

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*

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1. *Introduction*

On Sunday, 28 August 2022, four major organisations of European judges¹ – the European Association of Judges (EAJ), the Association of European Administrative Judges (AEAJ), Magistrats Européens pour la Démocratie et les Libertés (MEDEL) and Judges for Judges (J4J) – brought an action before the General Court of the European Union (GCEU) to challenge the Decision of the Council of the European Union of 17 June 2022² to release funds to Poland to help it recover from the COVID-19 pandemic³. Those funds had originally been withheld by the EU to force Poland to comply with various judgments of the Court of Justice of the European Union (CJEU).

The Council's Decision sets forth a number of milestones that Poland must achieve to obtain access to "European Recovery and Resilience Funds". Only when those milestones have been achieved will funds be paid out. The milestones that the

four judges' organisations have challenged concern (1) the disbandment and replacement of the Disciplinary Chamber of the Polish Supreme Court; (2) the reform of the disciplinary regime applicable to judges; and (3) the review of disciplinary decisions already taken, to be performed by the new Chamber that must replace the Disciplinary Chamber.

The CJEU has repeatedly ruled that the Disciplinary Chamber of the Polish Supreme Court, as currently constituted and functioning, violates EU law⁴. The four judges' organisations argue that achieving the aforementioned milestones would be insufficient to comply with the CJEU's judgments, because those milestones – unlike the existing case-law – do not require the immediate and automatic reinstatement of judges who have been irregularly disciplined.

The four judges' organisations are seeking to prevent the release of recovery funds to Poland until it has fully complied with the CJEU's judgments.

The unprecedented nature of this legal action was not lost on the community of judges. The Polish Association of Judges «Iustitia» (which is a member of both AEJ and MEDEL), in a letter of 10 August 2022 signed by its President, Professor Krystian Markiewicz, and addressed to the EAJ, endorsed the action by stating the following:

We are aware of all risks which such action can provoke but, anyhow, we strongly believe that the EAJ should be part of this legal endeavour and in this respect, as the President of IUSTITIA, I kindly ask you, Mr. President, to include EAJ as one of the plaintiffs. This matter is of utmost importance not only to the Polish society, but also to the European Union as a whole. If the European Union is to survive, it has to maintain the values it was built upon.

In bringing this action, the four judges' organisations believe that they are not only reinforcing the CJEU's effort to defend the rule of law as a founding value of the EU, which is fundamental to mutual trust between its Member States, but also stressing that this founding value is common to them all – not imposed on them by the CJEU.

The remainder of this paper will focus on three main issues: (2) who are the four organisations? (3) what was the background, and how did the four organisations reach the decision to take this unprecedented step? and (4) what are the two main sets of substantive legal arguments underpinning the legal action? In this context, it should be noted that one major topic related to the action has deliberately been excluded from the present paper, namely the admissibility of the action or, in other words, the standing (or *locus standi*) of the four judges' organisations. On 31 March 2023, the CJEU found it appropriate to continue its proceedings on the substance before ruling

on the Council's arguments pertaining to admissibility⁵.

2. *The applicant organisations*

2.1. *International Association of Judges (European Association of Judges)*

The International Association of Judges (IAJ) was founded in Salzburg, Austria, in 1953. It is a professional, non-political, international organisation, bringing together national associations of judges – not individual judges – that have been approved by its Central Council for admission to the Association⁶.

The IAJ is the largest networks of judges' associations worldwide. At present, its members include associations or representative groups of judges from 94 countries. It is open to representative associations of judges from all regions of the world. It does not have any political or trade-union character.

The objects of the IAJ are as follows:

1. To safeguard the independence of the judicial authority, as an essential requirement of the judicial function and guarantee of human rights and freedom.
2. To safeguard the constitutional and moral standing of the judicial authority.
3. To increase and perfect the knowledge and the understanding of Judges by putting them in touch with Judges of other countries, and by enabling them to become familiar with the nature and functioning of foreign organisations, with foreign laws and, in particular, with how those laws operate in practice.

4. To study together judicial problems, whether these are of regional, national or universal interest, and to arrive at better solutions to them.

The European Association of Judges (EAJ) is a regional organisation within the IAJ (where it is the largest regional group). It brings together 47 national associations in Europe. It has observer status in the Council of Europe, in the Consultative Council of European Judges (CCJE) and in the European Commission for the Efficiency of Justice (CEPEJ). Its members are national associations and national representative groups of judges that are members of the IAJ and either come from countries that are wholly or partially located in Europe or have been admitted as members by the General Assembly of the EAJ.

In its activities, the EAJ focuses on various goals, but its main focus is on promoting closer European co-operation in all areas pertaining to the judiciaries of its Member States and to international and supranational judiciaries (not exceeding the European level). Therefore, the EAJ specifically aims to:

(a) strengthen and support the rule of law as well as judicial independence and impartiality within Europe and in all Member States;

(b) safeguard the interests of the judiciary, as an essential requirement of the judicial function and guarantee of human rights and freedoms;

(c) safeguard the constitutional and moral standing of the judiciary;

(d) increase and perfect the knowledge and the understanding of judges;

(e) study together judicial problems, whether of European, regional or national

interest, with particular regard to European laws and their application in practice;

(f) improve knowledge of European law and cross-border judicial co-operation;

(g) defend and represent the interests of European judges and magistrates as well as other members of the judiciary enjoying judicial status, where they are concerned by projects and decisions of international and transnational governmental organisations (not exceeding the European level).

2.2. *Association of European Administrative Judges*

The Association of European Administrative Judges (AEAJ) was founded in 2000 as a European-wide apex association of national associations of administrative judges, with the aim of strengthening and promoting the professional interests of administrative judges, which includes the defence of judicial independence in all its various aspects. It is open to membership for associations (as well as individuals) from all countries that are members of the Council of Europe. It currently has members from 34 European countries and represents approximately 6,000 administrative judges.

