THE TREATIES WITHOUT A GUARDIAN: THE EUROPEAN COMMISSION AND THE RULE OF LAW

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INTRODUCTION

The Treaty on European Union assigns responsibility for the enforcement of Union law to the European Commission: "Article 17(1) TEU: The Commission shall . . . ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. . . ."[1]

In pursuit of this mandate, the Commission has taken lead responsibility for strengthening the rule of law, given that the rule of law in the European Union requires – among other things – the effective and uniform application of Union law across the Member States. Toward that end, the Commission has stated:

> Strengthening the rule of law in the Union is, and must remain, a key objective for all. Therefore. . . the Commission has set out concrete actions to strengthen the Union's capacity to promote and

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[1] Treaty on European Union, art. 17, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TEU].

> uphold the rule of law, through promotion of a common rule of law culture, prevention of rule of law problems and an effective response.[2]

If my task in this Article is to discuss the responsibility of the European Commission to ensure the rule of law, then the black-letter answer seems absolutely easy. The Commission has the mandate to ensure that Union law is applied across the Member States and it has positioned itself as the central coordinating actor in the EU when it comes to the rule of law. As I will argue in the Article, however, the Commission has failed on both counts – both in ensuring the effective and uniform application of Union law and in effectively guiding the European Union's efforts to ensure that the rule of law is defended.

While the rule of law embraces many different dimensions of legality, the enforcement of law as written is particularly crucial to realizing the "the rule of law – a value common to the European Union and the Member States which forms part of the very foundations of the European Union and its legal order."[3] In Union law, enforcement involves a division of labor. Each Member State has the front-line obligation to ensure that Union law has primacy and direct effect within its legal system, guaranteeing also that Union law is both effective and uniformly applied across the Member States. The Commission has the back-up obligation to ensure that the Member States are actually following through on their commitments, which includes monitoring and ensuring that the jurisprudence of the Court of Justice – requiring independent courts, irremovability of judges, guarantees against disciplining judges for the content of their decisions and a commitment to maintaining high standards once achieved – is observed.[4]

Promoting a rule of law culture across Union institutions as well as within Member States must also be part of the mix, but the Commission is in the best position to guarantee – as it itself has said – that "rule of law problems" must be met with an "effective response." This will be especially true when rule of law backsliding affects the central institutions within Member States that are tasked with ensuring that Union law is connected to a system of effective remedies, which means that the Commission should be particularly concerned about the state of the independent national judiciaries. In this Article, then, I will examine the Commission's track record in acting to ensure the rule of law through the enforcement of EU law in the Member States, particularly when it comes to protecting and defending the independence of national courts.

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[2] *Initiative to Strengthen the Rule of Law in the EU*, EUROPEAN COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en (last visited February 13, 2023).

[3] Hungary v. Parliament and Council, Case C-156/21, EU:C:2022:97, ¶ 128.

[4] This Article will elaborate on the Court decisions that have announced these principles, but for now, a good summary of the jurisprudence of the Court in its first five years of decisions on point can be found in LAURENT PECH & DIMITRY KOCHENOV, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments Since the Portuguese Judges Case*, SIEPS, Sept. 2021, https://sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/ [hereinafter PECH & KOCHENOV, *Respect for the Rule of Law*].

The key tool that the Commission has to accomplish this task is the infringement procedure specified in Article 258 TFEU, with a backup capacity to enforce decisions of the European Court of Justice [ECJ] through penalty payments under Article 260 TFEU. When we look at what the European Commission has done over the last two decades as the rule of law issues in the EU have become more prominent, however, its track record is spotty at best. As R. Daniel Kelemen and Tommaso Pavone have documented in a recent paper, the Commission's overall use of infringement actions across the board has fallen continuously ever since the Barroso Commission took office in 2004. As they show: "Between 2004 and 2018, infringements opened by the Commission dropped by 67%, and infringements referred to the ECJ dropped by 87%."[5]

Even though the EU admitted 10 new states in 2004, the Commission's infringement actions declined in absolute numbers around the same time and fell even more dramatically when one calculates the number of infringements launched per Member State. As the Kelemen and Pavone study shows, in 2004 – the year of "big bang" enlargement – the Commission sent 259 infringement cases to the ECJ but by 2016, only 34 cases were sent.[6] Since that time, the decline has continued. In 2021, the most recent year for which statistics are now available,[7] the Commission sent only two cases to the Court of Justice, one each under Article 258 TFEU and Article 260(3) TFEU, during that entire year.[8]

Of course, it's not impossible that EU Member States have become angels who need no external enforcement of EU law (hence the drop in the total number of infringement cases opened). They may also have become eager implementers who need only the slightest suggestion that they are in violation of Union law before they hasten to comply (hence the even sharper decline in cases referred to the Court of Justice). If so, the precipitous drop in both numbers would just be a reflection of

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[5] R. Daniel Kelemen & Tommaso Pavone, *Where Have all the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union* 3 (Working Paper, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918. Forthcoming in *World Politics*, 2023.

[6] *Id.* at 4-5.

[7] The Commission breaks out the number of complaints it receives, the number of files it closes and the number of cases taken forward through different stages of the process across different areas of EU law in annual statistical reports. The most recent report is the *Comm'n Staff Working Document - General Statistical Overview Accompanying the Report from the 2021 Annual Report on Monitoring the Application of EU Law*, SWD (2022) 194 final (July 15, 2022), https://ec.europa.eu/info/sites/default/files/2021-swd-annual-report-eulaw-overview_en.pdf [hereinafter *Comm'n Staff General Statistical Overview 2021*]. In looking at the substantive areas in which the Commission has been active, about one-quarter of the pilot files, generally the first step in an infringement procedure, were in the area of migration and home affairs and another quarter covered taxation and the customs union. Most of these cases were opened on the initiative of the Commission, since migration and home affairs accounted for only 6% of the complaints made to the Commission and taxation and customs accounted for only 9% of the complaints. The gap between the subjects of the complaints filed and cases taken to the pilot and infringement stages is most pronounced in the area of justice and consumers, which accounted for about one-third of the complaints received by the Commission but which registered such a negligible number of pilot procedures and infringements that the whole category was subsumed under "other" which makes it impossible to tease out from the statistics published just how many of the complaints were taken up for action. Given that complaints about judicial independence are most likely to fall into this category, it seems that the pressures on the Commission to act could be quite substantial but the Commission is finding the complaints do not warrant a follow-up.

[8] *Id.* at 3.

extraordinary compliance by the Member States. The reality, however, is rather the reverse. The timing of the Commission's steady retrenchment in its use of infringement actions coincides with the Era of Crises, in which the Euro Crisis was followed by the Migration Crisis. Each of these crises brought about serious challenges to the uniform application of EU law[9] as some Member States in each crisis went their own delinquent ways and as complaints against Member States mounted.[10] Since that time, of course, both Covid and the Ukraine War have also

[9] With regard the Euro Crisis: The fiscal rules set out in the Maastricht Treaty specified that budget deficits should run no higher than 3% of GDP and that public debt should not exceed 60% of GDP, but these rules were honored in the breach during and after the financial crisis of 2008 when nearly all Member States violated the rules at once. Piort Arak et al., *How the EU's Fiscal Rules Should be Reformed*, LONDON SCHOOL OF ECONOMICS: EUROPP BLOG (Apr. 16, 2021), https://blogs.lse.ac.uk/europpblog/2021/04/16/how-the-eus-fiscal-rules-should-be-reformed/. The triggering of the Excessive Deficit Procedure (EDP), the enforcement mechanism provided for in the law, did not result in widespread conformity with the target figures and was never carried through to its logical conclusion with sanctions even for Member States that remained in stubborn noncompliance over a decade or more. A study of the effectiveness of the use of the Excessive Deficit Procedure during the Euro Crisis found that net contributor countries – which would have been in better financial shape to begin with – did attempt to enforce the EDP recommendations which resulted in these Member States coming closer to the fiscal targets. The EDP did seem to work in those countries, at least in part. But in net beneficiary states, the researchers struggled to find a connection between the recommendations and the fiscal results so there seemed to be no traceable effect at all. Jasper F.M. DeJong & Niels D. Gilbert, *Fiscal Discipline in the EMU? Testing the effectiveness of the Excessive Deficit Procedure*, 61 J. OF EUR. POL. ECON. 1018 (2020). Paralleling the Kelemen and Pavone finding on infringement actions, the Commission seems to have made repeated recommendations, but it did not issue a single fine through 2016 under the EDP despite the fact that many countries – most notably, Spain, Portugal and Hungary – had been in violation of the standards long before the financial crisis and remained in violation for years afterwards. Anna auf dem Brinke, *The Excessive Deficit Procedure has Never Led to a Fine: So What Does it Actually Do?* JACQUES DELORS INSTITUT: BLOG (July 29, 2016), https://www.hertie-school.org/fileadmin/user_upload/20160729_Excessive-deficit-Brinke-AB.pdf. One might conclude from this that once countries realize that recommendations will be made with no consequence for ignoring them, the recommendations cease to have an effect on the persistent violators.

With regard to migration rules, Alezini Loxa and Vladislava Stoyanova have documented "the collapse of the Common European Asylum System, manifested through its systemic non-application" throughout the migration crisis of 2015. They argued that "If the EU cannot guarantee compliance with its rules (such as those in the CEAS) in a context where mutual trust among the Member States must be assumed, Member States will resort to self-help, that is, each Member State will try to individually solve the issues in accordance with its own interests as perceived at the particular point in time." Alezini Loxa & Vladislava Stoyanova, *Migration as a Constitutional Crisis for the European Union*, *in* MIGRANTS' RIGHTS, POPULISM AND LEGAL RESILIENCE IN EUROPE 139, 141-42 (Vladislava Stoyanova & Stijn Smet eds., 2022). Here, the Commission did act against the most blatant breaches of the rules – for example filing five infringements against Hungary for its violation of CEAS and related directives. But seven years past the end of the crisis, the Commission has neither achieved compliance nor levied sanctions with regard to Hungary. In November 2021, the Commission finally referred Hungary to the Court of Justice under Article 260 TFEU for penalty payments that have yet to be determined. European Comm'n Press Release IP/21/5801, Migration: Commission Refers Hungary to the Court of Justice of the European Union over its Failure to Comply with Court Judgment (Nov. 12, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5801.

Even with these crises happening in quick succession, the number of infringements and referrals to the Court of Justice still steadily decreased during this period, as the Kelemen and Pavone data show. Kelemen & Pavone, *supra* note 5.

[10] Kelemen and Pavone found that complaints to the Commission of violations of EU law on the part of the Member States grew during this period as did national court referrals of questions to the ECJ, both of which would indicate that enforcement issues were rising. Kelemen & Pavone, *supra* note 5, at 11-13. Of course, if national courts can address the EU law enforcement problems on their own through references to the Court of Justice, there may not be a need for the Commission to bring infringements. But it is not always possible to address serious and systemic infringements of EU law from the legal posture of

posed new dilemmas for the EU. [11] Under the circumstances, one might have expected the number of infringements to grow given the larger number of Member

a reference, as the Court currently understands the limits of the procedure. For the reasons I will explain below, many crucial issues remain unaddressed in the area of judicial independence because no national cause of action exists that would allow the national courts to tee up the relevant questions to the ECJ. *See infra* notes 303-304. If the Court were to adjust the way it handles reference cases, however, it might be able to address serious and systemic problems better than it currently does. I will develop those arguments in the last section of this paper.

[11] The Covid pandemic resulted in serious breaches of EU law, for example unilateral restrictions on mobility across borders in excess of permissible deviations. *See* Daniel Thum and Jonas Bornemann, *Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism Law and Politics*, 5 EUR. PAPERS 1143 (2020) https://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2020_3_4_Articles_Daniel_Thym_Jonas_Bornemann_00420_0.pdf. In addition, the declaration of national states of emergency in many Member States threatened the protection of EU law rights across the EU. *See* MARIA DIAZ CREGO ET AL., EUR. PARL. RES. SERV., STATES OF EMERGENCY IN RESPONSE TO THE CORONAVIRUS CRISIS (2020), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf.

In response, the Commission bent the rules rather than simply watch most Member States breaking them. DAVID EDWARD ET AL., EUROPEAN POLICY CENTER, EU LAW IN THE TIME OF COVID-19 (2020), https://www.epc.eu/content/PDF/2020/EU_law_in_the_time_of_COVID_v6.pdf. All told, the Commission acted quickly in this crisis to loosen the rules and allow Member States a great deal of leeway to violate EU law temporarily.

But where the violations were not temporary, for example in Hungary, a declaration of a state of emergency in March 2020 allowed the prime minister to govern by decree for more than two years. In May 2022, the Hungarian Covid emergency was replaced by a state of emergency declared for the war in neighboring Ukraine so that the prime minister's emergency powers continue to this day. While the European Commission's 2022 Rule of Law Report on Hungary mentioned these developments as disturbing, it ultimately said nothing about more than two years of emergency rule in its country recommendations. *Comm'n Staff Working Document: 2022 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary*, at 2, SWD (2022) 517 final (July 13, 2022), https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf [hereinafter *Comm'n Staff Situation in Hungary 2022*]. One might have thought that the fact that one of the first decrees exempted a wide swath of public contracts from EU public procurement rules might have attracted the Commission's enforcement attention, but it did not. *Hungary Relaxes Certain Public Procurement Rules During the Covid-19 Crisis*, CMS LAW-NOW, Mar. 23, 2020, https://www.cms-lawnow.com/ealerts/2020/03/hungary-relaxes-certain-public-procurement-rules-during-covid-19-crisis . One year into the crisis as Hungary remained under a state of emergency, Transparency International Hungary concluded that the amount of cronyism in the awarding of public contracts increased during the pandemic: "[p]ublic resources reallocated for crisis management purposes were often used inefficiently, or to promote oligarchs and the government's clientele. . . .[I]n 2019, 51 percent of tenders won by businesses with government ties lacked competition, and this proportion increased in 2020's first trimester." Bálint Mikola, *Hungary's Rule of Law Backsliding Continues Amidst the Covid-19 Crisis*, TRANSPARENCY INTERNATIONAL: BLOG (Feb. 18, 2021), https://www.transparency.org/en/blog/hungarys-rule-of-law-backsliding-continues-amidst-the-covid-19-crisis. In April 2022, the Commission launched the new Conditionality Regulation against Hungary given its track-record in misspending EU funds. This action allows the Commission to reach corruption, but it is harder to address other structural issues related to the rule of law through this action (for example, the crackdown on NGOs and consolidated control over the media). Now that the Commission has published its recommendation to the Council on application of the Conditionality Regulation, we can see that tackling judicial independence is not on the list of changes that it insists that Hungary make to receive EU funds. *Comm'n Proposal for a Council Implementing Decision on Measures for the Protection of the Union Budget against Breaches of the Principles of the Rule of Law in Hungary*, COM (2022) 485 final (Sept. 18, 2022), https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/com_2022_485_f1_proposal_for_a_decision_en_v7_p1_2236449.pdf.

With regard to the Ukraine crisis, the Commission loosened the application of state aid and competition law rules, again to avoid the situation in which many Member States would be in violation of the rules at once. Dzhuliia Lypaio, *Competition Law in Times of War: Response to the Russian Invasion of Ukraine*, WOLTERS KLUWER: KLUWER COMPETITION L. BLOG (Apr. 4, 2023), http://competitionlawblog.

States and the succession of crises that tested normal rules. But the extensive interviews conducted by Kelemen and Pavone indicate that non-enforcement became a deliberate policy at the Commission in order to avoid conflict with the Member States. As Kelemen and Pavone concluded:

> . . . the Commission's political leadership rolled back enforcement to address declining intergovernmental support and the damage that was doing to its ability to pursue its policy agenda. . . . This strategy succeeded in its political aim: Governments in the Council responded as hoped, becoming broadly supportive of the Commission and its softer enforcement approach. However, forbearance was applied so broadly that it generated a pervasive chilling effect on enforcement that proved harder to revoke than anticipated. In particular, forbearance discouraged Commission civil servants from laboring to build enforcement cases, given that most of these files ended up being dropped after an opaque political dialogue with national capitals.[12]

As Kelemen and Pavone show, the Commission was not failing to enforce EU law because EU law was being rigorously applied by Member States. The Commission was deliberately reducing the effort it spent on enforcement in an effort to generate support from the Member States for its other projects. And as Commission leadership dropped potential infringement actions in order to curry favor with the Member States, Commission staff produced fewer cases.

The Commission has been very sensitive on this point. When criticized for failing to use infringement procedures effectively, the Commission has boasted about its excellent track record. In July 2021, President von der Leyen claimed that on her watch fully 42 rule-of-law-related infringements had been launched.[13] Closer inspection revealed this to be a seriously inflated claim.[14] Faced with the evidence

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kluwercompetitionlaw.com/2022/04/04/competition-law-in-times-of-war-response-to-the-russian-invasion-of-ukraine/. This crisis is too new to be able to tell whether the Commission can guide a return to the prior rules after the crisis is over, but its track record from earlier crises in which it relaxed rules and then restored them without an enforcement effort to go after those who did not restore the pre-crisis rules is not promising given that the Commission is not inclined to engage in rigorous enforcement in general these days.

[12] Kelemen & Pavone, *supra* note 5 at 10.

[13] Ursula von der Leyen, President, European Comm'n, Speech by President von der Leyen at the European Parliament Plenary on the Conclusions of the European Council Meeting of 24-25 June 2021 (July 7, 2021), https://ec.europa.eu/commission/presscorner/detail/en/speech_21_3526 .

[14] "[M]ost of these actions are primarily about the incorrect or partial transposition of directives adopted more than a decade before. Furthermore, almost half these actions relate to EU environmental law – total of 17 environmental law transposition related actions concerned with access to justice as regards Environmental Liability Directive 2004/35 and Air Quality Directive 2008/50/EC – with an additional total
of 11 actions relating to transposition issues concerning EU Framework Decision 2008/913 on combating certain forms of expressions of racism and xenophobia by means of criminal law. The list of 42 actions also include a couple of actions which do not primarily, if at all, raise violations of Article 2 TEU values such as the ones raising the issue of access to high-level posts in the Greek public service, Cyprus and Malta's investor citizenship schemes, or the non-conformity of Bulgarian pension law with Directive 79/7." LAURENT PECH & PETRA BÁRD, EUROPEAN PARLIAMENT POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, THE COMMISSION'S RULE OF LAW REPORT AND THE EU MONITORING AND ENFORCEMENT OF ARTICLE 2 TEU VALUES 85 (2022), https://www.europarl.europa.eu/

from the Kelemen and Pavone article about the declining use of infringements and also with a strong reaction from the Parliament as the Commission continued to delay in bringing enforcement actions on the rule of law in Poland and Hungary,[15] the Commission has since issued a Communication boasting again about its track record, shifting some of the blame for rule of law problems to others and emphasizing prevention over enforcement.[16] In reporting on recent records bringing infringement cases in this Communication, the Communication primarily analyzed the last five years,[17] which obscures the sharp drop that occurred before that time as well as the fact that nearly all of these infringements were routine non-transposition cases that did not address rule of law issues.

Whatever the wisdom of the Commission strategy to avoid infringement actions where possible, there is no doubting that the Rule of Law Crisis grew steadily during precisely the period when the Commission sharply reduced its enforcement of EU law. The accommodating stance of the Commission might well have encouraged budding autocrats who wanted to consolidate power at home without encountering tough enforcement of EU law from Brussels. Even if loosening enforcement didn't cause the Rule of Law Crisis, however, it was, at a minimum, an unfortunate coincidence that helped it along. As I will explain below, it's not that the Commission did nothing as the rule of law crisis intensified. Instead of bringing infringement actions, it spent much of its energy inventing new tools to cope with the crisis, tools that were either not used or were not effective.[18] But while the Commission was doing this, it left its most effective tool –infringement procedures – underutilized.

The Rule of Law Crisis started in earnest in 2010 with the election of Viktor Orbán in Hungary and his immediate autocratic consolidation of power, which involved rewriting the Hungarian constitutional order with hundreds of new laws that removed checks and balances and put the judiciary under political control.[19] EU Law was implicated, at a minimum, in the attacks on the judiciary (about which more below),[20] the violation of data protection rules,[21] and the independence of the

RegData/etudes/STUD/2022/727551/IPOL_STU(2022)727551_EN.pdf [hereinafter PECH & BÁRD, ARTICLE 2 TEU VALUES]. Report prepared at the Request of the LIBE and AFCO Committees.

[15] Andreas Rogal, *European Comm'n Rejects MEPs' Demand To Take Legal Action on Rule-of-Law Violations*, THE PARLIAMENT MAGAZINE, Aug. 26, 2021, https://www.theparliamentmagazine.eu/news/article/european-commission-rejects-meps-demand-to-take-legal-action-on-ruleoflaw-violations.

[16] *Communication from the Comm'n to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Enforcing EU Law for a Europe that Delivers*, COM (2022) 518 final (Oct. 13, 2022), https://ec.europa.eu/info/sites/default/files/com_2022_518_1_en.pdf.

[17] *Id.* at 20-24.

[18] *See infra* Part II.

[19] *See* Miklós Bánkuti et al., *Hungary's Illiberal Turn: Dismantling the Constitution*, 21 J. OF DEMOCRACY 138 (2012).

[20] *See infra* notes 44-59.

[21] The Commission did bring a successful infringement action in 2012 against Hungary for the removal of the data protection ombudsman before the end of his term, although the action did not succeed in restoring him to office. Comm'n. v. Hungary, Case C-288/12, EU:C:2014:237. But the Commission never asked the next logical question, which is why it was so important to the government to replace the fired official. The data protection ombudsman had brought an action in the Hungarian courts against the government's mass collection of citizens' political opinions through "social consultations," a practice that

central bank.[22] The establishment of a functional media monopoly controlled by a politically dependent media regulator might have attracted the Commission's

continues to this day in violation of Article 9 of the General Data Protection Regulation. European Parliament and Council Regulation (EU) 2016/679, On the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. (L 119) 1 [hereinafter GDPR]. Before the Hungarian court could decide the matter, however, government removed the data protection ombudsman rather than stop its data collection and the newly installed data privacy officer presided over a newly constituted office that dropped the case. Kim Lane Scheppele, *Making Infringement Procedures More Effective: A Comment on Comm'n v. Hungary*, VERFASSUNGSBLOG (Apr. 30. 2014), https://verfassungsblog.de/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary/. The Hungarian government has since gone on to lose a case at the European Court of Human Rights, which found that the newly created anti-terrorism police force was given unlimited surveillance powers, not even tethered to terrorism, in violation of the Article 8 of the Convention. Szabó & Vissy v. Hungary, app. no. 37138/14, CE:ECHR:2016:0112JUD003713814. Hungary has still not complied with this judgment and the Commission has not visibly assessed the implications of this non-compliance with the ECtHR decision for compliance with the GDPR. The European Court of Human Rights again confirmed in September 2022 its finding that the Hungarian government has no meaningful checks on domestic police surveillance. *See* Hüttl v. Hungary, app. no. 58032/16, CE:ECHR:2022:0929JUD005803216. More recently, the Hungarian government admitted to using the cellphone-infiltration software Pegasus against journalists and government critics, but the data protection officer who replaced the fired ombudsman determined that the use of Pegasus was legal under Hungarian law. Here, too, after excusing the government's practices, he dropped the case. NEMZETI ADATVÉDELMI ÉS INFORMÁCIÓSZABADSÁG HATÓSÁG (HUNGARIAN NATIONAL AUTHORITY FOR DATA PROTECTION AND FREEDOM OF INFORMATION), FINDINGS OF THE INVESTIGATION LAUNCHED EX OFFICIO CONCERNING THE APPLICATION OF THE "PEGASUS" SPYWARE IN HUNGARY (2022), https://www.naih.hu/data-protection/data-protection-reports/file/492-findings-of-the-investigation-of-the-nemzeti-adatvedelmi-es-informacioszabadsag-hatosag-hungarian-national-authority-for-data-protection-and-freedom-of-information-launched-ex-officio-concerning-the-application-of-the-pegasus-spyware-in-hungary. Since the initial exposé of the Pegasus surveillance, new investigative reporting has uncovered evidence that the Hungarian government has purchased from foreign sellers a whole range of deep surveillance tools beyond Pegasus. Szabolcs Pányi, *Boosting of Spying Capabilities Stokes Fear Hungary is Building a Surveillance State*, BALKAN INSIGHT, Oct. 13. 2022, https://balkaninsight.com/2022/10/13/boosting-of-spying-capabilities-stokes-fear-hungary-is-building-a-surveillance-state/.

While widespread surveillance is a problem in many EU Member States, the Commission has not taken steps to challenge its use anywhere in the EU nor has it seen a particular urgency in examining widespread surveillance in a Member State that is no longer classified by democracy raters as a democracy. Vincent Manancourt, *Europe's State of Mass Surveillance: The EU's Top Court Says Mass Surveillance is Banned. Governments Do it Anyway*, POLITICO.EU, July 6, 2022, https://www.politico.eu/article/data-retention-europe-mass-surveillance/. The key cases in which the Court of Justice has recently and urgently elaborated its view of what EU law requires in this regard are all reference cases and notably not infringements: Privacy International v. U.K., Case C-623/17, EU:C:2020:790; La Quadrature du Net v. France, Joined Cases C-511/18 & C-512/1, EU:C:2020:791; Ordre des Barreaux Francophones & Germanophone v. Belgium (forthcoming), Case C-520/18, EU:C:2020:7, for which the Opinion of Advocate General Sánchez-Bordona has already issued.

[22] The Barroso Commission criticized the government of Hungary for trying to remove the president of the Hungarian central bank before his lawful term expired. European Comm'n Press Release MEMO/12/165, Comm'n Takes Further Legal Steps on Measures Affecting the Judiciary and the Independence of the Data Protection Authority, Notes Some Progress on Central Bank Independence, but Further Evidence and Clarification Needed (Mar. 7, 2012), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_165. At first, the Hungarian government backed down. But because the central bank president's term expired the following year, the Hungarian government simply waited and then installed a member of the government's inner circle as bank president when the previous bank president's term expired, thus bringing the bank under government control only a short time later, all without complaint from the Commission or the European Central Bank. Krisztina Than & Marton Dunai, *Hungary PM Names Right-Hand Matolcsy for Central Bank*, REUTERS, Mar. 1, 2013, https://www.reuters.com/article/uk-hungary-centralbank/hungary-pm-names-right-hand-matolcsy-for-central-bank-idUKBRE9200CY20130301. The Commission might have assessed this development against its obligation to ensure the application of art. 130 of the Treaty on the Functioning of

attention earlier than it did.[23] The political capture of the prosecutor's office, audit office, procurement process and other institutions responsible for the adequate monitoring of EU funds continued for more than a decade before the Commission finally took steps to cut the flow of EU funds to Hungary.[24]

As Hungary swiftly declined into autocracy, the Rule of Law Crisis got worse with the election of the PiS party in Poland. In back-to-back elections in 2015, PiS won both the presidency and majorities in both parliamentary chambers. Immediately, the PiS government began open assaults on the Polish judiciary.[25] As we will see below, the Commission responded more swiftly to these violations than

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the European Union [hereinafter TFEU], which says in relevant part: "When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB . . . [no] national central bank . . . shall seek or take instructions from . . . any government of a Member State . . . Member States undertake to respect this principle and not to seek to influence the members of decision-making bodies . . .of the national central banks in the performance of their tasks." TFEU, art. 130, Oct. 26, 2012, 2012 O.J. (C 326) 1.

[23] After more than 10 years of harassment and the serial refusal of broadcasting rights of independent and opposition-controlled media by the Media Council in Hungary, the Commission finally advanced an infringement action against Hungary for cancelling the broadcast license of the last remaining independent radio station in the country, Klubrádió. European Comm'n Press Release IP/22/2688, Media Freedom: The Comm'n Refers Hungary to the Court of Justice of the European Union for Failure to Comply with EU Electronic Communications Rules (July 15, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2688. The Commission had not acted once over the preceding decade when all other broadcast media outlets came under control of government-friendly autocrats or were denied broadcasting licenses. Instead, the Commission waited until the last independent radio station had already lost its last frequency and was pushed online before bringing an infringement.

[24] The Commission had argued that it needed "new tools" before it could withhold funds from a Member State, but as Dan Kelemen and I argued, the Commission already had extensive power under the Common Provisions Regulation to do just this. R. Daniel Kelemen & Kim Lane Scheppele, *How to Stop Funding Autocracy in the EU*, VERFASSUNGSBLOG (Sept. 10, 2018), https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/. Eventually in 2020, the Council and Parliament passed the Conditionality Regulation giving the Commission this power. European Parliament and Council Regulation (EU) 2020/2092, General Regime of Conditionality for the Protection of the Union Budget, 2020 O.J. (L 433I) 1 [hereinafter Conditionality Regulation]. The Commission delayed more than a year after the regulation took effect in using it, waiting for a Court of Justice judgment as to its legality, before it finally triggered the new Conditionality Regulation against Hungary on April 27, 2022. *EC Triggers Rule of Law Conditionality Mechanism against Hungary*, BNE INTELLINEWS, Apr. 28. 2022, https://www.intellinews.com/ec-triggers-rule-of-law-conditionality-mechanism-against-hungary-242718/. For a detailed analysis of why the Commission was justified in triggering the regulation, *see* KIM LANE SCHEPPELE ET AL., THE EU COMM'N HAS TO CUT FUNDING TO HUNGARY: THE LEGAL CASE (2021), bit.ly/3xofAtT (study commissioned by the Greens/EFA group in the European Parliament). As for why the Commission would be justified in cutting *all* of Hungary's EU funds, *see* KIM LANE SCHEPPELE ET AL., FREEZING ALL FUNDS TO HUNGARY (2022), https://t.co/l6wVCzEPwj [hereinafter SCHEPPELE ET AL., FREEZING ALL FUNDS] (study commissioned by the Green/EFA group in the European Parliament).

[25] The attacks on the Polish judiciary produced a line of cases, as we will see below. *See infra* Part I (B) elaborating the Article 2 TEU value of "rule of law" as it is given concrete form in Article 19(1) TEU . Using this framework, the Court of Justice found that Member State courts must remain independent to provide "remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law." Associacao Sindical dos Juizes Portugueses, Case C-64/16, EU:C:2018:117 [hereinafter *Portuguese Judges.*] As the ECJ has elaborated these standards in the Polish cases, however, the Commission has not enforced them with regard to the Hungarian courts. For a detailed comparison of Hungary and Poland, *see* Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union*, 51 J. OF COMMUNIST & POST-COMMUNIST STUD. 189 (2018) [hereinafter Kovács & Scheppele, *Fragility*].

it did in the case of Hungary, though even then the Commission did too little, too late and in ways that have yet to make a substantial difference.[26]

The Rule of Law Crisis has grown larger, to the point where it now threatens the very existence of the European Union[27] because the rule of law is, as Court of Justice President Koen Lenaerts observed, "the precondition for the union's cohesion."[28] In particular, if Member States' judiciaries are not reliably independent but are instead subject to political pressure, then the principle of mutual trust, which requires that all Member States assume that the other Member States are good-faith enforcers of EU law, is seriously damaged. If the Commission is not ensuring that the conditions for mutual trust prevail by enforcing EU law in the Member States when the Member States have failed to enforce it themselves, then cooperation under the Treaties no longer has a firm basis. Without centralized enforcement to back up the principle of mutual trust, then, Member States may find themselves resorting to self-help outside the Treaty framework. During all of these crises in which many Member States were either finding it challenging to follow EU law or had decided to go their own way by flouting European rules, the precipitous decline in the Commission's enforcement of EU law was particularly ill-timed.

The statistics documenting the Commission's sharp reductions in its enforcement activity are therefore even worse than they look since there are many signs that violations of EU law were increasing while the Commission's enforcement effort decreased so that, if the Commission had continued to enforce EU law at the rate it did before 2004, cases should have skyrocketed. But infringement actions fell as one Member State – Hungary – ceased being a consolidated democracy, falling through the ranks of semi-consolidated democracies into the category of a hybrid or "competitive authoritarian" regime[29] and as another state – Poland – moved from being a consolidated to a semi-consolidated democracy

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[26] For one critical overview of the Commission's handling of the Polish rule of law crisis in its first five years, *see* Laurent Pech et al., *Poland's Rule of Law Breakdown: A Five-Year Assessment of the EU's (In)Action*, 13 HAGUE J. RULE L. 1 (2021) [hereinafter Pech et al., *The EU's (In)Action*].

[27] *See generally* Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the European Union*, 19 CAMBRIDGE Y.B. Eur. L. 3 (2017).

[28] Derek Scally, *ECJ President Warns EU Cannot Survive Solo Runs by Member States on Rule of Law*, IRISH TIMES, Nov. 2, 2021, https://www.irishtimes.com/news/world/europe/ecj-president-warns-eu-cannot-survive-solo-runs-by-member-states-on-rule-of-law-1.4717440 .

