



JUDGMENTS OF THE CJEU AND ECtHR LOST BY THE POLISH GOVERNMENT PROVING THAT POLAND BREACHED THE TREATY AND CONVENTION STANDARDS REGARDING THE ADMINISTRATION OF JUSTICE

We have presented below a list of judgments of the Court of Justice of the European Union (“CJEU”) and the European Court of Human Rights (“ECtHR”), which Poland is obliged to execute. We have presented two of them in detail, which were issued by the CJEU in July 2021, on the execution of which the European Commission made the start of the National Reconstruction Plan conditional, specifying which of the publicly presented bills implements these judgments. All three bills under discussion already have parliamentary forms.

A draft of a new Act on the Supreme Court (hereinafter: **“Zbigniew Ziobro’s Bill”**) was submitted to the Polish Parliament during the work on this document (22 February 2022). The proposed amendments were prepared by Solidarna Polska, a party led by Zbigniew Ziobro, the Minister of Justice and Prosecutor General, who is responsible for most of the changes made to the structure of the Polish judiciary since 2015. These amendments are a blatant defiance of ALL the CJEU rulings, including those which Poland has already executed (reinstatement of judges in the Supreme Court). The bill practically removes the Supreme Court and equates the execution of European judgments with resignation from judicial office. It even reinstates the discrimination against female judges regarding retirement which was declared illegal by the CJEU. For these reasons, we are not discussing this bill in the table as it is in conflict with the judgments. The appendix to this table presents a summary of the solutions proposed by Zbigniew Ziobro.

The final part of the document also contains a list of other judgments, which must be executed in order to restore the rule of law in Poland, as well as the right of citizens to have their cases heard by an impartial judge and an independent court. The execution of these judgments is just as important to the restoration of the legal order in Poland.

Free Courts Foundation

 ul. Wiejska 12
00-490 Warszawa
Poland

 kontakt@wolnesady.org
 www.wolnesady.org
 facebook.com/WolneSady
 twitter.com/WolneSady1

National Court Register: 0000829554
REGON no.: 385597360
TIN: 7010972487
a/c number: PL 06 1090 2851 0000 0001 4444 0763

WYROK (C-791/19) DOTYCZĄCY CAŁOŚCIOWO SYSTEMU ODPOWIEDZIALNOŚCI DYSCYPLINARNEJ SĘDZIÓW W POLSCE PO REFORMACH PIS

<u>Infringement</u>	<u>Whether it is fixed by the President's bill (Sejm form 2011)</u>	<u>Whether it is fixed by PiS's bill (Sejm form 2013)</u>	<u>Whether it is fixed by Iustitia's and PDP's bill (Sejm form 2012)</u>
The failure to ensure the independence and impartiality of the Disciplinary Chamber of the Supreme Court	NO judges of the Disciplinary Chamber and other neo-judges remain in the Supreme Court and can be reappointed to the chamber, which will only have a changed name and the membership of which will be specified by the President, namely a politician	NO the Disciplinary Chamber remains in the Supreme Court, disciplinary liability of judges will depend on panels drawn by lots, including neo-judges	YES The Disciplinary Chamber is dissolved and its illegally appointed judges lose their positions
Allowing the content of judicial decisions to be classified as a disciplinary offence by judges of the ordinary courts (Article 107 § 1 of the Act on the Structure of Ordinary Courts – ASOC – and Article 97 §§ 1 and 3 of the Act on the Supreme Court)	NO furthermore, the refusal to be members of benches with neo-judges, namely directly for executing the CJEU decisions is treated as a disciplinary offence. The bill does not remove the provisions of the Muzzle Act. Additionally, the bill contains a list of types of judgments for which there will be no liability, which, <i>a contrario</i> , could mean liability for other types of judgments.	NO furthermore, the bill contains a strange "trick" referring to vague terms taken from the justification of the CJEU's judgment, but which are completely abused in the body of the Act, which should be clear and transparent, especially since this applies to someone's liability, including that of judges ("a judge's serious, inexcusable conduct" will still justify prosecuting the judge.)	YES The bill introduces a comprehensive new regulation of the disciplinary procedure for judges, which is consistent with procedural standards and ensures the involvement of potential victims
Conferring on the President of the Disciplinary Chamber of the Supreme	NO	NO	YES