According to Article 1 of its statutes, the AEAJ pursues the following objectives⁷:

(a) to advance legal redress for individuals vis-à-vis public authority in Europe and to promote the legality of administrative acts, thereby helping Europe to grow together in freedom and justice;

(b) to respect the legal cultures in the various Member States of the European

Union and the Council of Europe on the way towards attaining this objective;

(c) to help broaden the knowledge of legal redress in administrative matters among administrative judges in Europe, and for this purpose, to have an intensive exchange of information on pertinent legislation and case law;

(d) to strengthen the position of administrative judges in Europe which is growing together;

(e) to promote the professional interests of administrative judges at national and European level.

2.3. *Magistrats Européens pour la Démocratie et les Libertés*

Magistrats Européens pour la Démocratie et les Libertés (MEDEL)⁸ was founded in June 1985 in Strasbourg, France, by eight professional organisations (trade unions or associations) gathering judges and prosecutors from six European countries: Belgium, France, Germany, Italy, Portugal and Spain. Its establishment was the result of several previous meetings between European judges and prosecutors committed to the defence of the independence of the judiciary, the promotion of the democratic rule of law and the construction of a European judicial area based on the guarantee of fundamental rights and freedoms, in political as well as economic and social matters.

After the fall of the Berlin Wall and the disappearance of the Iron Curtain, MEDEL became involved in supporting the establishment in former Eastern Bloc countries of independent judicial institutions, respectful of the rule of law. It gradually ex-

panded, welcoming new organisations of judges and prosecutors from Eastern and Southern Europe. At present it comprises 25 associations of judges and prosecutors from 17 Member States of the Council of Europe (Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Italy, Moldova, Montenegro, Poland, Portugal, Romania, Serbia, Spain and Turkey), representing more than 18,000 judges and prosecutors.

Two of MEDEL's member associations are the Polish judges' association «Iustitia» and the Polish prosecutors' association «Lex Super Omnia». Its current Vice-President is a Polish judge (who has been member of its governing body since 2017).

According to Article 1 of its statutes, MEDEL has the following goals:

1. The establishment of a debate between magistrates from different countries in order to support and promote European Community integration and the creation of a European political union;
2. The promotion and implementation of the civil, political and social rights necessary for a democratic society;
3. The defence of the independence of the judiciary;
4. The democratisation of the judiciary, its recruitment and the conditions under which the profession is exercised;
5. The respect in all circumstances of the values of the democratic rule of law;
6. The strengthening of the right of magistrates, like all citizens, to freedom of assembly, association and expression, and in particular the right to form unions and to act collectively;

7. Transparency of the public justice service, allowing citizens to monitor its operation;

8. The promotion of a democratic legal culture;

9. The proclamation and defence of the rights of minorities and differences, in particular the rights of immigrants and the most disadvantaged, in a perspective of social emancipation of the most vulnerable.

It has observer status in the Council of Europe, in the Consultative Council of European Judges (CCJE), in the Consultative Council of European Prosecutors (CCPE) and in the European Commission for the Efficiency of Justice (CEPEJ), and it is entitled to lodge collective complaints under the European Social Charter.

2.4. *Judges for Judges* (Rechters voor Rechters)

Rechters voor Rechters (Judges for Judges – J4J) was established in the Netherlands in 1999 as an independent and non-political foundation. It was set up by judges to support fellow judges abroad who have run into problems or risk problems on account of their professional practice. Such problems mostly relate to (presumed) violations of their professional independence. J4J also concerns itself with judges who have been discharged on dubious grounds, arrested or imprisoned, put under pressure, threatened or even assassinated. The activity of J4J covers a wide geographical area; the countries where the foundation has intervened in situations involving endangered judges include Afghanistan, the Philip-

pines, Poland, Serbia, Turkey and Venezuela⁹.

3. *Background to the legal action*

In order to fully understand the situation in which the four judges' associations felt compelled to act, it is essential to consider the backsliding of the rule of law – especially the attacks against the independence of the judiciary – that has been unfolding for more than a decade in the EU.

3.1. *The rule-of-law situation before Poland – the case of Hungary*

The first signs of democratic backsliding and direct attacks against the rule of law inside the EU appeared in Hungary, long before the situation in Poland started to deteriorate. In the April 2010 general elections, a coalition of two parties (Fidesz and the Christian Democratic People's Party, or KDNP) won 262 of the total 386 seats in the National Assembly, thus attaining the two-thirds majority necessary to amend cardinal laws and the Constitution. That coalition then followed the usual path to weaken (or even annihilate) the rule of law: shutting down or defunding independent institutions that may oppose intended changes; granting benefits or subsidies to their allies while bullying opponents or independent media that may offer different views or alternatives; and changing the electoral rules, making it almost impossible for opposition

parties to achieve significant success at the polls¹⁰.

In January 2012, a new Constitution came into force. It had been approved exclusively with the votes of the ruling majority and after a boycott – not only of the voting, but also of the entire debate that led to the drafting of the new text – by the opposition parties. Following this, the electoral laws were drastically changed in order to favour ruling-party candidates. Electoral districts were redesigned and changes were made to rules on voter registration, eventually leading to the legalisation of “voter tourism” in November 2021, when voters were given the right to choose where to vote, regardless of their place of residence¹¹.