[29] The Varieties of Democracy project, V-Dem, downgraded Hungary to an "electoral autocracy" in 2020, explaining, "Hungary is no longer a democracy, leaving the EU with its first non-democratic Member State." VARIETIES OF DEMOCRACY INSTITUTE, DEMOCRACY REPORT 2020: AUTOCRATIZATION SURGES – RESISTANCE GROWS 4 (2020), https://v-dem.net/documents/14/dr_2020_dqumD5e.pdf. Hungary has remained in the "electoral autocracy" category since. *See* VARIETIES OF DEMOCRACY INSTITUTE, DEMOCRACY REPORT 2021: AUTOCRATIZATION TURNS VIRAL (2021), https://www.v-dem.net/media/filer_public/c9/3f/c93f8e74-a3fd-4bac-adfd-ee2cfbc0a375/dr_2021.pdf [hereinafter AUTOCRATIZATION TURNS VIRAL]. Freedom House downgraded Hungary from a democracy to a "transitional/hybrid regime" in 2020, explaining that Hungary's decline has been the most precipitous ever tracked in the Nations in Transit Report on post-communist states. Hungary had been one of the three democratic frontrunners as of 2005, but in 2020 it became the first country to descend by two regime categories and leave the group of democracies entirely. FREEDOM HOUSE, NATIONS IN TRANSIT 2020: DROPPING THE DEMOCRATIC FAÇADE 2 (2020), https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf.

status and it is still falling fast.[30] Other countries – among them Romania, Slovenia, Croatia, Bulgaria and Malta – have also registered serious rule-of-law problems in recent years.[31] Judicial independence in backsliding Member States may be a dominant first casualty but the damage does not end there. Most crucially, it is much easier to reverse the damage to democratic institutions before democratic institutions become fully compromised and the damage becomes entrenched. Once independent and democratic institutions have been captured, the possibilities for reversal are much more limited.

The Court of Justice is now plainly alarmed at what is happening to the Article 2 TEU values and is signaling that the failure to enforce EU law is an existential crisis for the EU. The Court's concern applies not just to the rule of law as one central value, but it extends to all Article 2 values. The Court of Justice recently announced that *all* of the values of Article 2 TEU not only constitute "the very identity of the European legal order" but also that they are legally enforceable in a variety of ways, giving a strong hint to the Commission to use all available tools. As the full Court proclaimed in its recent decision in *Hungary v. Parliament and Council (Conditionality Regulation)*:

> 126. It follows that 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 . . . . 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.
>
> 127. The values contained in Article 2 TEU have been identified and are shared by the Member States. They 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. . . .
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> 159. . . . in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the

[30] In 2021, V-Dem found that Poland "takes a dubious first place" among "major autocratizers," leaving the category of "liberal democracy" and joining the category of "electoral democracy" run on the principle of pure majoritarianism. *See* AUTOCRATIZATION TURNS VIRAL, *supra* note 29 at 18-19. In 2022, Freedom House report labeled Poland a "semi-consolidated democracy" in which "national governance remains democratic, but the ruling parties have changed the system to their advantage, capturing and instrumentalizing key institutions such as the Constitutional Tribunal." FREEDOM HOUSE, NATIONS IN TRANSIT 2022: POLAND (2022), https://freedomhouse.org/country/poland/nations-transit/2022.

[31] JAKUB JARACZEWSKI & NINO TSERETELI, DEMOCRACY REPORTING INTERNATIONAL, THE RULE OF LAW IN THE EU IN 2021: WHAT WENT RIGHT? WHAT WENT WRONG? (2021), https://democracy-reporting.org/en/office/EU/publications/the-rule-of-law-in-the-eu-in-2021-what-went-right-what-went-wrong. One tracker of the litigation surrounding the rule of law crisis – including infringement actions but more numerously, preliminary references and cases brought by aggrieved parties to the European Court of Human Rights – can be found in the EU Rule of Law Dashboard established by the Meijers Committee in the Netherlands. *See Rule of Law Dashboard*, SAFEGUARDING THE RULE OF LAW IN THE EUROPEAN UNION, https://euruleoflaw.eu/rule-of-law-dashboard-new/ (last visited Feb. 13, 2023). That site presently lists the cases for Hungary, Poland, Romania and Malta with more countries coming soon.

> 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. . . .
>
> 232. . . . it must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing *legally binding obligations for the Member States.*[32]

As this introductory review indicates, deep problems in the governance of Member States threatening the basic elements of the EU legal order were accumulating while the Commission was failing to use the most reliable tool in its toolbox. Had the Commission shared the Court's urgency, it could have been acting more forcefully to prevent Member States from reversing their commitments to Union values so that they would not then become States that no longer met the criteria for admission. As I will argue, the Commission *should* have been doing this if it were taking its Treaty obligation seriously to ensure the consistent application of EU law across the Union. But what we saw over the last decade is something else. The Commission has made enforcement the option of last resort and has allowed rule of law problems to fester while it has continued to invent new tools that have so far not shown themselves to be nearly as effective as the Commission's tried-and-tested standard enforcement powers.

This Article will proceed as follows: In Part I, I'll show how the rule of law has been undermined in Hungary and Poland by focusing on their attacks on the judiciary in particular and I will explain how the Commission either did virtually nothing (in the case of Hungary) or did too little, too late (in the case of Poland). In Part II, I'll show how the Commission spent the crucial last decade creating a panoply of new tools instead of using the ones that it had to act quickly enough to head off the problems before they became intractable. Creating new tools allowed the Commission to appear to be doing something about a serious crisis while actually doing nothing to change facts on the ground. In Part III, I'll ask: What can be done now to make up for the Commission's past inaction? I will suggest that, while the Commission still has formal treaty responsibility for ensuring that Member States comply with EU values as an integral part of EU law and that it should more aggressively use infringement actions to ensure the effectiveness of EU law across the Union, the Court of Justice may have to fill in where the Commission has failed. In fact, the Court of Justice has already started to do this, but it needs to do more. The Treaties, in short, need more than one Guardian and those Guardians need to act decisively now.

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[32] *Hungary v. Parliament & Council*, EU:C:2022:97, ¶¶ 126–127, 159, 232 [emphasis added].

I. DROPPING THE BALL ON THE RULE OF LAW: THE CASE OF JUDICIAL INDEPENDENCE

The phrase "rule of law crisis in the EU" has become shorthand for discussing Hungary's and Poland's democratic backsliding.[33] Their attacks on the judiciary in particular have raised alarm bells across European institutions, especially at the Court of Justice. While democratic backsliding often comes with an attack on many other independent institutions as well, in this section I will focus on judicial independence as one of the core elements of the rule of law.

The Court has long noted that it works in partnership with national courts to ensure effective judicial protection under Union law. And it has long insisted that these national courts meet rigorous tests for independence. In 2006, for example, the Court in *Wilson v. Ordre des avocats du barreau de Luxembourg*,[34] addressing the right of lawyers licensed in one Member State to practice in another, the Court considered the role of the national judiciaries in enforcing Union law. The lack of a judicial remedy for a denial of the right led the Court to explain what would count as a national court or tribunal under then Article 234 EC (now Article 267 TFEU), with a particular emphasis on the requirement of judicial independence:

> 49. The concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision . . . .
>
> 50. The concept has two other aspects.
>
> 51. The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them . . . That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office . . .
>
> 52. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests . . . . That aspect requires objectivity . . . and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.
>
> 53. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the

[33] Kim Lane Scheppele & Laurent Pech, *What is Rule of Law Backsliding?*, VERFASSUNGSBLOG (Mar. 2, 2018), https://verfassungsblog.de/what-is-rule-of-law-backsliding/.

[34] Wilson v. Ordre des Avocats du Barreau de Luxembourg, Case C-506/04, EU:C:2006:587.

> imperviousness of that body to external factors and its neutrality with respect to the interests before it . . .

This statement of the importance of judicial independence in the enforcement of Union law became more explicit as national courts started to come under pronounced attack in Hungary and it should have been a signal to the Commission that the Court would act to protect the independence of national courts as a crucial element of EU law.

If the Commission may have nonetheless doubted the Court's resolve in this matter, the Court's 2011 Opinion on the draft agreement creating a unified patent litigation system found the treaty incompatible with EU law precisely on the grounds that it deprived national courts of their powers with regard to the interpretation and application of Union law. [35] With this reaffirmation of the centrality of national courts as EU courts along with its prior insistence that national courts must remain independent, the Court of Justice had already signaled even before the Hungarian legal reforms began in earnest that both Member States and the Commission had obligations under the Treaties to ensure that national courts live up to the obligations required of them under Union law and that national courts must remain independent while doing so.

Deepening the point, the Court of Justice ruled in 2013 on an appeal from the General Court of an action for annulment in which the appellants challenged the lack of an avenue available to them for contesting the validity of a Union regulation. In this case, *Inuit Tapiriit Kanatami* v. *Parliament and Council*,[36] the Court recalled that national courts carry out EU law functions and therefore that Member States have an obligation to ensure that these national courts can provide effective judicial review as EU law requires. As it had in the Opinion on the draft patent agreement, the Court of Justice pointed specifically to the provision of the Treaties that would form the basis for the Court's later judicial independence jurisprudence:

> 100. [T]he Member States [must] establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection . . . .
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> 101. That obligation on the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States 'shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law'.[37]

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[35] Opinion 1/09 of the Court (Full Court), Case C-1/09, EU:C:2011:123.

[36] Inuit Tapiriit Kanatami v. Parliament and Council, Case C-583/11 P, EU:C:2013:625, ¶¶ 100-101. Note that this was not an infringement action brought by the Commission.

[37] The Court also said in that judgment:

66. As is evident from Article 19(1) TEU, the guardians of [the Union] legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States. . . .

68. It should also be observed that the Member States are obliged, 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 European Union law . . . Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general

Despite this consistent jurisprudence, the Commission did not take the hint in these cases (and others) that effective judicial protection in the national courts was an EU law matter that fell within the Commission's jurisdiction to enforce if a Member State failed to do so. Eventually, the Court of Justice made the point in such a way that the Commission could hardly avoid the message. In 2018, as the assault on judicial independence was already far advanced in both Poland and Hungary, the Court of Justice – significantly in a reference case out of Portugal and not in an infringement action – announced explicitly that EU law requires all Member States to maintain an independent judiciary, deriving this obligation from reading the "rule of law" as a core Article 2 TEU value together with both Article 19(1) TEU which ensures that effective remedies are available in each Member State for breaches of EU law and Article 47 CFR which provides an individual right to an effective remedy and a fair trial.[38] If the hints had been relatively subtle before this point, this *Portuguese Judges* shouted that judicial independence of national courts was part of the backbone of the Union legal order, implicating its central values.

The *Portuguese Judges* case emerged late in the process of judicial destruction, eight years into the rule of law crisis in Hungary and three years into the rule of law crisis in Poland.[39] Crucially, it did not emerge through an infringement action brought by the Commission. Given the importance of independent judiciaries across the EU for ensuring mutual trust, the Commission should have attempted to develop this legal argument further itself, especially once the Court had signaled in the earlier cases that Article 19(1) subparagraph 2 could be used as a resource for establishing the obligations of Member States with regard to national judiciaries. But the Commission did not. Until the Court of Justice laid out a clear path with the arguments already developed for the taking, the Commission – like the proverbial deer in the headlights – remained frozen in place as the speeding cars of autocracy bore in on it.

Even with open invitation from the Court of Justice to the Commission in the *Portuguese Judges* case to bring infringement actions involving the destruction of national judiciaries, the Commission did (and has still done) nothing with regard to the destruction of judicial independence in Hungary. While it attempted to intervene gingerly in Poland, the Commission avoided infringement actions for the first several years of judicial destruction and has used infringements for only some of the

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or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law . . .

Inuit Tapiriit Kanatami, EU:C:2013:625.

[38] "Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals." *Portuguese Judges*, EU:C:2018:117, ¶ 32; "It follows that every Member State must 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." *Id.* ¶ 37; "In order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy." *Id.* ¶ 41.

[39] For a casebook excerpting and explaining the rapidly developing jurisprudence in this area in its first five years, *see* PECH & KOCHENOV, *Respect for the Rule of Law*, *supra* note 4.

most blatant attacks on judicial independence. In the meantime, the damage to judicial independence spread in both countries. As I will show below, the Commission has failed to react in a timely way to the concerted attacks on judicial independence in Member States for more than a decade. And it has certainly not done all it could have done, even now that the Court has pushed it to do so. To explain in detail how the Commission missed opportunities it should have taken, I will start with Hungary before taking up the case of Poland.

A. Hungary

As Hungary has moved from a consolidated democracy to a competitive authoritarian regime in just one decade, the European Commission, Guardian of the Treaties, has been strangely silent on the most important elements of autocratic capture.[40] While the attacks on constitutional democracy under Prime Minister Viktor Orbán's government in Hungary have been mounted on many fronts,[41] perhaps the most consequential for the European Union have been the attacks on the independence of the judiciary.[42] Observers have repeatedly called attention to the

[40] By contrast, the European Parliament passed a resolution in September 2022 calling out the fact that "the lack of decisive EU action has contributed to a breakdown in democracy, the rule of law and fundamental rights in Hungary, turning the country into a hybrid regime of electoral autocracy." *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* (2018/0902R(NLE)), ¶ 2 (Sept. 15, 2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0324_EN.html [hereinafter *European Parliament Resolution* (2018/0902R(NLE))].

[41] The Council of Europe voted in October 2022 to place Hungary under a full monitoring procedure due to concerns about the rule of law and democracy. Parliamentary Assembly of the Council of Europe Press Release, PACE Votes to Begin Monitoring of Hungary over Rule of Law and Democracy Issues (Oct. 12, 2022), https://pace.coe.int/en/news/8848/pace-votes-to-begin-monitoring-of-hungary-over-rule-of-law-and-democracy-issues. For earlier warnings, *see generally* INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, HUNGARY: DEMOCRACY UNDER THREAT: SIX YEARS OF ATTACKS ON THE RULE OF LAW (2016), https://www.fidh.org/IMG/pdf/hungary_democracy_under_threat.pdf (describing attacks on the judiciary, the media, freedom of information, civil society, religious groups and electoral laws in the first six years of the Orbán regime).

[42] Because this Article is about the rule of law, and the rule of law has so far been interpreted primarily as affecting the status of the judiciary across the EU, I will limit the discussion in this section to judicial independence, though I point to a number of other areas in which the Commission could – and in my view, should – have been active enforcing EU law that would have made the consolidation of autocracy harder to accomplish. With regard to progress on the rule of law in particular, I am heartened by the broader definition of the rule of law given in the new Conditionality Regulation, Article 2(1):

'[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.

European Parliament and Council Regulation (EU) 2020/2092, A General Regime of Conditionality for the Protection of the Union Budget, art. 2(a), 2020 O.J. (L 433) 6. This definition sweeps more broadly than judicial independence to include many other elements of democratic decay, though the requirement of a nexus between rule of law violations and the proper spending of EU funds limits the sweep of the definition in practice.

This definition and the pronouncements of the Court of Justice in the cases brought by Hungary and Poland challenging this regulation have established that the other values of Article 2 TEU might also be legally enforceable: "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which. . . are an integral part of the very identity of the European Union as a common

progressive destruction of judicial independence[43] since the Orbán government came to power in 2010 – and yet ongoing destruction continues to this day without substantial pushback from Union institutions. Admittedly, not all aspects of democratic backsliding will constitute violations of Union law but, as I will argue in this section, interference with judicial independence does – and that is why the Commission should have been more active in combatting it.

At the very start of Viktor Orbán's campaign to capture the independent judiciary in Hungary, the Commission acted once. It brought an infringement action in 2012 challenging the forced retirement of 274 Hungarian judges who were suddenly subject to a new retirement age.[44] The Commission expedited the case and prevailed, but only 20% of the abruptly pensioned judges were ever reinstated as judges, primarily because their positions had been filled with new judges in the time it took the Court of Justice to make its decision.[45] Because the Commission routinely fails to ask in a timely way for interim measures to keep a Member State's unlawful action from changing facts on the ground while the case is pending,[46] the Commission can win on the law but change nothing on the ground.

The Commission's only persistent foray into the attacks on judicial independence in Hungary – brought as a case about age discrimination – is a perfect example. The case met the standards for interim measures.[47] The Court agreed with

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legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States." *Hungary v. Parliament & Council*, EU:C:2022:97, ¶ 232.

[43] The Venice Commission has repeatedly criticized Hungarian attacks on the independence of the judiciary starting in 2011. *Venice Comm'n Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, Op. 663/2012 (March 19, 2012) , https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e; *Venice Comm'n Opinion on the Cardinal Acts on the Judiciary that were Amended following the Adoption of Opinion CDL-AD(2012)001*, Op. 683/2012 (Oct. 15, 2012), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e ; *Venice Comm'n Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges Adopted by the Hungarian Parliament in December 2020*, ¶ 18, Op. 1051/2021 (Oct. 16, 2021). So did the International Bar Association. *See* INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE, STILL UNDER THREAT: THE INDEPENDENCE OF THE JUDICIARY AND THE RULE OF LAW IN HUNGARY (2015), https://www.ajoa.asn.au/wp-content/uploads/2015/08/Hungary-report.pdf. So did the European Parliament. *European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary* (2012/2130(INI)) (Jul. 3, 2013), https://www.europarl.europa.eu/doceo/document/TA-7-2013-0315_EN.html ; *European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, 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* (2017/2131(INL)), ¶¶ 12-19 (Sept. 12, 2018), https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html; *European Parliament Resolution* (2018/0902R(NLE)), *supra* note 40.

[44] Comm'n v. Hungary, Case C-286/12, EU:C:2012:687. The story of this case is well told in Gábor Halmai, *The Early Retirement Age of the Hungarian Judges*, *in* EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 471 (Nicola Fernanda and Billy Davies eds., 2017) [hereinafter Halmai, *Retirement Age*].

[45] *See* Halmai, *Retirement Age*, *id.* at 483.

[46] For the failure of the Commission to ask for interim measures with regard to Poland and the damage that caused, *see generally* Pech et al., *The EU's (In)Action*, *supra* note 26.

[47] The ECJ is authorized to impose interim measures under Art. 279 TFEU. The Court has elaborated in its case law the standards for granting them:

the Commission's analysis, which meant that the legal basis for bringing the action was sound. And the judges were being speedily removed and replaced pending the Court's expedited judgment, which meant that the interests of the EU in blocking unlawful removal of judges were irreparably harmed by delay. The balance of interests tilted in favor of freezing the status quo in place since there was no obvious harm in delaying this judicial "reform" by half a year. Had the Commission asked for interim measures, the lawful judges would have still been in office to receive the benefits of the Court's decision. In one fell swoop, however, judges subject to new qualifications for office were dismissed and their replacements were appointed by the then-new politically appointed president of the National Office of the Judiciary (NOJ) [48] were installed in key positions throughout the Hungarian judiciary. The newly appointed judges remained in place even after the Court announced that the vacancies that these judges filled were creating unlawfully.

The retirement age case was just the start of the attack on independent judges and their replacement by government-friendly magistrates, but it is the last time that the Commission weighed in on judicial independence in Hungary. In this one time out, the Commission won its case, but the Hungarian government achieved what it sought anyway, which might have put the Commission on notice that it needed to seek interim measures to maintain the status quo while governments moved quickly to undermine judicial independence. Instead, the Commission backed off doing anything else with regard to the Hungarian judiciary for the next ten years (and counting) as the government has captured the key positions throughout the judiciary, allowing the government to channel all cases it cares about to friendly judges.

The Commission failed to act when the Orbán government overhauled the system for controlling judicial careers, placing near-total power for the appointment, promotion, demotion, reassignment, disciplining and removal of judges in the hands of one person, nominally a judge but politically elected by and accountable only to the Parliament. The overhaul created the NOJ with its all-powerful president, who began work in 2012 controlling virtually all aspects of judges' careers. The president from 2011 through 2019 was a close friend and law school classmate of the Prime Minister as well as married to the author of Hungary's new constitution.[49] It is hard to imagine a more politically connected appointee running this office.

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29. [T]he court hearing an application for interim relief may order an interim measure only if it is established that granting such a measure is justified, prima facie, in fact and in law (*fumus boni juris*) and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached regarding the substance. The court hearing the application for interim relief must, where appropriate, also weigh up the interests involved. Those conditions are cumulative, so that an application for interim measures must be dismissed if one of them is not met.

Comm'n. v. Poland, Case C-619/18, EU:C:2018:1021, ¶ 29 [hereinafter Interim Measures Order, *Second Infringement*].

[48] The office in Hungarian is called the *Országos Bírósági Hivatal*, generally abbreviated OBH, and in many international assessments of the system, it is called the National Judicial Office and abbreviated NJO. The Court of Justice in the *I.S.* case abbreviated it NOJ, which I will do in this Article to make cross-referencing with ECJ decisions easier. I.S., Case C-564/19, EU:C:2021:949, ¶ 33.

[49] Joshua Rozenberg, *Meet Tündo Handó: In Hungary, One Woman Effectively Controls the Judiciary, and She Happens to be Married to the Author of its Constitution*, GUARDIAN, Mar. 20, 2012, https://www.theguardian.com/law/2012/mar/20/tunde-hando-hungarian-judges .

The Venice Commission strongly objected to this arrangement in which so many powers were concentrated in one pair of politically connected hands:

> The main problem is the concentration of powers in the hands of one person, i.e. the President of the NJO [NOJ]. Although States enjoy a large margin of appreciation in designing a system for the administration of justice, in no other member state of the Council of Europe are such important powers, including the power to select judges and senior office holders, vested in one single person. Neither the way in which the President of the NJO is designated, nor the way in which the exercise of his or her functions is controlled, can reassure the Venice Commission. The President is indeed the crucial decision-maker of practically every aspect of the organisation of the judicial system and he or she has wide discretionary powers that are mostly not subject to judicial control. The President is elected without consultation of the members of the judiciary and not accountable in a meaningful way to anybody except in cases of violation of the law. The very long term of office (nine years) adds to these concerns.[50]

In response to the first Venice Commission report, the Hungarian government stingily granted a weak power to refuse consent to judicial appointments to the National Judicial Council (NJC), consisting of judges elected by their peers. But the relevant laws provided ways to bypass this consent by allowing the president of the NOJ to temporarily appoint judges whom the NJC had rejected into the positions anyway. Not surprisingly, the Venice Commission found these modifications did not address their earlier criticisms.[51] Even with this damning assessment, the European Commission still did not object to the concentration of extraordinary powers in the hands of a political official at the time, nor at any time since, despite the fact that the Venice Commission has repeatedly criticized – most recently in October 2021[52] – the structure of this office as well as its political dependency. The Commission has not even commented as the president of the NOJ has since promoted her favorites, demoted her enemies, seconded judges without their consent and used her arbitrary powers to appoint judges temporarily into important positions so frequently that many judges have decided that keeping their heads down or leaving the bench altogether are preferable to defending their own independence publicly.[53]

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[50] *Venice Comm'n Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, ¶ 118, Op. 663/2012 (March 19, 2012), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e.

[51] The Venice Commission repeated this concern after "reforms" designed to respond to the Commission's criticisms. *Venice Comm'n Opinion on the Cardinal Acts on the Judiciary that were Amended following the Adoption of Opinion CDL-AD(2012)001*, ¶¶ 16-29, Op. 683/2012 (Oct. 15, 2012), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e.

[52] *Venice Comm'n Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges Adopted by the Hungarian Parliament in December 2020*, ¶ 18, Op. 1051/2021 (Oct. 16, 2021), https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)036-e.

[53] For a list of the major attacks on the independent judiciary in Hungary over the last decade, *see* AMNESTY INTERNATIONAL & HUNGARIAN HELSINKI COMMITTEE, TIMELINE OF UNDERMINING THE INDEPENDENCE OF THE JUDICIARY IN HUNGARY 2012-2019 (2019), https://helsinki.hu/wp-content/uploads/Hungary_judicary_timeline_AI-HHC_2012-2019.pdf . For the atmosphere in the Hungarian judiciary, *see* Benjamin Novak, *Fear and Loathing in Hungary's Judiciary*, BUDAPEST BEACON, Nov. 8, 2017, https://budapestbeacon.com/fear-loathing-hungarys-judiciary/.

Failing to challenge a highly politicized judicial appointments process cannot be attributed to a lack of a legal basis for doing so. The Court of Justice has said repeatedly in elaborating in what Article 19(1) TEU means, "guarantees of independence and impartiality require rules, particularly as regards the composition of the body and *the appointment*, length of service and *grounds for abstention, rejection and dismissal of its members*, that are such as to dispel any reasonable doubt in the minds of individuals as to the *imperviousness of that body to external factors* and its neutrality with respect to the interests before it."[54] When a political figure single-handedly controls judicial careers, the external independence of the judiciary is in doubt. But the Commission has not brought an enforcement action to challenge this practice.

When the National Judicial Council (NJC), a body of judges elected by their peers, finally in 2019 rose up against the head of the NOJ seven years into this system of control, the judges elected to the Council by their peers accused the NOJ president – with copious evidence – of violating her legal minimal consultation obligations as she appointed temporary judges into important positions, including into court presidencies, over the objections of the NJC. Eventually, the NJC recommended her impeachment to the Parliament, which was the only disciplinary action that the NJC could initiate, but the Parliament considered the request for only three minutes before voting along party lines to reconfirm her in office.[55]

The public prosecutor (also affiliated with the governing party) then retaliated against the judges who had tried to remove the head of the NOJ. When one of the leading members of the National Judicial Council sent, in his capacity as national judge, a preliminary reference to the Court of Justice asking about the legality of temporarily appointed judges whose installation in office bypassed the consent of the

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[54] Comm'n. v. Poland, Case C-619/18, EU:C:2019:531, ¶ 74 [emphasis added] [hereinafter *Second Infringement*]. *See also* A.K. v. Krajowa Rada Sądownictwa, Joined Cases C-585/18, C-624/18 & C-625/18, EU:C:2019:982, ¶ 123. The Court in *A.K.* went into more detail: "it is still necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions 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 appointed as judges." *Id.* ¶ 134.

[55] The story of the judicial uprising and putdown is explained in HUNGARIAN HELSINKI COMMITTEE & AMNESTY INTERNATIONAL, A CONSTITUTIONAL CRISIS IN THE HUNGARIAN JUDICIARY (2019), https://helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf. The European Commission took understated note of the controversy in its 2019 European Semester Country Report, finding that "checks and balances, which are crucial to ensuring judicial independence, have been further weakened within the ordinary court system. The National Judicial Council faces increasing difficulties in counter-balancing the powers of the President of the National Office for the Judiciary. This gives rise to concerns regarding judicial independence." The Commission vaguely recommended that Hungary "strengthen judicial independence." *Comm'n Recommendation for a Council Recommendation on the 2019 National Reform Programme of Hungary and Delivering a Council Opinion on the 2019 Convergence Programme of Hungary*, ¶ 17, Recommendation 4 COM (2019) 517 final (Jul. 9, 2019), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0517&from=EN. The standoff between the National Judicial Council and the head of the National Office for the Judiciary ended when Parliament backed the head of the NOJ, further marginalizing the role of the judges in the judicial appointments process, and implicitly approving the retaliatory measures she took against the judges who had recommended her impeachment. But the Commission took no action other than minimizing the extent and significance of the conflict in its European Semester Report.

NJC, the prosecutor used a newly created appeals process to leapfrog the case before the referring judge to the Supreme Court (*Kúria*) which found that the reference was both unnecessary and unlawful under Hungarian law. At that point, the temporarily appointed judge acting as the superior of the referring judge – the very judge complained about in the reference – initiated disciplinary proceedings against the referring judge for having sent an unlawful reference to Luxembourg.[56] The Commission expressed concern about this situation.[57] But the Commission did not file an infringement action despite the obvious interference with the preliminary reference process.[58] Even worse, when the reference went forward to the Court anyway, with the embattled judge adding new questions about the power of a national supreme court to declare references unlawful and about the lawfulness of disciplinary procedures initiated against a judge for making a reference, the Commission urged the Court to declare all questions involving the structure of the Hungarian judiciary inadmissible.[59] Ignoring the Commission, the Court made the two of these questions -- about the national court deciding on reference questions and initiating disciplinary procedures against a judge for making a reference -- the centerpiece of its judgment, anyway.

Both the European Court of Justice and the European Court of Human Rights (ECtHR) have found in cases arising out of Poland that overt political manipulation of judicial appointments and careers is unlawful. In Poland, the Justice Minister (who doubles as the Chief Prosecutor) has outsized powers to determine judicial careers similar to those possessed by the head of the NOJ in Hungary. In *W.Z.* , which challenged the lawfulness of the Polish Justice Minister moving judges from one court to another without publicly accessible criteria or individualized reasons, the Court of Justice repeated its view that:

> 109. It is settled case-law that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests

[56] I tell this story in more detail in Kim Lane Scheppele, *The Law Requires Translation: The Hungarian Reference Case on Reference Cases, Case C-564/19, I.S., Judgment of the Court of Justice (Grand Chamber), 23 November 2021*, 59 COMMON MKT. L. REV 1107 (2022) [hereinafter Scheppele, *Translation*].

[57] *Comm'n Staff Working Document: 2020 Rule of Law Report, Country Chapter on the Rule of Law Situation in Hungary*, SWD (2020) 316 final (Sept. 30, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602582109481&uri=CELEX%3A52020SC0316.

[58] Ultimately, the reference went forward and was decided in *I.S.*, EU:C:2021:949. As I will explain below, the fact that the Court took the reference didn't mean that the problem was solved. Instead, the Court ruled in *I.S.* that the question of the legality of temporarily appointed judges in the court above the referring judge was not relevant to answering the EU law question at issue in the case. But temporarily appointed judges – put in place to avoid vetoes from the Judicial Council – raise serious questions about judicial independence that no Union institution has so far addressed. Not only did the Commission not bring the case, but it urged the Court not to answer any of the questions involving judicial independence raised by this case, including the matter of temporary judges. *Id*. ¶ 140.

[59] *Id*. ¶ 84.

> before it (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311 . . .)[60]

Surely, this reasoning would cover Hungary as well, but the Commission has not challenged parallel practices there. And, of course, *W.Z.* itself was a reference case and not an infringement action, as was the *Repubblika* case it cited as authority.

The ECtHR has also objected to politicizing the appointment of judges and has even gone so far as to say – with regard to the Polish Constitutional Tribunal and the efforts made by the Polish government to pack the court with friendly judges – that the Constitutional Tribunal is no longer a tribunal established by law. In *Xero Flor w Polsce sp. z o.o. v. Poland*, the ECtHR was called upon to assess whether the Polish Constitutional Tribunal was properly constituted. The Strasbourg Court elaborated its general standards for making such an assessment:

> 249. In the first place, there must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation of the right to a tribunal established by law, since a procedure that is seemingly in compliance with the domestic rules may nevertheless produce results that are incompatible with the object and purpose of that right [to an impartial tribunal] . . .
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> 250. Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Accordingly, breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold. To the contrary, breaches that wholly disregard the most fundamental rules in the appointment or breaches that may otherwise undermine the purpose and effect of the "established by law" requirement must be considered to be in violation of that requirement . . . .
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> 251. Thirdly, the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself. The assessment by the

[60] W.Z., Case C-487/19, EU:C:2021:798. For the Court's elaboration on the problem of non-consensual secondments, *see* W.B., Joined Cases C-748/19 to C-754/19, EU:C:2021:931. As Advocate General Bobek noted in his *W.B.* opinion, "Quite simply, without an independent judiciary, there would no longer be a genuine legal system. If there is no 'law', there can hardly be more integration. The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe." Opinion of Advocate General Bobek, W.B., Joined Cases C-748/19 to C-754/19, EU:C:2021:403, ¶ 138.

> national courts of the legal effects of such a breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom . . . [61]

Applying these standards to the Polish Constitutional Tribunal, the ECtHR concluded that the body did not meet the standards of a tribunal established by law.[62] The Commission, taking the hint, subsequently filed an infringement action against Poland regarding the independence of its Constitutional Tribunal, precisely challenging the method of appointment of its judges.[63] Even though the jurisprudence of both European peak courts has provided a firm legal basis for challenging the politicization of judicial appointments, promotions, dismissals and secondments, the Commission to this day has never challenged the politicized system through which judges' careers are determined in Hungary.

The Constitutional Court in Hungary is no longer operating to check the government. From the start of his rein in 2010, Viktor Orbán made the Constitutional Court an early target for capture. As one of its first acts, the Fidesz Parliament removed the structural veto that opposition parties once had to Constitutional Court nominees. [64] Then the Parliament expanded the number of judges on the Court from 11 to 15. Then it elected – on party-line votes in the Parliament – judges who were Fidesz loyalists, an orientation that became obvious as soon as these judges began rubber-stamping whatever the government did. [65] By 2013, the Court was fully captured.[66] The Commission did not even take note of these developments while the Hungarian Constitutional Court was being packed with judges elected by the governing party alone.

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[61] Xero Flor w Polsce sp. z o.o. v. Poland, app. no. 4907/18, CE:ECHR:2021:0507JUD000490718, ¶ 251 [hereinafter *Xero Flor*].

