

The Polish Bulldozer

Towards a win-win-win for Poland, the EU and the European Commission

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Minister Ziobro's message for Commissioner Reynders,
18 November 2021

“Yielding to the European Union, yielding to foreign pressure, yielding to threats and unlawful demands leads to legal chaos in Poland and is a road to nowhere.”

Polish minister of Justice Zbigniew Ziobro, 23 July 2021

Executive summary

Today the European Commission faces a momentous decision on Poland. It must turn to the European Court of Justice (ECJ) and ask for an unprecedented penalty payment from a government which is refusing to implement one of the most important ECJ judgements in the history of European integration.

On 15 July 2021 the ECJ issued a historic judgement. It concluded that the Polish disciplinary system for judges violated the EU treaties and that Polish judges have good reason to fear consequences if they issue judgements that displease the government.

Zbigniew Ziobro, the most powerful minister of justice in Europe, dismissed the ECJ judgement by bashing the judges: “We are dealing with a political verdict, issued upon the political order from the European Commission, at the basis of which lies the segregation of countries into better and worse.” Ziobro has made his goal very clear: he wants complete control over his country’s judiciary. In response to pressure from the European Commission he is now pushing for further dramatic changes to Polish courts, following his earlier bulldozer approach. Ziobro is also linking the debate on the rule of law in Poland with memories of Polish resistance to German aggression to discredit European institutions. In fact, it is Belgians, not Germans, who play the leading roles in the current struggle over the rule of law. This is not surprising: it was in response to the tragic experiences of Europe in the early 20th century – war, invasion, occupation – that Belgian leaders embraced European integration based on the rule of law. Belgian leaders will not stand by today and watch the foundations of this phenomenal success story being destroyed by Ziobro and his allies. Nor should other Europeans.

For the Commission to preserve the independence of Polish courts it must ask the ECJ now to declare that Poland has failed to fulfil its obligations to implement the 15 July judgement and to impose a penalty payment:

1. It must go back to the European Court of Justice as soon as possible. It is vital to pre-empt further drastic changes damaging the Polish judiciary.
2. The financial penalty must be high enough to ensure that Poland will implement the 15 July ECJ judgement. The Commission’s guidelines on this refer to “the need to ensure that the penalty itself is a deterrent to further infringements.” ESI proposes 1 percent of Polish GDP per year, which is around 5 billion Euro. This would be in line with current EU law.
3. This would be even more likely to restore “effective legal protection” in Poland if the European Commission also explicitly links disbursements from its new Resilience and Recovery Facility (RRF) to implementation of ECJ judgements on the rule of law.

Ziobro has taken off his gloves. It is time for European institutions to prove that EU law and institutions are stronger than the chaos that he has already brought to his country’s courts.

Ziobro’s political masterstroke has been to get as far as he has while pursuing an agenda that most of his compatriots do not share. But therein lies his vulnerability. Surveys show that Ziobro’s agenda is far from popular. The European Commission should put a clear choice before pro-EU conservatives, without whom Ziobro cannot maintain his control: a choice between his radical agenda on the one hand and billions of Euros supporting Poland’s development on the other. By calling Ziobro’s bluff the European Commission and the ECJ not only save the rule of law in Poland and preserve the EU’s legal order but also break his spell over a shrinking radical minority.

This is a win-win-win scenario: A win for the rule of law in Poland. A win for the European legal order. A win for the people of Poland, as EU funding is disbursed, and for pro-EU Polish conservatives, fed up with Ziobro’s bulldozer tactics and concerned about his extraordinary power over courts and prosecutors. And a historic achievement for the von der Leyen Commission and the European Union.

“The Commission attaches the highest importance to the rule of law ... I will continue to defend it and the integrity of our European institutions. Be it about the primacy of European law, the freedom of the press, the independence of the judiciary or the sale of golden passports. European values are not for sale.”

*Ursula von Der Leyen, Commission president
State of the Union, September 2021*

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(ESI, 6 August 2021)

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*Guardians of the treaty: Ursula Von der Leyen, Vera Jourova, Didier Reynders
Commission president, vice-president, and Commissioner for Justice*

I. THE END OF THE ROAD

“There can be no compromise”

Today the European Commission, the EU’s executive, faces a momentous decision on Poland: the time has come to move from talking about the importance of protecting the rule of law to proposing sanctions to protect it. This is the moment for the Commission to turn to the European Court of Justice (ECJ) and to ask for an unprecedented penalty payment from a government which is refusing to implement one of the most important ECJ judgements in the history of European integration.

Four years ago, in December 2017, the European Commission warned about the “clear risk of a serious breach by the Republic of Poland of the rule of law.” It expressed “grave concerns” over the erosion of the independence of the Polish judiciary. It noted that in Poland the constitutionality of laws “can no longer be verified and guaranteed by an independent constitutional tribunal.” The Council of Europe’s Venice Commission, a group of international constitutional experts, warned that the legal changes made to the Polish judicial system, after a coalition led by the Law and Justice (PiS) party came to power in November 2015, bore “a striking resemblance with the institutions which existed in the Soviet Union and its satellites.”¹

On 3 April 2019, the European Commission concluded that a new disciplinary system gave the Polish minister of justice and prosecutor general, Zbigniew Ziobro, unprecedented power over judges, who were no longer protected in their job from political control.² (For more on what this means for individual judges in Poland: see Annex C.) The Commission sent a letter, asking the Polish government to remedy this situation.³ The Polish government refused. On 10 October 2019, the European Commission took Poland to the European Court of Justice (ECJ) in Luxembourg. It argued that the laws creating a new disciplinary system for judges were in violation of the EU treaties, which require member states to “ensure *effective legal protection* in the fields covered by Union law” (Article 19 of the Treaty on European Union, TEU).⁴

¹ Venice Commission, [Opinion No. 904/2017](#), 11 December 2017.

² ESI, [The disciplinary system for judges in Poland – The case for infringement proceedings](#), 22 March 2019.

³ European Commission, [“Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control”](#), 3 April 2019.

⁴ European Commission, [“Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control”](#), 10 October 2019.

On 15 July 2021 the ECJ issued a historic judgement.⁵ It concluded that the Polish disciplinary system *did* violate the EU treaties. Access to “effective legal protection” (Article 19 TEU), namely trials before independent judges not controlled by the government, were no longer guaranteed. Polish judges have good reason to fear consequences if they issue judgements that displease Zbigniew Ziobro, the minister of justice.

Ziobro immediately dismissed the ECJ judgement by bashing the judges:

“We are dealing with a political verdict, issued upon the political order from the European Commission, at the basis of which lies the segregation of countries into better and worse ... There is not, has not been and will not be any consent from Poland to *segregate countries according to extra-legal, political criteria that are at first sight reminiscent of colonialism.*”⁶

On 20 July 2021, five days later, the European Commission wrote another letter to the Polish government asking it to confirm that it “will take all the necessary steps needed to *fully* implement the 15 July judgement.” Vera Jourova, the vice-president of the European Commission, explained that “there can be *no compromise* on this.” She warned that “we will ask for financial sanctions if Poland does not remedy the situation by 16 August.”⁷

16 August came and went. The Polish government did not move. On 7 September, the European Commission started the process of taking Poland back to the ECJ to request a financial sanction for its failure to implement the 15 July judgement. Justice Commissioner Didier Reynders announced that “the Commission will not hesitate to take all the necessary measures to ensure the full application of EU law ... It is essential that Poland *fully* complies.” The Polish government was given two more months to respond.



*Constitutional Tribunal: president Julia Przyłębska
(with PiS leader Jarosław Kaczyński)*

Then, on 7 October, something unprecedented happened. The Polish Constitutional Tribunal under its president Julia Przyłębska, a friend of PiS party leader Jarosław Kaczyński, ruled that Article 19 of the Treaty on European Union, the very article EU bodies were calling on Poland to respect, was incompatible with the Polish constitution. Therefore, the Polish constitutional

⁵ [Curia, “C-791/19- Commission v Poland”, 15 July 2021.](#)

⁶ Ministry of Justice, [“Polityczny wyrok TSUE segreguje państwa Unii Europejskiej”](#), 15 July 2021.

⁷ European Commission, [“Remarks by Vice-President Věra Jourová at the press conference on Rule of Law Report 2021”](#), 20 July 2021.

judges argued, the 15 July ECJ judgement should be ignored. Commissioner Vera Jourova expressed alarm: “If we don’t uphold the principle in the EU that equal rules are respected the same way everywhere in Europe, the whole EU will start collapsing.”⁸ On 19 October Ursula von der Leyen, the President of the European Commission, warned during a debate in the European Parliament:

“This is the first time ever that a court of a member state finds that the EU Treaties are incompatible with the national constitution. This has serious consequences for the Polish people ... The ruling undermines the protection of judicial independence as guaranteed by Article 19 of the Treaty ... Without independent courts, people have less protection and consequently their rights are at stake.”⁹

On 7 November, the final deadline to implement the 15 July ECJ judgement passed. The Polish government had not budged. In the meantime, Poland’s minister of justice Zbigniew Ziobro dusted down old plans to demolish the last remaining vestiges of judicial independence.

On 20 November, Justice Commissioner Didier Reynders, concluding a fruitless visit to Warsaw, warned the Polish government one last time: complying with the 15 July judgement was “*the only way* out of the crisis.” He added: “If Poland does not comply with the ruling, the Commission will apply financial sanctions, because it has *a duty to do so*.”¹⁰

Three open questions

33 months have passed since the European Commission launched the infringement procedure in April 2019. At the end of this long road, there is just one step left for the Commission to achieve what it has repeatedly promised: to preserve the independence of Polish courts. The Commission must send one last letter to the ECJ. It must ask the ECJ to declare that Poland has failed to fulfil its obligations to implement the 15 July judgement and to impose a penalty payment.

