Polish government, give rise to reasonable doubts as to the imperviousness of the judges concerned to external factors and as to their neutrality due to the excessive discretion exercised by the Minister for Justice.

Judgment of 19 November 2019 (Grand Chamber), ***Case C-585/18, A.K. (Independence of the Disciplinary Chamber of the Supreme Court)***, EU:C:2019:982	The referring court must ascertain whether the new Disciplinary Chamber of the Polish Supreme Court is independent in order to determine whether that chamber has jurisdiction to rule on cases where judges of the Supreme Court have been retired, or in order to determine whether such cases must be examined by another court which meets the requirement that courts must be independent.
Judgment of 19 December 2019 (Grand Chamber), ***Case C-752/18, Deutsche Umwelthilfe***, EU:C:2019:1114	In line with the right to effective legal protection under Article 19(1) TEU and 47 CFR, national legislation which results in a situation where the judgment of a court remains ineffective fails to comply with the essential content of that right and deprives it of all useful effect.
Judgment of 21 January 2020 (Grand Chamber), ***Case C-274/14, Banco de Santander***, EU:C:2020:17	A body may only make a preliminary ruling reference to the CJEU only if it satisfies the criteria of judicial independence for being a "court or tribunal" under EU law. In this instance, the Spanish Central Tax Tribunal cannot be considered a "court or tribunal" for the purposes of Article 267 TFEU as it failed to meet the requirement for independence due to lack of internal impartiality.
Judgment of 26 March 2020 (Grand Chamber), ***Case C-558/18, Miasto Łowicz (Régime disciplinaire concernant les magistrats)***, EU:C:2020:234	The requests for a preliminary ruling concerning Poland's new disciplinary regime for judges measures are inadmissible because the disputes in the main proceedings are not connected with EU law, in particular with the second subparagraph of Article 19(1) TEU. The fact that a national judge made a request for a preliminary ruling which turned out to be inadmissible cannot, however, lead to disciplinary proceedings being brought against that judge.
Judgment of 26 March 2020 (Grand Chamber), ***Joined Cases C-542/18 RX-II Simpson*** and ***C-543/18 RX-II HG***, EU:C:2020:232	In reaffirming the requirement, under EU law, that a court or tribunal must be established by law, the Court confirmed that everyone must be able to invoke before any court an infringement of said requirement in relation to potential irregularities vitiating any judicial appointment procedure.
Judgment of 17 December 2020 (Grand Chamber), ***Case C-354/20 PPU, Openbaar Ministerie***, EU:C:2020:1033	Where the executing judicial authority called upon to decide on the surrender of a person in respect of whom an EAW has been issued has evidence of systemic or generalized deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, it may refuse that surrender only if it finds that, in the particular circumstances of the case, there are substantial grounds for believing that there is a real risk of breach of the fundamental right of the person concerned to a fair trial before an independent and impartial tribunal previously established by law.

Judgment of 2 March 2021 (Grand Chamber), ***Case C-824/18, A.B. and Others***, EU:C:2021:153	Successive amendments to the Polish Law on the National Council of the Judiciary which have the effect of removing effective judicial review of that council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court are liable to infringe EU law. Where an infringement has been proved, the principle of the primacy of EU law requires the national court to disapply such amendments, as Article 19(1) precludes legislative amendments that give rise to legitimate doubts as to the imperviousness of judges to external factors.
Judgment of 20 April 2021 (Grand Chamber), ***Case C-896/19, Repubblika***, EU:C:2021:311	Article 19(1)(2) TEU does not preclude national provisions which confer on a Prime Minister a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body tasked, in particular, with assessing candidates for judicial office and providing an opinion to that Prime Minister. The Court further ruled that a Member State cannot therefore amend its legislation, particularly in regard to the organisation of justice, in such a way as to bring about a reduction in the protection of the value of the rule of law.
Judgment of 18 May 2021 (Grand Chamber), ***Joined Cases C-83/19 et al, Asociația "Forumul Judecătorilor Din România"***, EU:C:2021:393	The Court ruled on a series of Romanian reforms in the areas of judicial organisation, the disciplinary regime applicable to judges and the financial liability of the State and the personal liability of judges as a result of judicial error. It found that the requirement of independence means that the necessary guarantees must be provided in order to prevent that regime being used as a system of political control of the content of judicial decisions.
Orders of 16 June 2021 (First Chamber), ***Case C-684/20 and C-685/20 P, Sharpston v Council and Conference of the Representatives of the Governments of the Member States***, EU:C:2021:486 and EU:C:2021:485	In the cases regarding the premature termination of Advocate General Sharpston's mandate following the UK's withdrawal from the EU, the Court found that the General Court had been correct in dismissing the annulments sought as inadmissible and confirmed that acts adopted by representatives of the governments of the Member States, acting not in their capacity as members of the Council but as representatives of their government, are not subject to judicial review by the EU Courts. The relevant criterion thus applied by the Court of Justice to exclude the jurisdiction of the EU Courts to hear and determine a legal action brought against such acts is therefore that relating to their author, irrespective of their binding legal effects.
Judgment of 15 July 2021 (Grand Chamber), ***Case C-791/19, Commission v Poland (Disciplinary regime for judges)***, EU:C:2021:596	The disciplinary regime for judges in Poland is not compatible with EU law as it allows for the content of judicial decisions adopted by judges of the ordinary courts to be classified as a disciplinary offence; accordingly, it could be used to exert political control over judicial decisions or to exert pressure on judges to influencing their decisions, and undermining the independence of the courts concerned. Moreover, national judges being exposed to disciplinary proceedings as a result of the fact that they have decided to make a reference for a preliminary ruling to the CJEU, undermines the system of judicial cooperation between the national courts and the CJEU established by the Treaties in order to secure uniformity and full effect of EU law.