[62] The ECtHR has also ruled that the Civil Chamber of the Polish Supreme Court, the Disciplinary Chamber of the Polish Supreme Court, and the Extraordinary Chamber of the Polish Supreme Court are not independent and impartial tribunals established by law. *See* Advance Pharma v. Poland, app. no. 1469/20, CE:ECHR:2022:0203JUD000146920, ¶ 349; Reczkowicz v. Poland, app. no. 43447/19, CE:ECHR:2021:0722JUD004344719, ¶ 280; Dolińska-Ficek & Ozimek v. Poland, app. nos. 49868/19 & 57511/19, CE:ECHR:2021:1108JUD004986819, ¶ 353; European Court of Human Rights Press Release ECHR 333, Poland Must Take Rapid Action to Resolve the Lack of Independence of the National Council of the Judiciary (Aug. 11, 2021), https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-7174935-9736233%22%5D%7D. In each case, the ECtHR has noted that the appointment of judges to each of these benches through a politically tainted National Judicial Council adversely affected the independence of each of these chambers.

[63] *See* European Comm'n Press Release IP/21/7070, Rule of Law: Comm'n Launches Infringement Procedure Against Poland for Violations of EU Law by its Constitutional Tribunal (Dec. 22, 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070 [hereinafter European Comm'n Press Release IP/21/7070].

[64] Bánkuti et al., *supra* note 19, at 139-40.

[65] For a description of the process of capturing the Constitutional Court, *see* Zoltán Szente, *The Political Orientation of Members of the Hungarian Constitutional Court between 2010 and 2014*, 1 CONST. STUD. 123 (2016), https://uwpress.wisc.edu/journals/pdfs/CSv01n01_06Szente_FINAL_web.pdf.

[66] For a detailed account of the Constitutional Court's struggle against being packed and the assistance it got from the Venice Commission and European courts (with little help from the European Commission), *see* Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)*, 23 TRANS. L. & CONTEMP. PROBS. 51 (2014).

The Commission expressed concern[67] but ultimately engaged in no visible enforcement actions when the Fourth Amendment to the 2012 Fundamental Law (constitution) was adopted in 2013. This amendment, half as long as the new constitution itself, nullified the entire rights-explicating jurisprudence of the Constitutional Court from 1990-2012 that had laid the foundations of Hungarian constitutional law and its protection of rights.[68] The newly packed Constitutional Court was therefore given the instant ability to ignore pesky precedents, thus destabilizing much of constitutional law including those parts that had brought European law into the Hungarian domestic legal system.

The Fourth Amendment also added directly to the constitution a number of laws declared unconstitutional by the not-yet-fully-packed Constitutional Court and that were also unlawful under EU law.[69] For example, the new Article XI(3) added by the Fourth Amendment permits the government to require university students whose education is subsidized by state fellowships to remain and work in the country for a fixed period of time after their university graduation.[70] The Constitutional Court – before it was packed – had struck down this law on the grounds that it infringed both the constitutional and EU law rights of free movement and residence.[71] But the Fourth Amendment inserted this into the Constitution, despite its conflict with EU law.[72]

With regard to judicial independence, the Fourth Amendment inserted into the Constitution the problematic division of labor between the National Office of the Judiciary and the National Judicial Council, through which the "central responsibilities of the administration of courts shall be performed by the President of the National Office of the Judiciary" while the National Judicial Council "shall participate" (without more) in those tasks.[73] Under this amendment, increasing the

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[67] *See* European Comm'n Press Release IP/13/327, The European Comm'n Reiterates its Serious Concern over the Fourth Amendment to the Constitution of Hungary (Apr. 12, 2013), https://ec.europa.eu/commission/presscorner/detail/en/IP_13_327.

[68] *See* Kim Lane Scheppele, *The Fog of Amendment*, N.Y. TIMES: PAUL KRUGMAN'S CONSCIENCE OF A LIBERAL BLOG (Mar. 11, 2013), https://archive.nytimes.com/krugman.blogs.nytimes.com/2013/03/12/guest-post-the-fog-of-amendment/.

[69] *See* Miklós Bánkuti et al., *Amicus Brief for the Venice Comm'n on the Fourth Amendment to the Fundamental Law of Hungary* (Gábor Halmai & Kim Lane Scheppele eds., 2013), http://fundamentum.hu/sites/default/files/amicus_brief_on_the_fourth_amendment.pdf .

[70] MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. XI(3), official translation at https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary_20201223_fin.pdf [hereinafter FUNDAMENTAL LAW OF HUNGARY].

[71] *See* Alkotmánybíróság [Constitutional Court] April 7, 2012, MK. 32/2012 (Hung.), http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2012-2-005 (English summary).

[72] In Laurence Prinz v. Region Hannover & Philipp Seeberger v. Studentenwerk Heidelberg, Joined Cases C-523/11 & C-585/11, EU:C:2013:524, ¶¶ 38-41, the Court found that EU law did not permit Member States to require a period of residence in their countries before enrolling in universities there. While the Court found that Member States could require a deeper connection with that Member State to qualify for funded educational places, the Court rejected mandatory residence as the sole criterion. Surely, the Court – if confronted with a case in which a Member State required a student to stay in that Member State *following* graduation for a period of years – would similarly find a violation of the freedom of movement of resident conferred on citizens of the EU through Articles 20 and 21 TFEU.

[73] Fundamental Law of Hungary, art. XXV(5).

powers of the National Judicial Council, as the Venice Commission strongly recommended, would be unconstitutional, so not surprisingly, the Venice Commission objected.[74] The European Commission did not. In its 2022 recommendations issued as part of the Rule of Law reporting mechanism, however, the Commission finally urged Hungary to strengthen the National Judicial Council relative to the president of the NOJ,[75] without noting that this system was entrenched in the constitution in 2013 without a word of objection from the Commission at the time.

The captured Hungarian Constitutional Court now routinely challenges the primacy of EU law and applies EU law in ways that raise questions about the consistent application of Union law across the Member States. For example, the Constitutional Court ruled in 2016[76] that it alone will be the guardian of Hungarian "constitutional identity" which, in its view, gives it the power to pick and choose which elements of EU law Hungarian courts will follow.[77] According to the Hungarian Constitutional Court:

> 67. The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. [78]

In this decision, the Hungarian Constitutional Court pronounced that it had the last word over EU law.

The Commission may not have reacted to this particular case because it did not in fact nullify any law or decision of the EU. It was simply a shot over the bow to warn the Commission against requiring Hungary to honor the Common European Asylum System, which was the subject of the case. But the Constitutional Court

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[74] In its opinion on the Fourth Amendment, the Venice Commission noted: "In two earlier Opinions, the Venice Commission strongly criticised the extensive powers of the President of the National Judicial Office (PNJO) and the lack of appropriate accountability. The Commission emphasised the need to enhance the role of the National Judicial Council as a control instance." *Venice Comm'n Opinion on the Fourth Amendment to the Fundamental Law of Hungary*, ¶ 68, Op. 720/2013, (June 17, 2013).

[75] *See* European Comm'n Press Release IP/22/4467, Rule of Law Report 2022: Comm'n Issues Specific Recommendations to Member States (July 13, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4467.

[76] *See* Alkotmánybíróság [Constitutional Court] November 30, 2016, MK.22/2016 (Hung.), https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016-1.pdf.

[77] For an analysis of this decision *see* Gábor Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E(2) of the Fundamental Law*, 43 REV. OF CENT. & EAST EUR. L. 23 (2018). For the bigger picture within which "constitutional identity" is being constructed, *see* Petra Bárd et al., *Inventing Constitutional Identity in Hungary* (MTA Law Working Paper no. 2022/6, 2022), https://jog.tk.hu/en/mtalwp/inventing-constitutional-identity-in-hungary.

[78] Alkotmánybíróság [Constitutional Court] November 30, 2016, MK.22/2016 (Hung.), ¶ 67. For a history of the way that constitutional identity and the historic constitution of Hungary have been understood in the jurisprudence of the Constitutional Court, *see* Bárd et al., *supra* note 77.

decision and the lack of reaction of the Commission to it emboldened the Hungarian government to alter the Fundamental Law through the Seventh Amendment in 2018 to modify Article E, through which the authority of Union law is recognized in the Hungarian constitutional order. Under the amendment, the Fundamental Law now denies EU law primacy in crucial areas:

> The exercise of powers under this paragraph [bringing EU law into the Hungarian constitutional order] shall be in conformity with the fundamental rights and freedoms enshrined in the Fundamental Law, nor shall it restrict the inalienable right of disposition of the territorial unit, population, form of government and state system of Hungary.[79]

This was a warning to the Commission not to interfere with the Fidesz government's reorganization of the system of state power to concentrate control in the hands of the prime minister.

At the same time as the constitution was amended to deny primacy to Union law in crucial areas, the Seventh Amendment also added Article R(4) to make the protection of constitutional identity – that is the supremacy of the Fundamental Law over EU law – a general duty of all state bodies.[80] The Commission did not challenge this demotion of EU law in the Hungarian constitutional order, binding on Hungarian courts. Nor did the Commission challenge other decisions that denied the applicability of EU law or interpreted EU law in a wildly deviant way. [81]

Twice in one decade, the Hungarian government changed the qualifications for judges of the Supreme Court, applied immediately to sitting judges without a transitional period. In both cases, the new rules permitted the government to install its hand-picked favorite as the president of the court even though, in both cases, the persons selected would not have been qualified under the rules that existed before the rules were changed for the purpose of bringing that particular person into that office. Neither episode resulted in any action from the Commission.

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[79] Fundamental Law of Hungary, art. E(2). For a translation of the entire Seventh Amendment as it was passed, *see Proposed Seventh Amendment to the Fundamental Law [full text in English]*, ABOUT HUNGARY, Oct. 19, 2016, https://abouthungary.hu/news-in-brief/proposed-seventh-amendment-to-the-fundamental-law-full-text-in-english.

[80] *See* Fundamental Law of Hungary, art. R(4).

[81] The Commission did, however, file an infringement after the Constitutional Court issued a decision contrary to EU law involving the "Stop Soros" act which criminalized the provision of assistance to refugees by civil sector groups. The Constitutional Court had found this law constitutional. *See* Alkotmánybíróság [Constitutional Court] February 25, 2019, MK.3/2019 (Hung.), http://public.mkab.hu/dev/dontesek.nsf/0/db659534a12560d4c12583300058b33d/$FILE/3_2019%20AB%20hat%C3%A1rozat.pdf; Constitutional Court of Hungary Press Release, The Criminal Code's New Statutory Definition Sanctioning the Facilitating of Illegal Immigration is not in Conflict with the Fundamental Law (Mar. 5, 2019), https://hunconcourt.hu/announcement/the-criminal-codes-new-statutory-definition-sanctioning-the-facilitating-of-illegal-immigration-is-not-in-conflict-with-the-fundamental-law. The European Commission eventually took the Hungarian government to the Court of Justice over this law, and the ECJ ruled in favor of the Commission in Comm'n v. Hungary, Case C-821/19, EU:C:2021:930, ¶¶ 151-64. But the Commission did not raise the issue of the lack of independence of the Constitutional Court in its submission, focusing only on the substantive content of this one law.

In the first round of judicial disqualifications, then-Supreme Court President András Baka was removed from office on January 1, 2012, three years before the end of his lawful term. His removal occurred through the operation of a new law, which renamed the Supreme Court the *Kúria* and created new qualifications for serving on this "new" court, namely that all *Kúria* judges have at least five years of judicial experience on the ordinary courts in Hungary. Because President Baka had only three years of judicial experience in Hungary and his 17 years as a judge on the European Court of Human Rights did not count under the law, he was disqualified, the only Supreme Court judge who was removed by the new qualification. His case at the European Court of Human Rights challenging his dismissal confirmed that he had been punished, in violation of his Convention rights, for having criticized the government's changes to the judiciary.[82] The Commission has taken no note either of the original decision or of the fact that Hungary remains in non-compliance because it has not strengthened free speech protections for judges.[83] With its 2022 Rule of Law Reports, the Commission has begun calling attention to non-compliance with ECtHR decisions as an element of the rule of law and it reported that at the start of 2022, Hungary had 47 leading judgments that had not been implemented.[84] While the Commission does not have jurisdiction to enforce ECtHR decisions directly, non-enforcement of ECtHR decisions in areas of Union law competency should, at a minimum, trigger a review of these decisions by the Commission to assess whether a proven Convention violation is also a violation of Union law.[85] Following on the ECtHR decisions, Union case law has now independently established the principle of the irremovability of judges,[86] which puts the Baka matter more directly into the Commission's field of responsibility.

In 2019, the Hungarian government changed the qualifications for Supreme Court judges yet again[87] so that instead of requiring five years of experience in the

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[82] *See* Baka v. Hungary, app. no. 0261/12, CE:ECHR:2016:0623JUD002026112, ¶¶ 171-76.

[83] In a hearing in September 2021, the Council of Europe's Committee of Ministers noted "a continuing absence of safeguards in connection with *ad hominem* constitutional-level measures terminating a judicial mandate" and pressed the Hungarian government to adopt "effective and adequate safeguards against abuse when it comes to restrictions on judges' freedom of expression."

See Committee of Ministers Decision CM/Del/Dec(2021)1411/H46-16, Supervision of the Execution of the European Court's Judgments, H46-16 Baka v. Hungary (App. No 20261/12), ¶¶ 314-16 (Sept. 16, 2021), https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a3c123.

[84] *See Comm'n Staff Situation in Hungary 2022*, *supra* note 11, at 28.

[85] George Stafford & Jakub Jaraszewski, *Taking European Judgments Seriously: A Call for the EU Comm'n to Take into Account the Non-Implementation of European Court Judgments in its Rule of Law Reports*, VERFASSUNGSBLOG (Jan. 24, 2022), https://verfassungsblog.de/taking-european-judgments-seriously/. In 2022, the Commission finally began to mention ECtHR rulings and their implementation in some of its annual Rule of Law Report country chapters. For example, *see Comm'n Staff Working Document: 2022 Rule of Law Report: Country Chapter on the Rule of Law Situation in Poland*, at 4, 8, SWD (2022) 521 final (July 13, 2022), https://ec.europa.eu/info/sites/default/files/48_1_194008_coun_chap_poland_en.pdf. But it failed to mention any of the judgments against Hungary with which Hungary has not yet complied. *Comm'n Staff Situation in Hungary 2022*, *supra* note 11.

[86] When the Polish government lowered the judicial retirement age, copying Hungary, the Commission filed an infringement action, this time resting the argument on the principle of judicial independence newly elaborated in the Portuguese Judges case. The Court in this case elaborated that one facet of judicial independence consisted of the principle of the irremovability of judges. *Second Infringement*, EU:C:2019:531.

[87] 2019. évi CXXVII. törvény az egyes törvényeknek az egyfokú járási hivatali eljárások megteremtésével összefüggő módosításáról (Act CXXVII Amending Certain Laws in Connection with

Hungarian ordinary courts to sit as a judge on the *Kúria* (the very qualification that tripped up President Baka in 2012), there is now a side door through which judges can step into seats on the *Kúria* without any judicial experience at all in an ordinary court. Under a 2019 law, [88] a Constitutional Court judge can now be appointed to the bench anywhere in the ordinary judiciary – including to the *Kúria* and even to its presidency -- without having had a single day of experience as an ordinary judge. Conveniently for the government, moving a judge from the Constitutional Court directly to the *Kúria* bypasses the otherwise required consent of the National Judicial Council which has the legal (if weak) power to weigh in on a choice that runs through the normal appointment process. But Constitutional Court judges are elected by the Parliament without vetting from any judicial body, so this new trick allows the government to insert judges who would otherwise be rejected by the judiciary into key leadership positions in the ordinary courts by first running them through the Constitutional Court. At present, all of the constitutional judges have been elected by the governing party's two-thirds parliamentary majority so a constitutional judge can be counted on as a reliable government ally.

Indeed, the 2019 Omnibus Act took effect on January 1, 2020, and precisely one year later, a Constitutional Court judge without any experience in the ordinary courts was dropped by the Parliament into the presidency of the *Kúria* over the unified opposition of the National Judicial Council.[89] The governing party's parliamentary supermajority elected Constitutional Judge Zsolt András Varga as the new president of the *Kúria*, even though he had had never served a single day as a judge on an ordinary court and so did not otherwise meet the qualifications to sit on that court. Instead, he had had a career in the public prosecution service before his short five-year tenure on the Constitutional Court (out of a term of 12 years). Judge Varga was therefore not qualified under the very law that had disqualified President Baka. The Parliament elected him on a party-line vote anyway.

In its 2021 Rule of Law Report country chapter on Hungary, the Commission expressed concern over this development:

> These developments confirm the concerns already flagged in the 2020 Rule of Law Report, with an appointment to the top judicial post being decided without involvement of a judicial body, and not in line with European standards. The UN Special Rapporteur on the independence of judges and lawyers characterised the election as an 'attack to the independence of the judiciary and as an attempt to submit the judiciary to the will of the legislative branch, in violation of the principle of separation of powers'. In the light of

Establishment of One-Stop District Office Procedures) (Hung.), ¶¶ 44, 91, https://mkogy.jogtar.hu/jogszabaly?docid=A1900127.TV [hereinafter Omnibus Act of 2019].

[88] Omnibus Act of 2019, ¶ 91 permits constitutional judges, for the first time, to parachute from their positions on the Constitutional Court – for which there is no judicial vetting by the NJC – directly into a judgeship in any ordinary court, even if the constitutional judges have had no experience in the ordinary judiciary and thus did not otherwise meet the minimum qualifications for those positions. HUNGARIAN HELSINKI COMMITTEE, THE NEW PRESIDENT OF THE *KÚRIA:* A POTENTIAL TRANSMISSION BELT OF THE EXECUTIVE WITHIN THE JUDICIARY (2020), https://helsinki.hu/wp-content/uploads/The_New_President_of_the_Kuria_20201022.pdf.

[89] *Id*.

> the administrative powers of the *Kúria* President and the key role of the *Kúria* in the justice system, these developments raise serious concerns as regards judicial independence.[90]

But if the Commission believed that independence of national courts was required by Union law and that this appointment seriously challenged the principle, the Commission did not act to enforce the rule of law here.

This is not for lack of relevant legal authority. The Court of Justice had recently considered the lawfulness of a tribunal whose members were appointed in an irregular process. It did so in *Simpson v. Council* and *HG v. Commission*,[91] a joined case involving the appointment of judges to the General Court and Civil Service Tribunal. In the case at issue, the irregularity was judged to be minor so the appointments did not affect the legality of the judgments of the tribunal. But, relevant to our analysis here, the Court said that, "As regards appointment decision specifically, it is in particular necessary for the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to such reasonable doubts with respect to the judges appointed."[92] Rules that have been changed twice in a decade to allow the government to put particular candidates into the presidency of the Hungarian Supreme Court surely raise reasonable doubts.

Advocate General Sharpston's Opinion in *Simpson and HG* provides a fuller account of the spectrum of irregularities that can occur in judicial appointments and suggests what follows from them:

> 107. . . . . As I see it, there is a wide spectrum, ranging from a procedural irregularity that is truly '*de minimis*' to a flagrant breach of the essential criteria governing the appointment of judges. The first category of irregularities would include, for example, a situation where a stamp in green ink should have been placed underneath the responsible minister's signature on the judge's letter of appointment but an assistant in a hurry picked up the wrong cartridge and the ink used was not green but blue. An example of the second category of irregularities would be where the procedure is manipulated by political leaders in order to secure the appointment as judge of a supporter of theirs who does not have the legal qualification required by the call for applications but

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[90] *Comm'n Staff Working Document: 2021 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary*, at 5-6, SWD (2021) 714 final (July 20, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0714 [hereinafter *Comm'n Staff Situation in Hungary 2021*].

[91] Simpson v. Council & HG v. Comm'n, Joined Cases C-542/18 RX-II & C-543/18 RX-II *H*, EU:C:2020:232. For a deeper discussion of this case and the issues it raises for judicial independence, *see* Laurent Pech, *Dealing with 'Fake Judges' Under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in Simpson and HG (*RECONNECT, Working Paper no. 8, 2020), https://reconnect-europe.eu/wp-content/uploads/2020/05/RECONNECT-WP8.pdf.

[92] *Id.* ¶ 71.

> who would unquestionably sentence anyone opposed to the government to life imprisonment.[93]

The case of the appointment of Judge Varga in Hungary as president of the *Kúria* is almost a textbook example of the second case, except that the Hungarian Parliament changed the law just before his appointment so that his appointment was not strictly illegal. But AG Sharpston's assessment of the consequences for a court of having such an irregularly appointed judge on it was clear and sharp: "Where there is a 'flagrant' breach of the right to a tribunal established by law that operates to the detriment of the confidence which justice in a democratic society should inspire in litigants, the judgments affected by that irregularity should evidently be set aside without more ado."[94] Judgments of the *Kúria* in Hungary continue to be final and binding despite the irregular appointment of its president.

In fact, the Hungarian case may well be worse than AG Sharpston's hypothetical "flagrant" example. The *Kúria* president was not only irregularly appointed himself but, as the president of the court, he was also given the power both to increase the number of judges on his court by fully one quarter and to pick these new judges himself.[95] He has now gone on to appoint other judges to his court irregularly.[96] The new law also gave him the power not only to assign specific cases to specific judges but also to continually rearrange the panels of judges who hear each case so that he can now design a unique configuration of judges for each case.[97] Even though the Hungarian Supreme Court's independence is surely compromised by all of these changes, the Commission has not found reason to launch an infringement procedure with the abundant case law that the Court of Justice has generated on the meaning of judicial independence.[98] Their lack of enforcement is made worse by the fact that the new *Kúria* president made many statements hostile to the EU and to Union law before taking office, raising serious questions about whether he will apply EU law in a spirit of sincere cooperation.[99]

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[93] Opinion of Advocate General Sharpston, Simpson v. Council & HG v. Comm'n, Joined Cases C-542/18 RX-II & C-543/18 RX-II, EU:C:2019:977, ¶ 107.

[94] *Id.* ¶ 109.

[95] AMNESTY INTERNATIONAL ET AL., CONTRIBUTIONS OF HUNGARIAN NGOS TO THE EUROPEAN COMMISSION'S RULE OF LAW REPORT 4 (2021), https://transparency.hu/wp-content/uploads/2021/03/HUN_NGO_contribution_EC_RoL_Report_2021.pdf.

[96] The Hungarian Helsinki Committee has now documented a number of instances in which President Varga has manipulated the appointment procedure to ensure that his favored candidates are appointed to the *Kúria* over the objections of the National Judicial Council. *Tribunal Established by Sleight of Hand*, HUNGARIAN HELSINKI COMMITTEE, Sept. 2, 2022, https://helsinki.hu/en/tribunal-established-by-sleight-of-hand/.

[97] The Omnibus Act of 2019, ¶¶ 66-74.

[98] The Commission extensively described this situation in its 2021 Rule of Law Report, noting "In the light of the administrative powers of the *Kúria* President and the key role of the *Kúria* in the justice system, these developments raise serious concerns as regards judicial independence." *Comm'n Staff Situation in Hungary 2021*, *supra* note 90, at 6. But no enforcement action followed.

[99] For many of the statements Judge Varga made before being elected President of the *Kúria* indicating his hostility to the EU, *see An Illiberal Chief Justice*, HUNGARIAN HELSINKI COMMITTEE, Jan. 7, 2021, https://helsinki.hu/en/an-illiberal-chief-justice/. As for sincere cooperation, the TEU states: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." TEU, art. 4(3).

The appointment of a new president of the *Kúria* over the heads of the judges on the National Judicial Council occurred after the serious constitutional crisis in 2019 that we have discussed above[100] when the National Judicial Council referred the president of the NOJ to the Parliament for impeachment because she had repeatedly skirted the law by irregularly appointing temporary judges after the NJC had refused her initial selections.[101] After the Parliament voted to keep her in office, she then responded by retaliating against the NJC in general and against its members in particular.[102] Even though the European Association of Judges noted the issue in real time and sounded the alarm about the assault on judicial independence in Hungary,[103] the Commission noted only in its Rule of Law report that "[t]he National Judicial Council continues to face challenges in counter-balancing the powers of the President of the National Office for the Judiciary as regards the management of the courts. . . . The NOJ President has repeatedly filled vacancies in higher courts, without a call for applications. . . ."[104]

The attacks on judicial independence continue including most recently – as I write – a case in which the wife of the Supreme Court president has been appointed as a senior judge in an important court despite being ranked lower than her competition by the National Judicial Council[105] and a case in another judge has been dismissed apparently for making a reference to the Court of Justice. [106] This latter case has gone to Strasbourg because she has no judicial appeal against her dismissal at home and, without a judicial route to contest her dismissal, she also cannot get a case on reference to the Court of Justice, as I will discuss in the final section of this

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[100] *See supra* notes 55-59.

[101] HUNGARIAN HELSINKI COMMITTEE & AMNESTY INTERNATIONAL, A CONSTITUTIONAL CRISIS IN THE HUNGARIAN JUDICIARY (2019), https://helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf.

[102] The *I.S.* case that came to the Court of Justice was one of them. *I.S.*, EU:C:2021:949. The referring judge had been subjected to a disciplinary procedure for sending a reference to the Court of Justice that the *Kúria* judged was both unnecessary and a violation of Hungarian law. The Court of Justice found that the *Kúria's* substitution of its judgment for the Court's judgment as well as its initiation of the disciplinary procedure against the referring judge were unlawful. But the Court did not answer the primary question that the referring judge was initially interested in, which was whether the irregularly appointed president of the court above him affected his own independence. The referring judge one of the NJC members who had voted to refer the president of the NOJ for impeachment and what happened to him was clearly retaliation. For an analysis of this decision *see* Scheppele, *Translation*, *supra* note 56.

[103] EUROPEAN ASSOCIATION OF JUDGES, REPORT ON THE FACT-FINDING MISSION OF THE EAJ TO HUNGARY (2019), https://birosag.hu/sites/default/files/users/2019.05.17_Report%20EAJ%20Hungary.pdf.

[104] *Comm'n Staff Situation in Hungary 2022*, *supra* note 11, at 2-3.

[105] Flora Garamvolgyi & Jennifer Rankin, *Viktor Orbán's Grip on Hungary's Courts Threatens Rule of Law, Warns Judge*, OBSERVER, Aug. 14, 2022, https://www.theguardian.com/world/2022/aug/14/viktor-orban-grip-on-hungary-courts-threatens-rule-of-law-warns-judge.

[106] Gabriella Szabó was dismissed from her position as an administrative law judge after she was found unsuitable for reappointment. During her short tenure on the bench, she had sent a preliminary reference to the Court of Justice regarding the "Stop Soros" law and the Court of Justice confirmed in March 2020 that her suspicions of an EU law violation were correct. L.H., Case C-564/18, EU:C:2020:218. The administrative procedure through which her appointment was terminated has no judicial appeal under Hungarian law, so she has now taken her case to the European Court of Human Rights to seek redress. *Another Scandal at the Judiciary: No Effective Remedy for Judges Dismissed from the Bench*, HUNGARIAN HELSINKI COMMITTEE, Sept. 12, 2022, https://helsinki.hu/en/another-scandal-at-the-judiciary-no-effective-remedy-for-judges-dismissed-from-the-bench/.

paper. That, of course, doesn't make her dismissal any less a violation of Union law but it limits the avenues through which such dismissals can be contested, which is why the Commission failure to bring infringements is particularly disturbing. The pattern of these individual cases suggests that those who control the judiciary are systemically purging the judiciary of uppity judges while ensuring government-friendly ones are appointed instead.

As the judiciary has come under increasing political pressure over more than a decade, the Commission has not brought a single infringement case against Hungary for its repeated attacks on judicial independence. While the Commission may not have felt it could invent arguments directly invoking judicial independence at the start of this process before the Court elaborated Union law directly on point, four years have passed since *Portuguese Judges* without the Commission initiating a single enforcement action against a country that has taken new steps each year to bring the judiciary to heel. The Commission has failed to be the Guardian of the Treaties in protecting the rule of law in Hungary. [107]

B. Poland

The Law and Justice (Polish acronym PiS) government in Poland, elected in 2015 to both the presidency and majorities in both houses of the Parliament, has attacked the judiciary far more comprehensively, overtly and without benefit of law than did Hungary. The crisis began when Poland's new president refused in 2015 to swear in Constitutional Tribunal judges properly elected by the outgoing Civic Platform Parliament while the incoming PiS Parliament voted not only to fill the seats that were its turn to fill but also to fill the seats that were legally filled by the preceding Parliament.[108] The resulting battle over Constitutional Tribunal membership featured the Constitutional Tribunal itself ruling that attacks on it were

[107] Because this Article deals primarily with the European Commission and the Court of Justice, I have not discussed the numerous resolutions of the European Parliament criticizing the Hungarian government for attacks on the judiciary, the media, the civil sector and more, culminating in the European Parliament triggering Article 7(1) with regard to Hungary in September 2018. *European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, 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* (2017/2131(INL)), 2019 O.J. (C 433) 66 (Sept. 12, 2018). The Council has so far held hearings on Hungary in September 2019, December 2019, June 2021 and May 2022. On the September and December 2019 meetings, see Laurent Pech, *From "Nuclear Option" to Damp Squib? A Critical Assessment of the Four Article 7(1) TEU Hearings to Date*, RECONNECT, 18 Nov. 2019, https://reconnect-europe.eu/blog/blog-fourart71teuhearings-pech/. On the June 2021 hearing, see Statewatch, *EU: Rule of Law: Reports of Council Hearings of Hungary and Poland*, https://www.statewatch.org/news/2021/july/eu-rule-of-law-reports-of-council-hearings-of-hungary-and-poland/ .On the May 2022 meeting, see Statewatch, *EU: Rule of Law: Nothing to See Here, Hungarian Government Tells the Council*, 15 June 2022, https://www.statewatch.org/news/2022/june/eu-rule-of-law-nothing-to-see-here-hungarian-government-tells-the-council/. Another meeting was scheduled for November 2022 under the Czech presidency of the Council. But to date the Council has not been able to generate the votes necessary for issuing the formal Article 7(1) warning.

[108] The outgoing Civic Platform government began the battle over Constitutional Tribunal judges when it changed the law strategically before the 2015 election to give itself five new appointments to the Constitutional Tribunal instead of the three that would have been lawfully within its power to fill before this legal modification. The Constitutional Court declared those extra two appointments unlawful, finding three were lawfully made. But the incoming government acted as if all five appointments were improper and so elected five new judges of its own. Kovács & Scheppele, *Fragility*, *supra* note 25, at 194-195.

illegal, after which the PiS government refused to publish or honor the Tribunal's decisions. The Parliament then passed six laws between November 2015 and December 2016 that clipped the wings of the Tribunal by limiting its ability to rule against the government's new initiatives, hampering its internal operation and disempowering it in crucial ways.[109] The Hungarian approach to capturing its Constitutional Court was more stealthy and technical, with every step formally legal and the whole process taking three years to complete. By contrast, the Polish government's opening assaults on the independent judiciary flouted Polish law and captured the Constitutional Tribunal in a little over one year.

The measures taken against the Constitutional Tribunal in Poland were so breathtaking and so obviously illegal under national law that the Commission reacted quickly. That said, the sudden mobilization of the Commission was due not only to the extreme and extremely visible actions of the Polish government but also to the changing of the guard at the European Commission itself. The 2015 Polish national elections had brought a new party into power, and the 2015 European elections also changed who was managing the rule of law files in the Commission. In particular, Dutch Commissioner Frans Timmermans became the Commission's vice-president, tasked with enforcing the rule of law. He had been the foreign minister of the Netherlands when Hungary started to go off the rails and was the prime architect of the "four foreign ministers' letter" urging the Commission to act more forcefully as Hungary became a pariah and suggesting that the EU find a way to cut funds to rogue Member States.[110] He was clearly personally committed to fighting for the rule of law. In his time holding this portfolio at the Commission, he pushed the issue as hard as he could with respect to Poland, but the Commission often dragged its feet and did not allow him to run with the brief.[111]

In December 2015, during the Constitutional Tribunal standoff, the Commission – namely Timmermans -- wrote to the PiS government, asking it to comply with the Tribunal's decisions and to delay enacting pending legislation affecting the Tribunal's powers. But when the PiS government both failed to honor the Tribunal's

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[109] As Wojciech Sadurksi explains, the laws on the Constitutional Tribunal fell into three main categories: Provisions exempting the governing party from constitutional scrutiny, provisions paralyzing decision-making at the Constitutional Tribunal and provisions enhancing the powers of the executive and legislative branches with respect to the Constitutional Tribunal. WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 58-95 (2019). For a description of the laws affecting the Constitutional Tribunal in particular, *see id.* at 70-74.

[110] "We … believe that a new and more effective mechanism to safeguard fundamental values in Member States is needed," write the foreign ministers of Germany, the Netherlands, Denmark and Finland in the letter, seen by Real Time Brussels. "We propose that the Commission as the guardian of the Treaties should have a stronger role here." Frances Robinson, *Laws, Rules for Rule of Law?* WALL ST. J., Mar. 8, 2013, https://www.wsj.com/articles/BL-RTBB-3594.