Unsurprisingly, the new ruling coalition also saw the judiciary as a problem¹². As early as 2013, the European Parliament highlighted the situation in Hungary in the Tavares Report (named after its rapporteur, the Portuguese MEP Rui Tavares)¹³. With regard to the judiciary, that report mentioned that:

- the sixyear mandate of the former President of the Supreme Court had been prematurely terminated after two years;
- the independence of the Constitutional Court and of the judiciary in general was not guaranteed by the new Constitution;
- the mandatory retirement age for judges had been reduced from 70 to 62 years;
- the political majority had raised the number of constitutional judges from eleven to fifteen and abolished the requirement for agreement with the opposition regarding the election of constitutional judges; as a result of these measures, eight of the fifteen constitutional judges had been elected

exclusively by the two-thirds majority (with one exception), and this included two new judges who had been appointed directly from their position as members of parliament.

Despite the apparent concern of the European Parliament, these developments in Hungary did not prompt the EU authorities to take concrete action. Apart from negative comments in speeches by President José Manuel Barroso and Vice-President Viviane Reding¹⁴, the Commission did not take any decisive action against Hungary. When Hungary was brought before the CJEU, it did rule against Hungary, but in doing so it did not directly invoke rule-of-law principles, citing instead secondary EU legislation without obvious links to that fundamental value¹⁵.

The Hungarian authorities were engaging in what Prime Minister Orbán himself called a “peacock dance”: apparently making compromises, but doing so only on marginal issues, while not conceding on any substantial points¹⁶. At least initially, this state of affairs in fact seemed to satisfy both parties involved, prompting the comment that «the two sides have a common interest in showing that compliance happened: the Member State seeking to avoid sanctions and the Commission demonstrating the effectiveness of its actions»¹⁷.

3.2. *The situation in Poland*

The lack of resolute action by EU authorities against the Hungarian autocratic drift gave an impetus to the populist movement that was simultaneously growing in Poland. In

November 2015, the Law and Justice Party (Prawo i Sprawiedliwość, or PiS) won the parliamentary elections and set out on the same path that Orbán's Fidesz party had followed in neighbouring Hungary¹⁸ – except that the attack against the independence of the judiciary was more explicit and bolder. To place the courts under the total control of the executive, the Polish government has followed a planned strategy with the following components¹⁹:

- disabling the Constitutional Tribunal;
- merging the positions of Minister of Justice and Attorney-General;
- modifying the system for training and appointing new judges;
- changing the law on the common courts to increase the influence of the Minister of Justice;
- taking control of the National Council of the Judiciary, which is in charge of safeguarding the independence of courts and judges;
- taking control of the Supreme Court; and
- changing the disciplinary regime for judges.

To achieve this, the government supplemented its legislative efforts with an intensive media campaign against judges. There were television shows deliberately aimed at tarnishing the public image of judges. Internet campaigns run by Ministry of Justice officials defamed the president and members of the judges' association «Iustitia», and billboard advertisements depicted judges as corrupt, dishonest or linked to the former communist regime²⁰. The strategy followed by the Polish authorities also involved persecuting prominent judges who stood up against the attacks, launching disciplinary investigations and pro-

ceedings against them. The many victims of this strategy include Paweł Juszczyszyn, Igor Tuleya, Waldemar Żurek and Beata Morawiec²¹.

The prosecution service was also in a difficult situation – perhaps even more difficult than the judiciary, given its specific position of total subordination to the Minister of Justice/Prosecutor-General. Independent prosecutors were persecuted²². As a disciplinary sanction, they were assigned without their consent to lower-level positions or transferred without being given reasons or prior notice to units located far away from their homes²³.

The scale of the attacks on the independence of the judiciary reached such a magnitude that it was no longer possible for the EU authorities to confine themselves to mere words of condemnation. In addition – and more importantly – two new developments contributed to making the EU's reaction to the authoritarian drift in Poland different from what had happened in the Hungarian case.

First, Polish judges have shown great resilience and ability to organise. They have managed to mobilise judges from across the EU in their support. At the end of 2019, the Polish parliament passed a law establishing a new Disciplinary Chamber of the Supreme Court with the power to punish judges who "engage in political activity". This law also made it a disciplinary offence (punishable by sanctions ranging from a fine to dismissal) for a judge to submit questions to the CJEU for a preliminary ruling where those questions cast doubt on the validity of the appointment of judges by the National Council of the Judiciary in its new composition. It became aptly known as the "Muzzle Law". Polish judges reacted by calling on

their colleagues from across Europe to take to the streets of Warsaw for a public demonstration. On 11 January 2020, judges from 22 European countries gathered in Warsaw in an unprecedented demonstration of the solidarity and unity of the European judiciary²⁴.

Second, on 27 February 2018, the CJEU had issued a landmark ruling in what has become known as the Portuguese Judges case²⁵. In its judgment, the CJEU affirmed its competence to assess whether the organisation of national judicial systems complies with the principles of EU law, one of which relates to the independence of the judiciary. That judgment opened the floodgates to a series of other cases – some concerning questions referred for a preliminary ruling by Polish judges or by judges from other countries who had to deal with European Arrest Warrants issued by Poland, and some concerning infringement procedures launched by the Commission against Poland, where the changes to the judiciary made by the Polish government were directly challenged. This allowed the CJEU to begin building a consolidated case-law regarding the principle of the rule of law and the independence of courts²⁶.

However, the newly assertive attitude of the Commission, the protests from European judges and the decisions of the CJEU did not cause the Polish government and the institutions it had captured to stand down. Instead, on 7 October 2021, the Polish Constitutional Tribunal went so far as to rule that the provisions of the Polish Constitution prevail over EU primary law, meaning that the decisions of the CJEU challenging Polish judicial “reforms” are not binding on Poland to the extent that they were adopted in an area where the EU

does not have any competences conferred by the Member States²⁷. The Commission recently decided to take Poland to the CJEU over this judgment²⁸.

