

# Doing Justice to Poland's Muzzle Law

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On 5 June 2023, the Court of Justice issued its fourth infringement [judgment](#) in relation to yet another Polish piece of legislation – informally known as the muzzle law – which aimed to dissuade or punish Polish judges for applying and upholding EU rule of law requirements.

As anyone with any basic understanding of EU law could have predicted, the law rushed into force by Poland's ruling coalition in December 2019 did not survive judicial scrutiny in Luxembourg. The Court held that the muzzle law was incompatible with the fundamental right to effective judicial protection, the fundamental right to respect for private life, the fundamental right to the protection of personal data, the principle of primacy of EU law, the functioning of the preliminary ruling mechanism and the EU General Data Protection Regulation.

This post will focus on this new Grand Chamber Court judgment relating to Poland's rule of law breakdown without further detailing Poland's gradual transformation into a "[legal black hole](#)". It is indeed already no easy task to provide a critical overview of a judgment totalling 46,681 words in fewer than 2,000 words.

Overall, the Court's muzzle law judgment is as compelling as it is comprehensive. One may only regret the Luxembourg Court's lack of engagement with the extensive [case law](#) of the Strasbourg Court. This is however less critical than the Commission's incomprehensible failure to raise the issue of the grossly irregular composition and grotesque lack of independence of the Poland's "[Extraordinary Chamber](#)" from the very start of the procedure while it furthermore continues to – irresponsibly – ignore the legal monster in the room, i.e., the [unconstitutional body](#) masquerading as Poland's National Council of the Judiciary (NCJ) which continues to irregularly nominate wave after wave of "judges" (and let us not forget the Commission's half-baked, in part unlawful recovery "[milestones](#)"). As long as the Commission fails to demand full compliance with CJEU case law and decisively address the issue of judicial usurpers, especially at the level of Poland's courts of last resort, just chipping away at the arbitrary disciplinary changes Polish authorities have made will always fail to solve Poland's fundamental and systemic issues.

## A long time in the coming

Poland's muzzle law was promptly, widely and severely criticised by [law professors](#), [civil society organisations](#), [judicial associations](#), [PACE](#), the [Venice Commission](#), the [OSCE](#) and the [European Parliament](#). It also led to public protests, including an unprecedented "[March of One Thousand Robes](#)" which gathered judges and lawyers from more than 20 countries in Warsaw. It however took the European Commission more than [four months to launch an infringement action](#) and more than a year after

the adoption the muzzle law to lodge the action with the ECJ in [April 2021](#). And it took two more years for the Court to decide the case on the merits.

Possibly to offset its previous procrastination (which one may contrast with the Commission's pleasingly [swift reaction](#) following the recent adoption of yet another rushed and grossly unconstitutional piece of legislation known as [Lex Tusk](#)), the Commission did apply for interim measures. No fewer than four orders were subsequently adopted by the ECJ. In a particularly noteworthy development, the ECJ Vice-President [ordered Poland on 27 October 2021](#) to pay a penalty payment of €1m per day as Polish authorities had not suspended the application of the muzzle law as previously ordered by [the Court on 14 July 2021](#). The last order was adopted on 21 April 2023 and resulted in the Court reducing this amount – on [unpersuasive grounds](#) – to €0.5m per day until adoption of the judgment on the merits, the main elements of which will now be outlined.

## **Repeating itself (I): Member State competence is no carte blanche to dismantle the rule of law**

Ever since it had to defend its judicial changes (not “reforms” please!), the Polish government has challenged the [Court's jurisdiction](#) to review national measures or practices relating the organisation of national judiciaries. More originally, in this case, the Polish government relied on the decisions of the [currently imploding](#) body masquerading as Poland's Constitutional Tribunal (CT), arguing that Poland's (un)constitutional identity as interpreted by their (un)constitutional tribunal means that they can disregard basic EU membership requirements such as the rule of law.

In response, the Court had to offer a first-year law lecture reiterating basic points such as Poland's acquiescence to complying with the rule of law when it decided to join the EU and Member States' obligation to comply with EU law, including when they are allegedly seeking to “reform” the national judiciary. With respect of constitutional identity, the Court recalled what it held in its [twin judgments](#) regarding the EU's Conditionality Regulation: The rule of law is an integral part of the EU's very identity and Member States cannot hide behind their (captured or otherwise) constitutional courts to disregard it and systematically undermine, for instance, judicial independence.

## **Repeating itself (II): The Disciplinary Chamber as a [kangaroo court](#)**

The Court had also to [repeat that the Disciplinary Chamber \(DC\) is not a proper court](#). More interestingly, the Court further developed its previous case law regarding judicial immunity rules to reiterate inter alia that decisions waiving judicial immunity must at the very least be reviewed by proper courts with the Court rightly emphasising the mere possibility or risk of involving a kangaroo court – my phrasing of course – suffices to infringe judicial independence.

The DC has since been disbanded but only to be replaced in July 2022 by a [body which suffers from the same flaws](#). This new body may appear to make more reasonable decisions but this is only because the ruling party wants to unlock access to recovery funds without fundamentally altering the set of tools it has adopted to control and punish judges. The Court does not address this development as it is well-established that it can only assess the situation as it existed when the administrative phase of the infringement action concluded. The changes adopted in [July 2022](#) and [January 2023](#) are, in any event, [cosmetic or unconstitutional](#) and plainly insufficient to ensure compliance with the case law of both the CJEU and ECtHR.