[111] After his performance on the Rule of Law portfolio, Frans Timmermans was widely touted as the next president of the Commission. His bid, however, was vetoed by Hungary and Poland precisely because he had tried to enforce the rule of law. Rather than stand up to the rogue states, the other Member States deferred to them and handed the presidency to Ursula von der Leyen, outside the system of *Spitzenkandidaten* nominated by the major parties. *Frans Timmermans Fails to get European Comm'n President Role*, DutchNews.NL, July 3, 2019, https://www.dutchnews.nl/news/2019/07/frans-timmermans-fails-to-get-european-commission-president-role/. This was no doubt a signal to the new Commission that going too hard on these rogue countries could have negative consequences for one's career.

decisions and passed the offending laws in January 2016 anyway,[112] the European Commission began an intense correspondence with the Polish government before triggering application of its newly created Rule of Law Framework in July 2016.[113] The Framework establishes a process through which the Commission can enter into a structured dialogue with a Member State and issue warnings and recommendations as the Commission assesses whether Article 7(1) TEU should be launched. Article 7 is the part of the Treaty on European Union that was designed to warn and discipline Member States that violate the basic values of the Treaties.[114]

Over the course of 2016 and 2017, the Commission walked through all the complex stages of its new Rule of Law Framework – assessing and warning, and assessing and warning again, and assessing and warning a third time, and then a fourth time – all without launching any infringements against Poland for its attacks on the judiciary. But the Commission's monitoring of and recommendations[115] to the PiS government did not deter the Polish government from continuing to attack the independence of Polish courts. By the end of 2016,[116] the Constitutional Tribunal was completely captured and it has since issued judgments that do not recognize the authority of either the Court of Justice or the European Court of Human Rights over rule of law matters.[117] And then the PiS government attacked the ordinary courts.

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[112] *Venice Comm'n Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, Op. 833/2015 (March 11, 2016)**,** https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e .

[113] The Commission invoked the Rule of Law Framework with regard to Poland in *Comm'n Recommendation (EU) 2016/1374 of 27 July 2016 Regarding the Rule of Law in Poland* (C/2016/5703), 2016 O.J. (L 217) 53 (Jul. 27, 2016), https://op.europa.eu/en/publication-detail/-/publication/bc443bd0-604f-11e6-9b08-01aa75ed71a1/language-sk [hereinafter *Comm'n Recommendation (EU) 2016/1374*]. The recommendation describes the trail of correspondence between the Polish government and the Commission before the Framework was launched. For a fuller analysis of the Rule of Law Framework's first invocation, *see* Dimitry Kochenov & Laurent Pech, *Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation*, 54 J.C.M.S. 1062 (2016). For an explanation of how and why the Rule of Law Framework was created, *see infra* note 239.

[114] TEU art. 7(1) is the treaty provision that allows the Council and Parliament, acting together, to warn a Member State that its actions may breach EU values. TEU arts. 7(2)-(3), which lay out a sequence of steps through which sanctions may issue against an offending state, is a totally separate procedure that does not require the invocation of TEU art. 7(1) first.

[115] The Commission issued four "recommendations" against Poland within the Rule of Law Framework:

1) *Comm'n Recommendation (EU) 2016/1374* (Jul. 27, 2016), *supra* note 113.

2) *Comm'n Recommendation (EU) 2017/146 of 21 December 2016 Regarding the Rule of Law in Poland*, 2016 O.J. (L 22) 65 (Dec. 21, 2016);

3) *Comm'n Recommendation (EU) 2017/1520 of 26 July 2017 Regarding the Rule of Law in Poland*, 2017 O.J. (L 228) 19 (Jul. 26, 2017) [hereinafter *Comm'n Recommendation (EU) 2017/1520*]; and

4) *Comm'n Recommendation (EU) 2018/103 of 20 December 2017 Regarding the Rule of Law in Poland*, 2017 O.J. (L 17) 50 (Dec. 20, 2017).

[116] Pech et al., *The EU's (In)Action*, *supra* note 26, at 6-7.

[117] In July 2021, the Polish Constitutional Tribunal ruled that the second sentence of TEU art. 4(3) taken in conjunction with TFEU art. 279 violated the Polish Constitution. Constitutional Tribunal of the Republic of Poland July 14, 2021, Case P 7/20. In October 2021, the Constitutional Tribunal ruled that the second subparagraph of TEU art. 19(1) violated the Polish Constitution, holding that the Polish government did not have to comply with any ECJ judgments citing that provision. Constitutional Tribunal of Republic of Poland Oct. 7, 2021, Case K 3/21. In November 2021, the Constitutional Tribunal ruled that ECHR art. 6(1) was incompatible with the Polish Constitution. Constitutional Tribunal of the Republic of Poland Nov. 24, 2021, Case K 6/21. And in March 2022, the Constitutional Tribunal again

Even as the Commission walked through all of the steps of the Rule of Law Framework, finally recommending to the Council in December 2017 that it invoke Article 7(1) to warn Poland of a serious breach of EU values,[118] the Polish government continued to take measures that would bring the courts under political control. In summer 2017, the PiS-dominated Parliament passed three new laws to make the ordinary courts politically dependent.[119] One law would have allowed the National Judicial Council (the KRS), which makes judicial appointments, to be dissolved and then captured by the PiS party through a new system for politically appointing its members. Another law would have dismissed all Supreme Court judges so that the PiS government could appoint an entirely new bench using its newly dominated KRS to select the new judges. The third law permitted the Justice Minister to fire all sitting lower-court presidents and replace them with new ones, and it also lowered the judicial retirement age, effectively immediately, for all courts apart from the Supreme Court (but differently for men and women). This third law also contained an option for newly pensioned judges to appeal to the Justice Minister for a discretionary extension of their terms. In the face of massive public demonstrations and an international outcry, Polish President Andrzej Duda vetoed the first two laws but signed the third that allowed the firing of court presidents and vice-presidents throughout the judiciary within the following six months without having to provide reasons.[120] In addition, the new retirement age took effect immediately in the lower courts, removing senior judges and generating a "recommendation" from the Commission under the Rule of Law mechanism.[121]

In fall 2017, President Duda emerged with new draft laws to replace the two he had vetoed.[122] The first, like the one it replaced, prematurely dissolved the old KRS

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held that ECHR art. 6(1) was incompatible with the Polish Constitution and further said that it would be unconstitutional for any Polish authorities to comply with decisions of the Court of Human Rights invoking this article. Constitutional Tribunal of the Republic of Poland Mar. 10, 2022, Case K 7/21. The Commission eventually initiated an infringement action against Poland for the Constitutional Tribunal's violation of EU law by refusing to recognize EU law primacy in December 2021. European Comm'n Press Release IP/21/7070, Rule of Law: Comm'n Launches Infringement Procedure against Poland for Violations of EU Law by its Constitutional Tribunal (Dec. 22, 2021), https://ec.europa.eu /commission/presscorner/detail/en/ip_21_7070.

[118] *European Comm'n, 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*, at 1, COM (2017) 0835 final (Dec. 20, 2017).

[119] This paragraph and the next are drawn from the more detailed account in SADURSKI, *supra* note 109, at 98-124.

[120] *Polish President Signs Bill Giving Justice Minister Power to Hire Court Heads*, REUTERS, July 25, 2017, https://www.reuters.com/article/poland-judiciary-bill/polish-president-signs-bill-giving-justice-minister-power-to-hire-court-heads-idINL5N1KG1E6 . This third law generated an adverse decision at the European Court of Human Rights finding that two vice-presidents of Polish courts had not been given reasons for their dismissal in violation of their right to access to a court. Broda & Bojara v. Poland, apps. no. 26691/18 & 27367/18, CE:ECHR:2021:0629JUD002669118. This might well have triggered a parallel infringement procedure in Union law, but the Commission never mentioned the dismissal of court leadership in its infringement action against the part of the third law prematurely retiring judges in the lower courts.

[121] *Comm'n Recommendation (EU) 2017/1520*, *supra* note 115.

[122] The European Commission requested that Poland seek the Venice Commission's opinion on both draft laws before passage. Jan Strupczewski, *EU Calls for Legal Comm'n to Vet New Polish Judicial Reform Laws*, REUTERS, Sept. 25, 2017, https://www.reuters.com/article/us-poland-judiciary-eu/eu-calls-for-legal-commission-to-vet-new-polish-judicial-reform-laws-idUSKCN1C0205.

without allowing its then-current members to finish their lawful terms and created a new one packed with judges approved by the governing party and its parliamentary majority.[123] The second, repeating the tactic used by the Orbán government, forced nearly 40% of the sitting Supreme Court judges into early retirement by lowering the judicial retirement age, something that the Polish government had already done over the summer with the lower courts. This new law on the Supreme Court also created two new Supreme Court chambers – a disciplinary chamber and an "extraordinary chamber" – and staffed them with individuals who would be appointed through the new politically packed KRS. While the Polish government waited to put these two laws up for a parliamentary vote until the Venice Commission assessed them, the Parliament passed the laws without responding to the Venice Commission's many criticisms.[124]

As a result, in December 2017, the Commission triggered Article 7(1)TEU by publishing a "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."[125] On one hand, launching Article 7(1) TEU was a major step, as it signaled the first time that the Commission – or for that matter, any EU institution – had found a Member State deserving of the most comprehensive condemnation that the Treaties have to offer. But on the other hand, it was all just words. Article 7(1) comes with no sanctions, and the Commission's negative assessment by itself isn't even sufficient to constitute an official warning. Both the Parliament and the Council must approve by supermajorities first – and even then, it is just a warning. Although the European Parliament then voted in favor of Article 7(1) with regard to Poland,[126] the Member

[123] The procedure was actually slightly more complicated than this but the result was the same: Party control of the membership of the KRS by prematurely firing the judges who lawfully sat on the Council to make way for new judges elected by the Parliament. The premature firings were found to constitute a Convention violation by the European Court of Human Rights in Grzęda v. Poland, app. no. 43572/18, CE:ECHR:2022:0315JUD004357218, ¶ 348, because the applicants had been denied access to a court to challenge their dismissals. In this 2022 case, however, the ECHR minced no words in providing a devastating overview of the situation in Poland as regards judicial independence by that point:

> The Court notes that the whole sequence of events in Poland . . . vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the NCJ [KRS] and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline. . . . As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened.

[124] *Venice Comm'n Opinion on the Draft Act Amending the Act on the National Council of the Judiciary; on the Draft Act Amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, Op. 904/2017 (Dec. 11, 2017), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e. The law was passed three days before the Venice Commission opinion was approved, at which time the Polish government surely knew what the opinion said because that national governments are always given copies of opinions before they are voted on before the whole Commission. Christian Davies, *Polish MPs Pass Judicial Bills Amid Accusations of Threat to Democracy*, GUARDIAN, Dec. 8, 2017, https://www.theguardian.com/world/2017/dec/08/polish-mps-pass-supreme-court-bill-criticised-as-grave-threat .

[125] *Comm'n 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 final (Dec. 20, 2017).

[126] *European Parliament Resolution of 1 March 2018 on the Commission's Decision to Activate Article 7(1) TEU as regards the Situation in Poland* (2018/2541(RSP)), 2019 O.J. (C 129) 13 (Mar. 1, 2018) [hereinafter *European Parliament Resolution* (2018/2541(RSP))].

States in the Council have dragged out the process and as of the time of this writing, going on five years later, the Council has still failed to act. Article 7(1) TEU hangs in the air – neither a sanction nor a threat. It is merely the possibility of a warning with no consequences, and yet the Council cannot muster the votes to pass it, holding only occasional hearings on the matter whenever the rotating presidency wants to appear to be doing something about the rule of law.[127] Not surprisingly, Poland has done nothing to address the concerns raised in the procedure.

So even though the Commission had come all that way through the various "recommendation" stages of the Rule of Law Framework, its efforts fizzled at the end without generating a unified front of condemnation from the Council. The PiS government was apparently emboldened by the fact that the Commission had deployed a set of tools that consisted of a mere dialogue punctuated by toothless scoldings. There were simply no sanctions anywhere in the mix.[128] Without deploying its power to bring infringements backed by the potential sanctions of penalty payments, the Commission could only cajole and rely on Poland's basic goodwill toward the EU, which seemed to be spectacularly missing. The Commission surely didn't work publicly to generate compliance. Had the Commission resorted to infringements, which it could have launched on its own and which would be assessed by the impartial Court of Justice instead of the political Council, it might have gotten farther in generating a serious threat of real costs for Poland in order to move the country toward restoration of the rule of law. But the Commission did not take this route for the first year and a half of the Polish assault on the judiciary, sticking instead with the Rule of Law Framework.

But then, in February 2018, the Court of Justice decided its landmark *Portuguese Judges* case, announcing explicitly that all Member States were obligated by the Treaties to maintain an independent judiciary.[129] This decision acted as an open invitation (or perhaps, a hard shove) to get the Commission to bring infringement actions to stop the damage to the Polish judiciary as it was being carried out in real time. Through this case, the ECJ signaled to the Commission that the independence of national courts was fundamental to the enforcement of EU law. As the Court helpfully elaborated, judicial independence "presupposes . . . that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or . . . instructions from any source whatsoever,

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[127] A list of the hearings conducted through February 2022 is provided in Pech & Bárd, *supra* note 14, at 40. Hearings were held in September and December 2019 before a long break meant that the next hearing was not until June 2021 and then another in February 2022. As this schedule makes clear, the General Affairs Council has not approached the task with great urgency nor, as of this writing, have they decided on the matter nearly five years after the Reasoned Opinion from the Commission reached them.

[128] The procedure under TEU art. 7(1), even if approved by the Parliament and the Council, would only result in a warning. Sanctions, including the removal of Poland's vote from the Council and/or the withholding of European funds, would only issue following the invocation of a different procedure under TEU art. 7(2) that would require a unanimous vote of all other Member States to establish a breach of TEU art. 2 values before sanctions could be levied under TEU art. 7(3). But Hungary and Poland had pledged to veto sanctions against each other, ensuring that neither one had anything to fear from an Article 7 process. I think that there may be a way around this by suspending them both at once, but my proposal is hotly contested. Kim Lane Scheppele, *EU Can Still Block Hungary's Veto on Polish Sanctions*, POLITICO.EU, Jan. 11, 2016, https://www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions/.

[129] *Portuguese Judges*, EU:C:2018:117, ¶ 41.

and that it is thus protected against external interventions . . ."[130] The Commission was clearly being instructed to bring infringements to the Court which was waiting for them with open arms.

Taking the hint, the Commission launched an infringement action against Poland in March 2018 regarding the independence of the ordinary judiciary, challenging the law that had gone into effect the prior summer which lowered the judicial retirement age in the lower courts and featured a gender difference in retirement ages. The Commission challenged a particularly worrisome feature of the new retirement scheme, which was that the Minister of Justice – a member of the government – could extend the term of any judge who requested it, without having any formal criteria for deciding which judges would go and which judges would stay. The Commission took what the Court of Justice had offered them, and grounded its infringement on Article 19(1) as the legal basis for arguing that the premature and discretionary retirement of a swath of senior judges was unlawful.[131]

Not surprisingly, the Court agreed with the Commission. The Court found the question admissible because the affected Polish courts were not just national courts but also competent to rule on matters of EU law.[132] The Court found that Poland was in violation of Article 19(1) TEU because the independence of the judiciary requires "the necessary freedom of judges from all external intervention or pressure [which in turn] requires certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office."[133] In order to provide this guarantee, the system in place for dismissing judges must "prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions."[134] If a retirement age is put in place and exceptions to it are permitted, the Court argued, such extensions may not be discretionarily awarded by a political official. Because the power possessed by the Minister of Justice to extend judges' service beyond the new retirement age was exercised with no standards, it thus "give[s] rise to reasonable doubts . . . as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests that may be the subject of argument before them."[135] As a result, the Court found that this discretionary power violated the principle of the irremovability of judges.[136] Poland was also found in violation of Article 157 TFEU and Articles 5(1)(a) and 9(1)(f) of Directive 2006/54 with regard to the gender discrimination claim in the lowering of the judicial retirement age.[137]

The Commission's first infringement action on the matter of judicial independence was confirmed by Court of Justice. But by the time the Commission

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[130] *Id.* ¶ 44.

[131] Comm'n. v. Poland, Case C-192/18, EU:C:2019:924, ¶ 87. [hereinafter *First Infringement*]. (Because I will now be discussing a sequence of infringement actions that are hard to distinguish because they presented overlapping challenges, I will refer to them in the order in which the Commission brought them. Hereinafter, this case will be called *First Infringement*).

[132] *Id.* ¶¶ 104-05

[133] *Id.* ¶ 112.

[134] *Id.* ¶ 114.

[135] *Id.* ¶ 124.

[136] *Id.* ¶ 125.

[137] *Id.* ¶¶ 78-84.

acted, the prematurely retired judges were long gone from the bench. In addition, fully 158 presidents and vice-presidents of the lower courts, including the leadership of 10 of the 11 courts of appeal, had already been fired and replaced even before the Commission filed its first case.[138] The court presidencies were particularly crucial given that Polish court presidents have substantial control over the judges on their courts and they also decide which judges hear particular cases.[139] In its infringement action on the law pertaining to the lower courts, however, the Commission ignored what was happening to court presidents and vice-presidents, and instead limited this infringement to the retirement age, its gender discrimination aspect and the discretionary extension of retired judges' terms.[140] Though of course the principle of the irremovability of judges would have applied equally strongly to the wholesale dismissal of court presidents and vice-presidents before the ends of their lawful terms, the Commission never challenged their removal. Because the Commission never raised the question, the Polish government was able to capture the presidencies of the key courts below the Supreme Court without any serious objections. As Pech and his coauthors noted, "No remedy has ever been provided for the judges who have been arbitrarily dismissed under this regime."[141]

The Commission's victory in this case – which was decided eventually in November 2019, more than two years after the removal of judges had already been accomplished – came too late to change facts on the ground because the affected judges had long since been replaced with judges of the government's choosing even before the Commission filed the case. The Commission had not learned from the Hungarian judicial retirement age case that moving quickly and asking for expedited review would be helpful.[142] The Commission had simply entered the fray on this first infringement too late and, even then, the Commission only challenged some of the

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[138] SADURSKI, *supra* note 109, at 116.

[139] *Id.* at 117.

[140] The ECtHR eventually ruled that the prematurely fired court vice-presidents had been denied their Convention rights, but too late to be useful in actually restoring them to office. *Broda & Bohara v. Poland*, CE:ECHR:2021:0629JUD002669118.

[141] Pech et al., *The EU's (In)Action*, *supra* note 26, at 13.

[142] Going the infringement route is not speedy. But back when the Commission launched that one lone infringement action against the Hungarian government for attacks on the judiciary, both the Commission and the Court acted quickly. The Commission criticized the law when it was passed in late 2011 and opened an infringement action as soon as the law went into effect in January 2012. European Commission Press Release IP/12/24, European Commission launches accelerated infringement proceedings against Hungary over the Independence of its Central Bank and Data Protection Authorities, as well as Over Measures affecting the Judiciary (Jan. 17, 2012), https://ec.europa.eu/commission/presscorner/detail/en/IP_12_24 . It then moved to the reasoned opinion in March and moved to refer the matter of judicial independence to the ECJ in April. European Commission Press Release IP/12/395, Hungary – Infringements: European Commission Satisfied With Changes to Central Bank Statute, But Refers Hungary to the Court of Justice on the Independence of the Data Protection Authority and Measures Affecting the Judiciary (Apr. 25, 2012), https://ec.europa.eu/commission/presscorner/detail/en/IP_12_395. The ECJ agreed with the Commission's request to expedite the case on July 13, 2012 and the Court issued its judgment on November 12, 2012. *Comm'n. v. Hungary*, EU:C:2012:687, ¶¶ 18-19. From start to finish, then the case took less than one year. Nonetheless, it was still too late. In the interim, the Hungarian government had speeded up the appointments of the replacement judges so that by the time the Commission tried to enforce the ECJ judgment, the prematurely retired judges had no jobs to return to. Halmai, *supra* note 44. The Commission should have learned from this experience, but didn't, that any case worthy of expedited review is probably also worthy of a request for interim measures.

premature removals. As a result, the principle of the irremovability of judges was announced when the primary beneficiaries of the irremovability of judges would be the new court presidents and other judges appointed by the PiS government. Under the Court's logic, it would now be problematic to dislodge *them* to reappoint their predecessors or – for that matter – anyone else.[143] So even though the "neo-judges" were appointed with a cloud over their heads because of the way other judges had been unlawfully pushed aside to make room for them and because they were appointed in a system controlled by the governing party, they are now the judges who are irremovable.

As this first infringement case growing out of the law signed by President Duda in summer 2017 wound its way through the Court of Justice, facts kept changing on the ground. The new laws on the KRS (judicial council) and the Supreme Court were promulgated in early 2018. The law on the KRS went into effect first. It dissolved the old KRS and removed all of its members, "despite their constitutionally guaranteed term of office (of four years)." [144] While the old KRS's membership featured a majority of judges elected by their fellow judges, the new KRS's membership was changed substantially so that now fully 23 of its 25 members are elected by politicians.[145] The neo-KRS had its first meeting in April 2018 and was, from that moment on a political rather than a legal institution.[146]

To this day, the Commission has never brought an infringement action that directly challenges the composition of this body, even though a politicized appointments process centrally affects the independence of the Polish judiciary as a whole and even though the Court of Justice has emphasized from the beginning of its foray into this field that judicial independence requires an appointments process that buffers courts from external influence.[147] The Commission was not spurred to act

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[143] The Court of Justice may be pressed to alter its case law in light of the wave of cases coming from the ECtHR finding that the judges placed by the new KRS on the ordinary courts or by parliamentary majorities to unlawfully emptied seats on the Constitutional Court are not lawfully appointed and therefore that all of their decisions infringe the Convention. *See, e.g, Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719 (finding that the Disciplinary Chamber of the Supreme Court did not constitute a "tribunal established by law" due to the "grave irregularities in the appointment of judges to" that body in violation of TEU art. 6(1)). *See also* Juszczyszyn v. Poland, app. no. 35599/20, CE:ECHR:2022:1006JUD003559920 (finding that the Disciplinary Chamber's composition violated TEU art. 6(1), adding that TEU art. 18 on the lawful restrictions on rights had been violated by this Chamber as well). *Xero Flor*, CE:ECHR:2021:0507JUD000490718 (finding that the Constitutional Court's composition was unlawful so its decisions violate the rights of those who are disadvantaged by the Court's decision). At the moment, there are dozens of communicated applications to Poland that raise the issue of the lawful composition of Polish courts in light of the irregular appointments of judges to these courts and it is pretty clear that the ECtHR will conclude in one case after the other that unlawfully constituted tribunals cannot make binding legal decisions. As these cases mount, the Court of Justice will eventually have to come to terms with the fact that one European court (the ECtHR) is finding that these national courts' decisions are not binding while the other European court (the ECJ) is acting as if these courts' decisions constitute business as usual.

[144] SADURSKI, *supra* note 109, at 102. There premature firings were successfully challenged at the European Court of Human Rights in *Grzęda v. Poland*, CE:ECHR:2022:0315JUD004357218.

[145] As Sadurski observed: "the parliamentary majority now enjoys full, unmediated and unconstrained power of appointment to the institution that appoints all Polish judges." SADURSKI, *supra* note 109, at 101.

[146] *Id.* at 104.

[147] *Portuguese Judges*, EU:C:2018:117, ¶ 44 defined independence from external influence: "The concept of independence presupposes, in particular, that the body concerned exercises its judicial

when the European Network on Councils of the Judiciary suspended the KRS's membership in September 2018 or even when the KRS was finally expelled in May 2020.[148] Nor was the Commission moved to act when a frustrated European Parliament demanded that the Commission bring an infringement over the political capture of KRS.[149]

Though the new law on the Supreme Court was also adopted in December 2017, it only took effect in April 2018, conveniently after the KRS's political capture. More than one-third of the sitting judges were to be removed from the Court under this law due to a new retirement age. As with the law on the retirement age of the judges of the lower courts, the Supreme Court judges who were prematurely retired could ask a political official – in this case, the President of the Republic – for permission to keep their jobs and he could discretionarily renew these judges (or not) with neither standards to guide him nor the requirement to give reasons. The European Commission – with its first infringement already pending before the ECJ on just this point – pressured Poland to modify this system of discretionary appointments. The Polish government agreed in May 2018 to require the President to seek the opinion of the KRS before a Supreme Court judge's term could be extended.[150] Of course, by May 2018, the KRS had been fully captured with sympathetic members installed by the governing party, so this did not represent a substantial check on the powers of the President. The Commission didn't seem to realize that it had won a toothless concession.

Beyond the new retirements, the law on the Supreme Court was designed to change the Court membership even more radically. The number of judges was increased from 93 to 120, with the new judges all being appointed by the new, packed KRS. Between the prematurely retired judges and the new judges, the new KRS was given the power to appoint fully 60% of the membership of the Court in just one year.[151] Because many sitting judges refused to apply for these new positions, considering them politically tainted, the law on the Supreme Court was

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 that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions." The unlawfulness of the composition of the KRS was eventually established through a reference case in which the Court of Justice laid out the conditions for judging whether an appointments process improperly tainted the resulting judges. Applying this decision, a chamber of the Polish Supreme Court (one of the uncaptured chambers at that point) applied the standards to the KRS, finding it improperly constituted. A.K. v. Krajowa Rada Sądownictwa, Joined Cases C-585/18, C-624/18 & C-625/18, EU:C:2019:982, ¶ 42 [hereinafter *A.K.*]. Because the government has sought to punish judges who have recognized this Supreme Court decision (about which, more below, *see infra* note 183), the decision of the Supreme Court has not been properly implemented and the KRS continues to appoint judges who will toe the party line.

[148] Press Release, European Network of Councils of the Judiciary [hereinafter ENCJ], ENCJ Suspends Polish National Judicial Council – KRS (Sept. 17, 2018), https://www.encj.eu/node/495; Press Release, ENCJ, ENCJ Executive Board Proposes to Expel KRS (May 27, 2020), https://www.encj.eu/node/556.

[149] *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* (2017/0360R(NLE)), ¶ ¶ 66, 68 (Sept 17, 2020), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0225_EN.html.

[150] SADURSKI, *supra* note 109, at 106.

[151] *Id.* at 111.

amended to lower the standards so that not only judges, but also prosecutors, would be eligible.[152]

The law on the Supreme Court also created two new chambers within the Court. The first was the Disciplinary Chamber whose members would hear what would become a large increase in disciplinary actions brought against judges, many of whom either criticized the government's judicial "reforms" or attempted to enforce Union law in Poland. The second was the Extraordinary Chamber that would handle election challenges and have the power to reopen cases under a new "extraordinary complaint" procedure through which any final judgment going back into the 1990s (with a few exceptions, like divorce cases) could be redecided by new judges. The judges of the two new chambers would be paid 40% more than their other colleagues on the Supreme Court and all of the judges in these new chambers would be appointed by the new KRS.[153] Along with these reforms, the President of the Republic was given the power to name the President of the Supreme Court.

Even though the Commission had not yet received a judgment from the Court of Justice in the first infringement, the Commission opened a second infringement in July 2018. Duplicating its argument from the first infringement that the removal of judges due to a newly changed judicial retirement age violated the principle of judicial independence, this second infringement case was referred to the Court of Justice in September 2018.[154] This time, however, the Commission wisely also filed for interim measures at the time it filed the case. Interim measures were granted by the Court of Justice on a preliminary basis on October 19 (which was the same day that 27 new Supreme Court judges were formally appointed by the Justice Minister to replace the 27 judges forced into retirement so the interim measures happened just in the nick of time).[155] The order was finalized by the Court (Grand Chamber) in December 2018.[156] The interim measures order required Poland to freeze in place the situation of the judges as of April 2018 when the law took effect. Because many of the prematurely retired judges of the Supreme Court had refused to leave the bench in acts of civil disobedience even as they were being replaced and considered by the government as officially retired, there was still time to save them because they had not yet been successfully expelled from the Court.[157]

The Court of Justice decided the second infringement case in June 2019, only eight months after the case was filed but fully five months before it decided the first infringement case.[158] The Court may have decided the second infringement first

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[152] *Id.*

[153] *Id.* at 113.

[154] For the timeline, *see* European Comm'n Press Release STATEMENT/19/3376, European Comm'n Statement on the Judgment of the European Court of Justice on Poland's Supreme Court Law (June 24, 2019), https://ec.europa.eu/commission/presscorner/detail/en/statement_19_3376.

[155] Interim Measures Order, *Second Infringement*, EU:C:2018:1021, ¶ 4.

[156] *Id.*

[157] SADURSKI, *supra* note 109, at 107-110.

[158] *Second Infringement*, EU:C:2019:531. One of the reasons why the Polish infringement actions are so confusing is that the Court of Justice did not decide them in the order in which they were filed, so the references within the final judgments of the Court cross-cut the initial filing dates and the order in which the offending laws were enacted. In addition, the first and second infringements raised the same issues about the lowering of the retirement age and the discretionary extension of judges' terms of office because they challenged two different laws in Poland that did the same thing for different courts. As a

because the dispute over the Supreme Court was ongoing and interim measures were in effect while the opportunity to change facts on the ground in the first infringement case was long since gone. Given that both cases involved a lowered retirement age and a discretionary extension of a judge's term beyond that, it should not be surprising that the first infringement case cites the second infringement case and repeats its reasoning both about the irremovability of judges[159] and about the unacceptability of discretionary extensions of judicial terms of office without standards or reasons.[160]

The Commission had argued that the nonconsensual removal of prematurely retired judges combined with the addition of many new judgeships on the Supreme Court "has rendered possible a profound and immediate change in that court's composition, infringing the principle of the irremovability of judges as a guarantee essential to their independence and, therefore, infringing the second subparagraph of Article 19(1) TEU"[161] and the Court agreed that the application of a new retirement age without a transitional period applicable immediately to sitting judges "raise[s] reasonable concerns as regards compliance with the principle of the irremovability of judges."[162] Those concerns were heightened when, as here, the President of the Republic was given the discretion to extend the terms of some judges and not others, which "reinforce[s] the impression that in fact [the law's] aim might be to exclude a pre-determined group of judges of the Sąd Najwyższy (Supreme Court)."[163] As with the first infringement action, the Court of Justice found that the lowered retirement age, immediately applicable to sitting judges, violated the principle of the irremovability of judges and that the discretionary extensions of prematurely retired judges' terms in the absence of either standards or reasons constituted a violation of judicial independence.[164]

Perhaps the primary difference between the two cases is that the second infringement case highlighted the effect that a loss of judicial independence in any Member State would have on the principle of mutual trust among Member States.[165]

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result, the reasoning was largely copy-pasted from the judgment in the second infringement action which was decided first into the first infringement action which was decided second. In short, the timeline of judgments from the Court gives a very different impression of the order in which things were happening on the ground. This will be even more spectacularly true when and if the fifth infringement on the Constitutional Tribunal will be referred to the Court of Justice late in 2022 or even in 2023, challenging the appointment to the bench of the judges who were unlawfully pushed onto the Tribunal in 2015 and 2016. The Commission launched the infringement only at the end of 2021. European Comm'n Press Release IP/21/7070, *supra* note 63. Throughout this Article, I will refer to the infringement actions regarding the independence of the judiciary in the order in which the Commission brought them.

[159] Interim Measures Order, *Second Infringement*, EU:C:2018:1021, ¶¶ 25, 98-106.

[160] *Id.* ¶¶ 115-21.

[161] *Id.* ¶ 63.

[162] *Id.* ¶ 78.

[163] *Id.* ¶ 85.

[164] One striking aspect of this case is that the Court refused to accept the Polish government's rationale for enacting the law, strongly implying that the Polish government had lied to the Court. As Pech and Kochenov noted, "by emphasising repeatedly its 'serious doubts; regarding the genuine nature of the ruling coalition's 'reform,' as well as its 'doubts' regarding the 'true aims' of the 'reform' being challenged, the Court could not have made clearer its ire at this deliberate attempt to mislead it." Pech & Kochenov, *supra* note 4, at 73.

[165] *Second Infringement*, EU:C:2019:531, ¶¶ 42-48. The Court may have also leaned on mutual trust here having just decided Minister for Justice and Equality v. L.M., Case C-216/18 PPU, EU:C:2018:586,

Given that the judicial system of the EU "has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU . . . [which] set[s] up a dialogue between . . . the Court of Justice and the courts and tribunals of the Member States,"[166] and given that "Member States are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law, [it] is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields."[167] The Court established that judicial independence was necessary for mutual trust to prevail.

By the time the second infringement case was decided, it had already had an effect in Poland. After the Court's interim measures order, the Supreme Court itself had formally readmitted the prematurely retired judges to the bench.[168] Faced with both a *fait accompli* and this pending infringement action which wasn't going well for Poland (given the interim measures order), the Polish Parliament adopted a law in November 2018 that reversed the premature retirements. The Court of Justice might then have decided not to carry through to the judgment on the grounds that the problem no longer existed -- which was precisely what the Polish government had argued in this case. But the Court of Justice wisely decided the case anyway, perhaps understanding that once the threat of an infringement was dropped, the Polish government could reverse its anticipatory compliance without consequence. By issuing a judgment, the Court turned a potential rollback of anticipatory compliance into a violation of a Court decision, potentially subject to Article 260 TFEU sanctions. One might note that the concessions that the Commission wrested from Poland -- both to put some constraints on the President in discretionarily extending judges' terms and in ensuring that unlawfully removed judges stayed on the bench -- only occurred when the Commission was pressing actual infringements before the ECJ and not when it was issuing "recommendations" under the Rule of Law Framework. This demonstrates that the realistic threat of actual sanctions works better than toothless exhortations.