3.3. *The Contested Decision*

On 1 June 2022, a highly divided College of Commissioners decided to give a positive assessment of Poland’s Recovery and Resilience Plan (RRP), which required the Council’s approval in order for Poland to be able to benefit financially from the Recovery and Resilience Facility created, among other things, to mitigate the economic and social impact of the COVID-19 pandemic. In essence, the Commission’s thinking seems to have been that, given the political situation involving the war in Ukraine and the vital role being played by Poland (in contrast to Hungary), it was necessary to keep Poland happy and hence to approve its RRP and release EU funds. Against the background of the rule-of-law violations established by the CJEU, the Commission proposed to make payments conditional on Poland’s attaining specific milestones related to judicial independence. Concretely, Poland would have to enact various reforms to its judicial system in order to meet standards for effective judicial protection, notably regarding its disciplinary regime for judges. On 17 June 2022, the Council adopted the Contested Decision, whereby it approved the Commission’s above-mentioned assessment of Poland’s RRP.

It is important to take a closer look at the milestones in question. The Annex of the Contested Decision contains three sections dealing, respectively, with the reforms and

investments proposed by Poland under the RRF (Section 1), the structuring of the instalments in which the financial support is to be granted (Section 2), and some additional arrangements (Section 3).

Within Section 1, sub-component F1 concerns the justice system. It is divided into two sub-sub-components:

- F1.1, to which Milestone F1G is linked, is in essence concerned with remedying only some of the illegalities identified in the CJEU's judgment in case C-791/19, *Commission v. Poland (Disciplinary regime for judges)*.

- F1.2, to which Milestones F2G and F3G are linked, is concerned with addressing the specific situation of judges affected by decisions of the Disciplinary Chamber of the Supreme Court.

These reforms are described as follows in the Annex of the Contested Decision:

F1.1 Reform strengthening the independence and impartiality of courts

The reform shall:

- a) in all cases relating to the judges, including the disciplinary and waiver of judicial immunity, determine the scope of jurisdiction of the Supreme Court Chamber, other than the existing Disciplinary Chamber, meeting the requirements ensuing from Article 19 paragraph 1 of the TEU. This shall ensure that the above-mentioned cases shall be examined by an independent and impartial court established by law, while the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of ordinary courts shall be circumscribed,

- b) clarify the scope of disciplinary liability of judges, by ensuring that the right of Polish courts to submit requests for

preliminary rulings to the CJEU is not restricted. Such request shall not be grounds to initiate disciplinary proceedings against a judge,

- c) while the judges may still be held liable for professional misconduct, including obvious and gross violations of the law, determine that the content of judicial decisions is not classified as a disciplinary offence,

- d) ensure that initiation of the verification, within the court proceedings, whether a judge meets the requirements of being independent, impartial and 'being established by law', according to Article 19 of the TEU is possible for a competent court where a serious doubt arises on that point and that such verification is not classified as a disciplinary offence,

- e) strengthen procedural guarantees and powers of parties in disciplinary proceedings concerning judges, through

- (i) assuring that the disciplinary cases against judges of the ordinary courts are examined within a reasonable time,

- (ii) making more precise regulations on territorial jurisdiction of the courts examining the disciplinary cases to ensure that the relevant court can be directly determined in accordance with the legislative act; and

- (iii) ensuring that the appointment of a defence counsel in disciplinary proceedings concerning a judge is done within a reasonable timeframe, as well as providing time for substantive preparation of the defence counsel to perform their functions in the given proceedings. Simultaneously the court shall suspend the course of proceedings in case of a duly justified absence of the accused judge or his or her defence counsel.

The reform shall enter into force by the end of the second quarter of 2022.

F1.2 Reform to remedy the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court in disciplinary cases and judicial immunity cases

The reform shall ensure that judges affected by decisions of the Disciplinary Chamber of the Supreme Court have access to review proceedings of their cases. Such cases already decided by the Disciplinary Chamber shall be reviewed by a court that meets the requirements of Article 19 paragraph 1 of the TEU, in accordance with the rules to be adopted on the basis of the reform above. The legislative act shall set out that the first hearing of the court to adjudicate those cases shall take place within three months from receipt of the motion of the judge asking for a review, and that the cases shall be adjudicated within twelve months from receipt of such motion. The cases which are currently still pending before the Disciplinary Chamber shall be referred for further consideration to the court and in accordance with the rules determined within the above-mentioned proceedings.

The reform shall enter into force by the end of the second quarter of 2022.

3.4. The decision of the four judges' organisations to take legal action

This is the first time ever that European judges' organisations have come together to bring an action before the EU courts, which is already in itself an unprecedented statement. But why did the four European judges'

organisations find it necessary to act as they did?

First and foremost, it should be stressed that all four organisations have a statutory goal and obligation either to defend and represent the interests of judges who are their members or to protect judges who see their independence endangered, using all legal means allowed in a democratic society governed by the rule of law. This is in fact not the first time that these four organisations have acted jointly. They have previously done so within the Platform for an Independent Judiciary in Turkey, which was established after the attempted coup d'état in July 2016. The purpose of this was to draw the attention of national and international authorities to the appalling situation of Turkish judges who had been unlawfully dismissed, deprived of their assets and property or imprisoned. A further aim was to provide assistance to all those who had had to flee their country and seek political asylum abroad.

Second, the four judges' organisations considered that the milestones to be attained by Poland failed to fully address the rule-of-law issues described above. Those milestones seem to ignore and circumvent the full meaning and effects of several judgments and orders concerning judicial independence in Poland in which the CJEU found clear breaches of EU law in relation to the Disciplinary Chamber of the Polish Supreme Court²⁹.

