# The future of rule of law in the European Union beyond Polish and Hungarian controversies

## A Czech view

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### *1 Introduction*

This chapter traces back judicial reforms in the Czech Republic in the course of its transition to democracy and its accession to the EU as well as the emergence of a new rule of law framework for the functioning of the domestic courts in EU Member States. In doing so, it discusses the relationship between the EU and its Member States beyond recent Polish and Hungarian controversies.

The chapter is structured as follows. The first section provides an overview of judicial reform and transformation processes before EU accession. It highlights the complexity of the continuity and discontinuity of the judiciary within democratic transformation, the efficiency of the courts as a neglected element of economic transformation as well as limits of the accession conditionality of the European Union. The second section sketches out EU requirements for Member States' courts, including the efficient application of EU law, communication with the Court of Justice of the EU (CJEU) and the courts of other EU countries as well as structural requirements for the courts of the EU countries. The third section informs about the creation of EU instruments. Attention is paid to infringement procedures before the CJEU, the Article 7 TEU mechanism, termination of the mutual recognition of judicial decisions, and the rule of law conditionality of financial transfers. Finally, it is discussed if the rules established constitute an emerging new EU regulatory domain or whether their impact will be limited to Poland and Hungary.

## 2 Judicial reform and transformation process before EU accession

### 2.1 Continuity and discontinuity of the judiciary within democratic transformation

The transformation of the Czech judiciary in the 1990s combined elements of continuity and discontinuity. The general structure of Czechoslovak (and later Czech) courts continued to exist[1] and the majority of judges remained in their posts.[2] A key institutional innovation was the establishment of a constitutional court, inspired by the German model of constitutional justice and defined as a "body for the protection of constitutionality", which has developed into a strong legal and political actor.[3] In the following decades, there was a clear tension between the constitutional court and senior ordinary courts, where the constitutional court pursued less formalistic positions in the interpretation of Czech laws than the general judiciary.[4] However, in contrast to Poland or Hungary, no significant Czech political party incorporated criticism of the continuity of the judiciary into their core political programmes.

The judicial regulations were changed only gradually. The new Constitution of the Czech Republic and the Charter of Fundamental Rights explicitly stated that the courts were bound only by laws,[5] banned special courts, prohibited the relocation of a judge without his/her consent, and expanded the catalogue of individual rights protected by the judiciary. In contrast, a comprehensive recodification of civil and criminal judicial procedure has not been completed even decades after the change of political regime.

At first, European integration had only a marginal influence on the internationalization and Europeanization of the Czech judiciary. Much more important was membership in the Council of Europe and accession to

1 Minor institutional changes were caused by the split of Czechoslovakia at the beginning of the decade.

2 David Kosař and Ladislav Vyhnánek, *The Constitution of Czechia: A Contextual Analysis* (Bloomsbury Publishing 2021) 147.

3 David Kosař and Ladislav Vyhnánek, *The Constitution of Czechia: A Contextual Analysis* (Bloomsbury Publishing 2021) 152.

4 Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Central European University Press 2002) 238–244.

5 In contrast to the practice of the Communist regime, which required the courts to respect both laws and administrative by-laws and ministerial regulations. To complete the picture, it shall be mentioned that Czech judges were also bound by international treaties on human rights and (since the "European" constitutional amendment in 2021) also by the majority of other international agreements ratified by the Czech Republic.

the European Convention on Human Rights and Fundamental Freedoms, which opened for Czech citizens the possibility to challenge the behaviour of Czech courts before the European Court of Human Rights in Strasbourg. Symptomatically, the first case lost by the Czech Republic there concerned a violation of the right to due process caused by judicial behaviour.