Just before the Juncker Commission's term ended and while Frans Timmermans was still holding the rule of law portfolio, the Commission launched one more infringement in April 2019, this time challenging the new Disciplinary Chamber of the Supreme Court, which had begun to punish judges "for the content of their judicial decisions […] includ[ing] decisions to refer questions to the Court of Justice."[169] In a sideways reference to the political capture of the KRS, the infringement announcement noted "the new disciplinary regime does not guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court which reviews decisions taken in disciplinary proceedings against judges. This

¶ 35 (a.k.a. "Celmer," named after the highly publicized national proceedings), in which the question of mutual trust in the context of the European Arrest Warrant had been raised.

[166] *Second Infringement*, EU:C:2019:531, ¶ 45.

[167] *Id*. ¶ 48.

[168] Maciej Taborowski & Pawel Marcisz, *The First Judgment of the ECJ Regarding a Breach of the Rule of Law in Poland*, VERFASSUNGSBLOG (May 29, 2019), https://verfassungsblog.de/the-first-judgment-of-the-ecj-regarding-a-breach-of-the-rule-of-law-in-poland/.

[169] European Comm'n Press Release IP/19/1957, Rule of Law: European Comm'n Launches Infringement Procedure to Protect Judges in Poland from Political Control (Apr. 3, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1957.

Disciplinary Chamber is composed solely of new judges selected by the National Council for the Judiciary [KRS] whose judges-members are now appointed by the Polish parliament (Sejm)."[170] But when the new von der Leyen Commission finally referred the case to the Court of Justice, the Commission inexplicably failed to file immediately for interim measures to halt the ongoing disciplinary actions against sitting judges. So the disciplinary actions continued without challenge while the case was pending.[171] The Commission eventually did seek an interim measures order, granted in April 2020, fully a year after the initial proceedings had been launched.[172] In the end, however, neither the interim measures order nor the eventual judgment in the case itself in July 2021 actually succeeded in getting the Polish government to stop using the Disciplinary Chamber to punish judges.[173]

The Commission had acted more swiftly and decisively to deal with the rule of law crisis in Poland from 2016 through 2019 than at any other point in 12 years that judicial independence has been under direct attack. But even in its heyday of enforcement, Commission nonetheless allowed the Polish government to succeed in capturing the courts because its infringements were not comprehensive or numerous enough. These three infringement actions showed that the Commission had finally become active in using its classic enforcement powers and the Court agreed with Commission in each case. But the first infringement failed to challenge the widespread removal of lower court presidents, so the ability of the Polish government to fire court leadership down through the judicial system and to replace

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[170] *Id.*

[171] In testimony at the ECJ hearing on the matter of the Disciplinary Chamber in September 2020, Sylwia Gregorczyk-Abram and Michał Wawrykiewicz, attorneys representing one of the judges harassed through an endless disciplinary proceeding, explained that, at the time of their testimony, 55 judges had been referred for disciplinary procedures, at least 14 of whom had been charged with a disciplinary offense by enforcing a decision of the ECJ. Another 90 were called before the Disciplinary Chamber in "explanatory proceedings." Additional disciplinary proceedings were instituted against 1,200 judges who had signed a letter to the OSCE challenging the legal status of the Extraordinary Chamber of the Supreme Court. Sylwia Gregorczyk-Abram & Michał Wawrykiewicz, *We, in Poland, are Witnessing a Unique Revolution in Poland Against the Rule of Law*, RULE OF LAW IN POLAND: BLOG (Sept. 22, 2020), https://ruleoflaw.pl/we-in-poland-are-witnessing-a-unique-revolution-in-poland-against-the-rule-of-law/.

[172] Interim Measures Order, Comm'n v. Poland, Case C-791/19 R, EU:C:2020:277 [hereinafter Interim Measures Order, *Third Infringement*]. For an analysis of the Interim Measures decision, *see* Laurent Pech, *Protecting Polish Judges from Poland's Disciplinary "Star Chamber": Comm'n v. Poland (Interim Proceedings)*, 58 COMMON MRKT. L. REV. 137 (2021). But even when the interim measures order issued, the Disciplinary Chamber and the Polish government refused to recognize it. Disciplinary procedures against judges continued, then, even after the ECJ judgment finding the Disciplinary Chamber to be unlawful. For example, four judges were disciplined in early 2022 after they attended an event where former European Council President and former Polish Prime Minister Donald Tusk spoke. They had previously attended a convention organized by the Committee for the Defense of Democracy. They were then called up on disciplinary complaints before the Disciplinary Chamber, after the Court of Justice had found the continued operation of the Disciplinary Chamber unlawful. *Polish Judges Face Disciplinary Proceedings for Attending Event of Anti-Government NGO*, NOTES FROM POLAND: BLOG (Feb. 21, 2022), https://notesfrompoland.com/2022/02/21/polish-judges-face-disciplinary-proceedings-for-attending-event-of-anti-government-ngo/. Disciplinary proceedings only stopped when Poland agreed to close the Disciplinary Chamber and create a replacement tribunal in order to have its Recovery Plan and associated funding approved by the European Commission. *Poland Closes Judicial Disciplinary Chamber at Heart of Dispute with EU*, NOTES FROM POLAND: BLOG (July 15, 2022), https://notesfrompoland.com/2022/07/15/poland-closes-judicial-disciplinary-chamber-at-heart-of-dispute-with-eu/.

[173] Comm'n v. Poland, Case C-791/19 R, EU:C:2021:596 [hereinafter *Third Infringement*].

independent judges with judges of their own choosing was allowed to proceed unchallenged. The first infringement was only brought after all the prematurely retired judges were already removed from office, limiting what the Commission could demand as compliance once the Court issued its judgment. Even after it won, the Commission took no additional steps to enforce this judgment.[174] The second infringement was brought while there was still time to preserve the original composition and terms of office of sitting Supreme Court judges and the immediate filing for interim measures stopped the destruction of the Supreme Court in part, but the second infringement ignored the fact that all of the new appointments to the Supreme Court – including the appointments to the new seats created by the expansion of the Court -- were made by a politically captured KRS, a body that surely failed to offer "sufficient guarantees of independence in relation to the legislature and the executive,"[175] as the Court would later say in the *A.K.* case which directly challenged the independence of the KRS through a preliminary reference. The third infringement primarily challenged the Disciplinary Chamber of the Court but the new Commission waited months after the case was filed with the Court of Justice to seek interim measures, so the cases against hundreds of judges in Poland were allowed to proceed unchecked and a number of judges were suspended or removed from the bench during that time. The new Commission has not insisted after it won its case that Poland comply with the Court of Justice decision by restoring the suspended and fired judges to their previous positions.[176] But even during those three active years when the Commission was most active as Frans Timmermans held the rule of law portfolio, however, the Commission never acted to preserve the independence of the Constitutional Tribunal as it was being captured[177] nor did it directly challenge the political composition of the KRS which was the original sin in the later destruction of the ordinary judiciary.[178]

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[174] For example, the Commission might have insisted that those prematurely retired judges whose terms were extended not be allowed to decide new cases involving EU law, given that their reappointments were politically tainted.

[175] *A.K.*, EU:C:2019:982, ¶ 140.

[176] Rather, the reverse is true. As one of the "milestones" agreed to by Poland and the Commission as part of Poland's Recovery Plan under the new Recovery and Resilience Facility, it is enough for the Polish government to create a new procedure to assess whether these unlawfully disciplined judges should be returned to the bench. A group of four associations representing European judges, including some of the affected judges from Poland, have since sued the Council to block its approval of the Commission's recommendations. Lili Bayer, *European Judges Sue Council over Polish Recovery Plan*, POLITICO.EU, Aug. 28, 2022, https://www.politico.eu/article/european-judges-sue-council-over-polish-recovery-plan/ [hereinafter Bayer, *European Judges Sue*].

[177] The Commission finally initiated an infringement proceeding pertaining to the independence of the Constitutional Tribunal in December 2021. But the Commission didn't do so until the Constitutional Tribunal had issued several rulings finding that the Polish Constitution prohibited the Polish government from honoring both Treaty provisions and decisions of the Court of Justice. European Comm'n Press Release IP/21/7070, *supra* note 63.

[178] The issue of the independence of the KRS was raised through a preliminary reference request and not by the Commission through infringement proceedings. The Court in the *A.K.* case, decided in November 2019, noted that the opinion of the KRS was decisive in the appointment of judges (¶ 137) and, therefore, that the independence of the KRS was indeed relevant to the question of whether its appointments would raise doubts about the independence of the courts to which its appointments were made (¶ 139). In this regard, the Court argued, the fact that the prior KRS was dissolved before the end of the lawful terms of its members and that the new KRS comprised 23 out of its 25 members elected by political authorities were relevant to that determination (¶ 142). The referring court would be justified in

So even when the Commission was most active and brought three infringements in three years, it was all too little, too late. While three infringements might seem like a lot of activity, we should not assess the Commission's actions in terms of the raw number of infringement it brought. Instead, we should assess the Commission's track record in light of the cases that it would have been legally warranted in bringing to preserve the independence of the Polish judiciary . That is where the Commission failed. And of course even when it was as active as it was ever going to get on the rule of law in this first decade of frontal assaults on national courts, the Commission brought not a single infringement action against Hungary for compromising the independence of its judiciary.

The change of guard at the Commission with the European elections of 2019 put an end to the short era of relatively aggressive Commission enforcement of the principle of the rule of law in Poland. Perhaps the new Commission learned a lesson from the political fate of Frans Timmermans. While Timmermans had been seriously considered as a potential Commission president, vetoes from Hungary and Poland blocked his election.[179] As one commentator noted at the time, "[Timmermans'] failure [to become Commission president] will certainly be seen as a victory for the argument that maintaining 'unity' in the union is the top political priority, ahead of treaty compliance on budgets or the rule of law."[180] Instead, a much less determined team – with Ursula von der Leyen as Commission president and the rule of law portfolio split between Vice President Vera Jourová and Commissioner Didier Reynders – came into office and de-prioritized the rule of law.

The third infringement already started by the outgoing Commission in April 2019 did move forward under the new Commission which, in the absence of a satisfactory response from Poland, referred the case to the Court of Justice in October 2019, requesting an expedited procedure. But while the Commission tried to speed up the process, the Court turned them down, given that "the sensitive and complex nature of those questions, which […] arise in the context of wide-ranging reforms in the field of justice in Poland, did not lend itself easily to the application of the expedited procedure."[181] The Court nonetheless agreed to grant the case priority treatment.[182] But the Commission failed to immediately ask for interim measures, as the previous Commission had done when a situation was deteriorating before its eyes and irreparable damage would be done between the filing of a case and the eventual

considering "the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary […] in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive" (¶ 144). *A.K.*, EU:C:2019:982, ¶¶ 137, 139, 142, 144. To this date, this understanding of the critical importance of the independence of judicial appointing bodies has not been interpreted by the Commission as invitation to file an infringement against the composition of the KRS, which continues to operate with the domination of political appointees and is still empowered to determine all of the judicial appointments in Poland.

[179] Dominika Sitnicka, *The Obsession with Timmermans*, RULE OF LAW IN POLAND: BLOG (July 23, 2019), https://ruleoflaw.pl/the-obsession-with-timmermans-anti-polish-a-tremendous-saboteur-the-european-gendarme/.

[180] Patryck Smith, *Poland and Hungary's Issue is with the EU, not Frans Timmermans*, IRISH TIMES, July 4, 2019, https://www.irishtimes.com/news/world/europe/poland-and-hungary-s-issue-is-with-the-eu-not-frans-timmermans-1.3945749.

[181] *Third Infringement*, EU:C:2021:596, ¶ 34.

[182] *Id.* ¶ 35.

judgment.[183] While the Commission dithered, the rule of law situation in Poland got worse as the Disciplinary Chamber continued to pursue judges whose judgments displeased the government.

In the meantime, however, a set of preliminary reference cases challenged the Disciplinary Chamber under an expedited procedure. [184] The cases arose out of the purging of judges under the laws that lowered the judicial retirement age. Judges who had asked to stay on and whose requests were refused by the Minister of Justice (for the lower courts) or the President (for the Supreme Court) had an available appeal of those decisions to none other than the newly constituted Disciplinary Chamber. The preliminary references inquired into the lawfulness of the Disciplinary Chamber, given that all of its members were appointed by the KRS, nearly all of whose members were elected directly by the Polish Parliament. Could the Disciplinary Chamber then be considered a "court or tribunal" as those terms are understood under Union law?

In November 2019, the Court of Justice in *A.K.* explained the features for the referring court to consider in deciding whether the Disciplinary Chamber was in fact an independent and impartial tribunal. These included:

> where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. [185]

As the Court concluded: "It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court)."[186]

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[183] In its defense, the Commission may have interpreted the Court's denial of an expedited procedure and the Court's reference to the "sensitive and complex nature of those questions" as meaning that the Commission was not likely to win on the merits, and therefore that a request for interim measures would have been denied. But in light of the Court's prior jurisprudence on judicial independence, it could be reasonably guessed – and of course the Court's eventual judgment in this case confirmed – that the Disciplinary Chamber would fail the test. Moreover Advocate General Tanchev's opinion had already been issued in *A.K.* in the summer before the Commission referred its Third Infringement to the Court of Justice. AG Tanchev had opined: "There are legitimate reasons to objectively doubt the independence of the Disciplinary Chamber in light of the role of the legislative authorities in electing the 15 judicial members of the NCJ [KRS] and the role of that body in selecting judges." Opinion of Advocate General Tanchev, A.K. v. Krajowa Rada Sądownictwa**,** Joined Cases C-585/18, C-624/18 & C-625/18, EU:C:2019:551, ¶ 137. Surely, the Commission could have leaned on that opinion in asking for interim measures.

[184] *A.K.*, EU:C:2019:982, ¶ 54.

[185] *Id.* at Operative Part.

[186] *Id.*

The Advocate General in this case, AG Tanchev, had concluded during the summer of 2019, before the Commission forwarded the third infringement to the Court of Justice, that the Disciplinary Chamber was not a court or tribunal within the meaning of Union law. [187] The Court itself laid out the criteria that the referring judge was to apply in making that determination while making it clear from its description of the KRS that it surely met those criteria. But given the way that the KRS and Disciplinary Chamber were described by both the Advocate General and the Court, the dubious legality of the KRS was not in doubt. The increased politicization of appointments through the KRS and the terms on which the Disciplinary Chamber was established with *only* judges appointed by the newly politicized KRS clearly made it reasonable for any referring judge to conclude that the Disciplinary Chamber was not a court or tribunal within the meaning of Union law and therefore that its continued operation would be unlawful.

After the ECJ's November 2019 judgment in the *A.K.* case, the Polish Supreme Court (through its not-yet-captured Labour and Social Insurance Chamber) ruled in December 2019 that the KRS "is not as currently constituted, an impartial body independent of the legislature and executive" and that the Disciplinary Chamber "cannot be regarded as a tribunal within the meaning of Article 47 of the Charter of Fundamental Rights . . ."[188] The Disciplinary Chamber judges refused to honor the judgment of the Polish Supreme Court, however, claiming that the "the impartiality and independence of the Disciplinary Chamber had not been called into questions by the judgment in *A. K."* and therefore that the Supreme Court's decision was "devoid of any rational basis."[189]

All this time, the third infringement – covering much the same ground as *A.K.* – was pending at the Court of Justice. Even though it was clear that the preliminary reference decision, promptly enforced by the Polish Supreme Court, had not succeeded in stopping the Disciplinary Chamber from punishing judges, the Commission still did not ask for interim measures. In December 2019, some of us wrote an open letter urging the Commission to urgently request interim measures because "Polish judges [were] being subject[ed] to harassment tactics in the form of multiple arbitrary disciplinary investigations, formal disciplinary proceedings and/or sanctions for applying EU law as interpreted by the ECJ or 'daring' to refer questions for a preliminary ruling to the Court of Justice."[190] The Commission finally filed for interim measures in January 2020.[191] The Court granted interim measures in April 2020,[192] issuing its final judgment in July 2021.[193]

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[187] Op. of Advoc. Gen., *A.K.*, EU:C:2019:551, ¶ 137.

[188] Interim Measures Order, *Third Infringement,* EU:C:2020:277, ¶¶ 19-20.

[189] *Id.* ¶ 24.

[190] Laurent Pech et al., *Open Letter to the President of the European Comm'n Regarding Poland's Disciplinary Regime for Judges and the Urgent Need for Interim Measures in Comm'n. v Poland* (C-791/19), VERFASSUNGSBLOG (Dec. 11, 2019), https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission/.

[191] *Third Infringement*, EU:C:2021:596, ¶ 36.

[192] Interim Measures Order, *Third Infringement,* EU:C:2020:277. In this application for interim measures, the Commission was supported by Belgium, Denmark, the Netherlands, Finland and Sweden.

[193] *Third Infringement*, EU:C:2021:596.

Because the Court had already telegraphed its reasoning on the Disciplinary Chamber in the *A.K.* case, its decision was not a surprise. But the Court's reasoning in the Polish cases was further bolstered by its April 2021 judgment in the *Repubblika* case which had established the principle of non-regression.[194] The non-regression principle means that a "Member State cannot […] amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law."[195] Considering the establishment of a new Disciplinary Chamber in Poland, the Court of Justice noted in the third infringement that "the mere prospect, for judges of the Sąd Najwyższy (Supreme Court) and of the ordinary courts, of running the risk of disciplinary proceedings which could lead to the bringing of proceedings before a body whose independence is not guaranteed is likely to affect their own independence,"[196] especially when "the creation of that chamber, by the new Law on the Supreme Court, took place in the wider context of major reforms concerning the organisation of the judiciary in Poland."[197] Those reforms included the creation of the KRS, "body whose independence from the political authorities is questionable."[198] As a result:

> it must be held that, taken together, the particular context and objective circumstances in which the Disciplinary Chamber was created, the characteristics of that chamber, and the way in which its members were appointed are such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular the direct or indirect influence of the Polish legislature and executive, and its neutrality with respect to the interests before it and, thus, are likely to lead to that body's not being seen to be independent or impartial, which is likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals. Such a development constitutes a reduction in the protection of the value of the rule of law for the purposes of the case-law of the Court . . .[199]

Finding that the structure, composition and many operating rules of the Disciplinary Chamber violated Article 19(1) TEU, the Court of Justice was no doubt influenced by the fact that judges were being hauled before the Disciplinary Chamber precisely because they either brought preliminary references to the ECJ or were attempting to enforce ECJ judgments.[200] In fact, the ECJ had already ruled in March 2020, in one of the preliminary reference cases growing out of a threatened disciplinary procedure against a judge who referred a question about his own independence to the Court of Justice, that such disciplinary actions "cannot […] be

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[194] *Repubblika v Il-Prim Ministru*, Case C-896/19, EU:C:2021:311, ¶¶ 63-65.
[195] *Third Infringement*, EU:C:2021:596, ¶ 51.
[196] *Id.* ¶ 82.
[197] *Id.* ¶ 88.
[198] *Id.* ¶ 110.
[199] *Id.* ¶ 112.
[200] *Id.* ¶¶ 117-18, 138, 154, 222-35.

permitted."[201] Given the flurry of preliminary reference cases that the Court had already decided in *A.K.* (laying out the standards for determining the independence of the Disciplinary Chamber), *Miasto Łowicz* (establishing in dicta the impermissibility of disciplinary retaliation against judges for filing preliminary references) and *Repubblika* (establishing that a Member State could not reform its institutions to provide *fewer* rule of law guarantees than when it entered the EU), the decision in the third infringement case fit those various puzzle pieces together to reach its judgment. While it's true some of the preliminary references relevant to this judgment were launched even before the Disciplinary Chamber was fully constituted and therefore it is not surprising that they were decided first, the Court of Justice may have deliberately delayed the decision in the third infringement, refusing an expedited procedure, to give itself time to create this jurisprudential infrastructure before deciding the case. The platform of an infringement action allowed the Court to definitively determine (as opposed to giving the national referring judges the tools to determine) that the Disciplinary Chamber as currently constituted was unlawful.

That said, after the *A.K.* case was decided by the ECJ, the Polish government doubled down in defense of the Disciplinary Chamber even while the third infringement was pending at the ECJ. In December 2019, after the Polish Supreme Court attempted to enforce the *A.K.* judgment by ruling that the Disciplinary Chamber was unlawfully constituted, the Polish Parliament passed a law that came to be known as the "Muzzle Law."[202] The law got its name because it:

> bars judges from ensuring observance of the right to a fair trial and from guaranteeing rights deriving from the EU Treaties, including effective judicial protection. The law also prevents judges from controlling the validity of judicial appointments and from criticizing authorities, at the risk of being sent for disciplinary action to the very chamber of the Supreme Court which has *already* been found to constitute an unlawful body by the Supreme Court itself following a ruling from the European Court of Justice.[203]

In the Muzzle Law, judges could be punished for making decisions in violation of Polish Law, which by now included decisions that followed Union law.

Instead of charging ahead with the same disciplinary procedures that had already gotten the Disciplinary Chamber into trouble, the Muzzle Law changed the role of the Disciplinary Chamber and added in a new role played by the

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[201] Miasto Łowicz & Prokurator Generalny, Joined Cases C-558/18 & C-563/18, EU:C:2020:234, ¶ 58. Because the underlying legal issue before the judge referring the case did not directly invoke EU law, the Court held that the questions sent by the referring judge were inadmissible. But in dicta, the Court made it abundantly clear that threats to punish judges for referring questions to the ECJ were unlawful.

[202] 2019. Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw [Law Amending the Law Relating to the Organisation of the Ordinary Courts, the Law on the Supreme Court and Certain Other Laws] (Pol.) [hereinafter Muzzle Law].

[203] Laurent Pech et al., *Open Letter to the President of the European Comm'n regarding Poland's 'Muzzle Law,'* VERFASSUNGSBLOG (Mar. 9, 2020), https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission-regarding-polands-muzzle-law/.

Extraordinary Chamber of the Supreme Court. [204] The Extraordinary Chamber was the second of the newly created Supreme Court chambers whose judges were also appointed exclusively by the new packed KRS. All questions about whether judges' decisions violated Polish law by, among other things, following Union law were to be sent to the Extraordinary Chamber for a determination of that legality question before the Disciplinary Chamber would be asked by the government to lift the judicial immunity of the offending judges and suspend them so that (fake) criminal charges could be brought against them.[205]

The Muzzle Law entered into force on February 14, 2020 but the Commission did not send a letter of formal notice initiating an infringement action challenging this law until two months later.[206] The Commission then engaged in a fruitless dialogue with the government of Poland hoping to persuade it to back down. As a result, the Commission waited a full year before referring the case to the Court of Justice, asking for interim measures only at the end of March 2021.[207]

In the meantime, a Karlsruhe District Court decided to refuse extradition of a Polish suspect under a European Arrest Warrant because, in the German court's view, the Muzzle Law created unbearable pressures on Polish judges so that they could not be assumed to be independent.[208] Other national judges, especially those from the Netherlands, began expressing doubts about the independence of the Polish judiciary once judges could be – and were already being – disciplined for enforcing Union law.[209] Back in Poland, fully 40 cases against judges had been opened on the basis of the Muzzle Law; 20 of them had already been examined by the Extraordinary Chamber and the number of new cases was speeding up.[210]

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[204] *Muzzle Law*, art. 26(2)-(4).

[205] For an explanation of the confusing Muzzle Law and the effect of the Court of Justice's interim measures order, *see* Laurent Pech, *Protecting Polish Judges from Political Control: A Brief Analysis of the ECJ's Infringement Ruling in Case C-791/19 (Disciplinary Regime for Judges) and Order in Case C-204/21 R (Muzzle Law)*, VERFASSUNGSBLOG (July 20, 2021), https://verfassungsblog.de/protecting-polish-judges-from-political-control/.

[206] European Comm'n Press Release IP/20/772, Rule of Law: European Comm'n Launches Infringement Procedure to Safeguard the Independence of Judges in Poland (Apr. 29, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772 .

[207] European Comm'n Press Release IP/21/1524, Rule of Law: European Comm'n Refers Poland to the European Court of Justice to Protect Independence of Polish Judges and Asks for Interim Measures (Mar. 31, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524.

[208] The judgment was unpublished. For a summary, *see* Maximilian Steinbeis, *So This is What the European Way of Life Looks Like, Huh?*, VERFASSUNGSBLOG (Mar. 6, 2020), https://verfassungsblog.de/so-this-is-what-the-european-way-of-life-looks-like-huh/.

[209] John Morijn, *Discussing Imploding Polish Judicial Independence, European Arrest Warrants and Fair Trial in Luxembourg: Silver Linings to a Grim Day*?, RULE OF LAW IN POLAND: BLOG (Oct. 13, 2020), https://ruleoflaw.pl/cjeu-eaw-poland/.

[210] Order of the Vice-President of the Court, Comm'n. v. Poland, Case C-204/21 R, EU:C:2021:593, ¶ 119 [hereinafter First Order of the Vice President, *Fourth Infringement*]. The proceedings in Case C-204/21 will be hereinafter referred to as the Fourth Infringement because the core Commission complaint challenged the new law and therefore opened a new line of enforcement. But here, too, the proceedings are confusing. Because, in the view of the Commission, the Muzzle Law added to the violations it alleged in the Third Infringement proceeding by providing new grounds for disciplinary actions against judges, the Commission's request for interim measures in the Fourth Infringement case overlapped the interim measures sought at the same time under the Third Infringement (which had not yet resulted in a judgment), since the Third Infringement also sought to enjoin further disciplinary proceedings by the Disciplinary Chamber. Interim measures in the Third Infringement were granted in April 2020. Interim

Against this background, the Court granted the interim measures sought in the Fourth Infringement, noting that the mere fact that judges *could* be prosecuted under this law on the basis of a determination by "a body whose independence might not be guaranteed" could harm the independence of the entire judiciary while the case was pending.[211] The Court explained:

> [T]he mere existence of national provisions which would enable the disciplinary regime to be used as a system of political control of the content of judicial decisions is such as to give rise to doubts in the minds of individuals and the other Member States as to the independence of the national courts, which might well cause serious and irreparable damage.[212]

Alarmed, the Court not only ordered interim measures but also suspended operation of all of the provisions of the Muzzle Law that the Commission had sought to challenge.[213]

Back in Poland, the (packed) Polish Constitutional Tribunal reacted to these interim measures by ruling two weeks later on July 27, 2021 that Article 4(3) TEU combined with Article 279 TFEU was incompatible with the Polish Constitution, and that therefore the interim measures awarded by the ECJ were *ultra vires.*[214] Armed with this decision, the Polish government returned to the ECJ in August to demand that the interim measures be cancelled. But the Court, deciding in October 2021, refused to budge.[215]

The demand from the Polish government that interim measures be cancelled crossed paths in time with a new application for interim measures filed by the Commission in September 2021. Pointing to the fact that Poland had not complied

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Measures Order, *Third Infringement*, EU:C:2020:277. The Order granting interim measures in the Fourth Infringement, enjoining all of the challenged provisions of the Muzzle Law, issued in July 2021. First Order of the Vice President, *Fourth Infringement*, EU:C:2021:593, ¶ 121. It detailed a lengthy correspondence between the Commission and Poland from the time that the *A.K.* judgment issued in November 2019 and the Polish Supreme Court applied that judgment in December 2019 through to the retaliation by the government against the Supreme Court by pushing through the Muzzle Law in February 2020. In addition, the detailed correspondence covers the various stages of the Fourth Infringement as it was launched and proceeded through the various stages on the way to an ECJ referral. *Id.* ¶¶ 26-37. The Commission was clearly active during this period, but spent many months in fruitless correspondence when it might have moved more quickly to ask for interim measures in the Third Infringement case to back up the Polish courts that were trying to enforce Union law as explicated in the *A.K.* judgment. As it was, the gap between the start of retaliatory measures in Poland against the Supreme Court's decision domesticating the reasoning of the *A.K.* case and the Commission's request for interim measure to prevent the judges from being punished for enforcing Union law lasted fully one year and four months, with judges being hauled up before the Disciplinary Chamber that entire time. While the Commission was not, strictly speaking, doing nothing, it was engaged in a fruitless correspondence as the number of disciplinary proceedings was rising sharply. It could have tried to stop those disciplinary procedures by speeding up the Third Infringement and seeking interim measures as soon as it referred the case to the Court. As it was, the interim measures ordered to stop the disciplinary procedures against Polish judges issued only in April 2021.

[211] First Order of the Vice President, *Fourth Infringement*, EU:C:2021:593, ¶ 121.

[212] *Id.* ¶ 246.

[213] *Id.* at Operative Part.

[214] Order of the Vice President of the Court, Comm'n v. Poland, Case C-204/21 R-RAP, EU:C:2021:834 [hereinafter Second Order of the Vice President, *Fourth Infringement*].

[215] *Id.*

with the interim measures ordered in July to suspend application of the Muzzle Law and that Poland was asserting that the very interim measures order violated the Polish Constitution, the Commission urged the Court to levy "a daily penalty payment in an amount likely to encourage that Member State to give effect as soon as possible to the interim measures."[216] Responding forcefully to Poland's challenge to the Court's authority, the Vice-President of the Court ordered a €1 million daily penalty payment from the date of this new interim measures order on October 27, 2021 until the government of Poland complied with the first interim order.[217]

As of this writing, however, the Polish government refuses either to comply with the interim measures or to pay the fines.[218] And, as of this writing, neither opinion nor judgment have issued in the Fourth Infringement Case. Poland is refusing to acknowledge either interim measures order – the one that required it to suspend the Muzzle Law and the one that ordered €1 million per day penalty payments. In a burst of creativity, however, the Commission simply announced in June 2022 that it would deduct the past due penalty payments from the funds allocated for Poland under the EU budget.[219]

As the Muzzle Law dispute was escalating, the Commission brought its fifth infringement action against Poland in December 2021 for attacks on judicial independence.[220] This time, reacting to a string of decisions in which the (packed) Constitutional Tribunal found parts of the EU Treaties unconstitutional under Polish law, the Commission finally confronted the fact that the Constitutional Tribunal had been unconstitutionally captured early on in the campaign to subdue the judiciary and so could be counted on to support the government's views whenever it wanted to hide behind a court decision. Following on a decision of the European Court of Human Rights finding that the Polish Constitutional Tribunal was no longer a tribunal established by law when adjudicating in a formation in which even one of the individuals appointed irregularly,[221] the Commission made a parallel argument in Union law. Since filing that action, however, the Commission has slow-walked the case. Even though the Polish government was required to respond to the initial notice in two months and one could reasonably expect that it was not going to

[216] Order of the Vice-President of the Court, Comm'n v. Poland, Case C-204/21 R, EU:C:2021:878 [hereinafter Third Order of the Vice-President, *Fourth Infringement*].

[217] *Id.* ¶ 64.

[218] By mid-April 2022, the Polish government owed €160 million but was still refusing either to comply or to pay the fines. The Comm'n then began deducting some of these payments from the money that was allocated to Poland under the European budget. Aleksandra Krzysztoszek, *Poland Refuses to Pay Comm'n Fines, Total Continues to Rise*, EURACTIV, Apr. 13, 2022, https://www.euractiv.com /section/politics/short_news/poland-refuses-to-pay-commission-fines-total-continues-to-rise/.

[219] Zosia Wanat and Paola Tamma, *Brussels Ups the Ante in Rule-of-Law Dispute With Poland*, POLITICO.EU, Sept. 21, 2021, https://www.politico.eu/article/brussels-eu-increases-pressure-rule-of-law-dispute-poland/. I had urged this possibility on the Commission years ago but it was a controversial idea back then. Kim Lane Scheppele, *Enforcing the Basic Principles of EU Law Through Systemic Infringement Actions*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION 105 (Carlos Closa and Dimitry Kochenov eds., 2016) [hereinafter Scheppele, *Systemic Infringement Actions*].

[220] European Comm'n Press Release IP/21/7070, *supra* note 63.

[221] *Xero Flor*, CE:ECHR:2021:0507JUD000490718.

suddenly fix the problems, the Commission waited seven months before it advanced the case with a reasoned opinion.[222]

In the three years that the von der Leyen Commission has been confronted with rule of law problems, it has advanced one infringement begun by the prior Commission and launched two of its own. In the two cases that it has taken to the Court of Justice so far, it has failed to ask for interim measures in a timely way in the first case and waited a year to refer the case to the Court of Justice with the attendant damage caused by delay in the second case. These delays have allowed the destruction of the Polish judiciary to proceed apace while the Commission has dithered. Now, with the infringement on the Constitutional Tribunal, the Commission also seems to show no sense of urgency as the Constitutional Tribunal continues to issue judgments finding EU law incompatible with the Polish Constitution and therefore *ultra vires* in Poland. Over two Commissions, with the possible exception of the second infringement that in fact did prevent the premature retirement of judges at the Supreme Court, the infringement actions have had little discernible effect on the campaign by the Polish government to bring the courts under political control because they have not sought to challenge facts on the ground quickly enough.

While five infringements in seven years (four lodged so far with the ECJ) may seem like a great deal of activity from the Commission, we have seen how many aspects of the attacks on the Polish judiciary were never addressed by the cases the Commission has chosen to bring. In addition, the cases were often initiated or interim measures sought (if at all) only after the damage had been done in ways that would be hard to fix. Now the Polish government is in open rebellion against the Commission, refusing to pay the penalty payments assessed for its blatant refusal to honor decisions of the Court of Justice while the Commission deducts the penalty payments from Poland's EU funds.