An ordinary reading of the CJEU's case-law would require the conclusion that all decisions taken by that Disciplinary Chamber would necessarily have to be declared null and void with immediate effect. Hence, as a matter of EU law, Polish judges subject to disciplinary measures (including measures

removing judicial immunity) would have to be immediately reinstated in their prior positions, without any need for further legal proceedings. By agreeing to the conditions outlined above, the Commission and Council instead accepted a legal situation where decisions of the Disciplinary Chamber continued to have legal effects and where review proceedings in relation to such decisions would have to take place – and be completed by the fourth quarter of 2023 – before a new chamber to be established within the Polish Supreme Court.

In other words, the milestones agreed to by the Commission and given the green light by the Council create an alternative legal reality in which Poland may be financially rewarded for enacting “reforms” that fall short of its true obligations under EU law in the field of effective judicial protection, as ruled by the CJEU. It is clear that such a compromise will not only affect the Polish judges concerned but will also directly undermine the authority of the CJEU and its decisions.

Against this background, the EAJ, the AEAJ, MEDEL and J4J decided to bring legal action in order to support fellow judges in Poland, many of whom are members of those associations and many of whom have been subjected to unlawful disciplinary proceedings and other arbitrary measures by the Polish government to the detriment of their independence and, in some cases, their livelihoods. In addition, all four judges’ organisations strongly believe that their action can also be construed as supporting the CJEU and seeking to ensure that its judgments will be fully complied with rather than being reduced to mere political bargaining-chips by other EU institutions.

4. *The arguments underpinning the action*

The action brought proceeds on the basis of a number of different pleas in law. They can essentially be divided into two substantive groups. Each of those groups also leads to a more procedural argument to the effect that the Council failed to provide sufficient reasons for approving the Commission’s proposal, but those arguments will not be further discussed here.

4.1. *Failure to pay due regard to the CJEU’s judgments and infringement of several treaty provisions as interpreted by the CJEU*

The first set of pleas concerns the unlawful disciplinary sanctions imposed on some Polish judges and the procedure laid down in the Contested Decision, more specifically in its Milestones F2G and F3G regarding «[r]eform to remedy the situation of judges affected by the decisions of the Disciplinary Chamber». In those milestones, a distinction is made between the entry into force of legislation setting up a review procedure (Milestone F2G) and the completion of proceedings launched in accordance with that review procedure (Milestone F3G). The reform is to enter into force by the second quarter of 2022, while all review proceedings are to be completed by the fourth quarter of 2023, subject to «duly justified exceptional circumstances». This approach is in blatant contrast to the situation that would comply with the CJEU’s case-law based on Articles 2 and 13(2) TEU, on the one hand, and Articles 2 and 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union (the “Char-



Council of the EU

ter”), on the other hand, namely a situation where the Polish judges in question were immediately rehabilitated and reinstated.

Indeed, whereas that case-law requires judges who have been unlawfully sanctioned by the Disciplinary Chamber to be reinstated and rehabilitated, notably by virtue of the direct effect of the second subparagraph of Article 19(1) TEU, the Contested Decision purports to make the reinstatement of judges subject to the commencement and completion of «review proceedings» before a court, thereby not only failing to meet the requirement of immediacy but also adding a procedural burden and a measure of uncertainty. By acting inconsistently with the CJEU’s case-law, and by according legal effect to unlawful decisions of the Disciplinary Chamber, the Council has infringed

the duty of mutual sincere co-operation imposed on EU institutions by Article 13(2) TEU and has itself violated the principle of the rule of law mentioned in Article 2 TEU.

Article 19 TEU gives concrete expression to the value of the rule of law affirmed in Article 2 TEU. The second subparagraph of Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. Moreover, the principle of effective judicial protection is a general principle of EU law, stemming from the constitutional traditions common to the Member States. Article 47 of the Charter and Article 6 of the European Convention on Human Rights guarantee the right to an effective remedy and to a fair trial, and they also recognise the right to a fair and pub-

lic hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Further, the CJEU has noted, with regard to the rule of law, that the EU is composed of States which have freely and voluntarily committed themselves to such common values, which respect those values and which undertake to promote them³⁰. The obligation to uphold and comply with EU law applies not only to the Member States, but also to the institutions and bodies of the EU itself. Accordingly, the obligation to uphold the rule of law applies to the Council. A failure to pay regard to judgments of the CJEU therefore in and of itself constitutes a breach of the principle of the rule of law.

Judgments of the EU courts are binding to the extent that they authoritatively interpret EU law. This results from the first subparagraph of Article 19(1) TEU, whereby the «Court of Justice of the European Union» (which includes both the CJEU and the General Court) is given the task of ensuring that «in the interpretation and application of the Treaties the law is observed». It bears reminding in the context of the present case that, by virtue of Article 17(1) TEU, the Commission is given the task of overseeing the application of EU law only «under the control of the Court of Justice of the European Union». In the case of a judgment rendered in an infringement action brought pursuant to Article 258 or 259 TFEU, Article 260(1) TFEU expressly provides that, if the CJEU finds that a Member State has failed to fulfil an obligation under the Treaties, the State concerned is required to take the necessary measures to comply with the judgment of the CJEU. What is more, the CJEU's judgments in infringement proceedings have a

res judicata effect as regards findings of fact in such proceedings.

With regard to specific case-law, there are numerous judgments and orders of the CJEU that concern restrictions on the independence and impartiality of the judiciary, effective judicial protection and the rule of law in Poland. The most important ones here are the judgments in *A.K.*³¹ and *Commission v. Poland (Disciplinary regime for judges)*³² and the order in *Commission v. Poland*³³.

In *A.K.*, in response to a preliminary reference from the Supreme Court of Poland, the CJEU identified various aspects of the national rules governing the composition of the Polish National Council of the Judiciary (or KRS) as giving rise to doubts regarding the independence of the judiciary, notably that of the Disciplinary Chamber. For example, the judges composing the Disciplinary Chamber were appointed by the President of the Republic on the proposal of the KRS. Whereas the members of the KRS had previously been elected by their peers, amendments to the national law now provided that they were to be elected by the Lower Chamber of Parliament. The CJEU left it to the referring court to assess whether, taken together, the factors identified by the CJEU were capable of giving rise to legitimate doubts as to whether the Disciplinary Chamber was independent and impartial.