This leaves three open questions:

When should the European Commission go back to the European Court of Justice?

As soon as possible, ideally before the end of this year. It is vital to pre-empt further drastic changes damaging the Polish judiciary.

How high does the financial penalty have to be to ensure that Poland will implement the 15 July ECJ judgement?

It must be high enough to ensure that it changes the behaviour of the Polish government. Given what is at stake, for Poland and for the EU legal order, this calls for the highest fine in the history of the EU infringement procedure. ESI proposes 1 percent of Polish GDP per year, which is around 5 billion Euro, to be payable unless the 15 ECJ July judgement is implemented fully within two months.

⁸ Euractive, [“Jourova: EU ‘will start collapsing’ unless it takes on Polish challenge”](#), 12 October 2021.

⁹ European Parliament, [Debate, Strasbourg](#), 19 October 2021.

¹⁰ Le Monde, [“Guerre des nerfs entre la Pologne et Bruxelles: A Varsovie, le commissaire Didier Reynders a rappelé les règles communautaires en matière d’Etat de droit”](#), 20 November 2021.

Will this restore “effective legal protection” in Poland?

It is very likely to. It is by far the most effective remedy available, particularly if the European Commission combines the request for a high penalty payment with explicitly linking disbursements from its new Resilience and Recovery Facility (RRF) to the implementation of ECJ judgements on the rule of law. Under the RRF Poland applied for €23.9 billion in grants and €12.1 billion in loans in May this year.¹¹ The Commission has so far withheld the approval necessary for any of it to be disbursed.

It has taken the Polish government, and the Commission, years to reach this unprecedented stand-off. The ECJ has never found another member state in violation of Article 19: the Polish case is unique.

The infringement procedure is the oldest instrument that exists in the European Union to enforce EU law. Using it like this would create a crucial precedent for the whole EU: member states must not undermine the principle of effective legal protection set out in Article 19. If a member state ignores an ECJ judgement on this matter it should expect a fine of 1 percent of annual GDP. This would protect the rule of law across the EU in the future like no other measure could.

II. TAKING OFF THE GLOVES

When talking is hopeless

18 November 2021 saw one final attempt at dialogue between the European Commission and the Polish government on the rule of law. It did not go well.

That day at noon, Zbigniew Ziobro hosted Didier Reynders, the European Commissioner for Justice, at his ministry in Warsaw. It took Ziobro only minutes to make his point. He handed Reynders two black and white photographs of the destroyed Polish capital, Warsaw: a landscape of death in the aftermath of one of Nazi Germany’s biggest war crimes during World War Two, “undoubtedly the greatest slaughter perpetrated within a single city in human history.”¹² These pictures, Ziobro explained, were gifts for the Belgian Commissioner and for his Dutch predecessor, Frans Timmermans. Reynders appeared stunned.

Following the meeting Ziobro explained that there had been no agreement on anything related to the rule of law: “We had the opportunity to exchange our points of view and to underline our divergences.” He then focused on his gifts:

“These photographs of the destructions carried out by the Germans, implementing the ideology of the segregation of nations, have a symbolic dimension ...”

The tragedy of Warsaw, Ziobro explained, was part of a wider “tragic and dramatic history of Warsaw and Poland, where one can see the destruction wrought by the German Nazis in retaliation for the Warsaw Uprising and in *pursuit of a tragic ideology based on the segregation*

¹¹ European Commission, [“Recovery and Resilience Facility: Poland submits official recovery and resilience plan”](#), press release, 3 May 2021.

¹² Gunnar Paulsson, referring to some 720,000 pre-war inhabitants of Warsaw who were killed. Quoted in Alexandra Richie, *Warsaw 1944 – Hitler, Himmler and the Crushing of a City*, 2014.

of nations and peoples, the domination of one nation over another.”¹³ Ziobro also tweeted: “I passed on to the commissioner @dreynders photos depicting the history of Warsaw and the destruction that the Germans carried out, implementing the ideology of the *segregation of nations* ...”¹⁴



Ziobro tweet, 18 November

Ziobro described Nazi-ideology as being about “segregation.” He used the same accusation against European institutions. On 15 July Ziobro tweeted about the ECJ judgement on the Polish judiciary: “I can say that we are dealing with a political judgment commissioned by the European Commission, which is *based on the segregation of EU countries* ... Underneath this is *colonial thinking*.”¹⁵ His message: Poles had fought the ideology of “segregation” in the past. They would do so again now.

The meeting reflected Ziobro’s strategy to link the debate on the rule of law with memories of resistance to German aggression. In this, he is not alone. Krystyna Pawłowicz, one of 15 judges on Poland’s Constitutional Tribunal and before that for many years a PiS parliamentarian, tweeted on 27 November 2021:

“Are the countries of Europe condemned to repeated historical attacks, in various forms, by Germans incapable of respecting their neighbours and weaker countries? Who always seek to brutally subjugate others, not allowing them to live in peace and freedom? Germany, the evil spirit of Europe?”

On 1 December 2021, Pawłowicz shared on twitter a photograph of a Nazi prison for Polish children:

¹³ TVN24, [“Ziobro przekazał Reyndersowi dwa zdjęcia. ‘Tragiczna ideologia, u której podstaw leżała segregacja państw’](#)”, 18 November 2021.

¹⁴ Zbigniew Ziobro’s [Twitter account](#), posted 18 November 2021.

¹⁵ Zbigniew Ziobro’s [Twitter account](#), posted 15 July 2021.

“On 1st December 1942 in Lodz on Przemyslowa street GERMANS set up a WORK CAMP for Polish CHILDREN and TEENAGERS between 6 and 16 years of age. The camp existed until 18 January 1945. No more German rule over Poland!”



For Ziobro it seems irrelevant that Didier Reynders is from Belgium, a country that was itself occupied by Nazi-Germany, or that it is Belgians, not Germans, who play the leading roles in the current struggle over the rule of law: Commissioner Didier Reynders, Belgian prime minister Alexander de Croo and the president of the ECJ, Koen Lenaerts.

On 27 October 2021, de Croo delivered what he called a “Belgian message to Europe” at the College of Europe in the Flemish city of Bruges: “Stay away from institutional dogmatism. The last thing we need is an ideological clash. The Euro-centralists versus the Euro-sceptics. The trench war between extremes.”¹⁶ The EU, so de Croo, is at its best when it focuses on concrete results with pragmatism and compromise. This, however, requires respect of common core values, including the separation of powers. It is “not an issue of West against East, of old against new. This is about an overwhelming majority of member states from the Baltics to Portugal, who agree that our union is a union of values. Not a cash machine. You cannot pocket all the money but refuse the values.”¹⁷ His speech hit a nerve. In response the Polish government summoned the Belgian ambassador.¹⁸

De Croo was born in the Flemish town of Vilvoorde.¹⁹ Koen Lenaerts, the president of the ECJ, was born less than 30 kilometres further north in Mortsels. He became a judge at the ECJ in 2003, its vice president in 2012 and president in October 2015, one month before Ziobro became Polish minister of justice.²⁰ For Lenaerts the purpose of European integration is for member states to be able to solve concrete problems: “EU institutions are at the service of the

¹⁶ Alexander de Croo, [“Opening address at the College of Europe”](#), 27 October 2021.

¹⁷ Youtube, [“Opening address of Prime Minister Alexander De Croo at College of Europe in Bruges \(27 Oct. 2021\)”](#), 27 October 2021, 16:45-18:01.

¹⁸ Reuters, [“Poland summons ambassador after Belgian PM’s rule of law comments”](#), 29 October 2021.

¹⁹ Brussels Times, [“Belgium’s new Prime Minister: Who is Alexander De Croo?”](#), 30 September 2020.

²⁰ Veto Independent student magazine, [“De Europese Unie is geen natiestaat. Gelukkig maar!”](#) (“The European Union is not a nation state. Fortunately! Interview with Koen Lenaerts on the importance of the EU as a legal framework”), 21 October 2018.

member states to make their common policies work, in areas where everyone knows that those member states alone cannot make a difference ... It is therefore about matters that very often affect the daily lives of citizens.”²¹ It was member states which drove the process of integration, after they had come “to the conclusion that they can no longer manage many matters efficiently on their own. Clean water does not end at national borders, neither does clean air.” On another occasion Lenaerts explained:

”We must stop seeing the member states as the opposite of the Union. The main players in the Union are the member states themselves ... Europe is not a centralized superstate ... It was never the intention, as in the US, to arrive at a unitary structure, but one that demonstrates its added value through states and populations working together harmoniously.”²²

For Lenaerts “the Union is not a nation state: fortunately, I would say. The Union is a legal framework within which member states pursue common policies and recognize each other’s policies as equivalent, in those areas in which they make their own choices.”²³ This only works on the basis of the rule of law accepted by all. As he put it in an essay he wrote in early 2020: “without judicial independence, remedies grounded in EU law become a paper tiger.” Until recently, Lenaerts wrote, it was assumed that upon joining the EU states “will remain committed to defending liberal democracy, fundamental rights and a government of laws, not men. *Recent developments show that this assumption cannot simply be taken for granted.*”

It is this Belgian vision of European integration based on the rule of law, not an imaginary project of creating a centralising Germanic Empire, that Ziobro is fighting today. On 18 November, just after Reynders left the ministry of justice, Michał Wojcik, Ziobro’s deputy and close ally, tweeted:

“Commissioner Reynders comes from Belgium, a country whose statehood is less than 200 years old. He is a guest in Poland, which has a history dating back over 1000 years. For this reason alone, it is inappropriate to teach us about the rule of law.”²⁴

Belgium became an independent state in 1830, at a time when most of today’s EU member states did not yet exist as states: neither Ireland nor Finland, neither Italy nor Germany, neither Poland nor Slovakia, neither Estonia, Latvia and Lithuania nor Croatia, Romania and Bulgaria. Belgium is also a veteran of the first hour when it comes to European integration: a founding member of every European and transatlantic institution set up after World War Two, from the Council of Europe and NATO to the European Coal and Steel Community (ECSC).

