

EDITORIAL COMMENTS

Clear and present danger: Poland, the rule of law & primacy

Poland's long-lasting disagreements with the EU – involving in particular migration, LGBT+ rights, and the rule of law – dramatically escalated in the first week of October. In an unprecedented ruling, the Constitutional Tribunal in Warsaw first declared the Polish Constitution to have primacy over the Treaty on European Union and subsequently held certain Treaty provisions as interpreted by the European Court of Justice to be incompatible with the Constitution.¹ The ruling was anxiously awaited, since the Polish Government had brought an action before the Constitutional Tribunal with the objective of questioning the primacy of EU law as interpreted by the Court of Justice. This action followed a number of critical judgments from the Court of Justice on the independence of Polish judges, as an essential requirement of the principle of effective legal protection. Notably, the judgment was issued precisely one day after the Vice-President of the Court of Justice had emphasized the pre-eminence of EU law over the law of the Member States, in accordance with established ECJ case law, in an Order dismissing the appeal by the Polish Government against her interim Order of 14 July 2021 suspending the application of several judicial reforms in Poland.² The ruling from the Constitutional Tribunal further propels Poland along its collision course with the EU. If it is effectively implemented, this will inevitably have drastic repercussions for the EU's legal order, and the place of Poland therein. The pressing question now is: what can the EU do to address this rapidly deteriorating situation?

What preceded

The ruling from the Constitutional Tribunal is, for the time being, the undisputed low point of the increasingly strained relationship between Poland and the EU over the country's democratic backsliding and the gradual but seemingly systematic breakdown of the rule of law in Poland. This process started when political party PiS, the *Law and Justice* party, came to power in

1. Constitutional Tribunal, Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union, K 3/21, Warsaw, 7 Oct. 2021, <trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

2. Order of the Vice-President of the CJEU in Case C-204/21 R-RAP, *European Commission v. Poland*, EU:C:2021:834.

2015 and started on a major overhaul of the judicial system, thereby undermining central tenets of the system of separation of powers and the checks and balances built in it, with the purpose of effectively subjecting the judiciary to the control of the executive and legislative branches of government.³ Growing concerns over developments in Poland have led to the launch of a number of infringement proceedings, as well as a number of preliminary rulings and even to the activation of the Article 7 TEU procedure in 2017.⁴ These were certainly instrumental in crossing the t's and dotting the i's in some ways, such as in *A.K. and others*, in which the Court of Justice further detailed the conditions under which a court is not an independent and impartial tribunal: "that is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it".⁵ But ultimately, all these legal actions did not exactly produce the desired effects.

In 2021, the situation further deteriorated. In early March, the Court of Justice held in *A.B. and others* that successive amendments to the Polish Law on the National Council of the Judiciary, which have the effect of removing effective judicial review of that council's decisions proposing to the Polish President candidates for the office of judge at the Supreme Court, are liable to infringe EU law, Article 19(1) TEU in particular.⁶ The ECJ added that where an infringement is established, the principle of primacy of EU law requires the referring national court to disapply the amendments at issue, regardless of whether they are of legislative or constitutional origin.

On 1 April 2021, the European Commission commenced a new Article 258 TFEU procedure, seeking a declaration that certain other judicial reforms are also not compatible with EU law, in particular Article 19(1) TEU *juncto* Articles 7, 8(1) and 47 CFR.⁷ It also filed a request for interim measures to temporarily suspend – pending the delivery of the ECJ's judgment in the case – the application of these new provisions of Polish law. These concern, *inter*

3. Pech, Wachowiec and Mazur, "Poland's rule of law breakdown: A five-year assessment of EU's (in)action", 13 *Hague Journal on the Rule of Law* (2021), 1–43.

4. See e.g. Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531; Case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, EU:C:2019:924; or, in relation to the Art. 7 TEU procedure: <ec.europa.eu/commission/presscorner/detail/en/MEMO_17_5368>.