### 2.2 The efficiency of the courts as a neglected element of economic transformation

The economic transformation in the Czech Republic was accompanied by a relative lack of interest in creating a sufficiently robust legal framework, when the whole process was even described by its critics as "running away from lawyers". In the judicial sector, this approach was mainly demonstrated by underfunding of the courts combined with a lack of judicial administrative staff. Later, when the constitutional court proved to be an actor capable of interfering in the political life of the state, there were also attempts by politicians to gain greater control over career processes in the judiciary. However, these efforts have been stopped by the constitutional court, and the political elite subsequently limited themselves to more detailed political profiling of candidates for constitutional judges, combined with occasional criticism of the excessively strong influence of the courts on policy-making.[6]

### 2.3 Judicial reform as part of the accession conditionality of the European Union

Respecting the rule of law is part of the political dimension of the Copenhagen criteria governing the EU accession conditionality. An independent and efficient judiciary is a component of the rule of law, as the Copenhagen criteria do not require simple formal adherence to the rule of law by states aspiring to join the EU but the existence of "stability of institutions ensuring democracy, the rule of law, human rights and respect for the protection of minorities" in those countries. As it transpired, the Copenhagen criteria reference to the rule of law was not just a symbolic demand. In the case of

6 Comp. Ivo Šlosarčík, 'Czech Republic 2006–2008: On President, Judges and the Lisbon Treaty' (2010) 16 European Public Law 1.

Slovakia, for instance, non-compliance with judgments of its constitutional court was one of the reasons for excluding Slovakia from the first group of candidate states with which negotiations on accession to the EU were initiated.[7]

However, the application of the rule of law conditionality has also been criticized, mainly because of the unclear, or even conflicting, signals sent by the EU countries and institutions to the candidate states. De Ridder and Kochenov in their analysis of the political conditionality mention that, for example, the inclusion of institutions for the training of judges (judicial academy) under auspices of the ministry of justice has been criticized by the European Commission in some candidate countries as a step threatening the independence of the judiciary, while elsewhere it was appreciated as a process enhancing the coherence and effectiveness of the training of judges and judicial staff.[8]

With the accession of the Czech Republic to the European Union, the accession conditionality associated with the existence of the rule of law ceased to exist and has been replaced by a new catalogue of requirements concerning EU law, complemented by a new range of procedural tools operating within the EU area.

## *3 EU requirements for Member States' courts*

### 3.1 Efficient application of EU law

The first and seemingly intuitive requirement of European integration is the ability of national courts to interpret and apply EU law. Hence, the EU expects judges to apply Europeanized legal norms in compliance with the EU's principles of direct effect, supremacy and loyal cooperation. The requirement of the proper application of EU law is not limited to extending the catalogue of applicable legal sources to include EU founding treaties and legal acts, but also requires judges to be familiar with the case law of the Court of Justice of the EU and, last but not least, to take account of

7 In more detail Vladimír Leška, *Slovensko 1993–2004: Léta obav i nadějí* (Slovakia 1993–2004: Years of fear and hope) (Institute of International Relations Prague 2006) 60f.

8 Eline De Ridder and Dimitry Kochenov, 'Democratic Conditionality in Eastern Enlargement: Ambitious Window Dressing' (2011) 16 European Foreign Affairs Review 589.

the multilingual nature of EU law, where the different language versions of EU legislation are (at least in theory) equal.[9] The judge must also be able to identify situations in which he or she is required to apply EU law and, if necessary, decide to disregard domestic legislation colliding with the EU rules. And even when interpreting ordinary national laws, the national court judge should interpret the domestic legal acts in the light of EU rules and consider the general EU dimension of the case being heard.

In the Czech legal environment, this scenario has materialized especially after the adoption of the "European amendment" of the Czech Constitution[10], which provides for direct effect of most international treaties, stipulates the respect of the Czech state for its international obligations, and explicitly permits the transfer of powers from the Czech state to an international institution or organization. Although new constitutional clauses have not answered all questions that the Czech courts dealt with during the interpretation and application of EU law, they have provided a solid basis for doctrinal debates on the position of EU law in the Czech legal system. Jurisprudence produced by Czech courts since EU accession have accepted, for example, the principle of direct effect of EU law, supremacy of EU law over Czech legislation and even a constitutional obligation of Euro-conformist interpretation of Czech constitutional and legislative rules. At the same time, however, the constitutional court used its review of the Lisbon Treaty in 2008 and 2009 to formulate, albeit indirectly and rather vaguely, constitutional limits to the impact of European integration in the Czech Republic.