Belgian leaders had very good reasons to play a leading role in building European institutions, embracing integration as an answer to the instability that Europe and their country had experienced in the first half of the 20th century. After all, the First World War in the West began with a German attack on its neutral Belgian neighbour. The Second World War in the West began with a German attack on Belgium and Luxemburg. It was in response to the tragic experiences of Europe in the early 20th century – war, invasion, occupation, protectionism, economic crises – that Belgian and other West European leaders embraced integration based on the rule of law. This proved a phenomenal success, so successful that new democracies in

²¹ Veto Independent student magazine, [“De Europese Unie is geen natiestaat. Gelukkig maar!”](#) (“The European Union is not a nation state. Fortunately! Interview with Koen Lenaerts on the importance of the EU as a legal framework”), 21 October 2018.

²² [Interview with Koen Lenaerts in KU Leuven](#), 4 February 2017.

²³ Veto Independent student magazine, [“De Europese Unie is geen natiestaat. Gelukkig maar!”](#), *ibid.*

²⁴ Michał Wojcik, [Twitter account](#), posted 18 November 2021.

South and Central Europe joined too. Belgian leaders will not stand by today and watch the foundations of this European integration success are being destroyed by Ziobro and his allies.

Ziobro's bulldozer strategy

“The most extreme way to capture the referees is to raze the courts altogether and create new ones.” *How Democracies Die*²⁵

Zbigniew Ziobro has made his goal very clear: he wants complete control over his country's judiciary. When, in July 2021, a panel of judges at the new Disciplinary Chamber of the Supreme Court decided not to lift the immunity of a judge from Krakow, whom Ziobro wanted to see tried he called a press conference. Furious, he claimed that these judges had “shamelessly [put] the unworthy corporate interest of the judicial community above the law and above the principles expected by the public.”²⁶ Their decision was not just wrong, it was evil, he explained: “the judicial community is incapable of self-cleaning. It is not capable of decisively fighting the evil and pathologies within its own environment.”²⁷

On 5 August, Ziobro took the time to explain his strategy on the rule of law dispute with the ECJ in a long interview.²⁸ He warned that any negotiations on the rule of law with European institutions were bound to weaken Poland's position: “Under no circumstances should one succumb to the unlawful and aggressive actions of the ECJ and of the European Union.” Ziobro pointed out that Polish politicians had already tried to negotiate with the European Commission in 2017 had failed:

“The president [*Duda*] already met the European Union's requests once by vetoing the laws on the Supreme Court and the National Council of the Judiciary [*in July 2017*] ... it is clear that the policy of concessions to successive demands from Brussels has not been effective in recent years. *If we had done our part and not given in* and withdrawn the planned changes, the reform of the judiciary would have been completed long ago.”

Ziobro referred to a presidential veto against a law he had proposed in July 2017 to radically restructure the Supreme Court. Ziobro's 2017 law would have reduced the Court's competencies, vetted all its judges and staff, decreased the number of judges to 44 in three newly created chambers, and moved the Court under the control of his ministry.²⁹

This proposal triggered massive protests across the country. It was also too much for president Duda, who vetoed the law after it was passed by parliament, arguing that “the influence of the minister of justice-prosecutor general on the activities of the Supreme Court would be enormous ... It must be remembered that the minister of justice, who is also the prosecutor general, is a party to a number of proceedings pending before the Supreme Court.”

²⁵ Steven Levitsky, Daniel Ziblatt, *How Democracies Die – What History reveals about our future*, 2018, p. 80.

²⁶ Gazeta Wyborcza, [“Ziobro atakuje Izbę Dyscyplinarną za ‘bezwstydną’ decyzję w sprawie sędzi Beaty Morawiec”](#), 9 July 2021.

²⁷ Sąd Najwyższy, [“Oświadczenie Pierwszej Prezes Sądu Najwyższego, w związku z wypowiedzią Ministra Sprawiedliwości z dnia 9 czerwca br.”](#), 11 July 2021.

²⁸ Rzeczpospolita, [“Zbigniew Ziobro: Obecność Polski w Unii Europejskiej nie za wszelką cenę”](#), 5 August 2021.

²⁹ Sejm, [“Druk 1727”](#), 12 July 2017.

President Duda then signed a law that would have forced “only” 40 percent of all Supreme Court judges into early retirement. This was stopped by the ECJ in 2019.³⁰

However, Ziobro did not give up on the idea of a dramatic transformation of the Supreme Court. And so, shortly after the 15 July ECJ judgement this year, Ziobro told the public on 23 July that there had been “nine laws, lying in the drawers of the Ministry of Justice for several years” which should now be resurrected: “Yielding to the European Union, yielding to foreign pressure, yielding to threats and unlawful demands leads to legal chaos in Poland and is a road to nowhere.”³¹ Ziobro insisted that “the prime minister and the entire political camp will decide to carry out a comprehensive reform of the judiciary, because only this will bring results.”³²

On 8 August 2021, Michał Wójcik, Ziobro’s deputy in the ministry of justice, told a daily that Ziobro would insist on far more radical changes of the entire judiciary, from the lowest to the Supreme Court, to complete the subordination of the judiciary to the ministry of justice. “Of course, we are ready to talk,” Wójcik noted, “about deep changes concerning the Supreme Court.” Wójcik also stressed that there must be no concession to the European Commission: “The European Commission and the ECJ are ruthlessly trying to appropriate further areas. I emphasize – ruthlessly. They treat us as second-class citizens. It’s a colonial mentality – they used to have their own colonies, and now they treat Poland this way.” What was needed was an even more radical restructuring of all courts in Poland: “We expect a return to those reforms that we carried out until the veto [*by president Duda in 2017*]. At that time, we were making changes in various areas of the justice system like a bulldozer.”³³

On 2 November 2021, the Rzeczpospolita daily published further details about Ziobro’s plans for the Supreme Court. The Supreme Court would lose many of its responsibilities. All current judges would have to be assessed once again by the National Council of the Judiciary (NCJ).³⁴ Instead of five there would be two chambers.

On 15 November, Ziobro announced that new drafts “were sent (to the government) for consultation two months ago.”³⁵ Two weeks later, he added: “I propose that we ... break with the policy of stubbornly trying to pander to EU institutions. We cannot be like the man who has been bruised twice in the same park at night, and who pushes himself there a third time.”³⁶ The time for talking with the European Commission was over. Duda’s “mistake” of 2017 could now be corrected.

³⁰ ESI, [Under Siege – Why Polish courts matter for Europe](#), 22 March 2019.

³¹ WNP.pl, [“Zbigniew Ziobro: uleganie UE to droga donikąd, trzeba dokończyć reformę”](#), 23 July 2021.

³² Ibid.

³³ All quotes: Gazeta Prawna, [“Wójcik: Chcemy mówić o zmianach w Sądzie Najwyższym i sądach powszechnych”](#), 8 August 2021.

³⁴ See: Court of Justice of the European Union Press Release No 31/21 Luxembourg, 2 March 2021. In July 2021, the European Court of Human Rights (ECtHR) in Strasbourg ruled that “the NCJ ... did not provide sufficient guarantees of independence from the legislative or executive powers.” ECHR, [“Newly created chamber of the Polish Supreme Court was in breach of the Convention”](#), 22 July 2021. On 8 November 2021 the ECtHR urged Poland to “take rapid action to address the lack of independence of the National Council of the Judiciary.” ECHR, [“Poland must take rapid action to resolve the lack of independence of the National Council of the Judiciary”](#), 8 November 2021.

³⁵ 300polityka.pl, [“Ziobro prezentuje ustawy reformujące sądownictwo, ale bez projektu zmian w SN: ‘To jeszcze nie moment, aby go przedstawiać. Trwają konsultacje’”](#), 29 November 2021.

³⁶ Gazeta.pl, [“Ziobro grozi buntem. Duda grozi wetem. Ostateczna rozprawa z sądami rozbija się o Pałac”](#), 1 December 2021.



Zbigniew Ziobro, Minister of justice



Mateusz Morawiecki, Prime minister

Morawiecki and the silent cash-machine

Ziobro is proudly disdainful of European institutions, their recommendations and proposals. Asked recently whether he considered the current policy of prime minister Morawiecki “too soft for the EU” he replied that “there is a fundamental difference in the view of Mateusz Morawiecki and mine, and thus of Solidarity Poland, on the conduct of the EU. The prime minister is in favor of finding compromises. We believe that EU aggression should be met with a tough response.”³⁷

Morawiecki became prime minister in December 2017. The anglophone ex-banker and Ziobro’s political rival has long pursued a strategy of offering to engage in talks with Brussels, without ever conceding anything on the substance of his government’s judicial reforms. For many years this worked well. Poland remained the biggest beneficiary of EU funding while the Polish government ignored all recommendations, concerns and warnings by European institutions concerning the rule of law. For years the EU truly was a silent cash-machine.³⁸

Following a meeting in January 2018 to discuss the rule of law in Poland Jean Claude Juncker, the European Commission president at the time, declared that he looked forward to “making progress by the end of February.” On 14 February 2018 Juncker repeated: “I think there is a good chance the Polish positions will move toward ours.” In early May 2018, the Financial Times and other international media wrote that “Poland offers fresh concessions to the EU over legal reforms.”