Judgment of 2 September 2021 (Grand Chamber), ***Case C-741/19, République de Moldavi***e, EU:C:2021:655	In a follow-up to the Achmea case, the Court ruled that the Investor-State Dispute Settlement mechanism provided for in the Energy Charter Treaty is not applicable to intra-EU disputes, as not to tarnish the autonomy of EU law, since these bodies would be outside the system of effective judicial remedies that Article 19(1)(2) requires Member States to establish.
Judgment of 6 October 2021 (Grand Chamber), ***Case C-487/19, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)***, EU:C:2021:798	Transfers without consent of a judge from one court to another or between two divisions of the same court are liable to undermine the principles of the irremovability of judges and judicial independence. Therefore, the order by which a court, ruling at last instance and sitting as a single judge, dismissed the action of a judge transferred against his will, must be declared null and void if the appointment of that single judge took place in clear breach of fundamental rules concerning the establishment and functioning of the judicial system concerned.
Order of the Vice-President of the Court of 27 October 2021, ***Case C-204/21 R, Commission v Poland***, EU:C:2021:878	The Court 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 an order for interim measures in this case dated 14 July 2021 or failing to do so, until the date of delivery of the judgment closing the proceedings in Case C-204/21.
Judgment of 16 November 2021 (Grand Chamber), ***Cases C-748/19 to 754/19, Criminal proceedings against WB and Others***, EU:C:2021:931	The requirement that judges be independent means that the rules relating to secondments must provide the necessary guarantees to prevent any risk of those secondments being used as a means of exerting political control over the content of judicial decisions, including in criminal matters. Therefore, EU law precludes the regime in force in Poland which permits the Minister for Justice to second judges to higher criminal courts; secondments which that minister – who is also the Public Prosecutor General – may terminate at any time without stating reasons.
Judgment of 23 November 2021 (Grand Chamber), ***Case C-564/19, IS***, EU:C:2021:949	EU law precludes a national supreme court, following an appeal in the interests of the law brought by the Prosecutor General, from declaring a request for a preliminary ruling submitted by a lower court unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings On the basis of the primacy of EU law, a national court must disregard any national judicial practice which is prejudicial to its right to make a reference to the CJEU.
Judgment of 21 December 2021 (Grand Chamber), ***Case C-357/19, Euro Box Promotion***, EU:C:2021:1034	EU law precludes the application of the jurisprudence of a national constitutional court insofar as this, combined with the national provisions pertaining to the statute of limitations, creates a risk of impunity. The primacy of EU law requires that national courts have the power to leave unapplied a decision of a constitutional court which is contrary to this right, without incurring into disciplinary liability.

Judgment of 21 December 2021 (Grand Chamber), ***Case C-497/20, Randstad Italia***, EU:C:2021:1037	EU law does not preclude the highest court in the judicial order of a Member State from being unable to set aside a judgment delivered in breach of EU law by that Member State's highest administrative court. This is without prejudice, however, to the possibility of persons harmed by such a breach claiming compensation from the Member State concerned. While it is for the Member States to establish procedural rules for remedies, in order to ensure effective judicial protection under Article 19(1), it is necessary to ensure that those rules are not less favourable than in similar domestic situations (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness).
Judgment of 9 February 2022 (Tenth Chamber, Extended Composition, of the General Court), ***Case T-791/19, Sped-Pro v Commission***, EU:T:2022:67	The General Court examined for the first time the impact of systemic or generalized deficiencies in the rule of law in a Member State on determining the competition authority that is best placed to examine a complaint. In order to determine whether a national body should not adjudicate a dispute based on rule of law deficiencies, the Court ruled that applying the test from Case C-261/18 by analogy would be appropriate. However, the General Court annulled the decision of the Commission rejecting a complaint against PKP Cargo, a company controlled by the Polish State, concerning an alleged abuse of its dominant position on the market for rail freight transport services in Poland, due to having applied the test inaccurately.
Judgments of 16 February 2022, (Full Court), ***Case C-156/21, Hungary v Parliament and Council***, EU:C:2022:97, and ***Case C-157/21, Poland v Parliament and Counci***l, EU:C:2022:98	The Court dismissed the annulment actions brought by Hungary and Poland against Regulation 2020/2092 (informally known as the Rule of Law Conditionality Regulation). The Court ruled that compliance with the common values on which the European Union is founded – which have been identified and are shared by the Member States and which define the very identity of the European Union as a legal order common to those States – such as the rule of law and solidarity, justifies mutual trust between those States. Since that compliance is a condition for the enjoyment of all the rights deriving from the application of the Treaties to a Member State, the European Union must be able to defend those values.
Judgment of 22 February 2022, (Grand Chamber), ***Case C-430/21, RS (Effect of the decisions of a constitutional court)***, EU:C:2022:99	EU law precludes a national rule under which national courts have no jurisdiction to examine the conformity with EU law of national legislation which has been held to be constitutional by a judgment of the constitutional court of the Member State. The application of such a rule would undermine the principle of the primacy of EU law and the effectiveness of the preliminary-ruling mechanism. In addition, the Court emphasises that since the Court alone has exclusive jurisdiction to provide the definitive interpretation of EU law, the constitutional court of a Member State cannot, on the basis of its own interpretation of provisions of EU law, validly hold that the Court has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from the Court.

