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# **Defending Checks and Balances in EU Member States**

Taking Stock of Europe's Actions

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# Preface

For much time, the general impression has been that Europe is doing little to nothing in responding to developments that threaten checks and balances in the European legal space. Today that is not true anymore, so the discussion should move on. This book brings together insight from two conferences on this topic. One conference was held at the University of Warsaw in September 2017, the topic being “Protecting European Union Values: Breaches of Article 2 TUE and their Consequences.” The other conference, held in Berlin at the Wissenschaftskolleg in January 2019, focused under the title of “Constitutional Courts and Political Change” on the role of domestic constitutional courts in this respect. The common thread is to better understand how checks and balances are threatened in some Member States and to assess what Europe is doing about it.

At the time when the first conference took place, few could expect that the whole situation develops so dynamically. A few months later, in December 2017, the European Commission triggered Article 7 (1) TEU for the first time in relation to Polish judicial reforms. There have been three infringement proceedings started against Poland by the Commission under Article 258 of the Treaty on the functioning of the European Union (TFEU). One of them concerning the regime of disciplinary liability of Polish judges is still pending (C-791/19). Two of them concerning aspects of judicial independence of Polish Common Courts (C-192/18) and the Polish Supreme Court (C-619/18) have been already brought to the end.

Worth mentioning is especially the latter case, which in fact saved the substance and independence of the Polish Supreme Court. The Court of Justice imposed on Poland a groundbreaking interim order (C-619/18 R), consisting not only of the suspension of the application of the regulations lowering the retirement age but also in reinstating the judges of the Supreme Court dismissed. The Court pointed out that ordering interim measures has the effect of directly and immediately suspending the application of the challenged national regulations, including those that led to repealing or replacement of the regulations formerly fixing the retirement age of Supreme Court judges, in view of which those former regulations shall apply until

delivery of final judgment in the case. Consequently, the Court “brought back to life” the former law that had been repealed by the national legislature.

In the final judgment, the Court held in strong words that doubts may be raised as to whether the reform of the retirement age was made by the Polish government in pursuance of standardizing the retirement age of judges and all other employees and not “with the aim of side-lining a certain group of Supreme Court judges.” By the same, it rejected Poland’s explanation that the introduced changes had an important, justified purpose and were proportionate.

It should also be stated that since 2018, Polish courts, including but not limited to the Supreme Court and the Supreme Administrative Court, referred to the Court of Justice for numerous preliminary references concerning the independence of judiciary treating EU law as a shield against governmental measures undermining the judiciary. A variety of these references are still pending before the Court of Justice.

One of the last notable events in Poland was the judgment issued by the Court of Justice on 19 November 2019 in Joined Cases *A.K. v. Krajowa Rada Sądownictwa* (C-585/18) and *CP (C-624/18), DO (C-625/18) v. Sąd Najwyższy*. This judgment made it clear that judicial independence must be guaranteed also in the context of procedures of appointing judges which must exclude any reasonable doubt as to the court’s independence of any external factors as well as its neutrality with respect to the overlapping interests on which it rules. It opened the door to questioning panels in courts that include individuals appointed with the recommendation of the Polish National Council of Judiciary and judgments issued by them.

Following the Court’s Judgment, the Chamber of Labour and Social Security of the SC issued three rulings in which it has been stated that the Disciplinary Chamber of the SC is not a court within the meaning of EU law due to its lack of independence according to the criteria established by the ECJ. Worth mentioning is also the resolution adopted by three “old” chambers of the Polish Supreme Court on 23 January 2020, which adopts binding criteria of the Court’s November ruling to Polish judicial procedures and national courts. That resolution states i.a. that two “new” chambers of the Polish Supreme Court (Chamber for Disciplinary matters and the Chamber of Extraordinary Control and Public Affairs), appointed by the current governmental majority, are not independent Courts in the meaning of EU Law and according to the Polish legal system.

As courts across Poland started to apply those criteria, the ruling majority started a counter-attack: massive disciplinary proceedings against judges (even with criminal charges) are being initiated under the supervision of the Prosecutor General who is at the same time the Minister of Justice. The government and the “new” part of the Supreme Court simply ignore the binding resolution of the “old” Supreme Court. A special “muzzle” law has been prepared in order to silence those judges who try to apply the ECJ’s judgment. According to that law actions challenging the existence of a service relationship of a judge, the effectiveness of a judge’s appointment or the legitimacy of a constitutional authority of the Republic of Poland constitutes a disciplinary offense for which the judge may be punished with dismissal from office.

In January 2020, few days before we finished this foreword, the Polish Constitutional Tribunal, which has already been subordinated to the will of the executive

power and does not guarantee impartial and effective constitutional control, issued an interim measure suspending the judgment of the Supreme Court which followed the aforementioned ruling of the Court of Justice. That suspension is without precedent and according to the majority of constitutional scholars also without any legal grounds. One of the contributions in this book emphasizes the importance of the “red lines”. Is it a moment in which these lines are just crossed?

Finally, one should not lose sight of numerous proceedings which are still pending before Polish courts, aimed at the verification of legislative solutions adopted by the ruling majority in Poland from the perspective of judicial independence. Those cases include preliminary referrals i.a. on suspending a national law on the basis of the principle of effective judicial protection (C-522/18), on the scope of application of Art. 19 (1) TEU in judicial proceedings that have no EU element at all (C-558/18 and C-563/18), on whether two chambers of the SC are “established by law” due to a flagrant infringement of national law during the appointing process of judges sitting on those benches (C-508/19 and C-487/19), or on the right to judicial control of the appointment process of judges to the SC from the perspective of candidates for judicial positions (C-824/18). There is no doubt that after those questions have been answered by the Court, a huge step in developing the standard of judicial independence in EU law will be made.

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