### 3.2 Communication with the CJEU and the courts of other EU countries

Communication with the CJEU through preliminary questions formulated by Czech courts has attracted a large part of the EU-related attention of judges and the academic community in the Czech Republic. The legislative anchoring of the preliminary reference mechanism was smooth[11] and Czech

9 Michal Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States? Don't Do as I Say?' (2008) 10 Cambridge Yearbook of European Legal Studies 1, 2–4.

10 Constitutional Act no. 395/2001 Coll. (adopted October 18, 2001, effective June 1, 2002).

11 Law No 99/1963 of 4 December 1963 Code of Civil Procedure, Act No. 120/2002 Coll. of 21 March 2002 Code of Administrative Procedure, Law No. 141/1961 Coll. of

ordinary courts began to turn to the Court of Justice of the EU on a regular basis, albeit less frequently than their counterparts in some other medium-size EU states.[12] However, not a single question has yet been asked by the constitutional court. In addition to the prevailing "more technical" questions, the communication between the CJEU and Czech courts has also contributed to the clarification of structural elements of the application of EU law in new Member States, especially in the first years of EU membership; specifically the problem of the (non-)application of the EU legislation not properly published in the Czech language in the Official Journal of the EU (C-161/06 Skoma-Lux).

According to its critics, the preliminary rulings mechanism has the potential to challenge the judicial hierarchy within a Member State, when the lower courts, using a question referred to the CJEU, can assert their legal opinion even against the superior domestic courts. The Czech Republic did not escape this destabilizing scenario during a series of disputes referred to as the Slovak pension saga concerning the pensions of Czech and Slovak citizens living in the Czech Republic, but calculated and paid according to Slovak rules, due to the regime established by Czech–Slovak treaties adopted in connection with the division of Czechoslovakia.[13] Opinions of the constitutional judges and their colleagues in the Supreme Administrative Court differed both regarding the constitutional and the EU dimensions of the problem. In one of the cases, the Supreme Administrative Court referred a preliminary question to the CJEU (C-399/09 Landtová), but the answer from Luxembourg was de facto ignored by the constitutional court in a later similar (albeit formally different) dispute, and the whole affair was declared as an exclusively domestic matter outside the ambits of

November 29 1961 on judicial criminal proceedings (Code of Criminal Procedure). There have also been suggestions that preliminary reference can be based directly on the relevant clauses of the TEU and the TFEU, i.e. without specific amendments of Czech procedural codes. Comp. Zdenek Kühn and Michal Bobek, 'What About That "Incoming Tide?" The Application of EU Law in the Czech Republic' in Lazowski (ed), *The Application of EU Law in the New Member States: Brave New World* (T.M.C. Asser Press 2010) 344.

12 In 2015–2019, Czech courts referred 34 preliminary questions, which is fewer than the Hungarian (100), Belgian (154), Irish (48), Latvian (40), Lithuanian (39), Portuguese (79), Swedish (38) or Austrian (146) courts. Court of Justice of the European Union. Annual Report 2019. Judicial Activity. Luxembourg 2020, p.163.

13 Filip Křepelka, 'The imperfect dismantlement of the Czechoslovak pension system as an impulse for rebellion against European Union law' (2012) 2 European Journal of Social Law 278, 286ff.