Judgment of 22 March 2022 (Grand Chamber), ***Case C-508/19, Prokurator Generalny***, EU:C:2022:201	The Court declared inadmissible the request for a preliminary ruling from a Polish court, asking whether EU law confers on it the power, which it does not have under Polish law, to find that a judge's service relationship does not exist due to irregularities vitiating the instrument of his appointment. The questions referred by the national court do not meet an objective need for the purpose of settling the dispute brought before it.
Judgment of 29 March 2022 (Grand Chamber), ***Case C-132/20, Getin Noble Bank***, EU:C:2022:235	The mere fact that a judge was appointed at a time when that judge's Member State was not a democratic regime does not affect the independence and impartiality of that judge. As regards the claim that the referring court is not proper court within the meaning of EU law, the Court of Justice indicated that it lacked information capable of rebutting the presumption that the referring court does not meet relevant EU requirements. However, this presumption may be rebutted where a final judicial decision handed down by a national or international court has found that the relevant court does not meet the requirements that allow it to be considered a court able to refer matters to the CJEU for a preliminary ruling.
Order of 20 October 2022 (Tenth Chamber), ***Case C-576/21 P, Ana Carla Mendes de Almeida v Council***, EU:C:2022:826	The Court upheld the General Court's dismissal of an annulment action concerning the independence of European prosecutors appointed to the European Public Prosecutor's Office (EPPO) brought by a Portuguese prosecutor who was not appointed by the Council despite being ranked first by the relevant independent panel.
Order of 7 November 2022 (Sixth Chamber), ***Case C-859/19, FX and Others***, EU:C:2022:878	National law/practice prescribing that the decisions of the national constitutional court are binding on ordinary courts is not precluded, provided that the independence of that constitutional court is guaranteed by national law. However, national law that can trigger disciplinary liability of national judges of ordinary courts when they fail to comply with the decisions of the national constitutional court is not compatible with EU law.
Judgment of 11 May 2023 (First Chamber), ***Case C-817/21, Inspecția Judiciară***, EU:C:2023:391	The disciplinary regime applicable to the judges who may be called upon to apply EU law must provide the necessary guarantees in order to prevent any risk of its being used as an instrument of political control over their activities. Articles 2 and 19(1)(2) TEU, read in conjunction with Commission Decision 2006/928/EC, must be interpreted as precluding national legislation which confers on the director of a body competent to conduct investigations and bring disciplinary proceedings against judges and prosecutors the power to adopt acts of a normative and individual nature.