<p>Court the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts (Article 110 § 3 and Article 114 § 7 ASOC)</p>			<p>The bill introduces a comprehensive new regulation of the disciplinary procedure for judges, which is consistent with procedural standards and the potential involvement of potential victims, while the competent disciplinary court is specified by a decision of the Supreme Court.</p>
<p>The failure to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time (second sentence of Article 112b § 5ASOC)</p>	<p>NO</p>	<p>NO</p>	<p>YES The bill introduces a comprehensive new regulation of the disciplinary procedure for judges, which is consistent with procedural standards and ensures the involvement of potential victims. Articles 108 and 114 <i>et seq.</i> set deadlines for activities in disciplinary proceedings, which ensures that the case is examined within a reasonable time.</p>
<p>The provision that actions related to the appointment of a defence counsel and the taking up of the defence by that counsel do not have a suspensory effect on the course of the disciplinary proceedings (Article 113a ASOC) and that the disciplinary tribunal is to conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel (Article 113a ASOC) – and</p>	<p>YES derogation of both of the contested provisions</p>	<p>NO</p>	<p>YES The bill introduces a comprehensive new regulation of the disciplinary procedure for judges, which is consistent with procedural standards and ensures the involvement of potential victims</p>

<p>therefore the failure to guarantee respect for the rights of defence of accused judges of the ordinary courts (Article 113a ASOC)</p>			
<p>Allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice of the European Union to be restricted by the possibility of triggering disciplinary proceedings</p>	<p>NO Furthermore, there is a new offence in the Act which precisely seeks to make pro-European interpretations of the defectiveness of the appointment of neo-judges a direct disciplinary offence. Although the judge will be able to request a preliminary ruling, he will not be allowed to execute a CJEU judgment in this respect.</p>	<p>NO</p>	<p>YES The bill introduces a comprehensive new regulation of the disciplinary procedure for judges, which is consistent with procedural standards and ensures the involvement of potential victims and repeals the so-called Muzzle Act. Article 107 of the bill regulates the grounds for a judge's liability.</p>

ORDER (C-204/21 R) SUSPENDING THE RULING OF THE DISCIPLINARY CHAMBER IN IMMUNITY CASES

<u>Infringement</u>	<u>Whether it is fixed by the President's bill</u>	<u>Whether it is fixed by PiS's bill</u>	<u>Whether it is fixed by Iustitia's and PDP's bill</u>
<p>Suspension of the application of the provisions under which the Disciplinary Chamber of the Supreme Court has jurisdiction to adjudicate, at both first instance and second instance, on applications for authorisation to initiate criminal proceedings against judges or trainee judges, place them in provisional detention, arrest them or summon them to appear before it (and therefore primarily Article 27 § 1 item 1a of the Act on the Supreme Court)</p>	<p>NO only the name of the Disciplinary Chamber will change; the same neo-judges as now will still be able to rule in disciplinary cases, having been elected to the Supreme Court in gross breach of the law, and with the involvement of a political factor – the President, so it will not be a court established by law.</p>	<p>YES but with a defect, because the respective amendments are not made to the provisions on the structure of the ordinary courts</p>	<p>YES The bill introduces a comprehensive new regulation of the disciplinary procedure for judges, which is consistent with procedural standards and ensures the involvement of potential victims and repeals the so-called Muzzle Act. The disciplinary chamber is liquidated and judges' cases are heard by an independent court established by law.</p>
<p>Suspension of the effects of the decisions already adopted by the Disciplinary Chamber on the basis of that article which authorise the</p>	<p>NO Article 19 of the President's Bill, which only grants any judge against whom a decision of the Disciplinary Chamber of the Supreme Court is</p>	<p>NO Although Article 8 is in place, it is very vague.</p>	<p>YES Article 15 of the bill fully removes the decisions of the illegally operating Disciplinary Chamber from legal transactions</p>

initiation of criminal proceedings against or the arrest of a judge	issued the right to apply for the resumption of proceedings		
Refraining from referring those cases to a court which does not meet the requirements of independence defined, in particular, in the judgment of 19 November 2019 (C 585/18, C 624/18 and C 625/18)	NO	NO	YES
Suspension of the application of the provisions on the basis of which the Disciplinary Chamber of the Supreme Court has jurisdiction to adjudicate in cases related to the status of judges of the Supreme Court and the performance of their office, in particular in cases related to employment and social security law and in cases related to the compulsory retirement of those judges (Article 27 § 1 items 2 and 3 of the Act on the Supreme Court)	YES	NO	YES
Refraining from referring the above cases to a court which does	NO	NO	YES