EU law. Many academic commentaries labelled this decision as a Czech constitutional revolt against EU law,[14] even though its fundament was a dispute between two Czech senior courts.[15] This Slovak pension inter-judicial dispute eventually de-escalated after the Supreme Administrative Court withdrew its later preliminary question formulated as an even more direct confrontation with the constitutional court (C-253/12 JS v Czech Social Security Administration).[16]

### 3.3 Structural requirements for the courts of EU countries

Traditionally, EU law did not interfere with the structures of judicial authorities in individual Member States. In recent years, however, the CJEU and other EU institutions have started to actively seek to define the EU structural requirements for the judiciary in EU countries. This effort seems to be motivated by a combination of several components of European integration, including the ongoing constitutionalization of the European Union,[17] the expansion of mutual recognition of judicial decisions requiring mutual trust between the courts of individual Member States, as well as the increasing sensitivity to the importance of judicial control of the use of funds distributed through the Union budget or other EU financial instruments.

The trend of greater interest in the judiciaries of EU countries is reflected by the emerging heterogeneous catalogue of procedural tools (discussed in the following section of this chapter) which share, from the perspective of their critics, two horizontal challenges. The first is the vagueness of the

14 Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10 European Constitutional Law Review 54.

15 Robert Zbíral, 'Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12 – A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires' (2012) 49 Common Market Law Review 1475.

16 The Supreme Administrative Court asked whether "European Union law prevents the national court, which is the highest court in the State in the field of administrative law and against whose decision there is no right of appeal, from being, in accordance with national law, bound by the legal assessment of the Constitutional Court of the Czech Republic where that assessment seems not to be in accordance with Union law as interpreted by the Court of Justice of the European Union?".

17 Comp. Thomas Christiansen and Christine Reh, *Constitutionalizing the European Union* (Palgrave 2009) 229–260.

frame of reference for the debate on EU standards for national justice. Several clauses of the EU's founding treaties (Article 19 TEU in particular) and the EU Charter of Fundamental Rights give only a limited idea how a judicial system of an EU state should look. Therefore, the EU actors must significantly rely on case law, the expertise of actors outside the European Union (e.g. the Venice Commission of the Council of Europe) or the views of the academic community.[18] The result is a regulatory mosaic that provides a relatively easy target for criticism.

A second weakness of the Union's efforts to influence the structural elements of the Member States' judiciaries is the lack of clarity of the boundaries of EU rules, or at least of the EU's influence. Clearly, the activities of the CJEU and other EU actors are not limited to situations with a clear cross-border element or to situations where national courts apply EU law but extend to the whole judiciary. Thus, in the case of Hungary and Poland, EU actions were directed against the general retirement rules for judges or their disciplinary responsibility.[19] In other cases, Union instruments require a closer link between structural judicial misconduct and Union activity, as with the rule of law conditionality, where the mechanism can be triggered only when breaches of principle of the rule of law affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.[20]

## *4 EU instruments*

### 4.1 Actions for breaches of EU law before the CJEU

The activities and structure of the courts of Member States are not immune from infringement actions initiated by the European Commission and decided by the Court of Justice of the EU. However, the Commission must identify here a binding segment of EU law which it claims to be

18 For instance, recent Horizon 2020 RECONNECT Reconciling Europe with its Citizens through Democracy and Rule of Law project.

19 The Polish case is described in detail for example in Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

20 Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, Article 4 par 1.

infringed. Sometimes, this requirement has led to paradoxical situations, such as when the Commission sued Hungary for reducing the compulsory retirement age of judges, motivated by a desire of the Hungarian government to vacate a number of judicial posts and refill them with government-friendly judges, only for a breach of general EU legislation against age discrimination in employment (C-286/12 EC v Hungary).[21] It was not until several years later that the European Commission and the CJEU began to identify strengthening governmental control over the national judiciary as an explicit violation of Article 19 TEU, requiring Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."[22]