Judgment of 5 June 2023 (Grand Chamber), ***Case C-204/21, Commission v Poland (Independence and private life of judges)***, EU:C:2023:442	In accordance with the doctrine of supremacy, ordinary national courts cannot be bound by national constitutional or supreme courts' case law which is contrary to EU law. As a result, no disciplinary consequences apply to judges who set aside the case law of these higher national courts in order to comply with EU law.
Judgment of 13 July 2023 (Grand Chamber), ***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	In 2020, the Disciplinary Chamber of the Polish Supreme Court adopted a resolution authorising the initiation of criminal proceedings against a judge of the Warsaw Regional Court, suspending him from his duties and reducing his remuneration for the duration of the suspension. This resolution was based on national provisions that the Court found contrary to EU law in Case C-204/21. In accordance with the doctrine of supremacy, any provisions or national case law contrary to EU law must be disapplied and no judge can see his/her disciplinary liability engaged on this basis.
Judgment of 24 July 2023 (Grand Chamber), ***Case C-107/23 PPU, Lin***, EU:C:2023:606	In accordance with the doctrine of supremacy, ordinary national courts cannot be bound by national constitutional or supreme courts' case law which is contrary to EU law. As a result, no disciplinary consequences apply to judges who set aside the case law of these higher national courts in order to comply with EU law.
Judgment of 7 September 2023 (First Chamber), ***Case C-216/21, Asociaţia „Forumul Judecătorilor din România" (Romanian Judges II)***, EU:C:2023:628	Judicial appointments must be in compliance with EU law, but EU law does not preclude a judicial promotion system where higher court judges sit on a board evaluating the candidates, provided that the substantive conditions and procedural rules governing the adoption of decisions relating to effective promotion cannot give rise to reasonable doubts as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been promoted.
Judgment if 9 November 2023 (Grand Chamber), ***Case C-819/21, Staatsanwaltschaft Aachen***, EU:C:2023:841	A Member State may refuse to recognise and enforce a judgment imposing a criminal sentence delivered by a court of another Member State where it has evidence of systemic or generalized deficiencies in that Member State regarding the right to a fair trial, in particular as regards the independence of the courts (in abstracto test), and where there are substantial grounds for believing that those deficiencies may have had a tangible influence on the criminal proceedings brought against the person concerned (in concreto test).
Judgment of 21 December 2023 (Grand Chamber), ***Case C-718/21, Krajowa Rada Sądownictwa (Continued holding of a judicial office)***, EU:C:2023:1015	In view of all the circumstances connected with the appointment of judges of the Extraordinary Review and Public Affairs Chamber of the Polish Supreme Court, an adjudicating panel of that chamber does not constitute a 'court or tribunal' for the purposes of EU law (referring to ECtHR judgment in Dolińska-Ficek and Ozimek v. Poland). Consequently, the Court held the preliminary ruling request inadmissible.

Judgment of 9 January 2024 (Grand Chamber), ***Joined Cases C-181/21 and C-269/21, G. and Others (Appointment of judges of the ordinary courts in Poland)***, EU:C:2024:1	Two requests for a preliminary ruling submitted by Polish judges regarding the status of Poland's "neo-judges" and whether a court consisting of "neo-judges" may still be considered a court established by law were held inadmissible. By contrast, AG Collins held the requests admissible and suggested that a national court cannot be considered a 'tribunal established by law' where a judge in the formation was appointed following a procedure in which (a) the opinion of a self-governing judicial body was not heard; (b) candidates were appointed on the basis of a resolution of a body such as Poland's National Council of the Judiciary, Poland; and (c) candidates in the competition could not challenge the appointment procedure before a court which complies with the requirements of EU law and those factors, coupled with all other relevant factors characterising that procedure, are such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed under that process
Judgment of 8 May 2024 (First Chamber), ***Case C-53/23, Asociația "Forumul Judecătorilor din România" (Romanian Judges III)***, EU:C:2024:388	EU law does not preclude a national law which excludes, in practice, professional associations of judges from challenging the appointment of prosecutors competent to conduct criminal prosecutions against judges, by requiring the existence of a legitimate private interest to be established in order for such an action to be admissible. In principle, it is for the Member States to decide who may bring actions before the courts, without however undermining the right to effective judicial protection. In addition, the sole fact that national legislation does not permit those associations to bring such actions is insufficient to create, in the minds of individuals, legitimate doubts as to the independence of Romanian judges.
Order of the General Court of 4 June 2024, ***Joined Cases T-530/22 to T-533/22, Medel et al***, EU:T:2024:363 (currently subject to an appeal before the Court of Justice: see Case C-555/24 P)	The annulment actions brought by organisations of European judges against the Council decision approving the recovery and resilience plan for Poland are dismissed as inadmissible. As regards the judges affected by decisions of the Disciplinary Chamber, the General Court held that that contested decision did not have the effect of making those judges subject to the conditions laid down in that decision, nor did it render a specific rule directly applicable to those judges.
Judgment of 11 July 2024 (Grand Chamber), ***Joined Cases C-554/21, C-622/21 and C-727/21, Hann-Invest and Others***, EU:C:2024:594	A procedural mechanism internal to a court intended to avoid conflicts in case-law and thus to ensure legal certainty and the rule of law, must itself comply with the requirements of judicial independence. In particular, only the judicial panel responsible for a case can take the final decision in the proceedings. The composition judicial panels should be subject to transparent rules known to litigants, so as to preclude any undue interference by persons before whom the parties have not been able to put forward their arguments.

Judgment of 29 July 2024 [GC], ***Case C-119/23, Valančius***, EU:C:2024:653	EU law does not preclude the government of a Member State, which has established a group of independent experts responsible for evaluating candidates for the office of Judge of the General Court of the European Union and drawing up a merit list of candidates meeting the requirements laid down in those provisions, from proposing, from among the candidates on that list, a candidate other than the best-ranked candidate, provided that the candidate proposed satisfies those requirements.