One might think that the Commission would double-down on more infringements, attempt to enforce more of the cases it has won through Article 260 penalty payments or try to mobilize the Council for a new push on Article 7 TEU rather than tolerate open defiance. But the Commission's determination to hold Poland accountable for the enforcement of ECJ decisions has been sporadic at best, and it hasn't held.

By June 2022, after the Russian war on Ukraine brought hundreds of thousands of refugees to Poland and the Commission attempted to mobilize a united Europe against the Russian threat, the Commission decided to greenlight cash to Poland without insisting either that Poland comply with all ECJ decisions or that it catch up by paying its accumulated fines. The Commission agreed to approve Poland's Recovery Plan to start receiving money from the EU's Recovery Fund,[223] money that

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[222] *European Comm'n Continues its Infringement Procedure against Constitutional Tribunal with a Reasoned Opinion*, AGENCE EUROPE, July 15, 2022, https://agenceurope.eu/en/bulletin/article/12994/4.

[223] The "Recovery Plan for Europe" – also known as the NextGenerationEU fund – was constituted as part of the post-Brexit budget of the EU, financed through floating EU debt instruments for the first time and aimed at helping Member States recover from the financial shock of the Covid pandemic. *See Recovery Plan for Europe*, EUROPEAN COMM'N, https://ec.europa.eu/info/strategy/recovery-plan-europe_en. Member States were to submit plans for spending this money, to be approved by the

the Commission had previously withheld on rule of law grounds. In exchange for the money, the Commission required a set of "milestones" be met, which includes disbanding the Disciplinary Chamber of the Supreme Court and reviewing the cases that led to disciplining judges under the old system (without any guarantees that the fired and suspended judges be reinstated as the Court's decisions require).[224] But the Commission did not insist that Poland follow all decisions of the ECJ, nor that it address matters raised in pending infringement procedures, like the independence of the Constitutional Tribunal.[225] This made the Commission's deal with Poland to allegedly achieve rule of law compliance look less like legal enforcement and more like a hostage negotiation in which the Commission had been threatened by Poland.[226]

The Commission's agreement with Poland to exchange some reform for money generated a negative reaction. Fully five of the Commissioners went on the record as opposing the deal.[227] The European Parliament expressed its opposition as well.[228] Four European judges associations filed suit against the Council to block its approval of the Commission's recommendations on the Polish plan.[229]

At first, Poland looked like it might comply with these easy targets to try to keep the agreement on track. It disbanded its much-contested Disciplinary Chamber in June 2022 while setting up a new disciplinary body as it promised the Commission it would do. As soon as the new law passed in May 2022 making clear how this new disciplinary body would be selected, however, Commission President von der Leyen noted that the new law did not comply with the "milestones" that had been agreed.[230] The Polish government then said it would rather give up the Recovery Funds than

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Commission and Council before the money was to be disbursed. From the start, however, Hungary's and Poland's plans were challenged by the Commission given that neither country complied with rule of law targets built into the Regulation establishing the Recovery Fund. Eszter Zalan, *Rule-of-law Issues Still Hold Up Hungary-Poland Recovery Plans*, EUOBSERVER, Sept. 3, 2021, https://euobserver.com/rule-of-law/152803 ; European Parliament and Council Regulation (EU) 2021/241, Establishing the Recovery and Resilience Facility, 2021 O.J. (L 57) 17, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32021R0241.

[224] European Comm'n Press Release IP/22/3375, NextGenerationEU: European Comm'n Endorses Poland's €35.4 Billion Recovery and Resilience Plan (June 1, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3375.

[225] The Commission finally filed an infringement action challenging Poland's political capture of the Constitutional Tribunal in December 2021. European Comm'n Press Release IP/21/7070, *supra* note 63. But this occurred only after the European Court of Human Rights ruled that the Constitutional Tribunal was not a tribunal established by law, given the political influence in its composition. *Xero Flor*, CE:ECHR:2021:0507JUD000490718.

[226] Wojciech Kość, *Poland's Parliament Partially Rolls Back Judicial Changes to get EU Cash*, POLITICO.EU, May 26, 2022, https://www.politico.eu/article/poland-parliament-partially-rolls-back-judicial-changes-rule-of-law-eu-recovery-funds/.

[227] Lili Bayer, *Amid Comm'n Rebellion, von der Leyen Defends Polish Recovery Cash Plan*, POLITICO.EU, June 2, 2022, https://www.politico.eu/article/amid-commission-rebellion-von-der-leyen-defends-polish-recovery-cash-plan/.

[228] *European Parliament Resolution of 9 June 2022 on the Rule of Law and the Potential Approval of the Polish National Recovery Plan (RRF)* (2022/2703(RSP)), 2022 O.J. (C 493) 10 (June 9, 2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0240_EN.html.

[229] Lili Bayer, *European Judges Sue*, *supra* note 176.

[230] *New Polish Judicial Law Does Not Meet All Requirements to Unlock Funds, Says Eu Comm'n Chief*, NOTES FROM POLAND: BLOG (July 4, 2022), https://notesfrompoland.com/2022/07/04/new-polish-judicial-law-does-not-meet-all-requirements-to-unlock-funds-says-eu-commission-chief/.

walk back its judicial "reforms."[231] And then the Commission threatened to block Poland's Cohesion Funds due to Poland's continuing rule of law violations.[232]

Given the track record of the Commission in failing to play hardball on rule of law with rogue Member States, it will be surprising if the Commission refuses to trade superficial compliance for clearing a set of files,[233] something that Hungary is no doubt watching closely.[234] That said, only serious threats from the Commission with something important at stake seem to generate any response at all from rogue countries. The ability to generate change in backsliding Member States by threatening to withhold funds from them seems to be a new power that the Commission is just starting to use and, as of this writing, it is by no means clear that the Commission will have the spine to follow through on the threats that the law now permits it to make.

II. INVENTING NEW TOOLS

As we have seen, the Commission has either not used its power to bring infringement actions at all in the case of Hungarian attacks on judicial independence after 2012 or, when it has used this power in the case of Poland, the infringements have been too little, too late. Even when the Commission wins at the Court of Justice, it has not rigorously enforced the decisions it has gotten to move rogue Member States in the direction of restoring judicial independence. If the Commission has not used infringement actions effectively to address the rule of law crisis as it has evolved in Member States and not been actively enforcing the judgments of the Court of Justice that it has managed to get, what has it been doing? The short answer is: Inventing new tools.

Before the Kelemen and Pavone paper, it was possible to think that the Commission had not been very active in bringing infringements against Hungary and Poland because its interpretation of EU law was too conservative to allow it to spot the EU-law issues in backsliding democracies. But this denies the evidence, presented above, that the Court had already outlined the key elements of its judicial independence jurisprudence before Hungary and Poland started attacking their

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[231] *Poland Warns of Repercussions if Brussels Keeps Blocking Funds*, REUTERS, Aug. 9, 2022, https://www.reuters.com/world/europe/poland-warns-repercussions-if-brussels-keeps-blocking-funds-2022-08-09/.

[232] Sam Fleming et al., *Rule of Law Stand-Off Threatens New EU Funding to Poland*, FIN. TIMES, Oct. 16, 2022, https://www.ft.com/content/e9c718ba-cccd-4b6d-8b22-d3481623a3d1.

[233] My frequent coauthor, Laurent Pech, agrees. Laurent Pech, *Covering Up and Rewarding the Destruction of the Rule of Law One Milestone at a Time*, VERFASSUNGSBLOG (June 21, 2022), https://verfassungsblog.de/covering-up-and-rewarding-the-destruction-of-the-rule-of-law-one-milestone-at-a-time.

[234] The Hungarian case for funding is more complicated because the Commission President's office under SG-RECOVER signs off on the Recovery Plans but the Budget Commissioner, working with DG-BUDGET, runs the process for enforcing the Conditionality Regulation which has been launched against Hungary. As a result, the two processes could in theory result in quite different conditions for distributing EU funds even though the Court of Justice has outlined a common set of standards for protecting judicial independence that should apply to both if the Commission is ensuring the uniform application of Union law.

courts. Still, one might imagine that the Commission wanted to wait for clearer signals.

With the Kelemen and Pavone evidence, however, another explanation for the Commission's timidity in bringing infringement cases to the Court of Justice seems more plausible. The Commission was not just failing to enforce EU law in backsliding democracies; it was failing to enforce EU law across the board. The problem wasn't that Poland and Hungary presented new problems that took a while for the Commission's legal service to get their minds around. The problem was that the Commission had a policy of non-confrontation against Member States in general. Confronting Member States over the organization of their own national institutions would have been a bridge too far.

That said, the Commission couldn't just ignore what was happening first in Hungary and then in Poland because it was too visible and too shocking. So they did what institutions under stress often do. They appear to do something without actually doing anything.[235] *Appearing to be doing something* is a strategy in which institutions under stress announce important values, look busy addressing the violations of those values, and yet in the end do not change anything at all because all that activity produces no result. This sort of behavior often appears when an institution is caught between audiences with conflicting demands. Not actually doing something about the problem pacifies one audience that wants to keep the status quo, while engaging in a lot of busy-work to appear to be doing something pacifies the audience that is demanding action. In the end, one audience gets the appearance of doing something and the other one gets the reality on the ground that nothing was done. Appearing to do something is a way of doing and not doing something at the same time.

Faced with Member States melting down as democracies in plain sight, the Commission could not fail to look like it was still the Guardian of the Treaties so it had to appear to be doing something about it. But faced with its determination not to alienate Member States with aggressive law enforcement, it didn't really want to press the rogue states too hard. So the Commission played for time by inventing new tools and hoping that the problem would disappear on its own.

What does *appearing to be doing something* look like? When the Orbán government began misbehaving, both Commission President José Manuel Barroso and Vice President Viviane Reding made numerous speeches criticizing Hungary. For example, in his State of the Union address in 2013, President Barroso stressed the increasing number of "threats to the legal and democratic fabric in some of our European states"[236] and called for new tools to fill the space between infringement

[235] I have elaborated this approach with regard to the US Supreme Court's decisions in the Guantanamo cases, calling it the "new judicial deference." There, the Court, faced with outrages that it could not ignore, issued judgments with dramatically quotable quotes that made it appear to be dealing with the problem, but in fact those decisions nothing changed on the ground – by design, because they provided no workable remedies for those affected. So the status quo remained. Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. LAW REV. 89 (2012).

[236] José Manuel Barroso, President, European Comm'n, State of the Union Address (Sept. 11, 2013), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_684.

actions and the "nuclear option" of collective sanctions made available by Article 7 TEU.

In fact, President Barroso's pessimism about infringement actions may have been justified by the Commission's early experience with infringements in Hungary. The Commission did bring two infringement actions to the Court of Justice against Hungary for its democratic backsliding just after the new constitution and its associated set of "cardinal" (that is, supermajority) laws came into effect in 2012. One infringement procedure, as we have seen, targeted the reduction of the judicial retirement age that enabled the replacement of many judges in important positions all at once, though the Commission brought the case as an example of age discrimination rather than as an attack on judicial independence.[237] The other targeted the fact that the Hungarian government had fired the data protection ombudsman, whose independence was supposed to be guaranteed under EU law.[238] While the Commission won both cases, nothing changed the facts on the ground since the prematurely retired judges and the fired data protection ombudsman were never reinstated. Instead their government-friendly replacements became entrenched and stood to benefit from the new protections awarded sitting judges and a new data commissioner. The Commission won on the law but it lost on the facts. The Commission may reasonably have thought that infringement actions might not actually fix things – so more tools were needed.

As President Barroso announced in his 2013 State of the Union address, the Commission would therefore create new tools to tackle the problem. By the time the Barroso Commission left office in 2014, the Commission had invented both the Rule of Law Framework and the Justice Scoreboard.

The Rule of Law Framework[239] provided a structure for the Commission's work in preparation for the activation of Article 7 TEU. Article 7 authorizes the Commission to propose to the Council and Parliament that they should either warn a Member State that it was in danger of breaching the values of Article 2 TEU through Article 7(1) TEU or determine that there had been a breach and apply sanctions through Article 7(2) and (3). But how was the Commission to prepare this proposal? The Rule of Law Framework, with its elaborate stages that mirrored the procedure for an infringement action (assessment, recommendation, reasoned opinion) structured the Commission's fact-finding and dialogue with the Member State to determine whether to urge the Council to invoke Article 7. But at the end of the dialogue, all the Commission could do was to recommend to the operative institutions under Article 7 – the Parliament and the Council – that they should act.

The Rule of Law Framework was obviously designed for Hungary since Poland had not yet become a problem at the time it was invented. But to this day, the Rule

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[237] *Comm'n v. Hungary*, EU:C:2012:687.

[238] *Comm'n v. Hungary*, EU:C:2014:237; Kim Lane Scheppele, *Making Infringement Procedures More Effective: A Comment on Comm'n v. Hungary*, VERFASSUNGSBLOG (Apr. 30, 2014), https://verfassungsblog.de/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary/.

[239] *Communication from the Comm'n to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM (2014) 0158 final (Mar. 11, 2014), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52014DC0158.

of Law Framework has never been invoked for Hungary. It was triggered for Poland at the start of 2016, however, and – as explained above – the Commission followed all of the steps over nearly two years, eventually recommending that the Council and Parliament invoke Article 7(1) TEU for Poland when all efforts at dialogue failed. But nothing has happened since in the Article 7 procedure and in the meantime important time was lost as the Polish government's efforts at capturing the judiciary became more multifaceted and entrenched. The fact that the Article 7 TEU procedure is broken because Member States won't discipline each other means that the Commission process leading to an Article 7 recommendation is unlikely to change much.

The Justice Scoreboard proceeded from the (in the end misguided) opinion that attacks on the judiciary could be objectively measured with neutral and quantitative tools.[240] The Scoreboard deploys a series of indicators designed to measure the efficiency, quality and independence of the judiciaries in the Member States, thereby consuming a lot of staff-hours in measurement for much of the year. The indicators do not track very well what we know from other sources about threats to the judiciary. For example, the indicators measure things like whether the national security agencies conduct background checks on judges as a measure of their independence (hint: if there are background checks, the judges are less independent).[241] But why would that be a better measure than whether a judge can be disciplined for her decisions, something that the Scoreboard does not measure and yet is actually being done in the rogue Member States?

Some problems are usefully highlighted with the Justice Scoreboard. For example, the Scoreboard measures the length of proceedings as one indicator of judicial quality.[242] In some Member States, justice comes unbearably slowly, and calling out the problem may well lead to a more well-functioning judiciary. On this measures, however, Croatia and Italy are the worst offenders while Hungary and Poland are very well-functioning. Of course, the shortest trials of all are in kangaroo courts where no evidence need be presented at all so it is always important to look behind the measure at the world it is counting.

Throughout the Justice Scoreboard measures, Poland and Hungary rarely appear as outliers. Yes, Hungary has the most expensive courts and the least legal aid.[243]

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[240] *EU Justice Scoreboard*, EUROPEAN COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en. For an assessment, *see* András Jakab & Lando Kirchmair, *How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way*, 22 GERMAN L. J. 936 (2021), https://www.cambridge.org/core/journals/german-law-journal/article/how-to-develop-the-eu-justice-scoreboard-into-a-rule-of-law-index-using-an-existing-tool-in-the-eu-rule-of-law-crisis-in-a-more-efficient-way/77604F34839CDB9AA8853A3543B19A30.

[241] For the 2022 results, *see Communication from the Comm'n to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: The 2022 EU Justice Scoreboard*, at 44, COM (2022) 234 final (May 19, 2022), https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2022.pdf. Poland has no security service background checks, so all is well! And Hungary has them, but only for judges who handle national security cases, so that sounds sensible. Other countries, like Denmark, are much worse on this measure as all judges are checked.

[242] *Id.* at 11-12.

[243] *Id.* at 23-24.

And while Hungary and Poland both score on the low end of the "perception of judicial independence" measures across the EU, they are not the worst countries on most measures in the EU (an honor taken by Croatia with Slovakia and Bulgaria in hot pursuit).[244] One would never guess from reading through the Justice Scoreboard indicators that Polish and Hungarian courts were in special and imminent danger.

In the end, the Justice Scoreboard has not had much of an impact on the judicial independence debate in the Member States where judicial independence has been under the most serious threat because it simply does not measure the most important things that go wrong when judiciaries are falling victim to political capture. That doesn't mean that the Justice Scoreboard was misguided. The indicators measured by the Scoreboard just don't track the most serious problems on the ground in the present rule of law crisis. But it was another tool invented by the Commission to appear to be doing something and to tie up the bureaucracy in rule of law theater.

As the rule of law crisis worsened despite these new tools, the Commission again complained that it needed still more tools. The outgoing Juncker Commission also proposed two new tools for the toolbox. One was the Rule of Law Mechanism which "provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law. The Rule of Law Report is the foundation of this new process."[245] So now the Commission prepares an annual Rule of Law Report from a wide variety of sources. It does this for every Member State every year as a response to the criticism that only certain rogue states were being singled out for double standards. Of course, in such an exercise, which analyzes exactly the same issues for every Member State, the big problems appear flattened in the formulaic approach that the Commission staff must take to make all of the reports sound standardized. And because the task is so huge, the Commission has had to prioritize certain issues over others so that not all aspects of the rule of law are covered each year.[246] The reports are useful for anyone who wants a narrative account of problems in particular Member States. But they were never attached to an action beyond the report itself. The Commission has strengthened the Rule of Law Reports by adding a recommendations section in 2022.[247] But because all Member States get these recommendations, the playing field of judicial independence looks more level than it is. In addition, the recommendations are rather general and do not take into account the national obstacles that have been erected to their realization. They also do not provide

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[244] *Id.* at 40-42.

[245] *Rule of Law Mechanism*, EUROPEAN COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

[246] For a critique of the first two editions of the annual Rule of Law Reports, *see* PECH & BÁRD, ARTICLE 2 TEU VALUES, *supra* note 14.

[247] European Comm'n Press Release IP/22/4467, Rule of Law Report 2022: Commission Issues Specific Recommendations to Member States (July 13, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4467. For recommendations for 2022, *see Annex to the Communication from the Comm'n to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2022 Rule of Law Report*, COM (2022) 500 final (July 13, 2022), https://ec.europa.eu /info/sites/default/files/4_1_194542_comm_recomm_en.pdf.

suggestions for how to fix the identified problems. Or any consequences for just ignoring them.

For example, the 2022 recommendation to Hungary that it strengthen the National Judicial Council's powers relative to the president of the National Office for the Judiciary is right on target. But it does not take into account that this would now require a constitutional amendment because the relative strengths of the two bodies are set in a prior constitutional amendment that the Commission said nothing about in 2013. Given that the (packed) Hungarian Constitutional Court has reserved for itself the power to enforce the Fundamental Law over and above EU law, particularly with regard to anything about state structure, one can imagine how this will play out in Hungary. The 2022 recommendations to Poland say nothing whatsoever about the Disciplinary Chamber (including in its new and inadequate form),[248] the Muzzle Law or the packed Constitutional Tribunal, which means that they don't even track the infringements that the Commission has brought. Because neither Hungary nor Poland have ever done anything in this whole long rule of law saga without having serious sanctions in the balance, recommendations will not achieve anything by themselves unless they are attached to some sanctioning mechanism like conditioning the distribution of EU funds on compliance.

The annual Rule of Law Reports thus "appear to be doing something" but they lead to no required action of any kind. Here, too, they tie up immense amounts of staff time; they give NGOs who are screaming that the Commission should do something about the rule of law a place to go to complain; and they produce a rack of reports that can be endlessly quoted but that cannot compel change.[249]

The other new tool in the toolbox, proposed by the Juncker Commission, is the new Rule of Law Conditionality Regulation,[250] which gives the Commission the power to find that a Member State's rule of law problems so seriously affect the integrity of the institutions that allocate, spend and account for EU funds in that Member State that those funds would be at risk of being improperly spent if they were given to that Member State. While the Commission has long had a number of other mechanisms for cutting funds to Member States that it could use on its own (for example the Common Provisions Regulation[251] and the Financial Regulation[252]),

[248] The Polish government agreed to disband the original offending Disciplinary Chamber and replace it with a new one. But after examining the new proposal, Commissioner Vera Jourová announced that the change was insufficient to comply with the Commission's demands. Wojciech Kosc, *Poland's Tweaks to Judiciary Reforms Do Not Yet Meet EU Criteria, Says Jourova*, BNE INTELLINEWS , July 1, 2022, https://intellinews.com/poland-s-tweaks-to-judiciary-reforms-do-not-yet-meet-eu-criteria-says-jourova-249258/.

[249] For a thoughtful assessment of the first two years of Rule of Law Reports, *see* PECH & BÁRD, ARTICLE 2 TEU VALUES, *supra* note 14.

[250] European Parliament and Council Regulation 2020/2092/EU, On a General Regime of Conditionality for the Protection of the Union Budget, 2020 O.J. (L 433I) 1.

[251] European Parliament and Council Regulation 2021/1060/EU, Laying Down Common Provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and Financial Rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, 2021 O.J. (L 231) 159 [hereinafter CPR]. This CPR replaced a prior CPR that had applied to the 2014-2020 Multi-Annual Financial Framework funds.

the Commission apparently wanted political cover before it cut funds in advance and on a grander scale so the new Conditionality Regulation doesn't allow the Commission to do anything on its own without getting a qualified-majority-vote decision of the Council first. In its defense, the Commission might well have thought that the preexisting legal framework only allowed it to withhold funds and sanction financial misbehavior one project at a time. The Conditionality Regulation therefore makes clear that all funds could be cut if need be.[253]

But will the Conditionality Regulation actually be carried out? Recall that the Council is the body that has so far failed to act on the Article 7(1) recommendation of the Commission with regard to either Poland or Hungary so it may be hard to convince the Council to follow through on Commission recommendations, assuming that the Commission won't cave in and approve partial or purely cosmetic compliance by rogue Member States so that no recommendation actually goes to the Council. Rule of law advocates have also worried that, as with the Rule of Law Framework, the Commission may finally act only to have its recommendations modified or rejected at the Council.

The Conditionality Regulation was first proposed in 2018 but it was not enacted until December 2020, and only then with a cliffhanger ending in which Hungary and Poland threatened to hold the whole EU budget hostage until the other Member States dropped the Conditionality Regulation.[254] The European Council under Germany's leadership hammered out a compromise that included, among other things, an agreement with the Commission that the Regulation was not to be enforced until Hungary and Poland – which had both objected strenuously to the Regulation – have an opportunity to challenge it before the Court of Justice. This delayed by another year the effective enforcement of the Regulation, conveniently putting its earliest enforcement after the Hungarian parliamentary election in April 2022 so that the Prime Minister of Hungary did not have to face his voters with European sanctions on his shoulders. The Regulation came into effect on January 1, 2021 and the Court of Justice reached its decision that the Regulation was consistent with the Treaties on February 16, 2022.[255] Finally in April 2022, days after Viktor Orbán won reelection for a fourth consecutive term, the European Commission notified Hungary that it was invoking the Conditionality Regulation against it.[256]

As I write, the process is ongoing. The Commission has proposed to withhold funds from Hungary, funds that would be unfrozen if Hungary carries out a set promised reforms. At stake were €7.5 billion to be withheld from Hungary's

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[252] Parliament and Council Regulation 2018/1046/EU, On the Financial Rules Applicable to the General Budget of the Union, 2018 O.J. (L 193) 1.

[253] For a detailed argument to this effect, *see* KIM LANE SCHEPPELE ET AL., FREEZING ALL EU FUNDS, *supra* note 24.

[254] Kim Lane Scheppele et al., *Compromising the Rule of Law while Compromising ON the Rule of Law*, VERFASSUNGSBLOG (Dec. 13, 2020), https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/.

[255] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 361; Republic of Poland v. Parliament and Council, Case C-157/21, EU:C:2022:98, ¶ 363.

[256] Vlad Makszimov, *Comm'n to Trigger Mechanism that Could See Hungary Lose EU Funds*, EURACTIV, Apr. 5, 2022, https://www.euractiv.com/section/politics/news/commission-to-trigger-mechanism-that-could-see-hungary-lose-eu-funds/.

cohesion funds if Hungary failed to meet the conditionalities.[257] While the deal covers a variety of anti-corruption initiatives, it requires that nothing be done with regard to judicial independence.

Of course, the Conditionality Regulation is not an infringement procedure, which the Commission could have brought at any time in the preceding decade, given that the Commission is now alleging that problems with procurement rules and procedures, the public prosecutor's office, and more are interfering with the proper spending of EU funds. Each one of those problems could have grounded an infringement action if the underlying action resulted in misspending EU funds; the set together could have been raised as a systemic infringement action.[258] Had the Commission acted earlier as each of these institutions was captured over the last 12 years, it might have been easier to roll back the changes before they became entrenched. But the Commission continues to be completely averse to bringing infringements against Hungary for its serial violations of EU law in the areas that affect its domestic governance. Even now, observers are concerned that we will see for Hungary what we have already seen with regard to Poland – which is that the Commission approves a plan to award the funds on the basis of a manifestly inadequate plan for compliance with the rule of law.

Throughout the decade of the 2010s, then, the Commission underutilized infringement actions and instead set about inventing a wide array of other "tools" for dealing with the rule of law problem, with most of those tools leading to reports, recommendations and no particular action. The Conditionality Regulation may be different because it is a procedure with real consequences at the end, but the proof will be in the pudding. Will the Commission and the Council actually cut funds to a Member State that no democracy-rating agency classifies as a democracy anymore? And will they cut *all* of the funds, as the Regulation logically requires if those funds are likely to be misspent? Will they insist that autocracy be rolled back and the rule of law restored in the rogue Member States under penalty of loss of EU funds? Until there are some serious consequences for undermining the rule of law, rogue governments will continue to find that autocracy has its payoffs.

III. WHAT IF THE GUARDIAN OF THE TREATIES IS MISSING IN ACTION? THE COURT AS SUPPLEMENTAL GUARDIAN

If the Commission is only sometimes enforcing EU law with infringement actions – and even then, too little, too late – and if the Commission is only appearing to be doing something by inventing new tools that have so far yielded few tangible results – then then who is acting as the Guardian of the Treaties? Of course it is an unprovable counterfactual to argue that aggressive enforcement of EU law by the Commission might have prevented the backsliding. But at least the basic principles of Article 2 TEU would have had a visible defender. Active and timely enforcement by the Commission might have deterred other states from going down the same road.

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[257] *Comm'n Proposal for a Council Implementing Decision on Measures for the Protection of the Union Budget against Breaches of the Principles of the Rule of Law in Hungary*, COM (2022) 485 final (Sept. 18, 2022), https://eur-lex.europa.eu/resource.html?uri=cellar:9473778e-372b-11ed-9c68-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[258] Kim Lane Scheppele, *Systemic Infringement Actions*, *supra* note 219, at 107.

Watching EU Member States descend from democracy into autocracy with largely ineffective pushback over the last decade has raised serious questions about the future of EU values and the ability of EU institutions to require that Member States honor the founding principles of the Union. The Commission is tasked with ensuring that Union law is being applied across the Member States, but it has not fully embraced that role.

Obviously, though it would be very late in the game, the best thing for the rule of law in Europe would be for the Commission to finally rise to the challenge and do its job by bringing more aggressive and more systemic infringements against Member States that no longer honor the rule of law. The Court of Justice has clearly indicated that it believes that the rule of law crisis is existential and it is hard to imagine that the Court of Justice wouldn't welcome more cases in which it has the chance to define fundamental values further and explain how they can be legally enforced.

But switching back to aggressively using infringements again to address serious trouble in the EU would require a major rethink of the Commission's role which, for at least two decades now, has not prioritized the enforcement of EU law. Such a major change in direction doesn't seem to be in the cards, especially under this particular Commission which is not notable for engaging in confrontational politics or for standing strong either against bullies or in defense of values.[259] In fact, the Commission's recent appeasement of Poland by opening the door to the Recovery Fund while not insisting that all rule of law infringements be resolved is just the latest in a decade-long track-record in which the Commission has acted too late and not aggressively enough. The fact that the Commission now seems to be going down the same road with Hungary, agreeing to a package of reforms that are unlikely to do what they promise to avoid reaching the stage of the Conditionality Regulation where funding will actually be cut,[260] shows that the Commission is still willing to substitute appearances for reality. If the Commission (backed by the Council) agrees to greenlight Recovery Funds to Hungary or to Poland or, invoking the Conditionality Regulation, to cut anything less than *all* of the EU funds allocated to Hungary until Hungary actually changes facts on the ground to restore the rule of law, it will have missed its last, best chance to come to grips with the rule of law crisis in the EU.

So who, then, can enforce EU law if the Commission isn't up for the task? In writing the Treaties, the drafters installed a backup plan to Article 258 TFEU in Article 259 TFEU. Under Article 259 TFEU, a Member State can launch an infringement against another Member State, using much the same procedure as Article 258 TFEU outlines for the Commission. The main difference between Article

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[259] Roger Daniel Kelemen, *Appeasement, ad Infinitum*, 29 MAASTRICHT J. EUR. & COMP. L. 177 (2022), https://journals.sagepub.com/doi/pdf/10.1177/1023263X221097648 .

[260] Gabór Mészáros & Kim Lane Scheppele, *How* NOT *to be an Independent Agency: The Hungarian Integrity Authority*, VERFASSUNGSBLOG (Oct. 6, 2022), https://verfassungsblog.de/how-not-to-be-an-independent-agency/; Kim Lane Scheppele & Gábor Mészáros, *Corrupting the Anti-Corruption Program: Hungary's Offering to the EU, Part II*, VERFASSUNGSBLOG (Oct. 12, 2022), https://verfassungsblog.de/corrupting-the-anti-corruption-program/; Kim Lane Scheppele et al., *Useless and Maybe Unconstitutional*, VERFASSUNGSBLOG (Oct. 26, 2022), https://verfassungsblog.de/useless-and-maybe-unconstitutional/.

258 and Article 259 infringement actions is that the Article 259 actions must make a stop at the Commission on the way to the Court of Justice to see if the Commission wants to join and convert the Article 259 action to an Article 258 procedure. While there have not been many Article 259 invocations over the course of Union history, there have been some. But because the meritorious cases have by and large been joined by the Commission and then appear before the Court as Article 258 cases, only the grudge match or somewhat crazy cases have been left to appear publicly as Article 259 cases. As a result, Article 259 cases have gotten a bad rap.[261]

Perhaps because of its dodgy reputation but perhaps also because Member States don't want to start conflicts with each other, [262] Article 259 has not been used to defend the rule of law in the last decade. No Member State – either alone or in concert with others -- has been willing to invoke it to challenge rogue states since the rule of law crisis started even though the Member State that launches an Article 259 infringement does not have to prove that it has been harmed or meet other difficult standing requirements. As we have seen with the Council, which also routinely fails to act in these matters by dropping the few balls that the Commission has pitched to them, Member States just won't defend the rule of law in other states, even if they are willing to uphold the rule of law at home.

The European Parliament has actually been the best of the European political institutions in calling out rule of law problems as they have occurred over the past decade. The Parliament has consistently been on top of developments in Hungary and Poland, having given a comprehensive warning to Hungary in 2013[263] before finally triggering Article 7(1) for Hungary in September 2018,[264] and then following up with a tough assessment in 2022.[265] The Parliament also voted to support the Commission's recommendation on the invocation of Article 7(1) for Poland,[266] and it has also been actively pushing the Commission for years to use the tools it has.[267]

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[261] Dimitry Kochenov, *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool*, 7 HAGUE J. ON THE RULE OF L. 153 (2015); Guillermo Íñiguez, *The Enemy Within? Article 259 TFEU and the EU's Rule of Law Crisis*, 23 GERMAN L. J. 1104 (2022).

[262] Note the similarity between this provision and Article 33 of the European Convention on Human Rights which allows High Contracting Parties to bring other High Contracting Parties to the ECtHR. The power for some states to enforce the law against others has not notably been used much in that venue either. *See generally* Isabella Risini, *The Inter-State Application under the European Convention on Human Rights, in* 125 INTERNATIONAL STUDIES IN HUMAN RIGHTS 28 (2018). Given Russia's recent wars on its neighbors, however, the number of inter-state cases has been increasing and that was even before Russia started the 2022 war in Ukraine. Elif Erken & Claire Loven, *The Recent Rise in ECtHR Inter-State Cases in Perspectiv*e, ECHR BLOG (Jan. 22 2021), https://www.echrblog.com/2021/01/guest-post-recent-rise-in-ecthr-inter.html. That said, these new cases are brought primarily by aggrieved High Contracting Parties against states that have injured them, not High Contracting Parties defending rights in the abstract.

[263] *European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary* (2012/2130(INI)), 2016 O.J. (C 75) 9 (July 3, 2013).

[264] *European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, 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* (2017/2131(INL)), 2019 O.J. (C 433) 66 (Sept. 12, 2018).

[265] *European Parliament Resolution* (2018/0902R(NLE)), *supra* note 40.

[266] *European Parliament Resolution* (2018/2541(RSP)), *supra* note 126.