Infringement judgments in disputes between the European Commission and Poland on the conformity of the new Polish regime for disciplining judges (C-791/19 Commission v Poland, C204/21 Commission v Poland), combined with the Court's answers to preliminary questions on a similar subject asked by Polish and Hungarian judges (C-487/19 Waldemar Zurek, C-564/19 IS), have formulated the most detailed picture yet of judicial independence standards in EU law.[23] At the same time, however, these cases also demonstrated shortcomings of the infringement procedure, when the CJEU judgments can be relatively painlessly ignored by national authorities and a change in the domestic rules frequently materialized only after the threat of financial sanctions for not respecting the original CJEU judgment.[24]

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21 Gábor Halmai, 'The Early Retirement Age of Hungarian Judges' in Nicola and Davies (eds) *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017); Uladzislau Belavusau, 'On age discrimination and beating dead dogs: Commission v. Hungary, Case C-286/12' (2013) 50 Common Market Law Review 1145.

22 However, this argument did not appear for the first time in the context of Central Europe, but as part of an effort by Portuguese judges to reverse the consequences of the austerity measures taken by the Portuguese government during the eurozone crisis (CJEU, case C-64/16 *Association Syndical dos Juízes Portugueses* (2018)).

23 Rafał Mamko and Przemysław Tacik, 'Sententia non existens: A new remedy under EU law?: Waldemar Zurek' (2022) 59 Common Market Law Review 1169; Kim Lane Scheppele, 'The law requires translation: The Hungarian preliminary reference on preliminary references: IS' (2022) 59 Common Market Law Review 1107; Michał Krajewski and Michał Ziólkowski, 'EU Judicial Independence Decentralized: A.K.' (2020) 57 Common Market Law Review 1107.

24 In more detail Laurent Pech, 'Protecting Polish judges from Poland's Disciplinary „Star Chamber": Commission v. Poland (Interim proceeding)' (2021) 58 Common Market Law Review 137.

## 4.2 Article 7 TEU procedure

Already in the 1990s, a new control-sanction mechanism capable of responding to the collapse or significant implosion of democratic institutions in EU countries was inserted into fundamental EU treaties (Article F.1. TEU, later renamed Article 7 TEU). The new mechanism should be activated if any EU Member State seriously and persistently violates EU values, including the rule of law. The state in question may be subject to sanctions going beyond the standard sanctions catalogue for breaches of EU law, including the suspension of the voting rights in the Council, the interruption of transfers from the EU budget or even restrictions of its citizens' or companies' access to the internal market. However, Article 7 TEU does not go so far as to allow the expulsion of a state from the European Union. The relative limitlessness of sanctions under Article 7 TEU is compensated by its procedural rules, with an emphasis on de facto unanimity voting and institutional dominance of the European Council and the Council of the EU. In the light of the Austrian political crisis in 2000, Article 7 TEU was supplemented by a warning segment allowing the Council to declare that there is a clear risk of a serious breach of EU values in an EU state. In 2014, the European Commission extended (by means of a communication, i.e. without amending the founding treaties) the mechanism of Article 7 TEU by a preliminary procedure consisting mainly of consultations (described rather optimistically as "dialogue" in the Commission's documents) between the Commission and the Member State in which the Commission identified a systemic threat to the "political, institutional and/or legal order of a Member State as such, its constitutional structure, the separation of the powers, independence and impartiality of the judiciary or its system of judicial review". Communication between the Commission and the EU state may be followed by a recommendation to remedy the situation and, in the event of non-compliance with the recommendation, the Commission shall "assess the possibility of activating the Article 7 TEU mechanism in its complexity".[25]

Poland and Hungary became the first EU states to test the Article 7 TEU mechanism in practice. Firstly, the European Commission published, after unsuccessful communication within its EU rule of law framework, a reasoned opinion declaring that there was a serious risk of a breach of EU

25 Communication from the Commission to the European Parliament and the Council. New EU Rule of Law Framework, Brussels, 2014.

values in Poland. Several months later, the European Parliament adopted a similar motion in relation to Hungary. However, the whole procedure has not moved forwards due to passivity of the Council, and the political attention has been gradually moving towards rule of law conditionality of the allocation of EU finances (discussed below).