ANNEX II

Chronological overview of the main ECtHR rule of law-related interim decisions and judgments since *Iceland Judges*[370]

Judgment of 1 December 2020 (Grand Chamber), ***Guðmundur Andri Astraðsson v. Iceland (Icelandic Judges)***, no. 26374/18	Violation of Article 6(1) ECHR (right to a tribunal established by law) on account of grave breaches in the appointment of a judge to the Icelandic Court of Appeal who was involved in hearing a case where the applicant's conviction for road traffic offences was upheld.
Judgment of 8 December 2020 (Fourth Section), ***Panioglu v. Romania***, no. 33794/14	No violation of Article 10 ECHR (freedom of expression) in a case where a judge suffered professional penalties following the publication of an article in which the judge severely criticized the President of the Court of Cassation's activities as a prosecutor under the repressive communist regime.
Judgment of 9 February 2021 (Second Section), ***Xhoxhai v. Albania***, no. 15227/19	No violation of Article 6(1) ECHR (right to an impartial and independent tribunal established by law) in setting up bodies to vet serving judges and prosecutors to combat corruption, as long as there is a clear legal basis and no pressure from the executive; no violation of Article 6(1) ECHR (legal certainty) on account of the lack of statutory limitations for asset evaluation, given the legitimate objective of the vetting process.
Judgment of 9 March 2021 (Second Section), ***Bilgen v. Türkiye***, no. 1571/07	Violation of Article 6(1) ECHR (right to fair trial; right to access to court) in a case in which a judge was subjected to an arbitrary transfer or judicial appointment; denying the applicant access to a court for an important career matter does not pursue a legitimate aim and has the potential of damaging judicial independence.
Judgment of 9 March 2021 (Second Section), ***Eminağaoğlu v. Türkiye***, no. 76521/12	Violation of Article 6(1) ECHR (right to fair trial; right to access to court) in the case of a judge subject to disciplinary sanctions (post relocation) due to criticism of high-profile cases in the media, due to the lack of judicial review; violation of Article 8 ECHR (right to private and family life) due to the use of recordings of telephone conversations which had been obtained in separate criminal proceedings in the context of the disciplinary investigation; violation of Article 10 ECHR (freedom of expression) because the measures taken against the applicant were not accompanied by effective and adequate safeguards against abuse.

370 This table was compiled with the view of offering an overview of the most important interim decisions and judgments delivered by the ECtHR from a rule of law backsliding point of view since the ECtHR's Grand Chamber Judgment of 1 December 2020 in *Icelandic Judges*.

Judgment of 7 May 2021 (First Section), ***Xero Flor w Polsce sp. z o.o. v. Poland***, no. 4907/18	Violation of Article 6(1) ECHR (right to a fair trial; right to tribunal established by law) due to the Polish court's failure to answer arguments brought by the applicant in the domestic proceedings and the manifest breaches of domestic law in the appointment of a judge of the Constitutional Court, who had been part of the bench adjudicating the case.
Judgment of 29 June 2021 (First Section), ***Broda and Bojara v. Poland***, nos. 26691/18 and 27367/18	Violation of Article 6(1) ECHR (right to access to court; irremovability of judges) in the case of premature termination of a judge's term in office, without the possibility of review by an independent judicial body and without a clear legal basis or reasoning provided.
Judgment of 22 July 2021 (First Section), ***Reczkowicz v. Poland***, no. 43447/19	Violation of Article 6(1) ECHR (right to a tribunal established by law) with regards to the Disciplinary Chamber of the Polish Supreme Court, because the procedure for judicial appointment to the Chamber had been unduly influenced by the legislative and executive powers, which amounts to a fundamental irregularity that adversely affects the whole process and compromises its legitimacy.
Judgment of 22 July 2021 (Fifth Section), ***Gumenyuk and Others v. Ukraine***, no. 11423/19	Violation of Article 6(1) ECHR (access to court, irremovability of judges, threatening judicial independence and authority) on account of legislative amendments replacing the Supreme Court of Ukraine with a new body and preventing former judges to exercise their judicial functions while they had not yet been dismissed, and without the possibility to challenge the law before a court (even after the Constitutional Court had found it unconstitutional); violation of Article 8 ECHR (respect for private life) for preventing these judges from pursuing personal and professional development goals.
Judgment of 19 October 2021 (Fourth Section), ***Todorova v. Bulgaria***, no. 40072/13	No violation of Article 6(1) ECHR on account of no evidence of a lack of independence or impartiality on the part of the issuing Supreme Administrative Court; violation of Article 10 ECHR (freedom of expression) in a case where the disciplinary proceedings against the applicant constituted retaliation for the exercise of that fundamental right; violation of Article 18 ECHR (limitation on the use of restrictions on rights) taken together with Article 10, since the predominant purpose of the disciplinary measures had been to penalise and intimidate the applicant on account of her criticism of state authorities.
Judgment of 26 October 2021 (Fourth Section), ***Donev v. Bulgaria***, no. 72437/11	No violation of Article 6(1) ECHR on account of the Supreme Judicial Council and Supreme Administrative Court, which conducted disciplinary proceedings against the applicant, meeting all criteria for independence, including lawful composition and lack of bias; no violation of Article 8 ECHR (right to private life) when disciplinary sanctions are justified on relevant and sufficient grounds proportionate to the breaches of professional duty noted.

