

# DIRITTI COMPARATI

## Comparare i diritti fondamentali in Europa

### **ON PRIMACY, THE RULE OF LAW AND POLAND: GOING DOWN THE RABBIT HOLE?**

*Posted on 25 Ottobre 2021 by [Martina Coli](#)*

Once again, Poland is on the spot for what concerns problems with the rule of law. In two judgements delivered between summer and autumn 2021 (the last one, on 7 October), the Constitutional Court of Poland – which is by now fully composed by loyalists to the government, some of them also [unlawfully appointed](#) – rejected the principle of primacy of EU law. With this move, Warsaw opted for open and unprecedented confrontation with the founding principles of the EU legal order, bringing the country into an unknown and disorienting legal dimension.

#### **Overview of the most relevant facts**

In the [judgment of 7 October](#), the Polish Constitutional Court decided to blatantly oppose the primacy of EU Law. The [action](#) over the constitutionality of the EU Treaty was introduced by Polish Prime Minister Morawiecki in March and came after the judgment of the Court of Justice in [A.B. and others](#), which found that EU law precludes measures such as the Polish provisions impeding preliminary references from Polish judges and governing judicial appointment to the Supreme Court. The Constitutional Court was supposed to deliver its judgment over the summer, but the verdict was delayed several times.

The judgment was ultimately issued by a full panel of judges and adopted

by majority vote, with two dissenting opinions. It entered into force only five days later, as the publication by the *government* in the official journal was required for that purpose. The Constitutional Court found Articles 1, 4(3) and 19(1) TEU incompatible with the [Polish constitution](#) – notably, Article 8(1), whereby “the Constitution shall be the supreme law of the Republic of Poland” – insofar as they require national courts to give precedence to EU law over the Polish Constitution and to disregard national provisions, including the constitutional ones, in case of a contrast with EU law. Moreover, Articles 2 and 19(1) TEU were found inconsistent with the Polish Constitution insofar as they allow Polish judges to assess the independence of their own peers. In drawing such conclusions, the Constitutional Court apparently performed each sort of [acrobatic legal reasoning](#), ignoring some important constitutional provisions. The flaws of the judgment are confirmed by the concerns expressed by the [former judges of the Constitutional Court](#), who consider that the judgment falls outside the competences of the tribunal and it is not consistent with the constitution. In a nutshell, the Constitutional Court rejected the common standards of judicial independence elaborated by the Court of Justice with the view of ensuring effective judicial protection in the EU legal order. The Polish Constitutional Court had already rejected the primacy of EU law in a [judgment](#) delivered on 14 July 2021. There, it found Article 4(3) TEU and Article 279 TFEU incompatible with Poland’s Constitution, insofar as they allow the Court of Justice to impose, via *interim* measures, obligations on Poland concerning the organization of the judiciary. That decision was issued by five judges only, one of which voted against. It was [published](#) by the government in the official journal on 16 July, and thus entered immediately in force. The judgment was a direct reaction against the decisions – and the related *interim* measures – through which the Court of Justice found that the Polish disciplinary chambers were in breach of Article 19(1) TEU. Notably, in [A.K. and others \(C-585/18, C-624/18 e C-625/18\)](#), the Luxembourg court offered guidance to the referring national court – the Labor Chamber of the Supreme Court – on how to evaluate the independence of a disciplinary chamber and a national judicial council under Article 47 of the EU Charter, hinting that the

requirement was not satisfied in the case at issue. Subsequently, the judgement in [Commission v Poland \(C-791/19\)](#) of 15 July 2021 acknowledged several violations of Article 19(1) TEU by Poland connected to the institution, powers and activities of the disciplinary chamber. It was preceded by an order for *interim* measures suspending the provisions giving jurisdiction to the disciplinary chamber to rule in disciplinary cases ([Order in case C-791/19 R](#) of 8 April 2020). The action that led to the July judgment of the Constitutional Court was filled by the judges of the disciplinary chamber the day after that order of the Court of Justice. It was thus a clear act of rebellion against the first decision of the Court of Justice to suspend the activities of the disciplinary chamber. At the same time, it was also a proof that the case law of the Luxembourg Court added teeth to the EU's reaction against rule of law backsliding in Poland. Finally, on the same day of the July judgment of the Constitutional Court of Poland, the Vice-President of the Court of Justice issued another order for *interim* measures, this time requesting Poland to suspend national provisions prohibiting domestic courts to check the legality and legitimacy of judicial appointment and giving new powers to the disciplinary chamber, such as the authorization to open criminal proceedings against judges ([Order in case C-204/21 R](#) of 14 July 2021).

While the Constitutional Court's July judgment only concerned *interim* measures, the decision of October is significantly broader and represents an open challenge to the principles of the EU legal order. However, the message from the Constitutional Court is the same: there is no room in the Polish Constitution for judicial independence as framed in the case law of the Court of Justice and the primacy of EU law can thus not be accepted.