### 4.3 Termination of mutual recognition of judicial decisions

The conformity of the national judicial system with EU law has been challenged by individual national courts, which have repeatedly asked the CJEU whether the courts can cooperate with their counterparts from the "problematic" states and, in particular, whether they shall recognize judicial decisions originating from there. In 2018, the Irish court asked whether it should cooperate in the surrender of a Polish citizen for whom a European Arrest Warrant had been issued by Polish courts on suspicion of drug offences (C-216/18 PPU Minister for Justice and Equality versus LM). The Irish court was not confident it should recognize the euro-warrant in a situation where the independence of the Polish judiciary was being called into question and Article 7 TEU proceedings had even been initiated against Poland. The CJEU replied to the Irish judges that neither the Article 7 TEU procedure nor the European Commission's infringement procedures against Poland were automatically grounds for blocking cooperation. However, the Irish court should autonomously assess whether, in a concrete case, the person being surrendered would be guaranteed a fair trial in Poland, and Polish courts are obliged to provide their Irish counterpart with sufficient information to enable it to make a qualified decision in this matter.

To contextualize the problem of mutual trust in the EU, it shall be mentioned that challenges to mutual recognition between courts of EU countries have not been limited to situations where the independence of the judiciary has been called into question. Similar doubts have been raised concerning a European Arrest Warrant issued by courts from countries with a low standard of prisons and detention centres (C-404/15 Aranyosi and Căldăraru) or from a country withdrawing from the European Union (C327/18 RO).

## 4.4 Conditionality of financial transfers in the EU

The EU's latest initiative to strengthen the rule of law has been to link financial transfers from the EU budget to the quality of the functioning of the courts that control the distribution of the EU funds. When negotiations on the EU's multiannual financial framework (i.e. the framework for the standard EU budget) for 2021–2027 and the negotiations on the extraordinary financial instrument responding to the Covid crisis (Next Generation EU) coincided in 2020, the existing catalogue of conditions for transfers from the EU budget expanded to include respect for the rule of law in the receiving countries (i.e. rule of law conditionality). Within trialogue negotiations between the EU institutions, the European Parliament advocated a broader scope of the respective regulation, which it considered more of a tool for upholding the rule of law, while the Council emphasized the specific role of the new conditionality in protecting the Union budget, and therefore preferred a narrower definition of the activities covered by the regulation and their more direct link to the distribution of the EU funds.[26]

Finally, the respective regulation[27] contains its own definition of the rule of law,[28] indicators of breaches of the rule of law, including the generally formulated threat to the independence of the judiciary,[29] and detailed procedures for taking "appropriate measures" (typically to interrupt financial transfers to governmental entities in the receiving state) to protect the EU

26 The adoption of the Regulation is dealt with in more detail by Editorial Comments, 'Compromising (on) the general conditionality mechanism and the rule of law' (2021) 58 Common Market Law Review 267.

27 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

28 Article 2 of the regulation states that "the rule of law refers to the Union … [it] includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law."

29 According to Article 3 of the regulation, the indications of breaches of the principles of the rule of law include: "Endangering the independence of the judiciary, failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest, or limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments…".

budget, where the European Commission shall play a central role while the Council of the EU will also retain its influence. In contrast, the European Parliament is vested with only limited formal powers, which does not prevent this EU institution from intervening in the procedure by means of political declarations and pressure.[30] The scope of this new rule of law conditionality is limited by a requirement that "appropriate measures" may be triggered only if "the breach of the rule of law in a Member State sufficiently directly affects or seriously jeopardises the sound financial management of the Union budget or harms or seriously jeopardises the protection of the Union's financial interests".[31]

