

# 7 Years Later: Poland as a Legal Black Hole

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7 years after the activation of the [pre-Article 7 procedure](#) in January 2016, Poland has become a “[legal black hole](#)”, to borrow the expression used as a warning by Advocate General Bobek in a case concerning Poland’s [arbitrary](#) secondment regime for judges.

In short, the EU is faced with a Member State where all of its top courts are now unlawfully composed; where every single judicial appointment procedure since 2018 is inherently defective due to the involvement of an unconstitutional body; and where core EU *and* ECHR requirements relating to effective judicial protection and the fundamental right to an independent court established by law have been held “unconstitutional” in [2021 and 2022](#) by the body [masquerading](#) as Poland’s Constitutional Tribunal (CT).

This led the Secretary General of the Council of Europe to report last month that Poland’s obligation to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction “[is not, at this stage, fulfilled](#)”. Read that again and let it sink in.

In another unprecedented warning, the Secretary General identified a threat “[to the future efficiency of the Convention system](#)”. The reason? An exponential rise in the number of similar applications relating to Poland’s rule of law crisis: more than 70 complaints were communicated to Polish authorities by the European Court of Human Rights (ECtHR) with the Strasbourg Court also issuing more than 20 interim measures in respect of 15 judges *in the past year alone*.

It is difficult not to conclude that the ECtHR is paying the price of the EU’s persistent failure to act promptly and decisively *after years* of acting in a [too little, too late](#) fashion. In a period of seven years, the European Commission has indeed lodged with the ECJ a grand total of four infringement actions and has been sitting on a [fifth one](#) regarding Poland’s unlawfully composed CT for more than a year. By contrast, Polish judges have referred no fewer than 39 requests for a preliminary ruling to the ECJ. In doing the Commission’s job, the referring judges have sacrificed their professional careers in addition to making themselves the target of repeated unlawful [proceedings](#), [sanctions](#), [abuse](#) and [threats](#).

It is not that the Commission is not aware of the gravity of the situation. In 2017, the Commission rightly emphasised how the situation “[has continuously deteriorated](#)” since the end of 2015 and how the combined effects of multiple legislative changes have “[put at serious risk](#)” the separation of powers. In 2019, the Commission went a step further and stressed how “the [executive and legislative powers now can interfere throughout the entire structure and output of the justice system](#)”. Most

recently, in its submissions to the ECJ in Case C-791/19 and Case C-204/21, the Commission accurately stated that the combination and simultaneous introduction of various legislative changes “[have given rise to a structural breakdown](#)” and described the changes made to the disciplinary regime for judges as amounting to a “[systemic rupture](#)” with Poland’s pre-2015 regime.

Considering the above, Poland must no longer be considered as facing a rule of law crisis but rather a rule of law *breakdown* whose key features will be outlined below. This post will then very briefly address the [latest bill](#) of January 2023 and which offers more [façade of change](#) so as to get the Commission to unlock [EU recovery funding](#).

## **A bird’s eye view of Poland’s rule of law breakdown**

Poland’s [rule of law breakdown](#) began with the capture of the Constitutional Tribunal. Where are we now, seven years later? Following a [judgment](#) of the ECtHR in May 2021, it can be concluded that the CT is no longer a tribunal established by law when deciding cases in formations including any of the three individuals occupying the seats of the properly elected judges due to the grave irregularities committed by the ruling coalition in December 2015. Most recently, Poland’s Supreme Administrative Court held that the whole CT is no longer a court as it is “[infected](#)” with unlawfulness.

The second key body used to organise the autocratic gangrenisation of Poland’s judicial system is known as the National Council for the Judiciary (NCJ). The [capture of the NCJ](#) has enabled Poland’s ruling coalition to interfere in all judicial appointment procedures. This has, in turn, led the ECtHR to [establish the neo-NCJ’s lack of independence](#) and hold that any court composed of individuals (so-called neo-judges) appointed in a procedure involving the neo-NCJ is *systematically compromised*. Notwithstanding the ECtHR demanding [rapid remedial action](#) and Poland’s Supreme Court finding the neo-NCJ to be an unconstitutional body, nothing has been done so one may expect a [continuous flow of ECtHR judgments finding against Poland](#).

A third (new) body, known as the Disciplinary Chamber (DC), was used to bully judges and prosecutors into submission. Multiple rulings have established that the DC is [no more than a kangaroo body](#). This explains why the lawful judges of Poland’s Supreme Court ruled in [January 2020](#) that all of its resolutions must be held null and void. A key legal aspect the Von der Leyen Commission irresponsibly decided to [ignore last year](#).