### **Which consequences for the EU legal order?**

It is not the first time that a constitutional court does not share the view of the Court of Justice on the foundational principle of the primacy of EU law. Divergencies in this respect are as old as the principle itself. The history of European integration teaches that judicial dialogue and confrontation between the Court of Justice and national courts, *in primis* the constitutional ones, is essential for the thorough application and the

uniform interpretation of EU law. A “[state of creative disagreement](#)” may well perform a positive function over the definition of the EU legal order and the protection of fundamental rights, also when strongly worded.

It might be tempting to compare the October judgment of the Polish Constitutional Court with the [PSPP decision](#) of the German Federal Constitutional Court (BVerfG) of 5 May 2020. However, the two judgments are significantly different in both spirit and magnitude. First – it cannot be stressed enough –, the Polish Constitutional Court is no longer an independent tribunal established by law. It is a captured court and a “[government-enabler](#)”. Its decisions can no longer be considered the result of a conflict of legal orders and different interpretation of the boundaries of EU law. Rather, they are statements that confirm the submission of the law to politics in Poland, blatantly contradicting the principle of the separation of powers. For these reasons, there is no need to wait for the written reasons of the judgment before expressing concern. Second, the decision of the Polish Constitutional Court is far more drastic and “stubborn” than the PSPP judgment, as it openly questions the primacy of EU law and deems it incompatible with the Polish constitution. Moreover – unlike the BVerfG –, the Polish Constitutional Court did not bother to send a preliminary request to the Court of Justice in order to avoid direct conflict. This confirms the non-cooperative behavior of Poland’s top court, as if it were not part of the EU legal system. Finally, there is also a substantive difference: the judgment of the BVerfG concerned monetary policy and not the EU founding values. It related to a specific ECB purchase programs and was [not directed towards every future decisions](#) of the Court of Justice. With its judgment, the Polish Constitutional Court is labelling as incompatible with the Polish constitution the independence of the judiciary as part of the EU notion of the rule of law and, ultimately, the separation of powers. At the same time, since the action of Prime Minister also built on the PSPP decision, fears expressed over the pretextual use of that judgment and the [lack of foresight](#) of the BVerfG seemingly come true.

As regards the consequences on the EU legal order, formally Poland is still bound to apply EU law and to implement the rulings of the Court of

Justice. Yet, the judgment of 7 October puts into question the correct application of EU law in Poland, especially as regards the requirements of judicial independence and, more generally, the imperative of effective judicial protection of EU-derived rights. Polish judges will feel even more pressure to comply with Polish law rather than with the judgments of the Court of Justice. Moreover, disciplinary proceedings against judges that uphold EU law are [likely to increase](#) now that the government can count on the rulings of the Constitutional Court in targeting the “rebellious judges”. In the long term, we might well experience problems for mutual trust and mutual recognition. How can other European courts trust the Polish tribunals now that their Constitutional Court no longer recognizes the primacy of EU law? The implementation of EU instruments of judicial cooperation becomes more blurred. Besides, new preliminary requests are probably on the horizon. National courts might wonder – for instance – how much weight should they attach to the judgment of the Polish Constitutional Court when deciding over the surrender of a person to Poland under the European Arrest Warrant. Will the Court of Justice maintain its two-tier test developed in [LM \(C-261/18 PPU\)](#) and confirmed in [Openbaar Ministerie \(C-354/20 PPU\)](#) or will the new situation induce a change? For sure, the Luxembourg Court will not make any concession over the primacy of EU law or the principle of judicial independence, which is currently the most prominent dimension of the EU concept of the rule of law. Finally, also the status of any Polish court as a “court or tribunal” for the purposes of Article 267 TFEU is called into question. Will they still be able to send preliminary references to the Court of Justice? At the same time, taking this option away from Polish judges – who are also relying on the preliminary ruling procedure to seek the help of the Court of Justice in reacting to the attacks to judicial independence – would further weaken judicial protection of EU rights. Undoubtedly, those are quite difficult knots to untangle.

In a certain way, we can talk about a “[legal polexit](#)” in the sense that Poland is abandoning the EU legal space with the above-mentioned consequences for mutual trust. However, much more difficult is arguing that the judgment is a first step towards an actual *polexit*, that is, an

[indirect triggering of Article 50 TEU](#) or, in any case, that it leads to a situation where [the Treaties no longer apply](#) to Poland. The judgment of the Constitutional court, even if published by the government, [cannot be considered a notification of withdrawal](#). As recognized by [Steinbeis](#), the future of the memberships of Poland in the EU is a political question and not a legal one. Article 50 TEU requires a Member State to expressly decide for withdrawing according to its constitutional requirements and then notify the European Council. Expulsion is not possible under EU Law, and the Union would violate its own rules (and thus the rule of law) by circumventing this problem. Moreover, given the profound impact of withdrawal “[on the rights of all Union citizens](#)”, that action would betray the Polish population who [strongly supports the Union](#). Yet, the fact that the Union is not fully completed in terms of use of coercion of the Member States, does not mean that there are no instruments at its disposal that might be used to take up the challenge of Warsaw.