The Polish Supreme Court, applying the guidance provided by the CJEU in *A.K.*, held that the Disciplinary Chamber indeed failed to fulfil the criteria of an impartial and independent court. It reiterated that finding in a subsequent resolution which was jointly adopted by its civil, criminal, and employment-law and social-security

chambers and therefore had the effect of giving rise to a “principle of law”. In that resolution, it added that decisions of the Disciplinary Chamber deserve no protection and therefore cannot produce legal effects, irrespective of the date when they were issued.

Commission v. Poland (Disciplinary regime for judges) concerned an infringement action brought by the Commission and supported by no fewer than five Member States. In its judgment of 15 July 2021, the CJEU declared that Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) on a number of counts:

- by failing to guarantee the independence and impartiality of the Disciplinary Chamber;
- by allowing the content of judicial decisions to be classified as a disciplinary offence;
- by conferring on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts and, therefore, failing to guarantee that disciplinary cases are examined by a tribunal “established by law”; and
- by failing to guarantee that disciplinary cases are examined within a reasonable time and failing to guarantee respect for the rights of defence of accused judges.

In its judgment, the CJEU further declared that Poland had failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the CJEU to be restricted by the possibility of triggering disciplinary proceedings.

Of significance here is also the order of 14 July 2021 in case C-204/21 R, *Commission v. Poland*, in which the Vice-President of the CJEU granted interim measures at the request of the Commission, notably ordering Poland to immediately suspend the application of national measures conferring jurisdiction on the Disciplinary Chamber until the final judgment in that case is delivered. The order also required Poland to suspend the application of national measures prohibiting judges, under threat of disciplinary sanctions, from verifying compliance with the requirements of EU law relating to an independent and impartial tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter. In the reasoning underpinning her order, the Vice-President of the CJEU held that if the interim measures sought were not granted, and the decisions of the Disciplinary Chamber were thus to maintain their effect, this was liable to entail serious and irreparable damage to the EU legal order³⁴.

In the light of the foregoing considerations, it must be concluded that the CJEU, in its case-law concerning the Disciplinary Chamber of the Polish Supreme Court, has authoritatively interpreted the obligations flowing from the relevant provisions of primary EU law as requiring that all decisions of that Disciplinary Chamber must be considered null and void. In the circumstances, no legal effects can therefore be attributed to any decisions of the Disciplinary Chamber purporting to impose sanctions on judges, and judges affected by such decisions must therefore be reinstated and rehabilitated with immediate effect.

Notwithstanding this, Milestones F2G and F3G of the Contested Decision do not

require Poland to immediately suspend the Disciplinary Chamber and to reinstate and rehabilitate, with immediate effect, the judges who have been the subject of unlawful disciplinary proceedings. Instead, those milestones refer to the introduction of «review proceedings» for judges affected by unlawful disciplinary sanctions. Concretely, it is envisaged that judges affected by unlawful decisions of the Disciplinary Chamber should introduce a «motion» asking for a review by a newly designated court that complies with the requirements of Article 19(1) TEU. Milestone F2G is defined as being attained upon the entry into force of the reform providing for access to such review proceedings while milestone F3G is defined as being attained when all review cases launched in accordance with Milestone F2G have been adjudicated, which they should be by the end of 2023 unless there are «duly justified exceptional circumstances».

We consider that we have good grounds for drawing the following conclusion:

These milestones, on which the Contested Decision is founded, are inconsistent with the case-law of the CJEU concerning the Disciplinary Chamber in that they:

- accord legal effects to the decisions of the Disciplinary Chamber rather than considering them null and void; and
- impose additional procedural burdens, uncertainty and delays on judges affected by unlawful decisions of the Disciplinary Chamber by requiring such judges to commence a new set of proceedings before a newly constituted chamber of the Supreme Court in order to clear their names; and
- do not even foresee that the judges in question will be temporarily reinstated

pending the outcome of any review proceedings.

4.2. *Ineffectiveness of financial controls in the absence of effective judicial protection*

The second set of pleas in law on which the action brought by the four judges' organisations is based relates to the ineffectiveness of controls over EU budgetary flows in the absence of effective judicial protection. In our opinion, the re-establishment of effective judicial protection in Poland is a prerequisite for the functioning of the internal control system necessary to safeguard the financial interests of the Union (Article 325 TFEU). This is in fact recognised in the Contested Decision³⁵. However, the three milestones in question cannot guarantee that, either individually or jointly. Hence the Council has approved an instrument that does not and cannot satisfy a requirement that it itself has imposed.

In particular, Article 22(1) of the RRF Regulation³⁶ requires Member States, as recipients of RRF funds, to take all appropriate measures to protect the EU's financial interests and to ensure that they use the funds in a manner that complies with relevant EU and national law. This includes putting in place guarantees that EU law will be applied so as to detect and correct fraud and corruption. Member States must also ensure that unduly disbursed RRF funds can be effectively recovered.

Further, it is clear from Article 20(5)(e) of the RRF Regulation that the very purpose of setting milestones is to protect the EU's financial interest. However, in the absence

of effective judicial protection provided by independent and impartial judges in Poland, it is by definition impossible to fully guarantee that the obligations under EU law when it comes to detecting and correcting fraud and corruption will be complied with. To the extent that the Contested Decision purports to authorise payments to Poland in circumstances where effective judicial protection is not guaranteed, and therefore in circumstances where no fully functioning internal control system is ensured, it thus clearly infringes Article 22 of the RRF Regulation and Article 325 TFEU.