[267] Just to take a couple of the most recent examples, the Parliament passed a resolution in March 2022 urging the Commission to apply the Conditionality Regulation to both Hungary and Poland, noting

But the Parliament has little formal power under the Treaties to engage in enforcement of EU law. It can cajole, deplore, insist and condemn, but it doesn't have the power to create binding rule of law standards or to ensure their compliance. That's why I have focused in this Article on the institutions that are on the frontlines of enforcement.

Given that the Commission has failed to effectively enforce EU law and the Member States (whether alone or in the Council) have not stepped in to fill the gap, who is left as the Guardian of the Treaties with the power to enforce EU law? In my view, the Court of Justice is the only defender of the values of the European Union that has shown itself to be willing and able to insist that Member States comply with EU law. Since the start of the rule of law crisis, the Court of Justice has been the most reliable enforcement institution, both defending and expanding EU law to reach the behavior of the rogue states. While it hasn't been perfect, the Court of Justice has been in practice the primary Guardian of the Treaties on duty for the last decade.[268]

In those instances where the Commission has (occasionally) brought infringements on the matter of judicial independence, the Court has not only leapt at every opportunity that the Commission has given it but it has also strongly suggested new lines of argument that the Commission might use to bring the Court more cases. For example, when the Commission was foundering in its use of the Rule of Law Framework with Poland, the Court threw the Commission a lifeline in the *Portuguese Judges*[269] case, quite explicitly inviting the infringements that the Commission finally brought. The Court has repeatedly defended an independent judiciary, including granting interim measures whenever asked so that judges were not punished or dismissed while their cases were pending.[270] The Court has strongly objected to the creation of a politicized disciplinary system for judges[271] and it granted interim measures preventing the politically packed Disciplinary Chamber in Poland from continuing to discipline judges in advance of a judgment.[272] The Court has also granted interim measures seeking a halt to the operation of the Polish Muzzle Law[273] and awarded penalty payments when the government refused.[274] One hopes the Court of Justice will also reach the question of the political composition of

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that "it is high time for the Commission to fulfil its duties as the guardian of the Treaties and to instantly react to the ongoing severe violations of the principles of the rule of law in some Member States." *European Parliament Resolution of 10 March 2022 on the Rule of Law and the Consequences of the ECJ Ruling* (2022/2535(RSP)), at Recommendation 2, 2022/2535 (RSP), O.J. (C 347) 168 (Mar. 10, 2022). And the European Parliament passed a resolution in June 2022 seriously questioning the deal that the European Commission made in order to free Recovery Funds to Poland and insisting on the observance of the rule of law conditions before the money is disbursed. *European Parliament Resolution of 9 June 2022 on the Rule of Law and the Potential Approval of the Polish National Recovery Plan (RRF)* (2022/2703(RSP)), at Recommendation 11, 2022 O.J. (C 493) 10 (June 9, 2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0240_EN.html.

[268] *See generally* PECH & KOCHENOV, *Respect for the Rule of Law*, *supra* note 4.

[269] *Portuguese Judges*, EU:C:2018:117, ¶¶ 41-45.

[270] *First Infringement*, EU:C:2019:924, ¶¶ 113-14; *Second Infringement*, EU:C:2019:531, ¶¶ 74-77. Interim measures were granted in Interim Measures Order, *Second Infringement*, EU:C:2018:1021, ¶¶ 117-18.

[271] *Third Infringement*, EU:C:2021:596, ¶ 66.

[272] Interim Measures Order, *Third Infringement*, EU:C:2020:277, ¶ 114.

[273] Second Order of the Vice-President, *Fourth Infringement*, EU:C:2021:834, ¶ 26.

[274] Third Order of the Vice-President, *Fourth Infringement*, EU:C:2021:878.

the Polish Constitutional Tribunal in the fifth Polish infringement procedure even though the Commission is slow-walking the case.[275]

But the Court of Justice can do nothing with infringements that the Commission has not brought. And the Commission has not brought a single judicial independence case for more than a decade in Hungary. In addition, it has missed many crucial issues affecting judicial independence in Poland. Given what the Commission has offered the Court as a platform for action, the Court has done what it can, but it cannot fix the substantial rule of law problems that remain unflagged by the Commission.

Of course, the Court is a reactive institution. It cannot initiate cases, but can only act when cases are brought to it. And herein lies the problem. If the Commission is the primary source of big structural cases for the Court that would allow the Court to examine the systemic problems within a Member State and provide structural remedies to fix the problems, and if the Commission is not acting to defend the rule of law as aggressively as it should, what's the Court to do? The Court now needs to be more creative to fill in where the Commission has left holes in the rule of law.

Fortunately, the Commission is not the only source of cases. National judges are trying to fill the gaps left by the Commission's inaction. Over the last half dozen years or so, we've seen many national judges in rogue states sending references to the Court of Justice identifying different broken pieces of the rule of law puzzle for repair.[276] In some cases, the Court has already used these reference cases to make big structural points that provide a good launching pad for future legal actions that can push states toward compliance with EU values.[277] But in other cases, the Court

[275] European Comm'n Press Release IP/21/7070, *supra* note 63. Of course, the Commission cannot ask for interim measures until it sends the case to the Court of Justice. But the infringement was launched nearly nine months after the Constitutional Tribunal started nullifying decisions of the ECJ by finding the Polish Constitution supreme over the Treaty provisions cited by the Court of Justice. Eight months out from the launching of the infringement, the Commission moved the case to the "reasoned opinion" stage. This is not moving with all deliberate speed. After nearly two years, Commission had not yet gotten to the stage where it *could* ask for interim measures. And then, if the recent track record of the Commission is any guide, it was not clear this Commission would ask for them.

[276] As of June 2022, Polish courts had brought at least 40 preliminary reference cases dealing with judicial independence, of which 16 remained to be answered by the Court. Calculations by Laurent Pech, slides on file with the author. The Hungarian judges have been slower to bring these cases, not least because the *Kúria* has ruled that challenging the basic structure of national courts before the ECJ is unlawful under Hungarian law, a point at issue in the *I.S.*, EU:C:2021:949. While the Court of Justice forcefully addressed this issue, the Hungarian government has since moved to tighten control over the judiciary so that judges might reasonably fear that they can still be disciplined for challenging the judicial "reforms" – if not through formal disciplinary procedures, then at least through being confined to non-controversial cases that would not allow them to raise such questions. *See generally* Scheppele, *Translation*, *supra* note 56.

[277] *See* A.B., Case C-824/18, EU:C:2021:153, ¶¶ 53, 106-07 (in which the Court of Justice decided that, while the case did not meet the criteria for being expedited, the case would be given priority, and then explained that TFEU art. 267 combined with TEU art. 4(3)is violated when national rules are changed to prevent national judges from sending preliminary references to the Court of Justice). *See also A.K.*, EU:C:2019:982. Both cases cast substantial doubt on the legal composition of the KRS under Union law, even though the Commission did not directly challenge the KRS in an infringement.

answers these questions narrowly and misses the chance to think structurally about how to solve rule of law problems when individual judges ask them to do so.[278]

One place where the Court of Justice could do better is in European Arrest Warrant (EAW) cases. In the EAW cases that implicate judicial independence, the executing judge is confronted with the request to send a suspect back to a court that is part of a judicial system under concerted political attack. In the *Celmer* case,[279] for example, an Irish judge asked the Court of Justice about a European Arrest Warrant request from Poland, after the Commission had published its reasoned proposal in December 2017 triggering the Article 7(1) process by arguing that the Polish judiciary was under attack and had already lost much of its independence. Under the *Aranyosi & Calderaru* test that foreshadowed *Celmer* and under pressure from the growing jurisprudence on extradition at the European Court of Human Rights, the Court of Justice had already found that sending a suspect back to a requesting jurisdiction didn't have to be automatic.[280] Instead a judge could inquire into whether *that particular suspect* would be treated in violation of his Charter rights if he were sent to the questionable country. The inquiry was to take place in two steps – first finding that there might be a general threat to the integrity of the judiciary (or prison system if the issue were about detention) and then finding that the applicant's case specifically raised a targeted warning that the *particular applicant* would risk a violation of his rights if returned.

Given the chance to say that some structural deficiencies in the judiciary as a whole might be sufficient to put all extradition requests under a cloud so that the second step would not be necessary because not practicable, the Court stuck by its two-step test. As I said critically at the time:

> But when the *whole judiciary* is the problematic institution, then a case-by-case assessment doesn't work. If the courts are compromised so that one cannot reliably tell which judges are independent and which are operating under political tutelage, then arbitrariness can sneak in anywhere in the system, including at the point at which the judge must reliably promise that a sought person would have his rights respected upon delivery to the compromised state. [281]

If national judges in rogue states must pledge that they are independent when they are not, how can we know that the replies they give are not coerced? And if the receiving judge is independent and honestly says so, how can we know that the court to which the receiving judge's case might be appealed is similarly independent? When the entire judiciary is under political pressure, answers given by individual

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[278] For example, the European Arrest Warrant cases and *I.S.*, EU:C:2021:949. For an analysis of the EAW cases, *see* Thomas Wahl, *CJEU: No Carte Blanche to Refuse EAWs from Poland*, EUCRIM, Apr. 14, 2022, https://eucrim.eu/news/cjeu-no-carte-blanche-to-refuse-eaws-from-poland/. For an analysis of *I.S.*, *see generally* Scheppele, *Translation*, *supra* note 56.

[279] *L.M.*, EU:C:2018:586.

[280] Aranyosi & Calderaru, Joined Cases C-404/15 & C-659-15, EU:C:2016:198.

[281] Kim Lane Scheppele, *Rule of Law Retail and Rule of Law Wholesale: The ECJ's (Alarming) Celmer Decision*, VERFASSUNGSBLOG (July 28, 2018), https://verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/ [hereinafter Scheppele, *Celmer*].

judges to the individualized requests that sending judges are not obligated to ask are not reliable.

Even as the Court of Justice's own jurisprudence bears witness to the compromised state of the Polish judiciary by the way it has ruled in the infringement cases, however, it has not loosened the *Celmer* test for returns to compromised judiciaries. Instead, it has doubled down on the two-step test in ways that fail to recognize how deeply problematic these cases are.[282]

That said, European Arrest Warrant cases do pose some serious issues that would have to be resolved if sending courts generally refused EAW requests from judges in compromised judicial systems. The inability to return defendants or prisoners to the state seeking them might lead to releasing them in another Member State that had no reason to try or detain them. The alleged criminals from rogue states might then be able to act with impunity, which is surely something that the Court of Justice would want to avoid.

Which is the greater evil: Returning defendants to a Member State that will not reliably honor their criminal procedure rights or allowing potentially guilty defendants to go free because the relevant jurisdiction for trying the crime has been compromised by political attacks on its courts? A rights-first framework would probably favor impunity over EU-sanctioned rights violations, implicating the EU because the sending court has contributed to the potential rights violations by underestimating the risks in rogue member states given the myopia of the two-step test. It may be relatively unproblematic to grant impunity in one case but harder hold that position if the number of cases mounts. Generalized impunity risks a different sort of breakdown in the rule of law because criminal law goes unenforced. If a Member State has a compromised judiciary and others will not honor their European Arrest Warrant requests, criminals only have to flee over the border into another Member States to be free from prosecution.

Because EU law rights to be tried by an impartial and independent court are at stake, however, there should be EU law remedies. Mutual trust underpins the European Arrest Warrant system, but if the conditions for mutual trust are lacking, then the EAW's presumptions crumble. This is why the independence of the judiciary is central to the rule of law and why preserving it should have been the EU institutions' priority all along. But if the EU institutions have failed to prevent the collapse of judicial independence in one or more Member States, then what?

A reading of the Framework Decision creating the EAW[283] shows that there may be a space between impunity and violation of the right to an independent and impartial tribunal. Automatic release of a suspect not returned under an EAW is not

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[282] L & P, Joined Cases C-354/20 PPU & C-412/20, EU:C:2020:1033; X & Y v. Openbaar Ministerie, Joined Cases C-562/21 PPU and C-563/21 PPU, EU:C:2022:100. For a critique of the latter judgment, *see* Febe Inghelbrecht, *Avoiding the Elephant in the Room Once Again: CJEU Confirms and Specifies the Application of Restrictive Two-Step Test to European Arrest Warrants from Poland*, VERFASSUNGSBLOG (Feb. 25, 2022), https://verfassungsblog.de/avoiding-the-elephant-in-the-room-once-again/.

[283] European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, art. 2, 2002 O.J. (L 190) 1, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32002F0584 [hereinafter EAW Framework Decision].

required. Some Member States' criminal procedure rules already allow their domestic courts to try cases in which the defendant is apprehended or simply present in the jurisdiction even if the crime were committed in another jurisdiction.[284] For the sorts of serious crimes listed in the European Arrest Warrant Framework Decision that could give rise to an EAW request, there would probably be a close equivalent in the country of apprehension so that the defendant would be eligible for prosecution in the apprehending state on the same charges.[285] Rather than condone impunity, the case could be transferred to the state that apprehended the suspect.

How would this transfer of jurisdiction to the apprehending state be squared with the legal framework for the EAW? Already the Framework Decision permits the executing court to keep the requested person in detention while the case is being considered.[286] The Framework Decision also contains rules for the judge to use in deciding between jurisdictions if multiple jurisdictions have requested the presence of the suspect for trial. Suppose an executing judge were to notify her own government that Union law requires her to not send a suspect back to a rogue Member State and then request that the case be formally transferred to her own apprehending state instead. If her state agrees, then the executing judge can decide between the requesting jurisdiction and her own jurisdiction to determine which should handle the case. Given the situation in the requesting jurisdiction, her own jurisdiction would almost surely be preferred.

In short, impunity is not the only option if executing judges refuse to send defendants back to requesting states that have compromised their courts within the existing framework of the EAW. The Court of Justice could therefore eliminate the two-step test for EAW returns to those Member States in which the judiciary has already been politically compromised without encouraging impunity. Perhaps the Court of Justice could even suggest that the apprehending Member State take jurisdiction once a national judge has made the determination that the person cannot be extradited to a rogue state. But even if assuming jurisdiction for criminal prosecution in these cases cannot be required on the part of an apprehending Member State, the EU might encourage such responsible behavior by making

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[284] For example, the German Criminal Procedure Code establishes that jurisdictional requirements for a criminal proceeding may be established in either the venue where the crime was committed or the venue where the indicted individual habitually resides or the venue in which the indicted person was apprehended. Strafprozeßordnung [StPO] [Code of Criminal Procedure], §§ 7-9, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0032 (Ger.). For an example outside the EAW framework in which Germany tried and convicted a Syrian national for torture of Syrians inside Syria on the basis of the mere presence of the defendant and the witnesses in Germany, *see generally* Deborah Amos, *In a Landmark Case, a German Court Convicts an Ex-Syrian Officer of Torture*, NAT. PUB. RADIO, Jan. 13, 2022, https://www.npr.org/2022/01/13/1072416672/germany-syria-torture-trial-crimes-against-humanity-verdict. Similarly, the Dutch Code of Criminal Procedure also provides for jurisdiction not just where the offense was committed, but also where the suspect lives or where the suspect currently is located. Chapter 2, § 2(1), Sv, https://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf (unofficial translation) (Neth.).

[285] This list of specific crimes to which the Framework Decision would apply was itself no doubt a way to block the objections raised on the basis of double criminality. As a result, the crimes for which EAWs can be sought are most likely to be those that are already subject to criminal sanctions in all of the Member States.

[286] *EAW Framework Decision*, *supra* note 283, at art. 12.

available the resources of Eurojust or Europol to assist with the investigation and prosecution of such crimes to take pressures off already-stretched national systems. It would take some work to create a parallel system of prosecution within the national legal systems of other Member States to handle the cases in which rogue states could not responsibly try suspects, but one can already see the outlines of such a system in existing national and European law.

EAW and transfer cases are not the only ones where the Court of Justice is faced with individual reference cases that require working out how to fix (or to work around) judiciaries whose independence has come under attack. National judges, particularly those in Poland, have been very active in engaging in self-help precisely because the Commission's infringements have not addressed the political pressures that these judges face. Some of the self-help cases have come to the Court of Justice from judges under pressure who ask about their own or their colleagues' compromised situation and seek a Court of Justice opinion as a shield to blunt attacks at home. But here, too, the Court has also not always defended national judges' independence as it might have because the Court has been locked into a rigid jurisprudence about what it is and is not allowed to do in reference cases. Because that lock is of the Court's own making, it could pick that lock for specific cases where judicial independence is at stake.

Reference cases that directly address the independence of the judiciary provide the Court with an opportunity to make up for the lack of cases coming from the Commission. We have already seen some cases in which a national judge has herself been disciplined or subjected to overt pressure and the referring judge (not the one who has been disciplined) asks the Court of Justice about the case before her in which the aggrieved national judge is the affected party. Perhaps the most important of these cases is *A.K.*, discussed above,[287] in which the Court of Justice assessed the role of the Polish judicial council (KRS) in appointing judges to the new Disciplinary Chamber of the Supreme Court. As the Court ruled, the political composition of the KRS could give rise to the appearance or reality of political influence in the process of naming all of the judges to this new chamber, and the Court gave standards to the national judge to determine whether new chamber could be seen as independent given the way it was composed. But it was clear from the judgment and from the application of that judgment by the national judge that the Disciplinary Chamber could not be regarded as independent because the KRS itself had been politically compromised. Though the Court of Justice later confirmed this judgment in the Third Infringement,[288] the groundwork for that judgment was laid in the preliminary reference case.

This was not the only case in which the Court of Justice used a preliminary reference procedure to make a structural argument about the independence of the judiciary. In the *A.B.* case out of Poland,[289] the moving parties in the national court had been denied judgeships in the Polish courts because the politically packed KRS refused to appoint them. While judicial review of the KRS decisions had once existed in Polish law, it been withdrawn in the new legislation. The referring judge

[287] *A.K.*, EU:C:2019:982.
[288] *Third Infringement*, EU:C:2021:596.
[289] *A.B.*, EU:C:2021:153.

then asked the Court of Justice, among other things, whether the influence of the national executive on the political composition of the KRS was consistent with EU law, given that its decisions were not subject to judicial review. The Court of Justice gave the case priority treatment[290] and explained that, because the KRS certification was decisive in the judicial appointment process but there was no meaningful judicial appeal of KRS decisions, the KRS itself must satisfy the standards of independence that are mandated for ordinary courts. These factors led the Court of Justice to conclude that if the referring judge were to find that the law establishing the new KRS failed to provide adequate remedies to applicant judges, then the referring judge should disapply the national provisions in question.

This decision effectively declared the KRS to be an unlawful appointment body for courts unless it remained free of external influence or unless its decisions were open to review by properly constituted independent courts. These are large structural issues reached through the mechanism of a preliminary reference, and they illustrate that the Court of Justice can do big things in what look like small cases. Of course, strictly speaking by the nature of references, the Court of Justice could not itself find the Polish arrangements contrary to Union law but it could give such clear and explicit instructions to the national judge that the national judge would have virtually no choice but to find violations of Union law by national authorities.

The collection of a set of preliminary reference cases joined under the heading of *W.B.*[291] provides another example of how the Court can reach structural issues through preliminary references. Here, the Polish Minister of Justice had seconded a number of judges without standards or reasons so that they now sat on particularly sensitive criminal cases. Expanding the reasoning of the W.Z.[292] case to reach the problem of arbitrary secondment, the Court explained that "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."[293] This ammunition allowed the national judge to order a halt to arbitrary secondment as a general practice.

Unfortunately, the Court of Justice does not always take advantage of preliminary references to make clear statements about what judicial independence requires. For example, the recent *I.S.* case out of Hungary involved a national judge who had gotten into trouble with the Hungarian government for being a member of the National Judicial Council when the NJC had challenged the president of the National Office of the Judiciary and recommended to the Parliament that she be dismissed. The judge was then the subject of retaliatory harassment, so he sent a reference to the Court of Justice asking whether having an irregularly appointed president of the court above him who held disciplinary powers over him interfered with his own independence. In addition, he asked whether judges' low salaries,

[290] *Id.* ¶ 53. Priority treatment is an interesting development in the Court of Justice, used for cases that need to be decided quickly because the situation complained about is deteriorating in real time but where the case in question does not meet the Court's established rules about expedited procedures.

[291] *W.B.*, EU:C:2021:931.

[292] *W.Ż.*, EU:C:2021:798.

[293] *W.B.*, EU:C:2021:931, ¶ 73.

supplemented only by discretionary bonuses awarded by the same irregularly appointed judge, constituted a threat to judicial independence. The prosecutor – a government loyalist – appealed the referring judge's stay of the case pending a decision from Luxembourg by going straight to the *Kúria*, where he questioned the propriety of the referring judge making the reference at all. The *Kúria* found that the referring judge's questions to Luxembourg were irrelevant to the case before him and were also illegal under Hungarian law which states that preliminary references may not call into question the Hungarian constitutional order, including the structure of the judiciary. Having been found to have violated Hungarian law by sending a preliminary reference, the referring judge was then subjected to a disciplinary procedure brought by the irregularly appointed judge above him – the very judge complained against in the initial reference! The Court of Justice found that it was unlawful both for the national supreme court to foreclose references by answering the questions themselves and also for a disciplinary procedure to be initiated against a referring judge for making a reference that – in the view of the national supreme court -- violated EU law. These rulings were brave and clear – and put the Hungarian government on notice that it should not mess with the reference procedure.

But the Court of Justice refused to answer the questions about the irregularly appointed superior as well as about the discretionary salary bonuses as being too far removed from the question before the referring judge in the specific case at hand. According to the Court, answering these questions was not strictly relevant to the case, which narrowly required the judge to assess whether a translation given to a criminal defendant was adequate. As I said in my analysis of this case:

> [C]onsider where the refusal to answer those two questions left the referring judge. What judge would be willing to withstand immense domestic political pressures to rule in a way that the government might disfavor if that decision could be simply overruled by the court above him, headed by an irregular appointee whose political sentiments were on full display in this case? If displeasing the government also causes one's already-low salary to be disqualified from receiving discretionary bonuses, how likely is a judge to keep making fruitless decisions that will be overturned immediately when the government doesn't like them and can punish him financially? In short, if politics infuses the appointment of the referring judge's superiors as well as the discretionary determination of his salary, what judge would still fight to rule as EU law requires against a government that wants a different result? What's the point of being brave for one fleeting moment if nothing you do will stand and you suffer personally besides? [294]

[294] Scheppele, *Translation*, *supra* note 56, at 1123. I might note that the absence of cases about judicial independence in Hungary brought since the *Kúria* made this judgment might be taken as evidence of the chilling effect that the *Kúria* decision generated even though the ECJ judgment found it must be disapplied. Hungarian judges still bring many reference cases in cases where the government has no particular dog in the fight, but few deal with the structure of Hungarian public institutions, since those are the reference questions barred by Hungarian law.

In the *I.S.* case, the Court of Justice missed the opportunity to opine on some features of the Hungarian judiciary that threaten judges when they attempt to apply EU law properly. Between the political supervision from superior courts and the use of discretionary salary allotments to keep judges in line, who would stand up for EU law when it is clear that the government doesn't want the judge to do so? The Hungarian government has not made secret its disdain for the primacy of EU law when it might provide a basis for challenging the concentration of power in the hands of the prime minister or when it challenges his culture war appeals.[295] Those who have been appointed to top judicial positions in Hungary are well known for their hostility to EU law.[296] Judges get the message. So when a judge is brave enough to send a message in a bottle to Luxembourg seeking a ruling on questions of judicial independence, and the message is sent back in the bottle unopened, it is very discouraging for the referring judge – and for all of the others who realize that Luxembourg will not back them up. Hungarian judges will keep sending references to Luxembourg, but not on these hot-button issues that will get judges in trouble back home.

The difference between the reference cases in which the Court has acted boldly (for example *A.B.* and *A.K.)* and the cases in which the court has not addressed all of the structural issues posed to it (for example, *I.S.*) may be accounted for by the different postures in which the questions arose in the two sets of cases. The Polish reference cases in which the ECJ has ruled expansively involved judges as parties in the cases that the referring judges had before them, while the Hungarian *I.S.* case involved the judge asking about his own independence as he decided on a case involving a totally different area of EU law (guarantees of adequate translation in criminal matters). At least the *I.S.* case got father with the Court than the otherwise structurally similar case out of Poland, *Miasto Łowicz*,[297] which also featured disciplinary procedures being brought against the referring judge. In *Miasto Łowicz*, however, the underlying case before the referring judge did not raise a question of EU law so the Court's disapproval of disciplinary actions brought against judges for the content of their decisions appeared in *dicta* only. In the *I.S.* case, the underlying case did involve EU law, so the Court answered the questions about local authorities trying to thwart or punish references. But the Court did not go farther into the

[295] Gábor Halmai quotes Prime Minister Viktor Orbán's reaction to the decision of the Constitutional Court finding that the Hungarian Constitution trumped EU Law: "I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary's constitutional identity. This means that the cabinet cannot support a decision made in Brussels that violates Hungary's sovereignty," adding that the Court decision is good news for "all those who do not want to see the country occupied." Gábor Halmai, *The Hungarian Constitutional Court and Constitutional Identity*, VERFASSUNGSBLOG, Jan. 1, 2017, https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/.

[296] The new *Kúria* president, András Zsolt Varga, has said that "Article 2 of the TEU, together with Article 7 threatens the member states that do not respect the undefined principle of the rule of law. [B]y elevating the abstract principle of the rule of law to normative rank, a gate was opened which might not be possible to close again. It created a device that can be used unlimitedly by the bodies of the European Union. The power is vested ultimately to the ECJ, a court that is *per definitionem* beyond political (i.e. democratic) control." Accordingly, "the rule of law can become an arbitrary means of discipline due to its content which is not delimited." HUNGARIAN HELSINKI COMMITTEE, AN ILLIBERAL CHIEF JUSTICE, Jan. 7, 2021 https://helsinki.hu/en/an-illiberal-chief-justice/.

[297] *Miasto Łowicz & Prokurator Generalny*, EU:C:2020:234.

organization of the national legal system that made sitting judges dependent on irregularly appointed superiors.

The Court has also refused to answer structural questions about judicial independence in other cases. In the *W.B.* case out of Poland, the Court boldly condemned the secondment of judges to sit on criminal cases without standards or reasons as it defended judicial independence in the case, but the referring court had asked other questions too. As in *I.S.* where the referring judge wanted the Court of Justice to opine on the irregularity of appointments in the appeals court, the referring judge in *W.B.* inquired whether appeals of criminal convictions to a court in which at least one of the judges had been appointed by the politically captured KRS could be given full legal effect.[298] The Court decided that the question was "hypothetical"[299] because an appeal had not yet been brought, and therefore the question did not have to be answered. Of course, the prevalence of KRS-appointed judges throughout the Polish judiciary is precisely why its independence is under such threat, but the Court of Justice avoided addressing the legality of these politically tainted appointments in this case. A similar reticence in identifying the KRS as the root of most problems in the Polish judiciary has not affected the European Court of Human Rights, however, which has by now repeatedly found that courts containing judges appointed by that overtly political body do not constitute "tribunals established by law."[300] The Court of Justice, however, has been loath to reach that conclusion and so has just avoided the question.

Perhaps even more dramatically, in *M.F. v. J.M.*,[301] another case out of Poland, the Court was asked a series of questions about the new appointment procedures for judges in Poland and the extent to which national courts had the power under EU law to review these appointments to ensure that they were validly made. In the course of changing the structure of the judiciary, the Polish government transferred the power to review appointments for validity from the ordinary courts (which still contain independent judges) to the politically packed Disciplinary Chamber of the Supreme Court. The referring judge asked the Court of Justice a series of questions probing whether ordinary courts had the power to review judicial appointments under EU law because EU law required independent courts and the independence of such courts could only be determined by examining the validity of judicial appointments. The Court found all the questions inadmissible because they went "beyond the scope of the duties of the Court."[302] Once again, the Court sidestepped a crucial issue in the Polish judicial reforms, which was whether these new Supreme Court chambers, entirely filled with politically appointed judges, could take on core functions related to the supervision and discipline of the judiciary.

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[298] *W.B.*, EU:C:2021:931, ¶ 91.

[299] *Id.* ¶ 93.

[300] The ECtHR found that the Disciplinary Chamber of the Polish Supreme Court and Extraordinary Chamber of the Polish Supreme Court were not independent and impartial tribunals established by law due to the presence of judges appointed by the politically tainted National Judicial Council. See *Advance Pharma v. Poland*, CE:ECHR:2022:0203JUD000146920; *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719; *Dolińska-Ficek & Ozimek v. Poland*, CE:ECHR:2021:1108JUD004986819.

[301] *M.F. v. J.M.*, Case C-508/19, EU:C:2022:201.

[302] *Id.* ¶ 82.

What accounts for the Court's different approach in these varied cases? Sometimes, the Court dives in and makes a bold decision about the way national judiciaries must be structured to meet the tests of Union law. Sometimes, the Court pulls its punches and won't address key cases. Perhaps this is judicial diplomacy, with the Court of Justice picking its battles. But it could also be because the reference cases that the Court of Justice is likely to get from Member States' judiciaries that are being attacked in different ways are likely to be different. Many of the actions taken by Polish authorities were unconstitutional under Polish law, even if the packed Constitutional Tribunal didn't say so.[303] Judges are fired, disciplined, and given no avenues to appeal adverse rulings in their personnel cases. They are barred from sending references and disciplined for enforcing EU law. In addition, the Polish authorities, as we have seen, fired judges *en masse* and launched disciplinary procedures against dissenting judges. Many individual Polish judges, therefore, have had something concrete to complain about in the way that they have been personally treated because they were affirmatively abused. Hence the references to the Court of Justice in which the referring judge is raising questions about the way his colleagues – the parties to the cases before him – have been treated. Where the party to the case before the referring judge is another judge who has been directly mistreated, the Court of Justice has generally stepped in.

The pressures on judges in Hungary are more subtle. After initially firing 274 judges by suddenly lowering the retirement age, the Hungarian government has by and large left sitting judges in place, simply capturing (by law) the system for appointing new ones. The Hungarian government has dealt with the still-independent judges by not raising their salaries, by overruling their opinions and by ensuring that they don't get cases that the government cares about in the first place. It would be hard for Hungarian judges to launch cases under domestic law of the sort that the judges have brought in Poland because there is no underlying right to the things they have been deprived of as their courts were captured. Can Hungarian judge claim a right to an increased salary as a matter of law? Or a right to not have decisions overruled? Or a right to get important cases assigned to her? These are matters that cannot be made the subject of a lawsuit from which a reference question could be generated challenging the political stranglehold on the Hungarian judiciary. Judge Csaba Vasvári in Hungary, who brought the *I.S.* case, was briefly the subject of a disciplinary procedure and the Court of Justice had no trouble reaching that. But the government, seeing the publicity this caused, shut down the disciplinary procedure in his case before the case came to the Court of Justice – and then the Hungarian government claimed "no harm, no foul" at the Court of Justice when the case was adjudicated there. (And, by the way, the Commission agreed.) It was fortunate that the Court of Justice realized it needed to write a judgment on this question anyway.

Thankfully, there are few disciplinary procedures actually brought against Hungarian judges. Instead, they are sidelined, overruled or simply given few cases to decide. They are paid too little, not promoted and sometimes given no work to do at all. The judges brought in as presidents of their courts ensure potentially dissident

[303] Adam Ploszka, *It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutiona*l. 15 HAGUE J RULE L. 51 (2022), https://doi.org/10.1007/s40803-022-00174-w.

judges are kept away from matters of interest to the government. They are treated badly by omission, so to speak. It's what they *do not* get (cases, salaries, promotions) that punishes them, and these omissions cannot be complained against as a matter of right. But still, the courts are captured because the government has been able to install pliant judges through a politically comprised procedure into all of the key positions in the system so that any case the government cares about can always find its way to a friendly judge. The Polish government may have bulldozed its way through the judiciary to generate compliant judges but the Hungarian government established a friendly corridor through the judicial process to ensure that it never loses cases that it and its allies care about. Both systems are compromised, but the judges in those systems have different things to complain about when their independent institutions are captured.

The way that the judiciary has been compromised in Hungary, then, may not lend itself to the sorts of references that the Court of Justice has seen fit to use as platforms for making structural decisions to support judicial independence in the Polish cases. Individual judges don't have domestic law bases in Hungary for bringing these challenges to the ways they are being treated. But that doesn't mean that the judiciary isn't being compromised. The consequences for the rule of law when independent judges are sidelined by omission are still dire. If the Commission isn't bringing infringements and the Court of Justice is turning away references that might allow it to reach some of these serious rule of law questions that affect the independence of national judiciaries because they come up sideways in cases whose central question is about something else, then the Treaties indeed have no Guardian.