There was no progress. There were no concessions. On 22 March 2018, Morawiecki admitted: “The essence, the most important elements of the reform, remains untouched. At the same time, we are looking at what would allow the other side to say: Oh, one can reach a compromise with Poland.”³⁹ In April 2018, the Polish Secretary of State for EU affairs explained: “We make a concession regarding issues which do not play any central role in the judiciary system.”⁴⁰ Adam Bielan, the deputy speaker of the Senate, told a radio station on 11 June 2018: “The European Commission now has more important problems than the rule of law in Poland.”⁴¹

³⁷ Rzeczpospolita, [“Zbigniew Ziobro: Obecność Polski w Unii Europejskiej nie za wszelką cenę”](#), 5 August 2021.

³⁸ ESI newsletter, [Beyond the silent cash-machine – smart solidarity](#), 27 April 2020.

³⁹ RMF24.pl, [“M. Morawiecki: Zależało mi, żeby najważniejsze elementy reformy ws. sądownictwa zostały nienaruszone”](#), 23 March 2021.

⁴⁰ TVN24, [“Kaczyński mówił o ‘ustępstwach’. Szymański: nie lubię tego słowa”](#), 9 April 2018.

⁴¹ [Wirtualna Polska](#), quoted in English in ESI newsletter, [Win-Win for Europe: Defending democracy in the Balkans – and in Poland](#), 22 June 2018.

Following the 15 July ECJ judgement Morawiecki pursued the same strategy once again. On 11 September 2021, German Chancellor Angela Merkel visited Poland. She confirmed, after meeting with Morawiecki in Warsaw's royal park, that they had spoken about the rule of law "in quite some depth". She added: "German-Polish relations are based on the ability to listen, keep an open mind and attempt to arrive at a compromise, even when we have difficult issues to discuss."⁴² On 18 October Morawiecki wrote a letter to European leaders in which he stated that he was looking forward "to talking – in the spirit of mutual respect, and respect of our sovereignty, without pushing us to give up our national competences" about the rule of law. In response German Chancellor Angela Merkel warned that "a cascade of legal disputes before the ECJ is not a solution to the problem of the rule of law".⁴³ Morawiecki was hopeful: "Fortunately, this is a political process. And political processes can be stopped by politicians ... then we are not talking to each other with a gun to our head."⁴⁴

In fact, Morawiecki refused to discuss the executive's control over Poland's judges. At a debate in the European Parliament in October 2021, Morawiecki suggested instead a debate on "constitutional pluralism" and on the competences of the ECJ and the European Commission: "If the institutions established in the treaties exceed their competences, member states must have the tools to react. We must say stop, the EU's competences have their limits, we must no longer remain silent when they are exceeded."⁴⁵ At the European Council that followed few leaders agreed. Hungarian prime minister Viktor Orbán warned against a witch hunt against Poland by European institutions without "any legitimate authority to do so." Most leaders did not agree. Dutch prime minister Mark Rutte demanded: "We have to be tough ... The independence of the Polish judiciary is the key issue we must discuss. It is very difficult to see how a big new fund of money could be made available to Poland when this is not settled." Belgian prime minister Alexander de Croo warned that the Polish government's "recent attack on the European Court of Justice is completely unacceptable." He called on all Europeans to back the ECJ: "This rule of law discussion is existential."⁴⁶

With the European Council divided, and his diplomatic strategy failing to unlock EU funding, Morawiecki's tone changed. In an interview published on 24 October, he warned that Poland might veto critical decisions on legislation, including the EU's climate package: "What is going to happen if the European Commission will start the third world war? If they start the third world war, we are going to defend our rights with any weapons which are at our disposal ... If someone attacks us in a completely unfair way, we will defend ourselves in any possible manner."⁴⁷ At the same time, Morawiecki predicted that in the end Poland would get all the EU money it had been promised, even without implementing the 15 July ECJ judgement.

But what if this turns out to be wrong? What if the European Commissioners and the ECJ mean it, when they say that this is an existential issue for the EU? What if they are not bluffing?

⁴² Bundeskanzlerin, "[German-Polish relations are 'important at a personal level'](#)", 11 September 2021.

⁴³ Deutsche Welle, "[Rule-of-law row with Poland set to dominate EU leaders' summit](#)", 21 October 2021.

⁴⁴ Financial Times, "[Poland's prime minister accuses EU of making demands with 'gun to our head'](#)", 24 October 2021.

⁴⁵ European Parliament, [Debate Strasbourg](#), 19 October 2021.

⁴⁶ Youtube, "[Opening address of Prime Minister Alexander De Croo at College of Europe in Bruges \(27 Oct. 2021\)](#)", 27 October 2021, 16:45-18:01.

⁴⁷ Financial Times, "[Poland's prime minister accuses EU of making demands with 'gun to our head'](#)", 24 October 2021.

III. CUTTING THE KNOT

“First, politics is about getting and keeping political power ... Second, political survival is best assured by depending on few people to attain and retain power.”⁴⁸

Ziobro’s power

To understand what gives Ziobro such confidence one must look at the arithmetic of political power in Warsaw today. In 2015 a coalition of three unequal partners fought elections under the banner of the *United Right*: by far the largest was *Law and Justice* (PiS), led by Jarosław Kaczyński; then there was *Agreement*, led by Jarosław Gowin, a former minister of justice under Donald Tusk; the smallest partner was *Solidarity Poland*, led by Zbigniew Ziobro.

The United Right narrowly won both the parliamentary elections in October 2015 and in October 2019. Between these elections Ziobro’s influence increased, with the number of his parliamentarians rising from 7 to 19.

Parliamentary elections: number of seats won in lower house (Sejm)

	October 2015	October 2019
PiS (Kaczynski)	216	198
Solidarity Poland (Ziobro)	7	19
Agreement (Gowin)	12	18
Total United Right	235	235
Total other parties	225	225

In August 2021, Gowin’s party left the coalition. The majority of the United Right government in the lower house of parliament now hangs by a thread. Before each vote, Kaczyński has to convince several opposition members to support PiS. The government already lost its majority in the upper house (the Senate).

Jaroslaw Kaczyński needs Ziobro’s support to prevent early elections. The support of the 19 members from Solidarity Poland is more crucial than ever. In recent months the position of the two main opposition parties has improved. If they were to form a coalition they could seriously threaten the position of PiS. In some recent polls, the combined support for *Civic Coalition* (Koalicja Obywatelska) and *Poland 2050* put it neck and neck with the ruling coalition. In other polls, it is ahead. On 23 November 2021, Euractiv reported that “Support for the ruling Law and Justice dropped to 30 percent, according to several opinion polls published over the last few days. The support of the democratic opposition remains steady at over 40 percent, often close to 50 percent, while the far-right Confederacy is polling below 10 percent.”⁴⁹

Kaczyński also depends on Ziobro for other reasons: the huge influence Ziobro has acquired over prosecutors and judges. Ever since the United Right majority in parliament merged the roles of minister of justice and prosecutor general into a single post in March 2016, Ziobro has accumulated massive influence, dismissing prosecutors, instructing them, intervening in any

⁴⁸ Bruce Bruno de Mequita, Alstair Smith, *The Dictator’s Handbook – Why Bad Behaviour is almost always good politics*, p. xviii, 2011.

⁴⁹ Euractiv, [“Ruling PiS party support drops to 30%”](#), 23 November 2021.

prosecution case he likes. He can disclose documents related to any investigation to whomever he wishes. This has turned him into a very valuable ally, and a dangerous man to alienate.

Ziobro also knows how to rally the far-right nationalist electorate with a powerful story of how Poland's national identity is at stake in the confrontation with the European Union's institutions: failure to resist the ECJ on the rule of law would lead to "introducing the propaganda of LGBT circles into schools." The stakes could not be higher, Ziobro warned:

"It is the European Union that is waging a political war with Hungary and Poland ... The aspirations of Brussels and of the largest European states are aiming to create a common federal state and blurring cultural differences. That is why refugees are introduced and the LGBT and gender ideology are promoted. Two countries stand in the way: Poland and Hungary. We are victims of a brutal political attack by EU institutions."⁵⁰

At the same time, Ziobro, like Morawiecki, reassures his supporters that they need not fear EU financial sanctions. In 2018, he explained, Commissioner Vera Jourova came to Warsaw on a similar mission to blackmail him:

"She then told me that if Poland did not join the European Public Prosecutor's Office, we would face serious financial consequences ... I explained to the Commissioner that not everything can be bought and that as long as I am the minister of justice, Poland will not succumb to any blackmail. I have not changed my mind. Poland did not join the European Public Prosecutor's Office and we did not suffer any penalty. This is an example that shows that it is worth playing a tough game with the EU."⁵¹

Ziobro suggests that Poland could simply refuse to pay any penalties. After the ECJ had ordered Poland to pay € 1 million a day in October 2021 for failing to comply with an order it had issued related to the Polish Supreme Court Ziobro insisted that his government "cannot and should not pay a single zloty ... Only the weak give in to pressure."⁵² Instead, Ziobro suggests, attack is the best defence:

"Poland should respond to the EU's blackmail with a veto on all matters that require unanimity in the EU. Poland should also revise its commitment to EU climate and energy policy, which results in drastic hikes of energy prices ... If this dispute escalates, I will demand that Poland suspends its EU contributions. It would be justifiable since the EU illegitimately denies us funds from a joint budget that we also contribute to."⁵³

Ziobro's Achilles heel

"Politics is not terribly complicated." *Bruce Bruno de Mequita and Alstair Smith*⁵⁴

Ziobro is telling a dramatic story, which appeals to his supporters: a patriotic leader defending Poland against hypocritical and dishonest European foes, controlled by a hostile Germany, who are also corrupt and do not have the stomach for a fight. But this story has one serious problem,

⁵⁰ Rzeczpospolita, "[Zbigniew Ziobro: Obecność Polski w Unii Europejskiej nie za wszelką cenę](#)", 5 August 2021.