5. Joined Cases C-585, 624 & 625/18, *A.K. & others*, EU:C:2019:982.

6. Case C-824/18, *A.B. and Others v. National Council of the Judiciary*, EU:C:2021:153.

7. Action brought on 1 April 2021 in Case C-204/21, *Commission v. Poland*, <curia.europa.eu/juris/document/document.jsf?docid=243505&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=27039901>.

alia, the grant of jurisdiction to the Disciplinary Chamber of the Supreme Court to adjudicate, at both first instance and second instance, on applications for authorization to initiate criminal proceedings against judges or trainee judges, place them in provisional detention, arrest them or summon them to appear before it. The Disciplinary Chamber is also given jurisdiction to adjudicate in cases relating to the status of judges of the Supreme Court, in particular in cases relating to the compulsory retirement of those judges. Further legislative provisions allow the 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, and establish 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.

In May 2021, the European Court of Human Rights also intervened in the situation of Poland. In *Xero Flor*, it unanimously held that Poland had acted in breach of Article 6(1) ECHR on the right to a tribunal established by law, on the ground that one of the judges of the Constitutional Tribunal who sat in the panel that tried the case, had been appointed in violation of the Polish Constitution, and in complete disregard of a judgment from the Constitutional Tribunal to that effect.⁸ In an interlocutory decision on 15 June 2021, the Constitutional Tribunal retaliated, by holding that the judgment of the ECtHR “is based on theses that demonstrate a lack of knowledge of the Polish legal system, including the fundamental principles governing the position, system and role of the Polish Constitutional Tribunal. In this respect, the judgment was issued without a legal basis, exceeds the competence of the ECHR and constitutes an unlawful interference with the national legal order, especially in matters which are outside the competence of the ECHR; for these reasons, it must be considered a non-existent judgment (*sententia non existens*).”⁹

The situation was thus already turbulent, but in July there came a flurry of judicial activity.¹⁰ First, by Order of 14 July, the Vice-President of the Court of Justice granted the Commission’s request for interim measures to suspend the application of the new reforms.¹¹ On the same day, however, the Polish Constitutional Tribunal already rebounded by rendering its judgment in

8. ECtHR, 7 May 2021, *Xero Flor v. Poland* (Appl. No. 4907/18), <hudoc.echr.coe.int/eng?i=001-210065>.

9. Constitutional Tribunal, 30/A/2021 Decision of 15 June 2021, P 7/20, available at <ruleoflaw.pl/wp-content/uploads/2021/06/20819_P-7_20_eng.pdf>.

10. Jaraczewski, “Polexit or judicial dialogue?: CJEU and Polish Constitutional Tribunal in July 2021”, *VerfassungsBlog*, 19 July 2021, <verfassungsblog.de/polexit-or-judicial-dialogue>.

11. Order of the Vice-President of the CJEU in Case C-204/21 R, *Commission v. Poland*, EU:C:2021:593.

case P 7/20, finding that the interim orders from the ECJ pertaining to the organizational structure and functioning of Polish courts and to the mode of proceedings before those courts are *ultra vires* and therefore incompatible with the Polish Constitution.¹² The next day, on 15 July 2021, the Court of Justice declared the new disciplinary regime for judges in Poland to be incompatible with EU law, in particular again Article 19(1), second paragraph TEU.¹³ The Court of Justice found, *inter alia*, that the Disciplinary Chamber of the Supreme Court does not provide all the necessary guarantees of impartiality and independence and, in particular, is not protected from the direct or indirect influence of the Polish legislature and executive. The Court of Justice criticized the fact that the process for appointing judges to the Supreme Court, including the members of the Disciplinary Chamber, is essentially determined by the National Council of the Judiciary, which has been significantly reorganized by the Polish executive and legislature and whose independence may give rise to reasonable doubts. The ECJ established further that because the disciplinary regime allows the *content* of judicial decisions to be classified as a disciplinary offence, political control could be exerted over judicial decisions, undermining the independence of the courts. This independence is further put at risk by Poland's failure to guarantee that disciplinary cases brought against judges of the ordinary courts will be examined within a reasonable time and by its failure to guarantee respect for the rights of defence of accused judges. Finally, the ECJ also condemned the system whereby national judges are exposed to disciplinary proceedings as a result of the fact that they have decided to make a reference for a preliminary ruling to the Court of Justice, which undermines their right or, as the case may be, their obligation to put questions to the ECJ, as well as the system of judicial cooperation between the national courts and the Court of Justice established by the EU Treaties.