## **Repeating itself (III): Broad and imprecise disciplinary provisions are not acceptable**

The Court had to [repeat itself](#) also as regards disciplinary rules applicable to judges, holding that disciplinary rules cannot be used as a system of political control of the content of judgments and/or punish judges for submitting preliminary questions to the Court of Justice.

The Court did however go beyond merely repeating what it held in its previous infringement ruling of 15 July 2021 regarding Poland's disciplinary regime for judges and made a number of unprecedented findings: First, the Court (rightly) found the muzzle law to amount to a deliberate attempt to "legalise" the violation of its [preliminary ruling in AK](#); Second, the Court explicitly confirmed that Polish judges, following AK, can rule on the (lack of) independence of the neo-NCJ and recalled that the then not yet captured Supreme Court had already established that the neo-NCJ is no longer independent; Third, the Court made the unprecedented finding that Polish executive and legislature deliberately rushed the muzzle law to neutralise pending preliminary references relating to the right to an independent tribunal established by law.

In the light of this legal vandalism, the Court unsurprisingly found multiple violations of Article 19(1) TEU combined with Article 47 of the Charter as well as Article 267 TFEU.

## **Stating the obvious: National judges cannot be disciplined for reviewing whether a court is "established by law"**

The primary aim of the muzzle law was to dissuade Poland's lawful judges from reviewing the irregular judicial appointments made by the unconstitutional neo-NCJ, thus blocking Polish judges from refusing to adjudicate with deficiently appointed "judges" or from overruling their acts. The Court's judgment is rich and persuasive but, to be brief, the Court stated the obvious here by holding that EU law precludes disciplinary provisions which can be used to arbitrarily prevent national courts from assessing whether a court or a judge meets the requirements relating to effective

judicial protection, where appropriate, by referring questions to the Court for a preliminary ruling.

The Court's reasoning is compelling but the Court's findings plainly contradict its own [EAW case law relating to Poland](#). In short, in answer to multiple questions from [sceptical national courts](#), the Court has made it practically impossible to refuse extraditions to Poland on the basis of the formal existence of rules and remedies such as the recusation procedure which the Court are now essentially holding to be illusory, vague or too limited to guarantee compliance with EU effective judicial protection requirements.

## **Most novel aspect: Transversality of effective judicial protection and monopolistic control by a single (kangaroo) court**

To its credit, the Commission provided the Court with the opportunity to build on the argument that issues relating to judicial independence must be understood as horizontal issues which should preclude any attempt to give exclusive jurisdiction over these issues to a new body such as the "Extraordinary Chamber" which, [similarly to the DC](#), was also found [not to be a court by the ECtHR](#). Disappointingly, the Commission raised the grossly irregular composition and lack of independence of this kangaroo body too late in the procedure for the Court to be able to address these crucial aspects.

In any event, the Court found multiple violations of EU law without engaging with either these irregularities. Instead, the Court compellingly explained how effective judicial requirements guaranteed by Article 19(1) TEU and Article 47 CFR – which the Court described as both constitutional and procedural in nature – must be transversally guaranteed across all the substantive areas of application of EU law and before all relevant national courts seised of cases within those areas.

Here, for the first time, the Court forcefully outlined how EU law precludes any reallocation of jurisdiction within a Member State when – to simplify – this reallocation has the object or effect of undermining effective judicial protection. And since all national courts must be able to ascertain whether they or other courts meet EU effective judicial protection requirements, a Member State cannot give exclusive jurisdiction to a single body such as the "Extraordinary Chamber", especially when said body cannot review the legality of judicial appointments.

Another noteworthy aspect is the Court's emphasis on Poland's specific rule of law context to further support its findings. In particular, the Court stressed the repeated attempts of Polish authorities to discourage or prevent Polish judges from fulfilling their EU obligations. Under those circumstances, the exclusive jurisdiction given to the "Extraordinary Chamber" was held to be liable to contribute to weakening even further the fundamental right to effective judicial protection.

## Welcome clarification: Harassment and stigmatisation of judges under false pretences

The last part of the Court's judgment, which would amply deserve a separate post, concerns the grossly disproportionate obligations the muzzle law imposed on judges who were required to provide personal information about specific non-professional activities for the purposes of online publication. As AG Collins [put it](#), "a judge could potentially have to declare membership of an amateur sporting association dating back to his or her early childhood". Again, the Court's repeatedly doubted Polish authorities' good faith when it comes to the public interests they claimed to be pursuing. Moreover, the Court identified specific and unlawful risks ("undue stigmatisation" and "career unduly hindered") created by the muzzle law, a finding the Court justified inter alia with reference to Poland's rule of law context. The muzzle law was therefore also held incompatible with the judges' rights to respect for private life and to the protection of personal data as well as the GDPR.

Polish authorities having already forcefully indicated their [intention not to comply](#) with the Court's judgment, it would be [irresponsible for the Commission](#) to unlock EU recovery funds on the back of cosmetic, in part unconstitutional, changes adopted in January 2023 while the [industrial-scale violation](#) of EU/ECHR rule of law requirements continues unabated.