⁵¹ Ibid.

⁵² Wyborcza, "[Ziobro twardo: Kary dla Polski są bezprawne. Tylko słabi ulegają presji](#)", 28 October 2021.

⁵³ Financial Times, "[Poland justice minister threatens EU veto over rule of law 'blackmail'](#)", 24 October 2021.

⁵⁴ Bruce Bruno de Mequita, Alstair Smith, *The Dictator's Handbook – Why Bad Behaviour is almost always good politics*, p. xix, 2011.

of which Jaroslaw Kazcynski is likely aware: a majority of Poles, including PiS voters, do not buy it.

Surveys show that Ziobro's agenda is far from popular. On 7 December 2021 Poland's Rzeczpospolita published an opinion poll where it asked whether the Polish government should do what the EU had called for regarding the rule of law: to suspend the Disciplinary Chamber of the Supreme Court and to reverse the suspension of judges ordered by this chamber. 56 percent agreed, while 29 percent disagreed and 15 percent stated that they did not know.⁵⁵ In another poll by the Institute of Public Affairs 48 percent of respondents in Poland agreed with the statement that "EU institutions react too late and too weak in response to the EU law violations by governments", while 22 percent disagreed.⁵⁶ As Euroactiv wrote:

"Interestingly, the belief that the EU's reaction has been inadequate and weak is shared not only by the disheartened majority of opposition voters but by half the supporters of the ruling Law and Justice (PiS). According to the same poll, most Poles support the controversial new principle of 'money for the rule of law' (61% to 25%), although the idea is opposed by 70% of PiS voters.

EU institutions are more trusted by Poles than the national institutions. Trust in the ECJ (49%), the European Commission (46%) and the European Parliament (45%) is higher than in the national Constitutional Tribunal (21%), the government (19%) and the national parliament (the Sejm) (16%). However, the numbers are lower among PiS supporters.

55% of Poles believe that the risk of Polesxit is real. Half of Poles believe that the Warsaw-Brussels crisis is primarily the responsibility of the Warsaw government, and only 19% blame the EU institutions ...

Some 82% of Poles continue to support EU membership, and 60% are afraid of a potential negative impact of Polesxit on the economy, deterioration of the quality of life, security and the state of democracy in Poland. In a hypothetical referendum on EU membership, 79% would vote to stay in the EU, 13% to leave. Support for Polesxit among PiS supporters is 21%.⁵⁷

Ziobro's political masterstroke has been to get as far as he has while pursuing an agenda that most of his compatriots do not share. But therein lies his vulnerability. What if the European Commission would put a clear choice before pro-EU conservatives, without whom Ziobro cannot maintain his control: a choice between his radical agenda on the one hand and billions of Euros supporting Poland's development on the other? What if by calling Ziobro's bluff the European Commission and the ECJ not only save the rule of law in Poland and preserve the EU's legal order but also break his spell over a shrinking radical minority? What if it is Ziobro, and not Reynders, who is bluffing?

⁵⁵ Rzeczpospolita via [Twitter](#), 7 December 2021.

⁵⁶ Institute of Public Affairs, [Widmo Polesxitu?](#), 2021.

⁵⁷ Euractiv, ["Half of Poles consider EU institutions 'too weak' over rule of law conflict"](#), 25 November 2021.

A message from Brussels

“The moment you set an example, the spell of the status quo is broken, and others will follow.”
*Timothy Snyder*⁵⁸

The European Commission has two powerful instruments to see the rule of law restored in Poland. The first it is already using: to withhold the funding of the € 734 billion *Resilience and Recovery Facility* (RRF), which was agreed upon in July 2020. The RRF entered into force on 19 February 2021. Member states had to prepare national recovery plans, outlining where these grants and loans would go.⁵⁹ Poland applied for € 23.9 billion in grants and € 12.1 billion in loans in May.⁶⁰ This is equivalent to almost 5 percent of Poland’s GDP.

*EU Recovery support grants (in € billion) as % of GDP*⁶¹

	RRF support	% of GDP
Greece	17.8	10.7
Romania	14.2	6.5
Spain	69.5	6.1
Hungary	7.2	5.3
Poland	23.9	4.6
Italy	68.9	4.2

By now almost all national recovery plans have been approved. Poland’s has not. According to the regulation establishing the RRF “no financial contribution should be awarded to the member state if the recovery and resilience plan does not satisfactorily address the assessment criteria.”⁶² These criteria include assessments of institutional resilience prepared by the Commission, which have consistently highlighted the importance of the rule of law and the problems with Poland’s judiciary.⁶³ Withholding RRF funding until ECJ judgements on the rule of law are implemented is a powerful tool in the hands of the European Commission. At the same time, it is in the interest of Poland, its citizens and of the EU that this money can be disbursed.

That makes the second instrument the Commission has even more important to help bring about a breakthrough soon: the ongoing infringement case related to the 15 July ECJ judgement on the disciplinary system. Article 260 of the Treaty on the Functioning of the European Union states:

“If ... the member state concerned has not taken the necessary measures to comply with the judgment of the Court, [the Commission] may bring the case before the Court ... *It*

⁵⁸ Timothy Snyder, *On Tyranny – Twenty Lessons from the Twentieth Century*, 2017, p. 51.

⁵⁹ European Commission, “[National recovery and resilience plans](#)”, accessed 29 June 2021.

⁶⁰ European Commission, “[Recovery and Resilience Facility: Poland submits official recovery and resilience plan](#)”, press release, 3 May 2021.

⁶¹ Eurostat, “[Gross domestic product at market prices](#)”, last updated 25 June 2021.

⁶² [Regulation \(EU\) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility](#), Recital 45.

⁶³ *Ibid.*, Article 19, b: “whether the recovery and resilience plan is expected to contribute to effectively addressing all or a significant subset of challenges identified in the relevant country-specific recommendations [...] addressed to the Member State concerned or challenges identified in other relevant documents officially adopted by the Commission in the context of the European Semester.” For the European Semester, see [here on the European Commission’s webpage](#). There is also a [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](#).

shall specify the amount of the lump sum or penalty payment to be paid ... which it considers appropriate in the circumstances.” (Article 260)

How are such fines determined? The treaty leaves this open. It specifies that fines must be *appropriate in the circumstances*.

EU law gives the Commission the right to propose any financial sanction. It gives the ECJ the right to decide the appropriate fine, at *whatever level it sees fit*. There are three criteria the Commission considers. First, how serious the violation is; second, how wealthy a member is; and third, how long an infringement violation went on for: seriousness, wealth, and time. Fines should be fair, objective and transparently calculated.

Legally, the Commission can suggest *any* amount to the Court. It is up to the ECJ to determine the actual fine, and it is completely free to do so, not bound by the Commission’s request or by any upper or lower limit. The highest lump sum which the ECJ has ever imposed has been € 40 million against Italy 2014 for failing “generally and persistently, to fulfil its waste management obligations.” The highest annual payment has been € 115.5 million, imposed on France in 2005 for allowing fisherman to catch fish that were too small. However, the Commission regularly imposes much higher fines in another field: competition policy. The maximum level of fines against companies are up to 10 percent of a company’s earnings in the preceding business year.⁶⁴ A previous Dutch Commissioner, Neelie Kroes, wanted this amount to “send three clear signals to companies. Don’t break the anti-trust rules; if you do, stop it as quickly as possible, and once you’ve stopped, don’t do it again.”⁶⁵ This is the message that the ECJ should now send to the Polish government. It requires a sizeable penalty: the larger, the more likely it will lead to a quick resolution of this crisis.

In July 2018, Margrethe Vestager, the Commissioner in charge of competition, explained why the Commission imposed a fine on Google: “What we want is for Google to change its behaviour, this is an illegal behaviour, we want this to stop in an effective manner.”⁶⁶ That fine was € 4.3 billion Euros.⁶⁷ Clearly, when it wants to be, the European Commission can be intolerant of violations of EU legislation. It is time to apply the same logic to the defence of the rule of law in Poland and in the European Union.

€ 5 billion to save the rule of law

“At the moment, the enemies of liberal democracy seem more determined to shape our world than its defenders. If we want to preserve both peace and prosperity, both popular rule and individual rights, we need to recognise that these are no ordinary times – and go to extraordinary lengths to defend our values.” *Yascha Mounk*⁶⁸

In 2017, the Commission announced that it would prioritize all cases that undermine the rule of law: “The Commission will therefore pursue rigorously all cases of national rules or general

⁶⁴ European Commission, [“Competition: revised Commission Guidelines for setting fines in antitrust cases – frequently asked questions”](#), 28 June 2006.

⁶⁵ European Commission, [“Competition: Commission revises Guidelines for setting fines in antitrust cases”](#), 28 June 2006.

⁶⁶ Youtube, [“European Commission fines Google €4.34 bn for illegal practices regarding Android mobile devices”](#).