Exactly one week later, on 22 July, the European Court of Human Rights ruled in *Reczkowicz v. Poland* that Poland had violated Article 6(1) ECHR, because the Disciplinary Chamber of the Supreme Court was not a tribunal established by law since it lacked the necessary impartiality and independence.¹⁴ The ECtHR found that the procedure for appointing judges

12. Constitutional Tribunal, The obligation of an EU Member State to implement interim measures pertaining to the organizational structure and functioning of constitutional authorities within the judicial branch of government of that Member State, P 7/20, Warsaw, 14 July 2021, available at <trybunal.gov.pl/en/hearings/judgments/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa>.

13. Case C-791/19, *Commission v. Poland*, EU:C:2021:596.

14. ECtHR, 22 July 2021, *Reczkowicz v. Poland* (Appl. No. 43447/19) <hudoc.echr.coe.int/fre?i=001-211127>.

had been unduly influenced by legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and fatally compromised the legitimacy of the Disciplinary Chamber of the Supreme Court, which had examined the applicant's case.¹⁵

When the dust of all those proceedings settled, it was clear that the Court of Justice had firmly and unequivocally rejected the Polish reforms of the judiciary for failing to comply with the requirements of EU law, specifically Article 19(1) second paragraph TEU as interpreted by the ECJ with regard to the independence and impartiality of judges. In *A.B. and others*, the ECJ ultimately left it to the referring court to adjudicate, but made it clear it seriously doubts whether the National Council of the Judiciary offers sufficient guarantees of independence. Taken together, the Order of 14 July and the judgment of 15 July in *Commission v. Poland* have the effect of leaving no room for the operation of the Disciplinary Chamber of the Supreme Court. The European Court of Human Rights played its part as well, even twice. First, it clearly stated that the current composition of the Constitutional Tribunal is not in accordance with the Polish Constitution because of the presence of three illegally appointed judges. Secondly, it dismissed the Disciplinary Chamber as not being a tribunal established by law.

The Polish Constitutional Tribunal was seemingly not impressed though. The ECtHR judgment in *Xero Flor* was cast aside as being non-existent. The dismissal of an ECtHR judgment by the constitutional court of a member country of the ECHR is quite something. It is disappointing (to say the least) that the authority of the ECHR is attacked by one of its High Contracting Parties in a blatant act of non-compliance.¹⁶ And the Constitutional Tribunal considered that the 14 July Order of the Vice-President of the ECJ, on the Commission's request for interim measures, was *ultra vires* and therefore incompatible with the Polish Constitution. That was of course a taste of what was to come on 7 October.

The significance of the ruling from the Constitutional Tribunal

The ruling of 7 October from the Constitutional Tribunal consists of three aspects. First, Article 1 TEU, in conjunction with Article 4(3) TEU, is considered incompatible with the Polish Constitution insofar as a) the EU acts outside the boundaries of the competences which have been conferred upon it; b) the Polish Constitution is no longer the supreme law of the land; and c) the

15. At the request of Poland, this case will be reheard by the Grand Chamber of the European Court of Human Rights.

16. Lawson, " 'Non-Existent': The Polish Constitutional Tribunal in a state of denial of the ECtHR *Xero Flor* judgment", *VerfassungsBlog*, 18 June 2021, <verfassungsblog.de/non-existent>.

Republic of Poland may no longer function as a sovereign and democratic State. Secondly, Article 19(1), second subparagraph TEU is also regarded as unconstitutional insofar as, for the purpose of ensuring effective legal protection in the areas covered by EU law, it grants domestic courts (common courts, administrative courts, military courts and the Supreme Court) the competence to a) bypass the provisions of the Constitution in the course of adjudication; and b) adjudicate on the basis of provisions which are not binding, having been revoked by the Sejm and/or ruled by the Constitutional Tribunal to be inconsistent with the Constitution. Thirdly, Articles 19(1), second paragraph and 2 TEU are found to be inconsistent with the Constitution insofar as, again for the purpose of ensuring effective legal protection in the areas covered by EU law and ensuring the independence of judges, they grant domestic courts (common courts, administrative courts, military courts and the Supreme Court) the competence to a) review the legality of the procedure for appointing a judge; b) review the legality of the National Council of the Judiciary's resolution to refer a request to the president of the Republic to appoint a judge; and c) determine the defectiveness of the process of appointing a judge.