### **The way forward for the EU**

On the very same 7 October, the Commission issued a [statement](#) in response to the judgment of the Polish Constitutional Court where it reaffirmed the principle of primacy and the binding nature of Court of Justice’s rulings and expressed its readiness to rely on “its powers under the Treaties to safeguard the uniform application and integrity of Union law”. Since the judgment is now published and, thus, in force, the Commission is called to live up to expectations. It is crucial that the declarations of the communiqué do not become a dead letter.

It is fair to point out that recently the Commission has become [more intransigent](#) towards Warsaw. As regards the July judgment on *interim* measures, it handed a twofold response. Firstly, it asked the Court of Justice to impose [financial penalties](#) on Poland until the order of 14 July 2021 was complied with. It also started an Article 260(2) TFEU procedure for non-compliance with the judgment in *Commission v Poland* (C-791/19), which, if successful, will lead to further financial sanctions. Second, the Commission [blocked](#) the procedure for releasing the 57 billion euros that Poland should receive under the EU recovery funds. Indeed, the national recovery and resilience plan of Poland – as well as that of Hungary – has

not yet been approved because it does not effectively address the [country specific recommendation](#), which also includes safeguarding judicial independence.

The Commission should follow this strategy also in response to the October judgment of the Polish Constitutional Court. An infringement procedure should be launched as soon as possible, and the Commission should be ready to ask for *interim* measures accompanied by financial penalties and the expedite procedure. In case of non-compliance with the judgment of the Court of Justice, the Commission should also be swift in enforcing it via Article 260(2) TFEU. Likewise, financing under the EU recovery funds should continue to be blocked until Poland takes serious measures to solve the problem. Moreover, the Union should make use of the powers it has under the [conditionality regulation 2020/2092](#) to suspend EU funds against Poland. The [European Council conclusions](#) of 10-11 December 2020 featured a controversial political compromise between the Member States that guaranteed Hungary and Poland that a procedure under the conditionality mechanism would be launched only after the Court of Justice delivered its judgment in the [pending action of annulment](#) against regulation 2020/2092. However, given that the compromise is [likely in breach of EU law](#), the Commission should simply ignore it and trigger the mechanism against Poland. The activation of Article 7(2) TEU – by either the Commission or one third of the Member States – should also be considered. Even though reaching a unanimous vote in the European Council is almost impossible in the current political scenario, it is time to send a clear message to Warsaw and compel it to respect the rules of the game. Hopefully, the decisions of the Constitutional Court will be also a stimulus for breaking the [deadlock](#) in the Council as regards the Article 7(1) TEU procedure against Poland, which was launched back in December 2017.

Plausibly, the Polish government will try to use the enforcement of the July and October judgments as trade good in the bargaining with the Commission over the unblocking of the EU recovery funds and in order to get other reassurances on the next actions by the EU in defense of the rule of law. The Commission must not take the bait. [As in the past](#), further

negotiations would lead only to the procrastination of the activation of the enforcement instruments at its disposal.

Clearly, the remedies mentioned above involve financial losses for Poland and, therefore, for its citizens. It is unfortunate that Polish citizens – who are widely pro-Europeans, as shown by the [demonstrations](#) in the aftermath of the judgment – are paying for the mistakes of their government and Constitutional Court. At present, Poland is already inflicted a penalty of 500 000 euros per day for failing to comply with the order of the Vice-President of the Court of Justice to cease activities at Turów mine (Order in case [C-121/21 R](#)). How much money of the Polish taxpayers is the government willing to waste?

Finally, an answer by the governments of EU Member States is also needed. The French and German ministers of foreign affairs issued a [joint statement](#) calling for respecting EU values and rules right after the judgment. Yet, that is not enough. It is time for the Member States to exercise real peer pressure against violations of the rule of law by Poland. That could first of all include the issuing of [diplomatic sanctions](#). Moreover, as suggested by [McCrea](#), in the context of EU decision making Member States “can ensure Poland pays a price every time an issue it cares about is up for discussion”. Ultimately, they are empowered to initiate both [infringement actions under Article 259 TFEU](#) and the Article 7(2) procedure. It is well known that Member States are generally reluctant to start direct confrontations with one of their peers. However, the threat to the unity of the EU legal order posed by Poland requires a response of equal intensity.