The draft regulation was opposed in the Council mainly by Hungary and Poland, which, although they alone could not block the adoption of the regulation in the Council (decided by a qualified majority), threatened to veto the Multiannual Financial Framework (adopted by consensus of Member States). A political solution to this deadlock was found by the European Council, which in its conclusions of December 2020 asked the European Commission to develop a detailed methodology for the evaluation of new conditionality as well as to promise not to use the regulation to assess general deficiencies in the rule of law in EU countries.[32] In addition, the European Council requested the European Commission to de facto postpone the activation of the entire mechanism until the review of its legality by the CJEU.[33] The Court did so in 2022 when it dismissed the actions brought by Hungary and Poland challenging the legality of the

30 In particular, European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

31 Article 4 par. 1 of the Regulation.

32 The European Council conclusions state, inter alia, that "the application of the conditionality mechanism under the Regulation will be objective, fair, impartial and fact-based, ensuring due process, non-discrimination and equal treatment of Member States" and "the triggering factors set out in the Regulation are to be read and applied as a closed list of homogenous elements and not be open to factors or events of a different nature. The Regulation does not relate to generalised deficiencies." European Council conclusions 10–11 December 2020.

33 The wording used was: "Should an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment … Until such guidelines are finalised, the Commission will not propose measures under the Regulation." European Council conclusions 10–11 December 2020, I. para. 2.point. c.

regulation (C-156/21 Hungary v EP and Council and C-157/21 Poland v EP and Council).

## 5 *Emerging new EU regulatory domain or only a Polish/Hungarian controversy?*

A new regulatory framework is emerging in the European Union limiting the autonomy of Member States to establish rules for the functioning of their domestic courts. At present, it focuses predominantly on the ability of courts to decide independently of political pressure from the executive, but the boundaries of EU influence are still unclear and potentially expanding, e.g. into agenda of underfinancing of the judiciary, independence of the public prosecutor's office or (absence of) governmental activity when the national judiciary refuses to respect EU law.

The new EU regulatory framework is formed by a loosely interconnected group of procedural tools with no mutual hierarchy or temporal coherence. Individual procedural tools also differ regarding space they provide for different EU and domestic institutions to pursue their views and preferences. The attention given to Poland and Hungary in recent years may overshadow the overall picture of this EU regulatory transformation and generate uncertainty of its future direction.

The first open question is whether the new EU rules will effectively expand beyond the Polish/Hungarian "two-country case study" and, in particular, whether the new EU regulatory domain will be limited to states which joined the EU in 2004 or later. Otherwise, it may be difficult to persuade the political elites of new EU states that strengthening EU oversight of their national judiciary is not just another manifestation of their treatment as de facto second-class members with diminished levels of trust, especially in a situation when some of the new EU states are expected to become net contributors to the EU budget.

A second factor influencing the future of the new EU regulatory framework will be its (in)capacity to capture not only formal rules but also to reflect the informal practice of interaction between the executive power and the courts.[34] The importance of attention given the soft constraints of the judiciary has already been reflected by the CJEU, which stressed how

34 For instance, the President of the Czech Republic, Miloš Zeman, revoked his already announced decision to award high state honour (Order of Tomas Garrigue Masaryk)

important for the rule of law an "appearance of judicial independence" of national courts is from the perspective of a well-informed outside observer.[35] The development of the EU regulatory framework in this direction will, however, require more robust comprehension of the legal systems and politics of new EU states in Brussels than exists at present.

Concluding, the competition between the EU procedural tools supervising the quality and independence of courts in Member States is not the only, or even the most pressing, challenge to the emerging EU regulatory regime. The legitimacy of this EU domain will require further clarification of its material scope (including the issues of subsidiarity and/or de minimis principle) as well as assurance of the non-discriminatory character of the territorial application of new EU instruments.

to the chairman of the constitutional court, Pavel Rychetský, as a reaction to the court's judgment annulling electoral legislation in 2021.

35 Michał Krajewski and Michał Ziolkowski, 'EU Judicial Independence Decentralized: A.K.' (2020) 57 Common Market Law Review 1107, 1124.