This decision is really "*du jamais vu*". While constitutional courts of almost all Member States have challenged the ECJ's rather absolute conception of EU primacy, most notably the *Bundesverfassungsgericht*, this is the first time in history that actual Treaty provisions have been deemed (partly) incompatible with a national constitution. The first part of the ruling is perhaps not so remarkable. In essence, the Constitutional Tribunal merely reiterates the principle of conferral, and reiterates its view that the Constitution is the highest law of the land. This is a view that was already expressed by the Polish Constitutional Tribunal before, for example in its ruling on the Lisbon Treaty; it is a view which is actually shared by many national constitutional courts, and reflects still unresolved issues regarding the nature, basis and scope of the principle of primacy.¹⁷ However, the Constitutional Tribunal actually contradicts its own established constitutional case law here, according to which any conflict between the Polish Constitution and EU law should be

17. See e.g. in Poland: Constitutional Tribunal, K 32/09, 24 Nov. 2010 (*Lisbon Treaty*); Constitutional Tribunal K 18/04, 11 May 2005 (*EU Accession Treaty*). In Germany: BVerfG, 2 BvR 2661/06, 6 July 2010 (*Honeywell*); BVerfG, 2 BvR 2728/13, 14 Jan. 2014 (*Gauweiler*); BVerfG, 2 BvR 859/15, 5 May 2020 (*Weiss*). In Czech Republic: Constitutional Court, Pl US 5/12 of 31 Jan. 2012 (*Slovak pensions*). In Denmark: Supreme Court, Case 15/2014, 6 Dec. 2016 (*Ajos*).

remedied by either changing the Polish Constitution, by changing EU law, or by withdrawing from the EU.¹⁸

The second part of the ruling is highly problematic. The Constitutional Tribunal starts by stating that in case of a conflict between a Treaty provision and the national Constitution, the national court must apply the Constitution. And then it also seems to imply that provisions of EU law can be stripped of their binding nature by national authorities, either when they are revoked by the lower house of the Polish Parliament or when they have been deemed incompatible with the Polish Constitution by the Constitutional Tribunal, and can thus no longer be relied upon by domestic courts when adjudicating. This amounts to nothing less than an open and full-frontal attack on the principle of primacy of EU law, not just at a conceptual level but at a very concrete one, which directly threatens the functioning of the EU legal order. Primacy is a foundational principle and essential feature of the EU legal order, destined to ensure the effectiveness and uniform application of EU law in the territories of the EU Member States.¹⁹ Since early cases such as *Costa*, *Simmenthal* or *Internationale Handelsgesellschaft*, it is clear that primacy requires all Member State bodies to give full effect to the various EU provisions, and that national laws that conflict with (directly effective) EU law must be set aside, even national law of a constitutional nature.²⁰ Not only does the Constitutional Tribunal blatantly disregard this established case law, it goes even further, by holding that it and even the national parliament have the power to set aside binding provisions of EU law. From an EU legal point of view, the former is unacceptable and the latter makes no sense: from the moment Member States have ratified the EU Treaties in accordance with their constitutional requirements (Art. 49 TEU), their national parliaments do not have the power to revoke provisions of EU secondary legislation or *de facto* end the applicability of EU law within their national legal order. In fact, EU law clearly obliges national courts to set aside any national norm that violates directly effective EU law, including any subsequent act of a national parliament aiming to limit the applicability of EU law based on the national constitution. Under Article 263 TFEU, it is clear that only the Court of Justice has the power to annul EU secondary legislation.