Judgment of 8 November 2021 (First Section), ***Dolińska-Ficek and Ozimek v. Poland***, nos. 49868/19 and 57511/19	Violation of Article 6(1) ECHR (right to fair trial; right to an independent tribunal established by law) on account of a fundamental irregularity in judicial appointments, affecting the whole process and compromising the legitimacy of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court; the fact that the President of Poland carried out judicial appointments despite a final court order staying the implementation of the National Council of the Judiciary's resolution recommending judges to the Chamber of Extraordinary Review and Public Affairs was found to be "in blatant defiance of the rule of law".
Judgment of 3 February 2022 (First Section), ***Advance Pharma Sp. z o.o. v. Poland***, no. 1469/20	Violation of Article 6(1) ECHR (right to an independent tribunal established by law) with regards to the Civil Chamber of the Polish Supreme Court, due to unduly influence by the legislative and executive powers in the appointment procedure, amounting to a fundamental irregularity that adversely affected the whole process and compromized its legitimacy; violation of Article 46 ECHR (binding force and execution of judgments), because the continued operation of the irregular National Council of the Judiciary and its involvement in the judicial appointments procedure perpetuated the systemic dysfunction established by the Court and might lead to further aggravation of the rule of law crisis in Poland.
Order of 8 February 2022, ***Wróbel v. Poland***, no. 6904/22	Polish government ordered to ensure that the proceedings concerning the lifting of Judge Wróbel's judicial immunity comply Article 6(1) ECHR (right to fair trial; right to an independent and impartial tribunal established by law) and that no decision in respect of his immunity be taken by the Disciplinary Chamber until the final determination of his complaints by the ECtHR.
Order of 23 February 2022, ***Piekarska-Drążek v. Poland***, no. 8076/22	Polish government ordered to ensure that no decision in respect of the applicant's suspension from judicial duties is taken by the Disciplinary Chamber until further notice and provide information on the practice of the Disciplinary Chamber in respect of suspension of judges ordered by Minister of Justice/Prosecutor General.
Judgment of 1 March 2022 (Second Section), ***Kozan v. Türkiye***, no. 16695/19	Violation of Article 10 ECHR (freedom of expression) in relation to measures curtailing judges' ability to impart ideas about the profession, including sharing media articles on topics of public interest on social media; violation of Article 13 ECHR (right to effective remedies) due to the lack of impartiality of the national body that imposed the sanctions and the lack remedy at the applicant's disposal.
Judgment of 15 March 2022 (Grand Chamber), ***Grzęda v. Poland***, no. 43572/18	Violation of Article 6(1) ECHR (right to access to court) due to the lack of judicial review available to challenge the applicant's removal from his post on the National Council of the Judiciary before the end of his term; additionally, the Court recognized a general trend, as a result of reforms, whereby the judiciary has been exposed to interference by the executive and legislator.

Order of 22 March 2022, ***Synakiewicz v. Poland***, no. 46453/21, ***Niklas-Bibik v. Poland***, no. 8687/22, ***Hetnarowicz-Sikora v. Poland***, no. 9988/22	Polish government ordered to give the ECtHR and the applicants 72 hours' notice of the date of any hearing or in camera session scheduled in the applicants' cases before the Disciplinary Chamber.
Judgment of 7 April 2022 (Fifth Section), ***Gloveli v. Georgia***, no. 18952/18	Violation of Article 6(1) ECHR (right to access to court) in a case in which a candidate to a judicial post is prevented from challenging decisions relating to judicial appointments before a court.
Order of 14 April 2022, ***Stępka v. Poland***, no. 18001/22	Polish government ordered to ensure that the proceedings concerning the lifting of a Supreme Court judge's judicial immunity comply with Article 6(1) ECHR and that no decision in respect of his immunity be taken by the Disciplinary Chamber until the final determination of his complaints by the ECtHR.
Judgment of 16 June 2022 (First Section), ***Żurek v. Poland***, no. 39650/18	Violation of Article 6(1) ECHR (right to access to court) on account of the lack of judicial review of the decision to remove the applicant from the NCJ; violation of Article 10 (freedom of expression) on account of the government's intimidation of judges exercising their duty to speak out in defence of the rule of law and judicial independence as members of the judiciary and, in this case, spokesperson of the NCJ.
Order of 8 July 2022, ***Raczkowski v. Poland***, no. 33082/22	Polish Government ordered to ensure that the proceedings concerning the lifting of a military judge's judicial immunity comply with the requirements guaranteed by Article 6(1) ECHR (right to fair trial) and that no decision be taken until the final determination of his complaints by the ECtHR.
Order of 22 July 2022, ***Synakiewicz v. Poland***, no. 46453/21	Previous interim measure of 22 March 2022 (see above) amended to apply to the renamed Disciplinary Chamber (the Professional Liability Chamber), with ECtHR also demanding information on panel composition and manner in which members of panel have been appointed to judicial office.
Order of 5 August 2022, ***Niklas-Bibik v. Poland***, 8687/22 and ***Piekarska-Drążek v. Polan***d, no. 8076/22	Previous interim measure of 22 March 2022 (see above) amended to apply to the renamed Disciplinary Chamber (the Professional Liability Chamber), with ECtHR also demanding information on panel composition and manner in which members of panel have been appointed to judicial office.
Order of 19 September 2022, ***Irena Piotrowska v. Polan***d, no. 44015/22, ***Aleksandra Janas v. Poland***, no. 44016/22 and ***Andrzej Sterkowicz v. Poland***, no. 3685/20	Polish government ordered to ensure that the disciplinary proceedings concerning these judges comply with the requirements of a fair trial as guaranteed by Article 6(1) ECHR.