Another new body, known as the Extraordinary Chamber, has been set up by Poland’s ruling coalition to protect its [irregularly appointed “judges”](#) and itself from potential [adverse electoral results](#). It was also established not to be a proper court [by the ECtHR](#) and suspended, in part, [by the ECJ](#) in July 2021, yet it continues to operate.

Another chamber of the Supreme Court – the Civil Chamber – was held [by the ECtHR](#) not to be a court established by law when consisting of individuals appointed

post 2018 via the neo-NCJ. It follows that any Supreme Court bench consisting of “neo-judges” must be considered an irregular bench in breach of Article 6(1) ECHR.

As of today, we have reached a stage where the fundamental right to an independent court established by law under the Polish Constitution, the ECHR and the EU Treaties is systemically violated with Polish authorities also casually and openly violating an increasing number of rule of law related rulings of the ECtHR and ECJ (non-exhaustive list):

- ECJ [judgment of 19 November 2019](#) in Joined Cases C-585/18, C-624/18 and C-625/18, AK (Independence of the DC)
- ECJ [judgment of 2 March 2021](#) in C-824/18, AB (Appointment of judges to the Supreme Court – Actions)
- ECtHR [judgment of 7 May 2021](#) in the case of Xero Flor
- ECtHR [judgment of 29 June 2021](#) in the cases of Judges Broda and Bojara
- ECJ [order of 14 July 2021](#) in Case C-204/21 R, Commission v Poland (Indépendance et vie privée des juges)
- ECJ [judgment of 15 July 2021](#) in Case C-791/19, Commission v Poland (Disciplinary regime for judges)
- ECtHR [judgment of 22 July 2021](#) in the case of Judge Reczkowicz
- ECJ [judgment of 6 October 2021](#) in Case C-487/19, W.#. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court-Appointment)
- ECJ [order of 27 October 2021](#) in Case C-204/21 R, Commission v Poland
- ECtHR [judgment of 8 November 2021](#) in the cases of Judges Dolińska-Ficek and Ozimek
- ECJ [judgment of 16 November 2021](#) in Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others
- ECtHR [judgment of 3 February 2022](#) in the case of Advance Pharma
- ECtHR [judgment of 15 March 2022](#) in the case of Judge Grz#da
- ECtHR [judgment of 16 June 2022](#) in the case of Judge #urek
- ECtHR [judgment of 6 October 2022](#) in the case of Judge Juszczyzyn
- ECtHR [interim measure of 6 December 2022](#) in the cases of Judges Leszczyńska-Furtak, Gregajtys and Piekarska-Dr##ek

## More lipstick-on-a-pig changes in latest attempt to unlock EU recovery funding

Last June, Polish authorities [pretended](#) to meet the Commission’s ([irresponsibly inadequate](#)) judicial milestones by replacing the DC with a [new chamber](#) comprising a majority of neo-judges and introducing a new but bogus [judicial independence test](#). Nothing was done however regarding the unlawfully composed/presided CT; the unconstitutional neo-NCJ; the fake Extraordinary Chamber; the Supreme Court’s usurpers; and the “unconstitutionalisation” of core requirements relating to Article 19(1) TEU and Article 6(1) ECHR as interpreted by the CJEU and the ECtHR. Cherry on the autocratisation cake, Polish authorities continue to disregard all “inconvenient” CJEU and ECtHR rulings.

Last month, the Committee of Ministers of the Council of Europe stressed that the legislative amendments of June 2022 do “[not constitute adequate remedial action](#)” because, *inter alia*, they failed to address the neo-NCJ’s deficiencies; the status of judges appointed in deficient procedures; the decisions adopted with their participation; the lack of an adequate framework for examining judicial appointments; the continuing risks of disciplinary liability for judges who implement Article 6 ECHR requirements. In addition, and importantly, Advocate General Collins recently opined that the abolition of the DC “[does not have the consequence that its resolutions are deemed to be null and void](#)” as required by EU law due to the “particularly grave” nature of the breach of Article 19(1) TEU committed by Polish authorities.

Does the latest ([unconstitutional](#)) bill approved by the Sejm [last Friday](#) fare better in this respect? Due to space constraints, let me put it bluntly: It [does not](#) and merely amounts to adding more lipstick on the proverbial pig while plainly disregarding the Commission’s [law-making milestone](#) and Article 7(1) [recommendation \(d\)](#).

It is to be hoped the von der Leyen Commission has learned from [last June’s debacle](#) and will not (again) prioritise [political expediency](#) over the strict enforcement of EU rule of law requirements, including its own (inadequate, in part [unlawful](#)) judicial milestones.