<p>not meet the requirements of independence defined, in particular, in the judgment of 19 November 2019 (C 585/18, C 624/18 and C 625/18)</p>			
<p>Suspension of the application of the provisions that allow disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union (Article 27 § 1, item 2 and 3 ASOC and Article 72 § 1 items 1–3 of the Act on the Supreme Court)</p>	<p>NO On the contrary, there is a new offence of “denial of administration of justice” which is intended precisely to prevent judges from executing CJEU rulings</p>	<p>NO</p>	<p>YES</p>
<p>Suspension of the application of certain provisions insofar as they prohibit national courts from verifying compliance with the requirements of the European Union related to an independent and impartial tribunal previously</p>	<p>NO On the contrary, there is a new offence of “denial of administration of justice” which is intended precisely to prevent judges from executing CJEU rulings</p>	<p>NO</p>	<p>YES</p>

<p>established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights (Article 42a §§ 1 and 2 and Article 55 § 4 ASOC; Article 26 § 3, and Article 29 §§ 2 and 3 of the Act on the Supreme Court; Article 5 §§ 1a and 1b of the Act on the Structure of the Administrative Courts – ASAC; and Article 8 of the so-called “Amending Act”)</p>			
<p>Suspension of the application of the provisions establishing the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber of the Supreme Court to examine complaints alleging lack of independence of a judge or a court (Article 26 §§ 2, 4–6 and Article 82 §§ 2–5 of the Act on the Supreme Court Act and Article 10 of the so-called “amending Act”)</p>	<p>NO</p>	<p>NO</p>	<p>YES The bill provides for the liquidation of this CHAMBER (Article 23 of the bill)</p>

OTHER JUDGMENTS OF THE TSUE AND ECtHR¹²

<u>Infringement</u>	<u>Whether it is fixed by the President's bill</u>	<u>Whether it is fixed by PiS's bill</u>	<u>Whether it is fixed by Iustitia's and PDP's bill</u>
Defective constitution of the NCJ and defective judicial nominations to the ordinary courts and the Supreme Court	NO	NO	YES , through provisions regarding: <ul style="list-style-type: none"> • the election of a correct NCJ • the regulation of the status of neo judges to protect citizens against the invalidity of judgments • the repetition of recruitments in accordance with the law and securing the smooth running of the justice system through a system of secondments enabling the completion of cases that have started • the loss of office by defectively elected judges of the Supreme Court • regulations upholding judgments issued by neo-judges, but with a party's right to reopen the proceedings

¹ Two of these judgments applied to purges in the ordinary courts and the Supreme Court and were executed after the Polish government lost the cases C-192/18 – Commission v Poland (independence of ordinary courts) – **judgment issued against Poland**; C-619/18 – Commission v Poland (independence of the Supreme Court) – interim measure and **judgment issued against Poland**

² Judgments in cases lost by the Polish Government;

1. C-585/18, C-624/18, C-625/18 - A.K.; preliminary questions (independence of the National Council of the Judiciary and Disciplinary Chamber) – **judgment issued against Poland**
2. C-824/18 - A.B.; preliminary questions (independence of the National Council of the Judiciary in the process of appointing the new Supreme Court judges) – **judgment issued against Poland**
3. C-487/19 - W.Ż.; preliminary question (independence of the newly formed Chamber of Extraordinary Control and Public Affairs of the Supreme Court) – **judgment issued against Poland**
4. C-748/19 to C-754/19 – W.B. and others; preliminary questions (seconding judges and cancelling secondments by the Minister for Justice who is also the Public Prosecutor General) – **judgment issued against Poland**
5. Broda v Poland, 26691/18 and Bojara v. Poland, 27367/18 – **judgment issued against Poland**
6. Reczkowicz v Poland, 43447/19 – **judgment issued against Poland**
7. Dolińska-Ficek and Ozimek v Poland, 49868/19 and 57511/19 – **judgment issued against Poland**
8. Advance Pharma v Poland, 1469/20 – **judgment issued against Poland**
9. Wróbel v Poland, 6904/22 – **interim measures issued**