Under these extraordinary circumstances in which the rule of law is under serious threat from more than one Member State and rule of law rot shows signs of spreading, the Court of Justice should change its approach if it hopes to avoid a situation in which the mutual trust that underlies the common European project is undermined. If mutual trust can no longer be relied upon because EU law is underenforced when there are egregious and persistent breaches, then the very ties that bind the EU Member States together start to unravel. While we have not yet seen a mass non-recognition of judgments from the compromised judiciaries, there are other signals that mutual trust is unraveling. Norway has refused to provide its EEA funds to Poland or to cooperate with the Polish judiciary,[304] while the European Network on Councils of the Judiciary has expelled Poland's KRS from membership in the organization.[305] The Global Alliance of National Human Rights Institutions recently demoted the Hungarian human rights ombudsman to non-voting status.[306] While being able to register for joint judicial training courses or participating in transnational networks may not be guaranteed under Union law, refusal of entry of certain Member State institutions to these once-common activities are symptoms that

[304] Eirik Holmøyvik, *For Norway It's Official: The Rule of Law is No More in Poland*, VERFASSUNGSBLOG (Feb. 29, 2020), https://verfassungsblog.de/for-norway-its-official-the-rule-of-law-is-no-more-in-poland/.

[305] Press Release, ENCJ, ENCJ Votes to Expel Polish Council for the Judiciary (Oct. 28, 2021), https://www.encj.eu/node/605.

[306] GLOBAL ALLIANCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS, REPORT AND RECOMMENDATIONS OF THE VIRTUAL SESSION OF THE SUB-COMMITTEE ON ACCREDITATION (SCA) 41-47 (2022), https://www.ohchr.org/sites/default/files/2022-04/SCA-Report-March-2022_E.pdf.

something serious is going wrong. These symbolic exclusions are desperately signaling that all is not well – though they fall short of simply breaking with the principle enshrined in Article 4(3) TEU that "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." But if these signals are not taken as warning signs that the system of mutual respect is seriously challenged, more dire consequences for the Union will follow.

The distinctive feature of the EU as compared with other international organizations is that its Member States give up self-help as a remedy for dealing with breaches of the Treaties that constitute the organization because the Treaties themselves contain robust measures for enforcing the Treaties' terms.[307] But if ensuring compliance with EU law becomes a matter of self-help by the Member States who believe that EU law should be enforced but who see that the Treaty mechanisms for enforcing EU law are not working, then it becomes rational for Member States to withdraw unilaterally from intergovernmental cooperation when they spot rule of law violations that the EU institutions are taking inadequate steps to fix. In short, without centralized enforcement of EU law, mutual trust fails and self-help emerges. Such a collapse would mean the end of the EU as we have known it. The rule of law crisis is truly an existential matter.

Given where we are after more than a decade of Commission reluctance to strictly enforce the rule of law, the Court may be the last line of defense. To step up to the responsibility of being Guardian of the Treaties, the Court will therefore need to figure out how to protect EU values in reference cases brought by national judges in situations where the Court may be tempted to wait either for infringements to provide the platform for more structural rulings or for specific judges to be harmed in cognizable ways so that the questions come to the Court on the backs of directly affected parties. In this regard, the *I.S.* case is a good example of the problem. In Hungary, judges don't have easy ways to get their own cases before courts to serve as the platform for a preliminary references, so some of the crucial questions will come up sideways, like the problem of the irregular appointment of court presidents. Those who are irregularly appointed have nothing to complain about and those who didn't get the promotion to court president have no right to the promotion against which to complain. Of course, it is relevant to the matter before the referring judge that his decision can be appealed to a court in which a politically selected and irregularly appointed president presides. But the Court of Justice has taken the view that, until the matter actually arises – the appeal to the improper judge, for example – it can say nothing about the matter. But when the case goes up on appeal to the improper judge, then how does the reference get to the Court? The improper court president surely won't send it and the judges who are assigned to handle the appeal of a delicate case will have no incentive to challenge it either, so this particular problem simply falls between the cracks. The Court of Justice should ask itself how else the particular questions that referring judges send them can be raised, if not in the instant procedure. And, if there is no other obvious way that the question can get to the Court, the Court may have to stretch its conception of what can be done in a

[307] William Phelan, *What is Sui Generis about the European Union? Costly International Cooperation in a Self-Contained Regime*, 14 INT. STUD. REV. 367 (2012).

preliminary reference procedure to answer the questions that are crucial for the independence of the judiciary.

The Court can therefore rise to the challenge of being the Guardian of the Treaties by broadening what it means for a question to be "necessary" for the national judge to know in order to make a ruling in a specific case. National judges should know that the courts above them will not politicize the cases that they have decided or deprive the parties of their EU law rights. They should be reassured that the judges with whom they sit in panels or who control the process for reviewing their decisions on appeal have not been appointed in order to undermine the uniform application of Union law. National judges should know that the constitutional courts at the peaks of their legal systems remain committed to the principle of EU law primacy and do not invent novel constitutional identity claims as a way of avoiding the application of EU law. National judges should be able to retain a measure of self-governance in order to preserve their own independence from political officials. Those topics may not be the facts at issue in the cases before the referring judge, but the referring judge needs to know that the broader judiciary of which she is a part is committed to honoring Union law before she can reliably decide cases involving Union law.

Unless the Court of Justice realizes that the national judges calling for help really cannot decide the cases before them without having more confidence that their judiciaries comply with the Union principle of judicial independence, then the referring judge may not be able to decide properly on an asylum case when the government has campaigned against migration, demonized migrants and is itself flouting EU law. The referring judge may not be able to properly decide a competition case in which a government oligarch stands to lose or a case involving the corruption of EU funds that implicates a member of the prime minister's family. Unless the Court of Justice understands the daily working conditions of judges in compromised legal systems as relevant to the decisions in the cases before those judges, the Court of Justice will not stretch to reach the very real problems in politically battered judiciaries that are at the heart of ensuring the rule of law.

As judicial independence has come under attack, national judges themselves are engaging in self-help and sending reference cases to the Court of Justice. But the Court of Justice is telling national judges all too often in, for example, European Arrest Warrant cases, to ascertain whether the particular court to which the particular defendant will be transferred is particularly problematic[308] when the problem is that the particular court to which the defendant maybe transferred sits in a larger system in which politics can influence any case of interest to the government. The Court of Justice is also telling national judges that it can say nothing about a court elsewhere in the system if that court doesn't have this particular case before it at the moment. The Court of Justice is not only telling referring judges not to rise to the defense of independent courts in Member States that are threatening those courts, but telling them to avert their eyes from these systemic attacks on courts other than their own at home.[309] In cases in which national judges are sending references that are cries for

[308] *See, e.g. X & Y v. Openbaar Ministerie*, EU:C:2022:100.
[309] Scheppele, *Celmer*, *supra* note 281.

help from the judge under political duress, the Court of Justice should take seriously the proposition that the referring judge really does need to know whether she can be protected from the adverse consequences that will come from deciding a case against the national government's wishes.

There are some signs, in a set of cases out of Romania, however, that the Court is starting to broaden its sense of what questions are relevant to the case before a referring judge. For example, in *R.S.*[310] the referring judge was caught between a rock and a hard place when the Romanian Constitutional Court ruled that national legislation, once judged constitutional as a natter of domestic law, could not be reviewed again by a national judge to determine its compatiblity with EU law. Asking the Court of Justice whether a referring judge could be barred from performing her essential Union law functions by examining all law relevant to the case before her, the referring judge could probably guess what she would be told. Of course, she had to be able to apply Union law, even on topics that were covered by and contrary to the domestic constitution, as was the procedure for investigation in the case. What made the case unusual, however, was that the referring judge wanted to examine the procedure through which investigation into judicial misconduct was carried out, since the allegation in the case before the referring judge was that the judges who heard the underlying criminal case had themselves committed an abuse of their office. In providing guidance about those disciplinary procedures, the Court said, "the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law, or in the assessment of the facts and the appraisal of the evidence, cannot in itself trigger the disciplinary liability of the judge concerned."[311] Even the mere prospect of being disciplined for the content of a decision interfered with judicial independence, announced the Court.[312] So while this case bears some similarities to *I.S.* and *Miasto Łowicz* in condemning disciplinary proceedings carried out against national judges who apply Union law, the case reaches a bit farther in giving the national judge the green light to expand her field of vision in the domestic case to examine not just the allegations raised by the case, but also how the investigation leading up to the proof offered in the case was carried out. In short, the Court and the referring judge together figured out how to get the Court to review the disciplinary procedures that applied to judges in Romania.

This case followed on the spectacular decision in *Eurobox Promotion,*[313] in which the Court had already freed national judges from following decisions of the Romanian Constitutional Court where following those decisions would result in the systematic inability of the ordinary courts to hear in a timely manner cases involving corruption. As in *I.S.* and *Miasto Łowicz*, judges could be punished for putting their obligations to apply Union law above national law, in this case, decisions of the Constitutional Court. Here, the Court raised the issue that the Constitutional Court was constituted in a different manner than ordinary courts, with a much larger political influence in the selection process for those judges. But the Court ultimately

[310] R.S., Case C-430/21, EU:C:2022:99.
[311] *Id.* ¶ 84.
[312] *Id.* ¶ 90.
[313] *Euro Box Promotion & Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034.

chose not to go down the road of finding the Constitutional Court was improperly constituted and instead settled for the less controversial argument that punishing judges for the content of their decisions ran contrary to Union law. The decision, however, put the Constitutional Court on notice that where its decisions interfered with the application of Union law in Romania, the ordinary courts could lean on Union law to ignore them. Both *Eurobox Promotion* and *R.S.* saw the Court moving toward pronouncing on courts and procedures that were not directly before the referring judges, but which were – to so speak – lurking in the background of the cases. Perhaps this shows that the Court is trying to find ways to get at the larger problems of judicial independence through questions asked in preliminary references.

As we have seen in this Article, the Commission has generally failed to protect judicial independence because it has not vigorously enforced Union law, so the national judges are resorting to self-help because they still have faith in the Court of Justice. But if the Court of Justice dismisses those questions raised collaterally to direct EU law disputes as irrelevant to the substantive issues in the case before the referring judges, then these pressured national judges have nowhere else to go. If the Commission won't bring enough infringements in a timely enough way to ensure that judiciaries remain independent – and then the ECJ won't respond to references that deal with these structural problems in the only way that the national judges can raise them – all doors are closed to the judges who seek help in enforcing Union law without bringing terrible consequences upon themselves and those whose Union rights they seek to enforce. There may be signs, however, that the Court of Justice is trying to address the pressures felt by national judges to ensure their continued independence, as Union law requires.

The Court of Justice should consider itself a parallel Guardian of the Treaties as it ensures that EU law is enforced uniformly across the Union. If, in the absence of infringement cases, national judges take a huge risk by going directly to the Court to attempt to protect their own independence, the Court should not turn those judges away or leave them to face their vindictive governments alone. The Court should back up those judges who are struggling to defend judicial independence by invoking EU law and broadening its sense of what is relevant to decide in reference cases. If the Court of Justice does not try to protect judges who have reached out to the Court for assistance, however, there will be no reason for references to keep coming.

The Court of Justice surely knows by now that the Commission has not been effective in preventing the destruction of judicial independence in two Member States. The Commission has simply not brought enough and well-enough-targeted infringements when judiciaries came under attack. Of course, the Commission should step up and bring more infringements, even at this late date, pressing them with the urgency they require. But if the Commission will not do that, references may provide the Court with the only chance it will have to defend core EU values. If the Court of Justice is to guard the Treaties, especially when the Commission has failed to do so, it may have to use the imperfect vehicle of preliminary references to do the job.

POSTSCRIPT:

THE COMMISSION FINALLY ACTS[314]

March 2023

The timeline traced in "Treaties Without a Guardian" ended in October 2022 when this article was sent off for publication. But between that date and publication of the article in March 2023, the Commission took a great leap forward in defending the rule of law.

In late 2022, the Commission suddenly revealed, though very quietly, that it was withholding nearly €30 billion of funds from Hungary and more than €110 billion in funds from Poland.[315] Neither Member State will receive those funds until they demonstrate progress in restoring the rule of law. After more than a decade in which the Commission consistently did too little, too late, the Commission ended 2022 with a Big Bang defense of Article 2 TEU values.

How did this happen? And how did it happen so quickly? Nothing in the EU is really fast, so what happened at the end of 2022 was actually the intersection of several different processes that had inched forward behind the scenes in slow motion for years. But the impact has been massive. Both Hungary and Poland now face the fact that they will receive none of the money allocated to them through the Cohesion Funds nor any of the money allocated to them through the Recovery and Resilience Fund unless they strengthen judicial independence, among other things. The eye-popping totals being withheld from both Member States were created through the focused operation of three different newly passed Regulations that were brought to bear all at once on the same set of problems.

The Conditionality Regulation, finally passed in December 2020, gave the Commission and Council the explicit power to withhold funds to Member States whose rule of law violations create a risk that EU funds allocated to that country would go astray. The Regulation, after being blessed by the Court of Justice in February 2022, was triggered by the Commission against Hungary in April 2022.[316] The Commission rather narrowly targeted 65% of three streams of money that were part of the Cohesion Funds, arguing that the dependence of these funds on flawed procurement processes and weak accountability mechanisms put those funds at

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[314] This postscript draws from Kim Lane Scheppele and John Morijn, *What Price Rule of Law*. Forthcoming in THE RULE OF LAW IN THE EU: CRISIS AND SOLUTIONS (Swedish Institute for European Policy Studies, 2023), https://www.sieps.se/en/seminars/upcoming-seminars/the-rule-of-law-in-the-eu-crisis-and-solutions/.

[315] The large difference in withholdings between the two countries does not measure the relative seriousness of the violations but instead reflects the relative size of the funding authorizations and therefore how much money was available to suspend. Poland has the largest absolute amount of EU funds allocated to it, while Hungary has the largest per capita amount so both sets of cuts are significant in the national budgets. For the size of the Cohesion Funds alone in the current 2021-2027 EU budget, see European Commission, Cohesion Open Data Platform, https://cohesiondata.ec.europa.eu/countries/PL/21-27 for Poland and https://cohesiondata.ec.europa.eu/countries/HU/21-27 for Hungary.

[316] *Supra*. at notes 250-257.

risk.[317] To receive the money, Hungary would be required to enact and enforce an anti-corruption program that created independent oversight of the public procurement process, monitored conflicts of interest, reduced the number of single-bid public contracts and strengthened the prosecution of corruption crimes. After the Hungarian government passed a series of laws that formally addressed many of these requirements in fall 2022,[318] the Commission found that these reforms fell short of establishing a truly independent set of institutions and procedures for fighting corruption.[319] The Council approved the Commission's final recommendation that these three funding streams be frozen on December 20, 2022 but cut only 55% of the allocated funds instead of the 65% that the Commission recommended because Hungary had done something positive to respond to the criticism.[320]

That said, the amounts of money that were at stake after all of the effort spent enacting the Conditionality Regulation were rather small in the context of the overall EU budget (€6.3 billion to one Member State).[321] In addition, the conditions Hungary was required to meet to receive the money did not remedy what many observers thought was the most important challenge to the rule of law – namely, the attacks on judicial independence. Even with all of these issues, however, the fact that any funds were withheld from a Member State for violating basic principles of the rule of law was a major accomplishment after the Commission had done too little, too late for too many years.

As the proposal to suspend funds to Hungary under the Conditionality Regulation was moving through all of the stages of the process outlined in that law, the Resilience and Recovery Regulation (RFF) emerged as another tool that the EU institutions could use to bring rogue Member States back to the rule of law through fiscal pressure. The RFF established a large fund of money that was paid for by floating EU debt instruments and that was allocated to the Member States to help jump-start their economies after the damage caused by the Covid pandemic.[322] Each Member State was charged with producing a Recovery Plan specifying how it would spend the money on the priorities outlined in the governing Regulation. But buried in the Regulation's text was the requirement that that each Member State comply with

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[317] *Supra*. at note 257.

[318] I described and assessed these reforms in detail in a series of blogposts with various coauthors published on the *Verfassungsblog* between October and December 2022 <https://verfassungsblog.de/author/kim-lane-scheppele/>.

[319] *Communication from the Comm'n to the Council on the remedial measures notified by Hungary under Regulation (EU, Euratom) 2020/2092 for the protection of the Union budget.* COMM (2022) 687 final (Nov. 30, 2022), https://commission.europa.eu/system/files/2022-12/COM_2022_687_1_EN_ACT_part1_v5.pdf

[320] *Council Implementing Decision (EU) 2022/2506 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary*, OJ L 325/94 (Dec. 15, 2022). [Hereinafter Council Conditionality Implementing Decision.]

[321] Council of the EU Press Release, Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary (Dec. 12, 2022) https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/.

[322] European Parliament and Council Regulation (EU) 2021/241, Establishing the Recovery and Resilience Facility, 2021 O.J. (L 57) 17, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32021R0241.

"country-specific recommendations" in spending these funds.[323] Country-specific recommendations are issued as the result of the annual European Semester assessment, which monitors whether EU Member States' macroeconomic and fiscal policies comply with the measures that were put in place after the financial crisis in 2008-2009 to prevent another European economic meltdown.[324] European Semester assessments had covered topics like the sustainability of debt burdens and mismatches between the labor force and available jobs. But for a few years now, the European Commission had been inserting into these country-specific recommendations measures related to judicial independence. In 2019, the Commission first recommended – and the Council adopted the recommendation – that Hungary take action to strengthen judicial independence[325] even though the Commission had not filed a single infringement about judicial independence in Hungary since 2012. In 2020, the Commission added – and the Council adopted -- strengthening judicial independence to Poland's list of country-specific recommendations.[326] When the Recovery Regulation conditioned receipt of the funds on compliance with country-specific recommendations, these little land mines that the Commission had planted in this annual technical assessment were poised to explode.

The Commission's use of the RRF to withhold allocated funds for rule of law conditionality was first on display with regard to Poland, when the Commission approved Poland's plan for using the recovery money in June 2022, but attached "milestones" that had to be met before Poland would actually receive the funds.[327] The milestones included reforms to the judiciary to make it more independent as the country-specific recommendations had required, but critics – including five of the Commissioners themselves – immediately attacked the formulation of these milestones for failing to require that Poland honor all of the decisions of the European Court of Justice that mandated changes to Poland's judiciary.[328] Four European umbrella organizations of judges brought an action of annulment in the General Court first against the Council for approving Poland's Recovery Plan with these milestones, and then against the Commission for having designed these

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[323] *Id.* at Article 17(3).

[324] Council of the European Union, The European Semester Explained, https://www.consilium.europa.eu/en/policies/european-semester/ .

[325] Council of the European Union, *Recommendation for a Council Recommendation on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary, 9942/19 - COM(2019) 517 final* (July 8, 2019), https://data.consilium.europa.eu/doc/document/ST-10170-2019-REV-2/en/pdf

[326] Council of the European Union, *Recommendation for a Council Recommendation on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland*, ST 8194/20 - COM(2020) 521 final (June 8, 2020), https://data.consilium.europa.eu/doc/document/ST-8440-2020-INIT/en/pdf.

[327] *Supra.* at notes 223-224.

[328] Jorge Liboreiro, *Fair Deal or Cave in? Brussels' Green Light of Poland's Recovery Plan Reveals Loopholes*, EURONEWS (3 June 2022) <https://www.euronews.com/my-europe/2022/06/03/fair-deal-or-cave-in-brussels-green-light-of-poland-s-recovery-plan-reveals-loopholes>; see also Laurent Pech, *Covering up and Rewarding the Destruction of the Rule of Law, One Milestone at a Time*, VERFASSUNGSBLOG (June 21, 2022) <https://verfassungsblog.de/covering-up-and-rewarding-the-destruction-of-the-rule-of-law-one-milestone-at-a-time/>.

inadequate milestones in the first place.[329] Chastened, the Commission then appeared to get tougher on Poland, rejecting various attempts by Poland in summer and fall 2022 to pass reforms in order to unlock the money, reforms that in the view of nearly all observers did not adequately respond to the criticisms.[330] So far, the Commission has held the line and insisted on more sweeping reforms. Poland has been denied access to all €35.4 billion allocated to it under the Recovery Fund so far for failure to comply with these country-specific recommendations built into the Recovery Plan.

In the same December 2022 meeting in which the Council froze some of Hungary's Cohesion Funds under the Conditionality Regulation, the Council also approved Hungary's Recovery Plan – also with milestones that had to be met before the funds would actually be disbursed.[331] Perhaps in response to the flak it had received for approving the Polish plan without addressing all of the ECJ judgments pertaining to judicial independence, the Commission in its recommendation to the Council on Hungary made the release of funds conditional on a set of detailed and substantial changes to the Hungarian judiciary. The milestones also included a copy-paste of the requirements for an anti-corruption program that had been previously attached to the Conditionality Regulation procedure. Through the use of the Recovery Regulation and its requirement that country-specific recommendations be honored in the spending of these funds, all of Hungary's €5.8 billion would be frozen until judicial independence was restored and an anti-corruption program successfully installed in Hungary.

Weeks after the Council had approved Hungary's conditions for receiving the Recovery Fund and froze more funds under the Conditionality Regulation, and as most of Brussels and its observers were readying themselves for the Christmas holiday by no longer paying attention to the news, Reuters published a small story that largely went unnoticed.[332] The Commission had announced it would withhold a whopping €22 billion in Cohesion Funds to Hungary due to concerns over fair trial rights because there had been a failure to ensure judicial independence as well as out of concern about intrusions into academic freedom, threats to LGBTIQ+ rights and the failure to ensure the right to asylum for migrants. Suddenly Hungary was facing not just the €6.3 billion cut under the Conditionality Regulation and the €5.8 billion under the Recovery Regulation, but now an additional €15.7 billion in frozen Cohesion Funds above and beyond those already cut under the Conditionality

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[329] *See* The Good Lobby Profs Action in support of the unprecedented lawsuit against the Council of the EU's decision to approve Poland's Recovery and Resilience Plan, THE GOOD LOBBY (Aug. 29, 2022) <https://www.thegoodlobby.eu/2022/08/29/tglprofaction/>. A later case was filed against the Commission on similar grounds. The cases are now pending as T-530/22, T-531/22, T-532/22 and T-533/22 (European association of judges v Council) and T-116/23 (MEDEL and others v. Commission).

[330] *Poland closes judicial disciplinary chamber at heart of dispute with EU*, NOTES FROM POLAND (July 15, 2022), https://notesfrompoland.com/2022/07/15/poland-closes-judicial-disciplinary-chamber-at-heart-of-dispute-with-eu/.

[331] *Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary*, Interinstitutional File: 2022/0414 (NLE) (Dec. 5, 2022), <https://data.consilium.europa.eu/doc/document/ST-15447-2022-INIT/en/pdf> and ANNEX <https://data.consilium.europa.eu/doc/document/ST-15447-2022-ADD-1/en/pdf>.

[332] Kate Abnett & Jan Strupczewski, *EU Holds Back All Of Hungary's Cohesion Funds Over Rights Concerns*, REUTERS, Dec. 22, 2022, https://www.reuters.com/world/europe/eu-holds-back-all-hungarys-cohesion-funds-over-rights-concerns-2022-12-22/ .

Regulation. The total? €27.8 billion of EU funds were frozen until Hungary took adequate steps to restore judicial independence, with the biggest bang coming from the Commission's announcement on December 22, 2022.

Of course, the Commission had to have a legal basis for what it did. Unnoticed by most observers[333] as it was going through the legislative process, the Common Provisions Regulation (CPR) was undergoing changes. Renewed with each EU budget cycle, the CPR provides the detailed terms and conditions for spending EU funds.[334] Added to the CPR in this budget cycle was Article 9.1[335] which made the spending of EU funds subject to the "horizontal principle" of respect for the Charter of Fundamental Rights. This was a new and sweeping conditionality hard-wired into the law that controls the spending of many lines of EU funds.

All of the funds covered by the CPR are subject to a Partnership Agreement negotiated between each Member State and the Commission that specifies how the funds are to be spent. The EU-Hungarian Partnership Agreement was published on 22 December 2022,[336] providing the basis for that pre-Christmas Reuters news story. The Agreement covers €22 billion in 11 national programs – and all of those funds are now frozen pending Hungary's compliance with the Charter of Fundamental Rights. The affected rights flagged in the Agreement include fair trial rights under Art. 47 CFR, which are harmed by the lack of judicial independence. As a result, the Commission copy-pasted the same conditions that were formulated for the RRF into the Partnership Agreement. In addition, the Commission has withheld monies under some of these funding streams pending a) the repeal of the 'child protection law' that infringes LGBT+ equality rights under Article 21(1) CFR[337] b) the restoration of academic freedom by changing the politicized boards of trustees of the newly

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[333] But noticed by John Morijn, *The July 2020 Special European Council, the EU budget(s) and the Rule of Law: Reading the European Council Conclusions in their Legal and Policy Context*, EU LAW LIVE (July 23, 2020) <https://eulawlive.com/op-ed-the-july-2020-special-european-council-the-eu-budgets-and-the-rule-of-law-reading-the-european-council-conclusions-in-their-legal-and-policy-context-by-john-morijn/#≥

[334] The EU funds covered by the CPR include the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund, the European Maritime, Fisheries and Aquaculture Fund, the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy. CPR, *supra.* note 251, Art. 1(1).

[335] *Id.* at Art. 9(1): "Member States and the Commission shall ensure respect for fundamental rights and compliance with the Charter of Fundamental Rights of the European Union in the implementation of the Funds."

[336] *Commission Implementing Decision of 22.12.2022 approving the partnership Agreement with Hungary*, C(2022) 10002 final, at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10002&lang=en . The Commission also helpfully published a summary. EU Cohesion Policy 2021–2027: Investing in a fair climate and digital transition while strengthening Hungary's administrative capacity, transparency and prevention of corruption (2022) <https://commission.europa.eu/system/files/2023-01/partnership-agreement-hungary-2021-2027.pdf≥.

[337] The law in question is the subject of an infringement procedure by the Commission against Hungary, which the Commission announced it would refer to the Court of Justice on July 15, 2022. European Comm'n Press Release IP/22/2689, Commission refers Hungary to the Court of Justice of the EU over violation of LGBTIQ rights (July 15, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2689 . The case was finally submitted to the Court of Justice only in December, however, where it was registered as Case C-769/22.

privatized universities[338] under Article 13 CFR and c) compliance with the right to asylum under Article 18 CFR which the ECJ has repeatedly found that Hungary violates.[339] As a result, Hungary is facing the suspension of more money under the Partnership Agreement and its CPR conditionalities than through the total withholdings under the Conditionality Regulation and RRF combined.

Poland seems to be getting a parallel treatment from the Commission but the suspensions, their amounts and their rationales are murkier.[340] Poland signed a – not yet released[341] -- Partnership Agreement with the EU on June 30, 2022,[342] in which the CFR conditionalities were limited to concerns about gender equality under Article 23 CFR and the rights of persons with disabilities under Article 21(1) CFR, with no mention of judicial independence under Article 47 CFR. Press reports in October, however, suggested that the Commission was withholding all of the funds subject to the Partnership Agreement after Poland had failed to carry out promised judicial reforms.[343] Though those press reports do not mention the legal basis for this action, one might extrapolate from the Hungarian Partnership Agreement and accompanying implementing decisions on various EU funds and guess that the Commission invoked Article 47 CFR as a horizontal condition on all of the funds covered by that agreement. What seems to be the case is that the Commission is withholding about €75 billion in Cohesion Funds all told[344] Poland acknowledges itself that it is not in compliance with the Charter and the Commission has indicated for the Just Transition Fund (one stream of the Cohesion Funds) that it is withholding the money in this program until Poland complies with the Charter.[345] And again, there may be even more funds withheld under other funding streams that

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[338] This conditionality was first laid down in the Council Conditionality Implementing Decision. *Supra* note 320, Article 2(2) in which the Council proclaims that "no legal commitments shall be entered into with any public interest trust." These public interest trusts are private law foundations created under Hungarian law as vehicles into which public Hungarian universities were transferred, thus privatizing them. The University of Debrecen, one of the affected universities, has filed an action for annulment in the General Court challenging its inclusion on this blacklist. Debreceni Egyetem v. Council, Case T-115/23.

[339] European Comm'n Press Release IP/21/5801, Migration: Commission refers Hungary to the Court of Justice of the European Union over its failure to comply with Court judgment (Nov. 21, 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5801

[340] Wojciech Kosc, *European Commission Reportedly to Withhold Most of Poland's Cohesion Funds for Rule of Law Failures*, BNE INTELLINEWS, Oct. 17, 2022, <https://intellinews.com/european-commission-reportedly-to-withhold-most-of-poland-s-cohesion-funds-for-rule-of-law-failures-259574/>.

[341] The Commission register of documents does, however, mention the document *Comm'n implementing decision approving the partnership agreement with the republic of Poland*, C(2022)4640, 30 June 2022 at https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)4640&lang=en

[342] European Comm'n Press Release IP/22/4223, EU Cohesion Policy: Commission Adopts €76.5 billion Partnership Agreement with Poland for 2021–2027 (2022), https://ec.europa.eu/commission /presscorner/detail/en/ip_22_4223> .

[343] Kosc, *supra* note 340.

[344] Zoltan Simon, *How EU is Withholding Funding to Try to Rein In Hungary, Poland*, WASHINGTON POST, Jan. 2, 2023, <https://www.washingtonpost.com/business/how-eu-is-withholding-funding-to-try-to-rein-in-hungary-poland/2022/12/30/ba3641fc-8818-11ed-b5ac-411280b122ef_story.html>

[345] European Comm'n Press Release IP/22/7413, EU Cohesion Policy: €3.85 billion for a just transition toward climate neutral economy in five Polish regions (Dec. 5, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7413. This press release explains that funds are being withheld because Poland is not in compliance with the Charter as required by the CPR, but it doesn't explain precisely which Charter provisions Poland is violating.

are not visible because the implementing decisions for Poland, although many are listed in the register of documents as having been published in December 2022, have not so far been released by the Commission.[346]

Poland has taken an additional hit to its EU funds because the Commission has been deducting from Poland's EU funding streams €1.5 million per day in fines for Poland's continuing violation of decisions of the Court of Justice.[347] The amount owed is now approaching €500 million.

Taking all of these various conditionalities and withholdings together, it now appears that nearly €30 billion of Hungary's EU funds are on hold while Poland is not receiving €110 billion that it expected. Instead, the flow of all of these funds has been made contingent on substantial rule of law reforms, with the largest amounts conditional on restoring judicial independence. As we have seen, the Commission has not been notably successful in nudging the EU's rogue Member States toward the rule of law with the other techniques it has used over the last decade, but this Big Bang conditionality is of a very different type and magnitude. Already we have seen Poland scramble to appear to roll back some of its judicial "reforms"[348] in summer 2022 and Hungary pushed through an anti-corruption program in fall 2022.[349] In both cases, the Commission said that the reforms were not sufficient.[350] Now Hungary has designed a new judicial reform program for enactment in spring 2023 that Hungarian NGOs have already found wanting.[351] But this is more action in the general direction of compliance than we have seen from either Hungary or Poland in the whole sad saga of their slides toward autocracy.

The Commission's great leap forward in defending the rule of law resulted from a surprisingly bold series of moves that built up slowly behind the scenes and then burst out all at once. After all of the expressions of concern, cajoling, bargaining and threatening to enforce the law, the Commission has finally realized that taking away rogue states' access to EU money may have the biggest effect of all. Now that the

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[346] Evidence of the existence of this batch of documents can be found here: https://tinyurl.com/yv6ans23 .

[347] Poland has been ordered to pay €1 million/day for refusal to close the disciplinary chamber for judges and €500,000/day for refusal to close a coalmine that has depleted groundwater and caused dangerous levels of air and water pollution on Poland's border with the Czech Republic and Germany. Jennifer Rankin, *EU to Withhold Funds from Poland over Unpaid Fine*, GUARDIAN, Feb. 8, 2022, <https://www.theguardian.com/world/2022/feb/08/eu-to-withhold-funds-from-poland-over-unpaid-fine-coal-mine>.

[348] *Poland closes judicial disciplinary chamber at heart of dispute with EU*, NOTES FROM POLAND, July 15, 2022, https://notesfrompoland.com/2022/07/15/poland-closes-judicial-disciplinary-chamber-at-heart-of-dispute-with-eu/.

[349] See my series of blogposts on the anti-corruption program, *supra.* at note 318.

[350] For Poland, *see* Kristie Bluett, Jasmine D. Cameron & Scott Cullinane, *Poland's Judicial Reform Falls Short of EU Expectations, Complicating Cooperation Against Russia*, JUST SECURITY (Oct. 3, 2022), https://www.justsecurity.org/83324/polands-judicial-reform-falls-short-of-eu-expectations-complicating-cooperation-against-russia/. For Hungary, *see Protecting Hungary from Itself: The Limitations of Forcing Compliance*, INTERNATIONAL IDEA (Dec. 15, 2022), https://www.idea.int/blog/protecting-hungary-itself-limitations-forcing-compliance .

[351] Amnesty International, Eötvös Károly Institute & Hungarian Helsinki Committee, ASSESSMENT OF THE GOVERNMENT'S DRAFT PROPOSAL ON THE AMENDMENT OF CERTAIN LAWS ON JUSTICE RELATED TO THE HUNGARIAN RECOVERY AND RESILIENCE PLAN (Feb. 3, 2023), <https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/2023judicial_package_assessment_AIHU_EKINT_HHC.pdf.

Commission has taken this big leap, however, it will need to be patient to ensure that the changes that Hungary and Poland make are real and substantial before it releases the money. It will need to be firm and insist on evidence of real effects. After having come this far, this is no time for the Commission to be satisfied with merely cosmetic compliance. Maybe, the Commission will resume its role as Guardian of the Treaties after all.