Judgment of 4 October 2022 (Third Section), ***Besnik Cani v. Albania***, no. 37474/20	Violation of Article 6(1) ECHR (right to a tribunal established by law) in a case where an arguable claim of a manifest breach of a fundamental rule of the domestic law had adversely affected the appointment of the applicant as a judge of the Special Appeal Chamber, as well as the failure of the domestic court to properly consider the relevant Convention questions raised by the applicant; under Article 46 ECHR (binding force and execution of judgments), the most appropriate form of redress would be to reopen the proceedings, should the applicant request such reopening, and to reexamine the case, observing all the requirements of Article 6(1).
Judgment of 6 October 2022 (First Section), ***Juszczyszyn v. Poland***, no. 35599/20	Violation of Article 6(1) ECHR (right to fair trial) since the Disciplinary Chamber of the Polish Supreme Court cannot be considered a tribunal established by law; violation of Article 8 ECHR (right to private life) since the decision to suspend the applicant had been unlawful and it had been impossible to foresee that his actions would lead to his suspension under the law; violation of Article 18 ECHR (limitation on use of restrictions of rights) because the suspension had the purposes of discouraging the applicant from examining the appointment procedure for judges.
Order of 18 October 2022, ***Żurek v. Poland***, nos. 36137/22 and 41885/22	Polish government ordered to ensure that extraordinary appeals comply with requirements of a fair trial and no decision as to the merits of the cases be taken by the Chamber of Extraordinary Review and Public Affairs of the Supreme Court composed of judges appointed in breach of Article 6(1) ECHR until the final determination of the applicant's complaints by the ECtHR.
Order of 6 December 2022, ***Leszczyńska-Furtak v. Poland***, no. 39471/22, ***Gregajtys v. Poland***, no. 39477/22 and ***Piekarska-Drążek v. Poland***, no. 44068/22	Polish authorities ordered to suspend the effects of decisions to transfer the applicants from the Criminal Division to the Labour and Social Security Division of the Warsaw Court of Appeal and ensure that no decision to transfer the applicants to another division of the Warsaw Court of Appeal against their will is taken until the final determination of the applicants' complaints by the ECtHR.
Judgment of 12 January 2023 (Fifth Section), ***Ovcharenko and Kolos v. Ukraine***, nos. 27276/15 and 33692/15	Violation of Article 8 ECHR (respect for private life) in the case of a dismissal of Constitutional Court judges for "breach of oath" without a clear interpretation of that offence and the scope of their functional immunity due to participating in a questionable judgment; violation of Article 6(1) ECHR (right to fair trial) on account of the absence of adequate judicial review to the dismissal decision made by the Parliament.
Judgment of 17 January 2023 (Fourth Section), ***Cotora v. Romania***, no. 30745/18	No violation of Article 6(1) ECHR (right to fair trial) in a case where all the judicial bodies involved in imposing disciplinary sanctions satisfy the criteria for independence and impartiality in their appointment and composition, as well as in the way they conduct proceedings, including judicial review by the High Court of Cassation.