Defective staffing and politicisation of the Constitutional Tribunal ³	NO	NO	NO but the social party has prepared a bill to sanitise the Constitutional Tribunal
Defective secondments of judges by the Minister of Justice – Prosecutor General	NO	NO	Yes, Articles 76a–78 ASOC. Provisions stipulating the rules on appointments to secondments and restricting the ability to dismiss a judge from a secondment

³ Xero Flor v Poland, 4907/18 – judgment issued against Poland

APPENDIX – DISCUSSION OF ZBIGNIEW ZIOBRO’S BILL IN THE CONTEXT OF THE GROSS BREACHES OF EUROPEAN LAW AND ACTIONS IN CONFLICT WITH THOSE ARISING FROM THE TSUE’S JUDGMENTS

The bill is a significant derogation from the standards developed in the case law of the CJEU and ECtHR. Furthermore, it exacerbates some of the problems by tightening the disciplinary regime with respect to Polish judges, extending the grounds for their liability and reorganising the operation of the Supreme Court so that it almost completely deprives it of its ability to independently and apolitically exercise the administration of justice. All the legal judges are to leave. The provision stating that a judge who refuses to rule together with a defectively appointed person (namely the one who executes the judgments of the CJEU in this respect) will be removed from judicial office is particularly noteworthy. This is because the Act equates such a situation with a judge resigning from his office. A judge who decides to overturn a judgment because of the status of the person who issued it and a judge who issues a decision to remove another judge because of a challenge as to whether he is in office will experience the same fate. This action grossly breaches the principle of judicial freedom and the irremovability of judges. It also deprives independent judges of the tools which they used to protect the independence of the judiciary and guarantee citizens a fair and apolitical outcome of their case.

Likewise, the bill fails to address a key issue for the whole of the judiciary – that of the legality of the appointment of judges because of the politicised nature of the National Council of the Judiciary. On the contrary, the new provisions grant the NCJ in its current form additional powers to form the membership of the Supreme Court (e.g. Article 110 § 2 of Zbigniew Ziobro’s Bill).

1. PROVISION:

Article 25 [...] § 2. *As part of the activities of the Supreme Court or its authorities, it is inadmissible to question the legitimacy of courts and tribunals, constitutional bodies of the state and bodies that control and protect the law.*

§ 3. *It is inadmissible for the Supreme Court or any other authority to establish or assess the lawfulness of the appointment of a judge or the resulting right to perform judicial tasks.*

BREACHED STANDARDS/PROVISIONS FROM THE INTERIM MEASURE:

- *Allowing the content of judicial decisions to be classified as a disciplinary offence by judges of the ordinary courts (C-791/19) – AGGRAVATED INFRINGEMENT*
- *Suspending the application of certain provisions insofar as they make it inadmissible for national courts to examine compliance with the European Union's requirements of an independent and impartial tribunal previously established by law within the meaning of Article 19(1) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights (C-204/21 R). AGGRAVATED INFRINGEMENT*

2. PROVISION:

Article 32 [...] § 2. *The following shall be deemed equivalent to a judge resigning from the office of judge of the Supreme Court:*

- 1) *the refusal to take up official activities because of questioning whether another judge holds office;*
- 2) *overturning a ruling issued by or with the participation of another judge because of questioning whether he holds office of a judge;*
- 3) *the removal of another judge from participating in a case because of questioning whether he holds office of a judge – even though that judge satisfies the conditions laid down in Article 25, § 1 or Article 55, § 1 of the Law on the Structure of Ordinary Courts of 27 July 2001.*

§ 3. *If a decision is overturned by a panel of judges, the provision of § 2, item 2 shall apply unless the judge files a dissenting opinion indicating that he is not questioning whether the judge who issued or participated in issuing the overturned decision holds office of a judge.*

§ 4. *In the event of learning of the circumstance referred to in § 2, the President of the Republic of Poland or the First President of the Supreme Court may order measures preventing the person who has been removed from office from performing judicial activities. [...]*

BREACHED STANDARDS/PROVISIONS FROM THE INTERIM MEASURE:

- *Allowing the content of judicial decisions to be classified as a disciplinary offence by judges of the ordinary courts (C-791/19) – AGGRAVATED INFRINGEMENT*
- *Suspending the application of certain provisions insofar as they make it inadmissible for national courts to examine compliance with the European Union's requirements of an independent and impartial tribunal previously established by law within the meaning of Article 19(1) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights (C-204/21 R); AGGRAVATED INFRINGEMENT*