18. Biernat and Letowska, “This was not just another ultra vires judgment!: Commentary to the statement of retired judges of the Constitutional Tribunal”, *VerfassungsBlog*, 27 Oct. 2021, <verfassungsblog.de/this-was-not-just-another-ultra-vires-judgment>.

19. Opinion 2/13, *ECHR Accession*, EU:C:2014:2454.

20. Case 6/64, *Costa v. ENEL*, EU:C:1964:66; Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, EU:C:1978:49. See also Case C-399/11, *Melloni v. Ministerio Fiscal*, EU:C:2013:107.

The final part of the ruling comes to the crunch of the matter. In the recent landmark ruling, *Portuguese judges*, the Court of Justice established, on the basis of an interpretation of Article 19(1), second paragraph TEU, that the existence of effective judicial review designed to ensure compliance with EU law is of the essence to the rule of law. Every Member State must ensure that the bodies which, as “courts or tribunals” within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.²¹ This requires, *inter alia*, that they are independent. The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions.²² Considering the vital importance of judicial independence, moreover, Article 19(1) TEU even creates its own scope. Crucially, this brings the national organization of the judiciary under the scope of EU law, *inter alia* enabling the Commission to start infringement proceedings directly based on Article 19(1) TEU and national courts to ask preliminary references on the compatibility of their national judicial system with EU law. The ECJ relied heavily on this interpretation of Article 19(1), second paragraph TEU to render judgment in *A.B. & Others*. In essence, the Polish Constitutional Tribunal disagrees with this interpretation of Article 19(1) TEU. In the view of the Constitutional Tribunal, it is not up to domestic courts (or the Court of Justice) to review the procedure to appoint judges, even if that procedure was politically inspired. The Tribunal finds that interpretation of Article 19(1), second paragraph inconsistent with the Polish Constitution.

The potentially disintegrative impact of this ruling, for the EU legal order and by extension, the EU itself, can hardly be overstated. Already in *Simmmenthal*, the Court of Justice issued the warning that “any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.”²³ In

21. Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, paras. 36–37.

22. *Idem*, para 44.

23. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, para 18.

its recent ruling, the Constitutional Tribunal in effect seems to relay the view of the Polish Government that the EU has no right to meddle in the way the Polish judicial architecture is reformed. To achieve this goal, it puts the principle of primacy at stake, attempting to deprive it of much of its practical effect. The principle of primacy is the most authoritative instrument by which EU law can be mobilized to try to resist these judicial reforms and preserve the independence and impartiality of the judiciary as an indispensable requirement of the principle of effective legal protection, which in itself is a *conditio sine qua non* for the protection of the rule of law.

It must be acknowledged that the development of Article 19 TEU is potentially highly intrusive, to a degree which was not really foreseen. The interpretation of this provision by the Court of Justice might be viewed as a logical step following the case law on primacy. It could also be said that the ECJ is once again stepping in to act where the political institutions have failed. In any event, however significant the development of Article 19 TEU may be, Poland's response to it is clearly not the appropriate one.

The fallout of this judgment could be fairly catastrophic.²⁴ The Court of Justice already held that “the independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, that mechanism may be activated only by a body responsible for applying EU law which satisfies, *inter alia*, that criterion of independence.”²⁵ If principles such as mutual trust and mutual recognition are at risk of being compromised, this will inevitably negatively impact cross-border cooperation in criminal affairs (for example, under the European Arrest Warrant system) as well as the Union's internal market. With this ruling, Poland *de facto* positions itself in the outer margins of, or even outside, the EU's legal order. Inevitably, the question about Poland's continued membership of the EU looms large.²⁶ This situation also carries the risk of contagion: how are other – possibly like-minded – Member States going to react?

What's next?

The terms in which the ruling is couched seem to indicate that Poland is seeking confrontation. Respect for the rule of law is one of the fundamental values of the European Union, expressed in Article 2 TEU. The case law of the Court of Justice on primacy, furthermore, is long established. Poland knew

24. Hillion, “Op-Ed – Last station before ‘Polexit’?”, available at <eulawlive.com/op-ed-last-station-before-polexit-by-christophe-hillion/>.