Judgment of 21 February 2023 (Second Section), ***Catană v. the Republic of Moldova***, no. 43237/13	Violation of Article 6(1) ECHR (right to independent and impartial tribunal) in case where the composition of a body empowered to impose disciplinary sanctions includes: the presence, even in a merely passive role, of a member of the government; lack of transparency as to the role of the Prosecutor General in the adoption of the disciplinary decisions; and lack of sufficient independence guarantees in the appointment of law professors to the body.
Judgment of 6 June 2023 (Second Section), ***Sarısu Pehlivan v. Türkiye***, no 63029/19	Violation of Article 10 ECHR in respect of a penalty imposed on the applicant, a judge and secretary-general of the judges' trade union.
Judgment of 22 June 2023 (Fifth Section), ***Lorenzo Bragado and Others v. Spain***, nos. 53193/21, 53707/21, 53848/21 et al.	Violation of Article 6(1) ECHR (right to access to court) in the case of dismissal of an appeal before the Constitutional Court, based on a technicality rather than on merit, when the applicants had been magistrates on the final candidate list who are still waiting in that position due to inaction of the Parliament.
Judgment of 6 July 2023 (First Section), ***Tuleya v. Poland***, nos. 21181/19 and 51751/20	Violation of Article 6(1) ECHR (right to fair trial), Article 8 ECHR (right to private life) and Article 10 ECHR (freedom of expression) on account of the imposition of disciplinary sanctions by a body that was not a tribunal established by law. The measures against the applicant had no lawful basis, had a significant impact on his right to private life and could be characterized as a strategy aimed at intimidating him for the views that he had expressed, given his status as an outspoken critic of judicial reforms in Poland.
Judgment of 13 July 2023 (Fifth Section), ***Golovin v. Ukraine***, no. 47052/18 (twin case to ***Ovcharenko and Kolos v. Ukraine***)	Violation of Article 6(1) ECHR (right to a reasoned judgment) and Article 8 ECHR (right to private life) in the case of the dismissal of a Constitutional Court judge for "breach of oath" without a clear interpretation of that offence and the scope of their functional immunity due to participating in a questionable judgment, with no adequate judicial review of the dismissal decision by the Parliament.
Judgment of 26 September 2023 (Grand Chamber), ***Yüksel Yalçınkaya v. Türkiye***, no. 15669/20	Violation of Article 6(1) ECHR (right to fair trial) on account of systemic issues regarding the national courts' approach to the use of an encrypted messaging application known as "ByLock". The Court held that Türkiye must take general measures to address the systemic problems it has identified, in particular with regard to the Turkish judiciary's approach to "ByLock" evidence.
Judgment of 23 October 2023 (Second Section), ***Stoianoglo v. the Republic of Moldova***, no. 19371/22	Violation of Article 6(1) ECHR (right to access to court) in the case of an automatic suspension without pay of the Prosecutor General upon the launch of disciplinary investigations against him by a member of Parliament under new legislation, without possibility of appeal before an authority independent of the executive and legislative powers.

Judgment of 24 October 2023 (First Section), ***Pająk and Others v. Poland***, nos. 25226/18, 25805/18, 8378/19 and 43949/19	Violation of Article 6(1) ECHR (right to access to court) on account of legislation that lowered the retirement age of judges and made a potential derogation of retirement conditional upon authorisation by the Minister of Justice and National Council of the Judiciary, subordinated to the executive; violation of Article 14 ECHR (prohibition of discrimination) in conjunction with Article 8 ECHR (right to private life) on account of different retirement age and conditions for staying in office for male and female judges.
Judgment of 23 November 2023 (First Section), ***Wałęsa v. Poland***, no. 50849/21	Violation of Article 6(1) ECHR (right to fair trial; impartial and independent tribunal; reasonable time) on account of the reversal by Supreme Court's Chamber of Extraordinary Review and Public Affairs of a final civil defamation judgment in applicant's favour taken ten years earlier following the Prosecutor General's extraordinary appeal, amounting to an abuse of legal procedures by the state authorities for political reasons that did not justify the departure from the principle of res judicata; violation of Article 8 ECHR (right to private life) in relation to the arbitrary interference made by the Prosecutor General and his abuse of process.
Judgment of 7 December 2023 (First Section), ***Gyulumyan and Others v. Armenia***, no. 25240/20	No violation of Article 6(1) ECHR (right to access to court) and Article 8 ECHR (right to private life) in a case where the restriction of access to court were justified on object grounds under national law, rather than specifically aimed at the applicants, and there is no significant impact on the private lives of the applicants, who either continued to work as judges or received fully compensatory pensions, and were no subject to any remarks about their personal and professional values from other authorities.
Judgment of 21 March 2024 (First Section), ***Sieć Obywatelska Watchdog Polska v. Poland***, no. 10103/20	Violation of Article 10 ECHR (freedom of expression) on account of the denial of a freedom of information request made by a watchdog NGO with regard to meeting diaries of Constitutional Court judges, despite legal basis in national legislation, since the documents held public interest, they were public and readily available, and the restriction was not necessary in a democratic society; no violation of Article 10 ECHR in the refusal to disclose the entry logs of the Constitutional Court building, since they failed to satisfy the test for being "ready and accessible".
Judgment of 26 March 2024 (Second Section), ***Kartal v. Türkiye***, no. 54699/14	Violation of Article 6(1) ECHR (right to access to court) on account of the lack of effective judicial remedies to challenge the termination of the applicant's term of office as vice-president of the Inspection Board of the High Council of Judges and Prosecutors following a legislative amendment even though there were no objective grounds to restrict his rights to access to court.
Judgment of 23 April 2024 (Second Section), ***Sacharuk v. Lithuania***, no. 39300/18	Violation of Article 6(1) ECHR (right to fair trial) in the case of the dismissal of the applicant's request to have a judge recuse herself from the second round of proceedings due to her having been part of the adjudicating panel in the first round, as this gives rise to legitimate doubts that the judge might have preconceived views of the applicant's guilt.

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