- *Suspending the application of the provisions that allow disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union (C-204/21 R). AGGRAVATED INFRINGEMENT*

3. PROVISION:

Article 68. § 1. *A judge of the Supreme Court shall be held liable for official (disciplinary) misconduct, in particular for:*

- 1) *a manifest and gross breach of the law;*
- 2) *acts or omissions that may prevent or significantly impede the functioning of the justice administration;*
- 3) *acts challenging the fact that a judge holds office, the effectiveness of his appointment or the authority of a constitutional body of the Republic of Poland [...];*

BREACHED STANDARDS/PROVISIONS FROM THE INTERIM MEASURE:

- *Allowing the content of judicial decisions to be classified as a disciplinary offence by judges of the ordinary courts (C-791/19) – AGGRAVATED INFRINGEMENT*
- *Suspending the application of certain provisions insofar as they make it inadmissible for national courts to examine compliance with the European Union's requirements of an independent and impartial tribunal previously established by law within the meaning of Article 19(1) TEU, in conjunction with Article 47 of the Charter of Fundamental Rights (C-204/21 R); AGGRAVATED INFRINGEMENT*
- *Suspending the application of the provisions that allow disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union (C-204/21 R). AGGRAVATED INFRINGEMENT*

4. PROVISION

Article 69. *The disciplinary courts in disciplinary cases regarding judges of the Supreme Court are:*

- 1) in the first instance – the Supreme Court in a panel of two judges and one lay judge of the Supreme Court;
- 2) in the second instance – the Supreme Court in a panel of three judges and two lay judges of the Supreme Court.

BREACHED STANDARDS/PROVISIONS FROM THE INTERIM MEASURE:

- *The lack of assurance of independence and impartiality of the Disciplinary Chamber of the Supreme Court constitutes an infringement (C-791/19; see comments on the President’s Bill and PiS’s Bill) AGGRAVATED INFRINGEMENT*
- *Suspension of the application of the provisions under which the Disciplinary Chamber of the Supreme Court has jurisdiction to adjudicate, at both first instance and second instance, on applications for authorisation to initiate criminal proceedings against judges or trainee judges, place them in provisional detention, arrest them or summon them to appear before it (C-204/21 R; see comments on the President’s Bill and PiS’s Bill); AGGRAVATED INFRINGEMENT*
- *Refraining from referring those cases to a court which does not meet the requirements of independence defined, in particular, in the judgment of 19 November 2019 (C-204/21 R). AGGRAVATED INFRINGEMENT*

5. PROVISIONS

Article 110 [...] § 2. *The President of the Republic of Poland shall nominate the judges to whom he shall allocate judicial posts in the Public Law Chamber or the Private Law Chamber from among the judges whose declarations on the intention to continue to adjudicate in the Supreme Court have received a positive opinion from the National Council of the Judiciary.*

Article 118. § 1. *Matters falling within the jurisdiction of the Supreme Court, as well as other matters pending before the Supreme Court, in which a hearing or a session has been scheduled before the day this Act enters into force, shall be taken over for consideration by: [...] 2) with regard to cases heard by the former Criminal Chamber, Disciplinary Chamber and Chamber of Extraordinary Control and Public Affairs – the Public Law Chamber.*

BREACHED STANDARDS/PROVISIONS FROM THE INTERIM MEASURE:

- *Suspension of the application of the provisions under which the Disciplinary Chamber of the Supreme Court has jurisdiction to adjudicate, at both first instance and second instance, on applications for authorisation to initiate criminal proceedings against*

judges or trainee judges, place them in provisional detention, arrest them or summon them to appear before it (C-204/21 R; see comments on the President's Bill and PiS's Bill); AGGRAVATED INFRINGEMENT

- *Suspension of the application of the provisions establishing the exclusive jurisdiction of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court to examine complaints alleging lack of independence of a judge or a court (C-204/21 R); AGGRAVATED INFRINGEMENT*
- *Refraining from referring those cases to a court which does not meet the requirements of independence defined, in particular, in the judgment of 19 November 2019 (C-204/21 R). AGGRAVATED INFRINGEMENT*