⁶⁷ European Commission, [“Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine”](#), press release, 18 July 2018.

⁶⁸ Yascha Mounk, *The People vs. Democracy – Why our freedom is in danger and how to save it*, 2018.

practices which impede the procedure for preliminary rulings by the Court of Justice, or where national law prevents the national courts from acknowledging the primacy of EU law.”⁶⁹

The Commission’s infringement guidelines provide for exceptional fines “where appropriate in particular cases.”⁷⁰ They note that the “fixing of the sanction must be based on the objective of the measure itself, that is to ensure effective application of Community law.” This includes “the need to ensure that the penalty itself is *a deterrent to further infringements*.”

This also applies to the ECJ 15 July 2021 judgement against Poland. The ECJ has never dealt with a case that posed a greater threat to the EU legal system. The Commission and the ECJ could argue for exceptionally large fines based on an *Article 19 – European Free courts principle*:

Whenever the ECJ finds that the right to “effective legal protection” through national courts, which Article 19 of the EU treaty guarantees, is violated by member states, and these do not remedy the situation, a financial sanction shall be imposed that is at least 1 percent of the GDP of the country annually.

In the case of Poland, which has a GDP of about € 520 billion, this would amount to a fine of some € 5.2 billion annually. The Commission should therefore propose, and the ECJ should impose a fine of € 880 million every two months until the Polish government implements the 15 July 2021 ruling.

Ziobro has taken off his gloves. It is time for European institutions to prove that EU law and institutions are stronger than the chaos that he has already brought to his country’s courts and that he has tried to export to the rest of the EU. But time is running out. The longer the Commission waits, the bigger the chances are that even more damage will be done to the Polish judiciary. As guardian of the treaty, the Commission has an obligation to act. It stands a very good chance of success.

The time to take Poland back to the ECJ is now. It is the best way to cut this Gordian knot and to ensure that the money from the RRF can flow soon to help Poles cope with the pressures created by the pandemic. This would be a win-win-win scenario: A win for the rule of law in Poland. A win for the European legal order. A win for the people of Poland, as EU funding is disbursed. A win also for pro-EU Polish conservatives, fed up with Ziobro’s bulldozer tactics and concerned about his extraordinary power over courts. And a historic achievement for the von der Leyen Commission and the European Union.

⁶⁹ Communication from the Commission, [EU law: Better results through better application, \(2017/C 18/02\)](#), 19 January 2017, page 5.

⁷⁰ European Commission, [“Application of Article 228 of the EC Treaty”](#) [now Art. 260 TFEU], 2005.

ANNEX A – BULLYING THE SUPREME COURT

“I declare as minister of justice that these are actions contrary to Polish law.”
*Zbigniew Ziobro, attacking Malgorzata Manowska,
 the Polish Supreme Court president, 6 August 2021*⁷¹



*Supreme Court president Malgorzata Manowska
 (with Zbigniew Ziobro)*

Ziobro’s understanding of the relationship between himself as minister of justice and Polish judges is encapsulated in his treatment of the Polish Supreme Court in recent months.

In 2007, Małgorzata Manowska was a deputy minister of justice under minister Zbigniew Ziobro.⁷² In 2016, Ziobro appointed her director of the National School of Judiciary and Public Prosecution. In 2018, President Andrzej Duda made her a judge of the Supreme Court. On 25 May 2020, Duda made Manowska the president of the Polish Supreme Court in a process criticized by most of the court’s own judges as violating the rules.

On 14 July 2021, the ECJ ordered the suspension of all activities of the new disciplinary Chamber of the Supreme Court.⁷³ A few hours later, a five-member panel of the Polish Constitutional Tribunal judged that such orders from the ECJ were unconstitutional and should be ignored.⁷⁴ The next day, on 15 July, it issued its historic judgment on the disciplinary regime, arguing that the Disciplinary Chamber of the Supreme Court “does not provide all the guarantees of impartiality and independence and, in particular, is not protected from the direct or indirect influence of the Polish legislature and executive.”⁷⁵

For Supreme Court president Manowska this presented a dilemma, as the disciplinary chamber is one of five chambers of her court. On 16 July, Manowska declared that she would ignore the judgement of the ECJ and allow the Disciplinary Chamber to operate. She explained that

⁷¹ TVN24, [“Zbigniew Ziobro krytykuje Małgorzatę Manowską po decyzji w sprawie Izby Dyscyplinarnej SN”](#), 6 August 2021.

⁷² Ziobro was minister of justice in an earlier government from 2005 to 2007.

⁷³ Curia, [“Polska zostaje zobowiązana do natychmiastowego zawieszenia stosowania przepisów krajowych odnoszących się w szczególności do uprawnień Izby Dyscyplinarnej Sądu Najwyższego”](#), 14 July 2021.

⁷⁴ Trybunał Konstytucyjny, [“Obowiązek państwa członkowskiego UE polegający na wykonywaniu środków tymczasowych odnoszących się do kształtu ustroju i funkcjonowania konstytucyjnych organów władzy sądowniczej tego państwa”](#), 14 July 2021.

⁷⁵ Curia, [“Polska zostaje zobowiązana do natychmiastowego zawieszenia stosowania przepisów krajowych odnoszących się w szczególności do uprawnień Izby Dyscyplinarnej Sądu Najwyższego”](#), 14 July 2021.

“European law does not cover the field of the organisation of justice, as it is the member states that have competence in this area.”

On 20 July, the European Commission increased its pressure. Commission vice-President Vera Jourova announced that the Commission would seek financial penalties.⁷⁶ Within two days president Manowska began to waver.

Asked on 22 July whether she would consider *suspending* the operation of the Disciplinary Chamber as demanded by the ECJ she replied vaguely that she was “considering such a step.”⁷⁷ Prime minister Morawiecki told a political rally that same day that he agreed with Manowska that “it was worth looking for solutions.”⁷⁸ An astonishing U-turn followed. On 28 July, Manowska wrote to the Polish government, explaining that Polish laws should be brought in conformity with European law. She announced that she was ready “to ensure ad hoc stabilisation of the existing situation for the duration of the legislative process, but no longer than until 31 January 2022”:

“Irrespective of the possible far-reaching financial consequences for Poland of failing to implement the ECJ rulings, I would like to draw attention to the actual paralysis of the system of disciplinary responsibility of judges resulting from the said rulings ... Thus, bringing the system into conformity with European law clearly requires immediate statutory changes.”

Then, on 5 August, Manowska issued orders to suspend the work of the Disciplinary Chamber.⁷⁹ Justifying this she referred to “the interest of the Republic of Poland”, “the Constitution of the Republic of Poland” and “the need to respect international law binding on the Republic of Poland.”⁸⁰

Ziobro reacted with outrage: “In connection with the orders issued yesterday by the First President of the Supreme Court, Małgorzata Manowska, blocking the full work of the Disciplinary Chamber, *I declare as minister of justice that these are actions contrary to Polish law.*” Ziobro mocked the Supreme Court president:

“Neither the Polish constitution has been amended, nor the provisions of the European treaties have changed, nor has the Constitutional Tribunal issued a different ruling ... Meanwhile, Madam First President, contrary to the above-quoted position, decided to once again effectively suspend the normal work of the Disciplinary Chamber.”⁸¹

In Ziobro’s eyes Manowska had disqualified herself: “A person who has decided to perform the responsible function of First President of the Supreme Court should be resistant to threats

⁷⁶ European Commission, [“Remarks by Vice-President Věra Jourová at the press conference on Rule of Law Report 2021”](#), 20 July 2021.

⁷⁷ Rzeczpospolita, [“Małgorzata Manowska: brak reformy systemu sprawiedliwości może być jedną z okoliczności mojego odejścia ze służby”](#), 22 July 2021.

⁷⁸ NaTemat, [“PiS mięknie ws. sporu z TSUE? Zaskakujące słowa Morawieckiego o Izbie Dyscyplinarnej”](#), 22 July 2021.

⁷⁹ All quotes: Sąd Najwyższy, [“Zarządzenie Nr 90/2021 Pierwszego Prezesa Sądu Najwyższego z dnia 5 sierpnia 2021 r. w związku z wyrokiem Trybunału Sprawiedliwości Unii Europejskiej z dnia 15 lipca 2021 r. \(C-791/19\)”](#), 5 August 2021.

⁸⁰ Sąd Najwyższy, [“Zarządzenie Nr 91/2021 Pierwszego Prezesa Sądu Najwyższego z dnia 5 sierpnia 2021 r. W sprawie unormowania zasad postępowania w zakresie przechowywania akt sądowych, rejestracji, przydziału spraw sędziom oraz wyznaczania członków składu orzekającego w niektórych sprawach”](#), 5 August 2021.

⁸¹ TVN24, [“Zbigniew Ziobro krytykuje Małgorzatę Manowską po decyzji w sprawie Izby Dyscyplinarnej SN”](#), 6 August 2021.

and pressure, both from foreign institutions and from the politicized part of the judiciary and the media supporting her. The decisions made by Mrs. Manowska mean that unfortunately she was not able to meet this challenge.” The Supreme Court issued a curt response: “The orders were intended to calm the conflict, not escalate it. Therefore, the political statement of the Ministry of Justice shall remain without a comment.”⁸²

On 9 August, Manowska deepened the confusion. She explained once again that she agreed with the Polish Constitutional Tribunal: “Personally, I do not agree with the ECJ’s judgment of 15 July or the ECJ vice president’s order of 14 July.” However, she also justified that she had “issued two orders just to give time to politicians to try to get along and set some direction for changes. *So that the threat of financial penalties does not hang over their heads.*”⁸³ This was a purely political, not legal, argument.