25. Case C-64/16, *Associação Sindical dos Juizes Portugueses*, para 43.

26. De Burca, “Should Hungary and Poland be EU Member States?”, CELS presentation, Cambridge, 17 Feb. 2021, available at <www.youtube.com/watch?v=AGuqUm_wgbc>.

and accepted all this as *acquis communautaire* when it signed and ratified the Treaty of Accession, and also when it agreed to Declaration 17 on Primacy attached to the Lisbon Treaty. If the situation in Poland is now quickly running out of control, the Union has the responsibility to react. The problem, however, is that the Union's toolbox is not ideally equipped to deal with a recalcitrant Member State. A tailor-made solution is not readily available. Legal, financial and political means must be sought, possibly combined.

Strictly legally speaking, the EU could decide to completely ignore the ruling of the "Institution formerly known as the Constitutional Tribunal",²⁷ on the ground that it is rendered by a body that does not meet the requirements of a court established by law under Article 6(1) ECHR, and does not function in accordance with its own Constitution. It is highly questionable, however, whether this could be instrumental in breaking the current stalemate.

Apart from doing nothing, the first real option is to start legal action against Poland. So far, the European Commission has only sparingly made use of Article 258 TFEU, preferring the political dialogue with the Polish Government. But now, it seems likely that the Commission will initiate infringement proceedings against Poland, as it has done against Germany in the wake of the judgment of the German Constitutional Court of May 2020.²⁸ Such a procedure does take time, however, and if the Court of Justice were to condemn Poland, which would seem nearly certain, it still remains to be seen whether Poland would comply with the judgment. In such a case, the Commission would have to start the legal follow-up procedure of Article 260 TFEU to ask the Court of Justice to impose a fine and/or penalty payment so as to incentivize the Member State into compliance. And even this might not be a walk in the park. On 20 September 2021, Poland vowed to keep its disputed Turow coal mine running despite being ordered to pay a €500,000 daily penalty to the European Commission for defying an earlier interim order to cease lignite extraction operations.²⁹ The Commission has now also indicated that if Poland refuses to pay that pecuniary penalty, it will consider the option of withholding payments due under other EU funds, by set-off. Such a measure, if adopted, could make a difference. Further, on 27 October

27. Koncewicz, "Poland and Europe at a critical juncture. What has happened? What is happening? What's next?", *VerfassungsBlog*, 16 Aug. 2021, <verfassungsblog.de/poland-and-europe-at-a-critical-juncture-what-has-happened-what-is-happening-whats-next/>.

28. <ec.europa.eu/commission/presscorner/detail/en/inf_21_2743>. On 9 June 2021, the European Commission decided to send a letter of formal notice to Germany for violation of fundamental principles of EU law, in particular the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the respect of the jurisdiction of the CJEU under Art. 267 TFEU.

29. Case C-121/21 R, *Czech Republic v. Poland*, EU:C:2021:752. See also <www.reuters.com/article/us-czech-poland-turow-idAFKBN2GG0WH>.

2021, Poland was ordered to pay the European Commission a daily penalty payment of €1 million, for failing to comply with the interim measures ordered on 14 July 2021 concerning the suspension of the application of the provisions of national legislation relating, in particular, to the areas of jurisdiction of the Disciplinary Chamber of the Supreme Court.³⁰

Building on all of these, a second option would be to attach wider financial consequences to the current disagreements. Between 2014 and 2020 Poland received approximately €106 billion from the EU's budget, including €72.9 billion for cohesion policy and €28.5 billion for agricultural policy, making it the largest recipient of EU funding for the period since 2007.³¹ Poland is currently entitled to some €36 billion from the new recovery plan Next Generation EU, €24 billion in grants and €12 billion in loans.³² The European Commission has, however, so far withheld approval of Poland's resilience and recovery plan, an indispensable condition for the transfer of these EU funds, and its President made it clear, at a Press Conference of 28 October 2021, that it will change its position only if the Polish Government accepts certain conditions relating to the disciplinary regime applicable to judges. Emphasizing negative financial consequences may be a suboptimal means to try to lure a rebellious Member State into EU law compliance. However, it does no harm to occasionally remind Member States that EU membership does not only create rights and entitlements, but also carries obligations.³³ It seems only logical that the Commission strictly adheres to the conditions laid down in the EU recovery instrument, and that as long as these are not complied with, no money is transferred to Poland. Moreover, EU Commissioner for Justice Reynders did hint at the possibility for the Commission to trigger the conditionality mechanism, despite previous pledges not to make use of it until the Court of Justice has given its fiat to the new mechanism.³⁴ This could lead to Poland being deprived of even more funds from the general EU budget.