That it would be legally problematic to release RRF funds to Poland without further conditions as regards the judiciary beyond the attainment of the three milestones discussed here is evident. To begin with, it will be impossible to ensure respect for Article 19(1) TEU as long as the Polish Constitutional Tribunal does not fulfil the requirement of an independent and impartial tribunal established by law and as long as that tribunal considers EU Treaty provisions to be incompatible with, and subordinate to, the Polish Constitution, thereby directly challenging the primacy of EU law³⁷. It is no surprise that the Commission announced on 13 February 2023 that it would bring Poland to the CJEU over this.

Further, the Contested Decision constitutes an evident misapplication of Article 19(3) of the RRF Regulation. That provision requires the Commission to assess the relevance, effectiveness, efficiency and coherence of the Polish RRP, including as to whether the measures proposed – in our case, to the extent that they relate to judicial independence as a prerequisite for effective control over EU funds – will contribute to effectively addressing «all or a signifi-

cant subset of challenges identified» in Poland (point (b)). In our opinion, it is clear that those measures do not even come close either to being fully relevant, effective, efficient and coherent, or to addressing all or a significant subset of the challenges identified by the EU institutions themselves.

Indeed, the disciplining of judges by an irregularly composed chamber of the Supreme Court is but one aspect of a much wider problem in Poland. For example, the Polish Constitutional Tribunal declared Article 19(1) TEU to be unconstitutional in the light of the Polish Constitution in case P 7/20. As just mentioned, it has also formally expressed, in case K 3/21, that view in such a way that the primacy of EU law is compromised – which the Commission has now also acknowledged to be highly problematic from the viewpoint of EU law. Another example is that the Polish prosecution service currently lacks functional independence from the Polish government, given that the Minister of Justice also holds the office of Prosecutor-General. How can any plan proposed by the Polish government that does not address these major shortcomings be «expected to prevent, detect and correct corruption, fraud and conflicts of interests when using the funds provided» (Article 19(3)(j) of the RRF Regulation)?

In conclusion, therefore, we find that the “reforms” set out in Component F1.1 of Poland’s RRP, and thus required pursuant to Milestone F1G, are not based on any coherent overarching assessment of what is required to re-establish effective judicial protection, which is a prerequisite for full compliance with Article 235 TFEU. The Council’s approach is a partial and incomplete one. Besides the fact that it will undermine the effect of the CJEU’s case-law, in

practical reality that approach is incapable, by definition, of bringing about a situation that would guarantee sound financial management of RRF funds flowing into Poland. Until the full impartiality and independence of all judges in Poland is assured, the effective internal controls required in that Member State for the disbursement and management of EU funds cannot be guaranteed.

5. Conclusion

Four European judges' organisations suing an EU institution was a headline-grabbing event across Europe in late August 2022. But there is no reason for jubilation in that regard. Nor is it appropriate to focus purely on the legal niceties of the case. Instead, let us pause and take in the enormity of the challenges ahead for the EU if, as a last resort, judges themselves, of all actors, need to step up to defend the unconditional,

non-negotiable binding nature of the judgments issued by the highest court in the EU legal system – and to defend each other. Irrespective of the outcome of these proceedings, that should not become a precedent. Never again should this be necessary. The EU institutions cannot be missing in action, or even actively contribute to the undermining of judicial independence, without directly affecting both the letter and the spirit of everything that they are responsible for. Markets and policies are worth nothing more than the paper they are written on without the safeguards of the rule of law, and judges protecting it. It is a powerful sign, both practical and symbolic, that judges themselves, at least, realised what the stakes are – and stepped up to support each other in the extraordinary show of pan-European judicial solidarity that is this case.

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¹ We use the term "organisations" rather than "associations", since – as mentioned below – one of the four (Judges for Judges) is a foundation and hence not an association. It should also be noted that MEDEL gathers not only judges but also prosecutors, although the action brought refers specifically only to those of its members who are judges. The analysis offered in this article describes the situation as it stood in November 2022, taking into account also the decision of the CJEU to continue

the proceedings on the substance before ruling on the admissibility arguments.

² Council Implementing Decision of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland, ST 9728 2022 INIT (referred to below as the "Contested Decision").

³ The cases are now pending as T-530/22 (Medel v. Council), T-531/22 (International Association of Judges v. Council), T-532/22 (Association of European Administrative Judges v. Council) and T-533/22 (Rechters voor Rechters v. Council), as well