Ziobro was having none of it. According to him, Manowska had “issued many completely mutually exclusive statements” and had “turned 180 degrees”:

“she herself noted that if she made such a decision, she would do so without a legal basis, so it would be illegal. Then she addressed a letter to the most important people in the country, the essence of which was ... a demand for Poland’s full capitulation to the illegal demands of Brussels and the ECJ. I look at it sadly. You cannot defend it and pretend that such behavior adds seriousness to the Supreme Court.”⁸⁴

Manowska’s policy was also ineffective. The Disciplinary Chamber kept working and suspended three more judges after the 15 July judgment. On 16 November, it suspended judge Maciej Ferek from the Kraków Regional Court and reduced his salary by half. On 24 November, it suspended judge Piotr Gąciarek from the Warsaw Regional Court and reduced his salary by 40 per cent. On 15 December, it suspended judge Maciej Rutkiewicz from Elbląg District Court.

As Ziobro pushes around Poland’s most senior judges, and these look for support to other politicians, chaos has descended upon the most important courts in the country. It is a chaos that Ziobro now seeks to export to the rest of the European Union.

⁸² Wprost, [“Sąd Najwyższy zignoruje ostre oświadczenie Ziobry? ‘Pozostanie bez komentarza’](#)”, 7 August 2021.

⁸³ Gazeta Prawna, [“Manowska: Spróbujmy zakończyć wojnę polsko-polską w wymiarze sprawiedliwości”](#), 9 August 2021.

⁸⁴ Rzeczpospolita, [“Zbigniew Ziobro: Obecność Polski w Unii Europejskiej nie za wszelką cenę”](#), 5 August 2021.

ANNEX B – THE BREAKDOWN OF THE JUDICIARY

In its 15 July judgement the ECJ referred to the recent “structural breakdown” of the Polish judiciary. This breakdown proceeded in several steps.

The Constitutional Tribunal

Everything began with an assault on Poland’s Constitutional Court, called the “Constitutional Tribunal”, in late 2015, just weeks after PiS’ election.⁸⁵ By December 2017, the European Commission warned that the constitutionality of laws “can no longer be verified and guaranteed by an independent constitutional tribunal.”

Since late 2016, the Constitutional Tribunal, led by a close friend of PiS-leader Kaczyński, Julia Przyłębska, had become a reliable defender of whatever the government wanted it to do. Przyłębska, has a close relationship with Jarosław Kaczyński, who visits her in her apartment across the street from the Tribunal. Kaczyński explained on TV that “she is a private acquaintance. I really like visiting her.”⁸⁶ Even judges on the Tribunal appointed by PiS are publicly uncomfortable about this close relationship. In November 2019 judge Jarosław Wyrembak accused Julia Przyłębska of scheduling hearings in accordance with PiS party interests, manipulating the composition of panels and adjusting dates of hearings to exclude some judges from adjudicating certain cases.⁸⁷ The judge spoke about pressure to attend secret meetings with government politicians.⁸⁸

As of today, all the Constitutional Tribunal’s judges have been chosen by the PiS majority. One of the judges appointed in 2019 was Stanisław Piotrowicz, a former PiS member of parliament and a leading architect of PiS’ judicial reform. Piotrowicz is a former communist prosecutor, who had worked during the period of martial law and prosecuted members of the anti-communist opposition. He was a member of the communist party for 22 years. In 1984 the communist regime awarded him a Bronze Cross of Merit. He became a constitutional tribunal judge with 230 votes (a simple majority of those voting) in the Sejm. He is now spearheading the fight against the ECJ in the Constitutional Tribunal.

On 22 July 2021, the European Court on Human Rights (ECtHR) in Strasbourg concluded in a judgement that the Polish Constitutional Tribunal “cannot be considered to safeguard independence in the exercise of its constitutional powers.” The ECtHR also warned that some of the Tribunal’s recent actions “must be characterised as an affront to the rule of law and the independence of the judiciary.”⁸⁹

The Ministry of Justice

From the very outset in 2015 Ziobro sought to remould the ministry of justice as an instrument of his will. As his deputy minister Lukasz Piebiak explained in February 2018: “Judges should always be on the side of the state ... the conduct of judges is dangerous when the judges turn against the legislative and executive authorities.” In August 2019, it emerged that Piebiak himself, together with other officials in the Ministry of Justice, organized a smear campaign against judges that were critical of his reforms. Piebiak used his access to classified material to

⁸⁵ This story is told here: Batory Foundation and ESI, [Where the law ends](#), 29 May 2018.

⁸⁶ Wprost, [“Jarosław Kaczyński: Julia Przyłębska to moje towarzyskie odkrycie”](#), 13 May 2019.

⁸⁷ Onet.pl, [“Poważne zarzuty wobec Przyłębskiej”](#), 18 November 2019.

⁸⁸ RMF24, [“Trybunał Konstytucyjny – je st gorzej, niż wygląda z zewnątrz”](#), 5 December 2019.

⁸⁹ ECtHR, [Case of Reczkowicz v. Poland, Judgment](#), 22 July 2021.

collect private information on 20 judges and leaked it to pro-governmental activists who put it on social media. Two members of the National Council of the Judiciary and a judge from the Disciplinary Chamber of the Supreme Court were also involved. Piebiak noted in his emails that he kept his “boss” informed. An independent news portal obtained and published transcripts of conversations between Piebiak and pro-PiS activists about this smear campaign. When a collaborator worried about the legality of these smear campaigns Piebiak responded: “We don’t jail people for doing good things.”⁹⁰



Lukasz Piebiak
Former deputy minister of justice
Coordinated smear campaigns
against critical judges



Stanislaw Piotrowicz
Judge at Constitutional Tribunal
Former PiS MP and architect of “judicial reform”
Former communist prosecutor

The current deputy minister, Sebastian Kaleta, is no stranger to controversy, constantly pouring oil into the flames of EU-Polish relation. He has long accused the ECJ of causing an “implosion of the EU from within” for its support to the rule of law. In April 2020 he asserted that “the European Union simply does not have the authority to assess the legality of constitutional bodies in a member state.” Earlier in 2021 he described the assessment by the advocate general of the ECJ that Poland’s disciplinary regime violated EU law as “another attack on Poland”, claiming that “The elites in Brussels are trying to interfere with Poland’s systemic sovereignty in the field of justice. We are observing another act of this political theatre today.’ In July 2021 he told the Financial Times that any attempt to fine Poland for non-compliance with the ECJ’s decision would be “illegal.” The ECJ, he explained, was simply “aiming to exacerbate the anarchy in the judiciary.”⁹¹

Prosecutor’s Office

Since March 2016 Ziobro also controls Poland’s prosecutors, as the new majority in parliament merged the roles of minister of justice and prosecutor general into a single post. Ziobro appoints all prosecutors, instructs them, and can intervene in all cases. He can disclose documents related to any investigation to whomever he wishes.

Ziobro quickly purged the prosecutors’ office. Within a few months he dismissed 1,000 of 6,100 prosecutors. He replaced the heads of all 11 provincial prosecutor’s offices and 44 of 45 regional prosecutor’s offices. He dismissed 90 percent of the heads of 342 district prosecutors’

⁹⁰ Onet.pl, [“Śledztwo Onetu. Farma trolli w Ministerstwie Sprawiedliwości, czyli ‘za czynienie dobra newsadzamy’”](#), 19 August 2019.

⁹¹ Rule of Law Poland, [“Justice Minister Zbigniew Ziobro on the CJEU ruling: it is unacceptable to us”](#), 3 March 2021.

offices. He changed the heads of departments at all levels as well as department directors. He promoted prosecutors he likes, some twice in a year. Critics were put under heavy pressure. Lex Super Omnia, a Polish association of prosecutors, noted that almost every critical statement by prosecutors results in disciplinary actions. The president of the association faced so many proceedings that, he noted, “it is impossible to keep track of all of them.” In January 2021, some prosecutors who had been critical of changes in the prosecution were transferred to remote locations far away from where they lived, sometimes with only two days’ notice.

Courts and their presidents

In July 2017, Ziobro was given absolute discretion for a period of six months to appoint and dismiss all presidents of ordinary courts (district, regional and appeal courts) in Poland. He used this power extensively. He was then given extensive permanent powers to appoint court presidents, as well as to dismiss them on vague grounds of “gross or persistent failure to perform professional duties” or if the continuation of the president in office “cannot be reconciled with the interests of justice.”

The power to appoint and dismiss court presidents is hugely important. These presidents have considerable influence on the working lives of the judges under their authority. These powers include assigning judges to divisions and “determining the manner of their participation in the assignment of cases”; dismissing heads of divisions and their deputies; withdrawing, reassigning and adding judges to cases in the interests of “the efficiency of proceedings”; ordering inspections (by “inspecting judges”) of all activities of courts under their authority; “reviewing the efficiency of proceedings in individual cases”; and reprimanding the presidents of lower courts for management errors and reducing their salaries.

The National Council of the Judiciary

In 2017 the PiS-majority remodelled the National Council of the Judiciary, which selects candidates for appointment as judges by the President of the Republic. Fifteen of the 25 members of the National Council of the Judiciary were previously elected by judges themselves, as is common practice across Europe for such bodies. These fifteen judges are now elected by the majority in the Sejm, the lower chamber of the Polish parliament. The other members are: four members *from* the Sejm itself, two members from the Senate, one representative of the President of the Republic, the president of the Supreme Court and the president of the Supreme Administrative Court ... and Ziobro as minister of justice. 23 of the 25 positions are now directly appointed by political authorities, the vast majority belonging to the governing coalition. This National Council of the Judiciary controls judicial appointments, including to the Supreme Court and its newly created disciplinary chamber

The disciplinary system

Before the creation of the new disciplinary regime in 2018, disciplinary officers were selected by the National Council of the Judiciary, a majority of whose members were chosen by judges. Judges in disciplinary trials were chosen at random among all judges in the courts of appeal.