30. Order of the Vice-President of the CJEU in Case C-204/21 R, *Commission v. Poland*, EU:C:2021:878.

31. Information from the website of the Polish Investment & Trade Agency, available at <www.paih.gov.pl/why_poland/eu_funds>.

32. Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 Feb. 2021 establishing the Recovery and Resilience Facility, O.J. 2021, L 57/17–75.

33. See the Opening Address of Belgian Prime Minister De Croo at the College of Europe in Bruges on 27 Oct. 2021, available at <www.premier.be/en/opening-address-college-europe>.

34. <www.bloomberg.com/news/articles/2021-10-17/eu-will-use-budget-tool-against-rule-of-law-scofflaws-in-days>. However, Commission President Von der Leyen later indicated the opposite, see <www.politico.eu/article/european-council-energy-prices-rule-of-law-poland/>. And in the meantime, the European Parliament has decided to bring the European Commission before the Court of Justice for not making use of its powers under the conditionality mechanism: see <www.politico.eu/article/european-parliament-european-poland-commission-rule-of-law-eu/>.

Before this happens, however, if at all, a lot of water will run under the bridge.³⁵ But this message signals that the European Commission might be willing to take off its gloves in this crisis. In this context, one also cannot fail to see the irony in Poland's attempt, alongside Hungary, to have the new conditionality mechanism annulled by the Court of Justice, while rejecting its jurisdiction in key justice areas.³⁶

Shutting off the financial gas would entail serious consequences for Poland. Were this to happen, the Polish population, which according to latest surveys is still overwhelmingly in favour of the EU,³⁷ is bound to be negatively affected. Such a draconian measure could therefore work in different ways: it could lead to resentment against the EU amongst the Polish people, if the government manages to put the blame on "Brussels" for the lack of EU funds; or it could result in less popular support for the PiS government, if the prevailing message is that this is the result of the actions of the Polish Government itself.

Finally, there is still the political route. Some commentators argued that the ruling of the Constitutional Tribunal has *de facto* placed Poland outside the EU legal order. It was even suggested that if the government were to implement the ruling, and publish it in the *Official Gazette*, this could perhaps amount to an indirect notification of withdrawal from the EU within the meaning of Article 50 TEU.³⁸ Article 50 TEU provides that any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements. In *Wightman*, the Court of Justice interpreted this Treaty provision as meaning that a withdrawing Member State is not required to take its decision in concert with the other Member States or with the EU institutions. The decision to withdraw is for that Member State alone to take, in accordance with its own constitutional requirements, and depends solely on its sovereign choice.³⁹ The Constitutional Tribunal's judgment does not seem to meet these requirements, however. The European Treaties also do not provide for the possibility to expel a Member State from the Union. In

35. Editorial Comments "Compromising (on) the general conditionality mechanism and the rule of law", 58 *CML Rev.* (2021), 267–284.

36. "After slapping down top EU court, Poland asks for its help", *Politico*, 11 Oct. 2021, available at <www.politico.eu/article/Poland-rejected-eu-court-now-wants-eu-assistance/>. Cases C-156/21 (H) and 157/21 (P) v. *European Parliament and Council of the European Union*, pending.

37. Guerra, "The Polish people support the EU – it's their government that continues to antagonise Brussels", available at <theconversation.com/the-polish-people-support-the-eu-its-their-government-that-continues-to-antagonise-brussels-170324>.