- as T-116/23 (Medel and others v. Commission).
- ⁴ See, in particular, judgment of 19 November 2019 in joint cases C-585/18, C-624/18 and C-625/18, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, ECLI:EU:C:2019:982, and judgment of 15 July 2021 in case C-791/19, *Commission v. Poland (Disciplinary regime for judges)*, ECLI:EU:C:2021:596.
- ⁵ Press release of 18 April 2023 <<https://www.iaj-uim.org/news/press-release-on-lawsuits-in-the-eu-general-court/>> (last visited on 15 May 2023).
- ⁶ <<https://www.iaj-uim.org/>> (last visited on 15 February 2023).
- ⁷ <<https://www.aej.org/page/Statutes>> (last visited on 15 February 2023).
- ⁸ <<https://www.medelnet.eu>> (last visited on 15 February 2023).
- ⁹ For a more detailed analysis of the activity of J4J, see <<http://www.rechtersvoorrechters.nl>> or A. Bruins, *Rechters in Nood*, in «Mr. (Magazine voor juristen)», n. 8/9, 2012, pp. 33-36 (available at <https://www.rechtersvoorrechters.nl/media/stichting/201208-09_MR_Rechters-in-nood_incl-cover.pdf>), English translation available at <https://www.rechtersvoorrechters.nl/media/stichting/201208-09_MR_Judges-in-Need.pdf> (last visited on 15 February 2023).
- ¹⁰ For a step-by-step description of the backsliding of the rule of law, see L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, in «Cambridge Yearbook of European Legal Studies», 19, 2017, pp. 3-47. See also S. Levitsky, D. Ziblatt, *How Democracies Die*, Crown Publishing Group, 2018.
- ¹¹ K. L. Scheppele, *How Viktor Orbán Wins*, in «Journal of Democracy», vol. 33, n. 3, July 2022, pp. 45-61.
- ¹² Populists taking over power often deploy what has been referred to as the «populist trap to the judiciary»: they first foment anger and promote the polarisation of society, which leads to distrust in institutions and a lack of political dialogue. Then they judicialise politics, further undermining the public's perception of the independence of the judiciary, so that judges can credibly be accused of belonging to a corrupt system that only the populists are capable of changing. See F. Marques, *Rule of law, national judges and the Court of Justice of the European Union: Let's keep it juridical*, in «European Law Journal», 27(1-3), 2021, pp. 228-239.
- ¹³ *Situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)*, 2012/2130(INI), 24 June 2013.
- ¹⁴ Pech, Scheppele, *Illiberalism Within* cit.
- ¹⁵ See judgment of 6 November 2012 in case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687, where the CJEU ruled that the lowering of the retirement age for judges was incompatible with EU law not because it undermined the independence of the judiciary but because it infringed Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).
- ¹⁶ In I. Krastev, S. Holmes, *The Light that Failed – A Reckoning*, Penguin Books, 2020, p. 77, this tactic on the part of Prime Minister Orbán is referred to as “selective imitation”: «Selective imitation has allowed Orbán to stymie EU attempts to penalize Hungary for the regime's attacks on freedom of the press and judicial independence. By assembling an illiberal whole out of liberal parts, Orbán has managed to turn the very idea of a Western Imitation Imperative into an in-your-face joke at Brussels' expense».
- ¹⁷ P. Bárd, A. Kocsik, Z. Körtvélyesi, *Tactics Against Criticism of Autocratization – The Hungarian Government and the EU's Prolonged Tolerance*, MTA Law Working Papers, 2022/5, Centre for Social Sciences – MTA Centre of Excellence, pp. 3. 44.
- ¹⁸ C. Davies, *Hostile Takeover: How Law and Justice Captured Poland*, in «Freedom House», May 2018, available at <<https://freedomhouse.org/sites/default/files/2020-02/poland%20brief%20finalo.pdf>> (last visited on 17 February 2023).
- ¹⁹ D. Zabłudowska, *The Battle for Judicial Independence in Poland, 2017-2022*, in «Giornale di Storia Costituzionale/Journal of Constitutional History», 44 / II, 2022, pp. 29-39.
- ²⁰ A. Applebaum, *The Disturbing Campaign Against Poland's Judges*, in «The Atlantic», 28 January 2020, available at <<https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/>> (last visited on 17 February 2023).
- ²¹ For brief descriptions of the disciplinary cases against some of these judges, see Marques, *Rule of law* cit.
- ²² *The Stick Method – The “Good Change” System of Prosecuting Independent Prosecutors*, Lex Super Omnia, available at <https://medelnet.eu/wp-content/uploads/2021/07/THE_STICK_METHOD.pdf> (last visited on 17 February 2023).
- ²³ D. Mazur, W. Żurek, *So called “Good change” in the Polish system of the administration of justice (updated for 6 October 2017)*, available at <https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Sanders/Dokumente/Good_change_-_7_October_2017_-_word.pdf> (last visited on 17 February 2023).
- ²⁴ *Thousands protest against Poland's plan to discipline judges*, Reuters, 11 January 2020, <<https://www.reuters.com/article/us-poland-jud>

- diciary-toga-march-idUSKB-N1ZAoPD> (last visited on 17 February 2023).
- ²⁵ Judgment of 27 February 2018 in case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117.
- ²⁶ For a summary of the main decisions, see R. Mañko, *European Court of Justice case law on judicial independence*, European Parliamentary Research Service, PE 696.173, July 2021, available at <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696173/EPRS_BRI\(2021\)696173_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696173/EPRS_BRI(2021)696173_EN.pdf)> (last visited on 17 February 2023).
- ²⁷ Regarding this decision, see F. Marques, *L'espace européen de justice: après la chute, l'atterrissage?*, in «Délibérée», 2022/1 (No. 15), pp. 57-61. DOI: 10.3917/delib.015.0057, available at <<https://www.cairn.info/revue-deliberée-2022-1-page-57.htm>> (last visited on 17 February 2023).
- ²⁸ See press release: <https://ec.europa.eu/commission/presscorner/detail/EN/IP_23_842>; no case number has been assigned yet.
- ²⁹ Judgment of 15 July 2021 in case C-791/19, *Commission v. Poland (Disciplinary regime for judges)*, ECLI:EU:C:2021:596, order of 27 October 2021 in case C-204/21 R, *Commission v. Poland*, ECLI:EU:C:2021:878, and other orders cited therein.
- ³⁰ Judgment of 24 June 2019 in case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, p. 42.
- ³¹ Judgment of 19 November 2019 in joint cases C-585/18, C-624/18 and C-625/18, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, ECLI:EU:C:2019:982.
- ³² Judgment of 15 July 2021 in case C-791/19, *Commission v. Poland (Disciplinary regime for judges)*, ECLI:EU:C:2021:596.
- ³³ Order of 27 October 2021 in case C-204/21 R, *Commission v. Poland*, EU:C:2021:878.
- ³⁴ Ivi, pp. 121-129.
- ³⁵ Recital 45 of the Contested Decision.
- ³⁶ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17.
- ³⁷ Polish Constitutional Tribunal, judgment in case K 3/21.