Today the minister of justice appoints the individuals involved in investigating, prosecuting and judging disciplinary charges against ordinary judges and can intervene in every case. It is an extraordinary degree of influence over some 10,000 judges at Poland’s different courts: 7,000

work at 321 district courts [sąd rejonowy], another 2,000 at 45 regional courts [sąd okręgowy] and 700 at 11 courts of appeal [sąd apelacyjny].⁹²

Ziobro can appoint a special disciplinary official to investigate any of Poland's almost 10,000 ordinary judges. Even if such an investigation is closed, Ziobro can appoint another disciplinary official to examine the same allegations and issue binding instructions how to conduct the investigation. In 2018 Ziobro appointed new permanent national disciplinary officials. These began to initiate disciplinary investigations against judges who have been particularly outspoken in their criticism of the judicial reforms. In 2019 this process accelerated, with a new law adopted in December completing the destruction of judicial independence. As Laurent Pech, Patryk Wachowiec and Dariusz Mazur have written, "In practice, this means that any Polish judge at any point in time can now be the subject of arbitrary disciplinary investigations, proceedings and/or sanctions (including dismissals), initiated, conducted and adopted by unlawful bodies (as a matter of EU law) – not to forget the subject of arbitrary criminal proceedings – for fulfilling their EU law duties and applying EU rule of law requirements."⁹³

Ziobro also appoints the disciplinary court judges who hear disciplinary cases. His ability to ensure that ideologically aligned judges hear disciplinary cases will not erode over time: while they are appointed for six-year terms he can increase their number at any moment. And he can reward them in the future, as he appoints all court presidents.

Nowhere else in the EU is there such a concentration of power over the judiciary in the hands of just one man. No other European democracy, including Hungary, has a system like the Polish one today.⁹⁴ In countries respectful of the rule of law the disciplinary system for judges is meant to prevent abuse. Not so in Poland.

In its ruling on 19 November 2019 the ECJ set out standards of judicial independence to be used in assessing the legality of the new disciplinary chamber in Poland's Supreme Court.⁹⁵ On 5 December 2019, the labour chamber of the Polish Supreme Court ruled that the disciplinary chamber failed to satisfy these criteria, not least because all its members had been appointed by the new National Council of the Judiciary, whose own composition has been used to ensure party political influence over judicial appointments.⁹⁶

Ziobro responded by warning that "the last word regarding the organization of the judiciary in Poland belongs to the Constitutional Tribunal."⁹⁷ The head of the prime minister's office declared that the Constitutional Tribunal should adjudicate on the issue.⁹⁸

Pro-government parliamentarians raised the stakes further, tabling a draft law on 12 December 2019 that introduced a range of *new* disciplinary offences, specifically targeting judges who might apply the recent ECJ ruling on the independence of Polish courts. This law entered into force within a few weeks, allowing the dismissal of judges for applying rulings from the ECJ

⁹² There are also administrative courts, supervised by the Supreme Administrative Court, and military courts.

⁹³ Laurent Pech, Patryk Wachowiec and Dariusz Mazur, "[Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's \(In\)Action](#)", Hague Journal on the Rule of Law 13 (2021): 1-43.

⁹⁴ "[A comparative analysis on Disciplinary systems for European judges and prosecutors](#)", 2012.

⁹⁵ ECJ, Joined Cases C-585/18, C-624/18 and C-625/18, A. K. and Others, ECLI:EU:C:2019:982 (19 November 2019).

⁹⁶ Case III PO 7/18.

⁹⁷ TVN24, "[Wyrok TSUE w sprawie KRS i Izby Dyscyplinarnej Sadu Najwyzszego](#)", 19 November 2019.

⁹⁸ Wirtualna Polska, "[Michał Dworczyk o wyroku TSUE: Może Trybunał Konstytucyjny będzie musiał goocenić](#)", 19 November 2019.

without a prior decision by the Constitutional Tribunal allowing this. In this way the PiS-controlled Constitutional Tribunal was set up as the sole arbiter of the application of EU law in Poland. The Polish government now challenged the supremacy of EU law directly.

From that moment on, this summer's showdown was inevitable. On 14 July 2021, the deputy president of the ECJ called on Poland to immediately suspend the disciplinary chamber. The same day a five-member panel of the Constitutional Tribunal, chaired by former communist prosecutor and former PiS MP turned constitutional judge Stanisław Piotrowicz, dismissed the ECJ:

“The EU Treaty, to the extent that the ECJ imposes interim measures relating to the system and jurisdiction of Polish courts, is inconsistent with Articles 2, 7, 8, and 90 of the Constitution and is not covered by the rules of direct application.”

ANNEX C – HOW ZIOBRO’S SYSTEM WORKS

To understand how the system Ziobro has constructed affects the daily professional life of Polish judges let us imagine the case of a judge working at the biggest court in the country, one of the two Warsaw regional courts. We’ll call her Magda. She is 42 years old, the average age of a Polish judge. Magda is experienced, she takes her job seriously, sees herself as an apolitical servant of her state and wants to remain in her job until the end of her professional life.

Imagine that Magda is given a sensitive case: a business deal that involves prominent members of the governing party and is of interest to the government, or a criminal case that Ziobro, the minister of justice and prosecutor general, has expressed strong views on, as he is wont to do. Is Magda “protected against external interventions or pressure liable to impair her independent judgment”, as the ECJ put it in its February 2018 Portuguese verdict? Could Ziobro threaten, pressure or punish her?

Yes, he could. In fact, new disciplinary procedures make it all too easy. In Poland judges risk a disciplinary procedure in case of “misconduct, including an obvious and gross violation of legal provisions and impairment of the authority of the office.”⁹⁹ A hierarchy of public servants is in charge of initiating disciplinary investigations to establish whether such misconduct has taken place.

At the top of this hierarchy are Ziobro’s three national disciplinary officials [in Polish: Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych], appointed directly by him. In June 2018, the minister appointed Piotr Schab as the head, and Michal Lasota and Przemyslaw Radzik as deputies. Schab in turn appointed more 56 disciplinary officials, one in each of the 11 courts of appeal and the 45 regional courts.



Piotr Schab – Michal Lasota – Przemyslaw Radzik

As a judge at the regional court in Warsaw, Magda would, ordinarily, fall under the responsibility of the disciplinary officer of the Warsaw court of appeals, appointed by the Ministry of Justice. But she might also face an investigation by Schab, Lasota or Radzik if they, or Ziobro himself, so decided. The charge might relate to criticizing the current judicial reforms or sending preliminary questions to the ECJ, or to the content of a judgement. She would then be asked to justify her behavior in writing. She might be questioned. Media would report on her case. She might be summoned and questioned about the entirely unrelated behavior of other judges, something that has already happened and is illegal, as Adam Bodnar, the country’s

⁹⁹ Art. 107 § 1, Law on the Organisation of Ordinary Courts.

former Human Rights Commissioner, has pointed out.¹⁰⁰ In some cases no legal representatives have been allowed to be present at such interrogations.¹⁰¹

If an investigation by a disciplinary officer into Magda's conduct concluded without charges being made, the minister of justice might himself insist that it continues anyways. The minister might appoint his own special disciplinary official to take over and pursue her case. Theoretically, any disciplinary investigation can last for as long as the minister decides.

In the event of a trial, Magda's case would be taken up by special disciplinary judges at one of 11 appeals courts, who have, courtesy of recent changes, all been appointed for six-year terms by the minister of Justice. Ziobro decides just how many such disciplinary judges there should be at each court of appeal, should the need for more compliant judges arise. At the Warsaw court of appeals the minister appointed 15 disciplinary judges. The president of the new and controversial disciplinary chamber at the Polish Supreme Court – himself appointed by a National Council of the Judiciary now packed with pro-government loyalists – would select which of the 11 courts of appeal would decide Magda's disciplinary case. The judge that would hear her case would then be chosen by lot, from the list of those previously appointed by the minister of justice.

If she is found guilty of misconduct, penalties range from an admonition to a reduction in her salary or dismissal. Magda would likely appeal any negative ruling. Her appeal would then go to the disciplinary chamber of the Supreme Court in Warsaw and its 12 members, which was established in 2018. The president of the disciplinary chamber, who determined in which of Poland's 11 courts of appeal Magda's disciplinary trial would take place, would now select two of the other eleven members of his chamber to decide on her appeal, together with a lay judge appointed by the Senate.

Imagine that Magda manages to navigate this system and pursues her career without incurring the displeasure of the minister of justice and that, one day, she is herself appointed a Supreme Court judge. The threat of arbitrary investigations of possible misconduct would continue to hang over her head. In such a case *both* her first and her second instance disciplinary trial would take place before the disciplinary chamber of the Supreme Court itself: at first instance her adjudicating panel would consist of one to three judges, on appeal it would consist of three.

¹⁰⁰ Rzeczpospolita, "[RPO: Sędzia nie może być przesłuchany jako świadek ws. Dyscyplinarnej](#)", 25 October 2018.

¹⁰¹ Rzeczpospolita, "[Postępowanie dyscyplinarne sędziego Tulei: Dubois wyproszony z przesłuchania](#)", 10 October 2018.

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