38. Steinbeis, "The exit door", *VerfassungsBlog*, 8 Oct. 2021, <verfassungsblog.de/the-exit-door/>.

39. Case C-621/18, *Wightman & others v. Secretary of State for Exiting the European Union*, EU:C:2018:999, para 50

Wightman, the Court made it clear that Article 50 TEU does not allow for an interpretation whereby a Member State would be forced to withdraw from the European Union against its will.⁴⁰

Finally, there is still the possibility to try to make more effective use of Article 7 TEU. Because of its possible far-reaching impact, it is generally regarded as the solution-of-last-resort. The European Commission already triggered stage one of the Article 7(1) procedure against Poland in December 2017. Until now, the activation of this procedure has not had any serious impact; there have only been a couple of (inconclusive) hearings on this matter. And the Council certainly has not (yet) officially determined that “there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU”, notwithstanding the fact that this should at least be plain and obvious by now and the required majority of four fifths of the Member States and the consent of the European Parliament appear hurdles that could perhaps be taken. In all likelihood, the reluctance to move forward with the Article 7 procedure has to do with the high thresholds in stage two of the procedure. First, the European Council must unanimously determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU. It is only after such a determination has been made that the Council may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of that Member State in the Council. Evidently, the unanimity requirement in the European Council is the stumbling block. The Member State in question cannot take part in the vote. But the Treaty drafters did not foresee the possibility that there would be two problematic Member States at the same time, as is the case right now with Poland and Hungary. The Article 7(2) TEU procedure cannot be triggered, because Hungary would use its veto to help Poland, and vice versa. One could leave it at that. Or one could advocate a functional, teleological interpretation of Article 7 TEU, considering that the Treaties are a living instrument.⁴¹ During the economic and monetary crisis, it was accepted that extreme circumstances may require extreme measures. In *Pringle*, the ECJ accepted that the no-bailout clause inserted in Article 125 TFEU did not stand in the way of the creation of the European Stability Mechanism, albeit outside the Treaty framework, because the financial stability of the Union was at stake.⁴² Though the situation is very

40. *Idem*, para 65.

41. On the Art. 7 TEU procedure, see e.g. Scheppele and Keleman, “Defending democracy in EU Member States”, in Bignami (Ed.), *EU Law in Populist Times* (Cambridge University Press, 2019), pp. 413–456; Kochenov, “Article 7: A commentary on a much talked-about ‘dead’ provision”, in von Bogdandy, Bogdanowicz et al. (Eds.), *Defending Checks and Balances in EU Member States* (Springer, 2021), pp. 127–154.

42. Case C-370/12, *Pringle v. Government of Ireland et al.*, EU:C:2012:756.

different, it might be argued that with the stability of the EU legal order currently in clear and present danger, the unanimity requirement in Article 7(2) TEU could be interpreted as meaning that Member States who are subject to an Article 7 procedure themselves, in this case, both Poland and Hungary, are excluded from voting. Admittedly, this would be a very long shot, with many pitfalls, but would pave the way for the Article 7 TEU procedure against Poland to be able to proceed and finally produce some meaningful effects. Clearly, for this to work, the Member States would also have to assume their responsibilities. At the moment, however, there does not appear to be much political appetite for drastic action against Poland.⁴³

Concluding remarks

A Member State of the EU has clearly indicated it is no longer willing to play by the EU rulebook in certain circumstances. And yet has no intention whatsoever to leave the EU, as the UK previously did. This makes the current crisis much more complex than Brexit; the functioning of the EU legal order itself is in jeopardy. Nevertheless, if Poland really wants to remain a Member State of the EU, the government will have no choice but to start respecting the rule of law again and restore the independence of the judiciary. This seems quintessential. Fundamental values cannot be compromised. There seems to be a glimmer of hope in this respect, as the Polish Prime Minister Morawiecki has hinted at the possibility the Polish Government might be willing to dismantle the Disciplinary Chamber of the Supreme Court. This could be a first step in the right direction. The situation is serious, but not hopeless.

43. See de Gruyter, "Komt er een akkoordje met Polen?", *NRC Handelsblad*, 29 Oct. 2021, available at <www.nrc.nl/nieuws/2021/10/29/komt-er-een-akkoordje-met-polen-a4063560>.