



How to solve a problem like Poland

by Camino Mortera-Martinez, 3 November 2021

The Polish government's defiance over the rule of law puts the EU in a bind. To protect the Union's integrity without alienating Polish citizens, the EU needs a mix of political pressure, legal action and better communication.

If Mateusz Morawiecki, Poland's bespectacled prime minister, looks less like a Trumpian populist leader and more like an EU law professor, it is because he is. A [well-educated](#) lawyer and economist, Morawiecki co-authored the country's first handbook on European Union law, *'Prawo europejskie'*, in 1999. His recent [letter](#) to EU leaders and his [speech](#) to the European Parliament in Strasbourg, on the dry subject of the primacy of EU law, were articulate, mostly factual – and dangerous.

Morawiecki made his Law and Justice (PiS) party's latest attack on the rule of law sound like an academic debate on the hierarchy of legal orders. The strategy worked – instead of confronting the Polish government, EU leaders chose to ['de-dramatise'](#) the issue during their October 21st summit in Brussels. Some, like France's Emmanuel Macron, are afraid of a domestic debate on sovereignty and the EU. Others, like outgoing German Chancellor Angela Merkel, believe that a public showdown with Poland is in no one's interest. European Council President Charles Michel, who does not have to face voters at home, decided to side-step the question. He only put the rule of law on the agenda at the last minute, and the Council [conclusions](#) made no mention of it.

EU leaders should be more alarmed. Whether EU law has primacy over the Polish legal order is not a matter of scholarly debate, but the latest flashpoint in the Polish government's escalating row with Brussels over Poland's compliance with the rule of law. This academic back-and-forth deflects both attention and political capital from the EU's real problem: how to keep Poland as part of the Union's common legal space by restoring judicial independence, without fuelling the government's nativist narrative at home.

After coming to power in 2015, Law and Justice and its coalition partners launched a [major overhaul](#) of Poland's judiciary. First, the government changed the rules governing the Constitutional Court, and packed it with friendly judges; second, with the help of the loyal Constitutional Court, it revamped the judiciary's governing body, the National Judiciary Council, and changed how both ordinary courts and the Supreme Court functioned. The reform also lowered the retirement age of judges, which allowed the government to force out magistrates seen as hostile to it and replace them with younger, pro-PiS judges.

Further reforms introduced disciplinary procedures that could be used against judges who wanted to apply certain EU laws, or submit preliminary questions to the European Court of Justice (ECJ) – a main feature of the EU’s legal system.

The European Commission thinks that these reforms compromise the independence of Polish judges. Because both the EU treaties and the [ECJ](#) say that all member-states should guarantee effective judicial protection, including ensuring that all judges are independent and cannot be unfairly sacked, the Commission has launched a string of court cases against Poland, summarised in the table below.

| The European Court of Justice and the independence of Poland’s judiciary | | | |
|--|--|--|--------------------------|
| Case | Summary | Ruling (with date) | Fines and other measures |
| C-619/18 Commission v Poland | <p>Poland’s ‘new law on the Supreme Court’ (law of December 8th 2017) and a later amending law of May 10th 2018 did the following:</p> <ul style="list-style-type: none"> Lowered the age of retirement of Supreme Court judges Allowed Poland’s president to order judges over the age of retirement to step down <p>The Commission argued that these laws breached the EU treaties and the Charter of Fundamental Rights of the European Union.</p> | <p>Poland’s new law on the Supreme Court and amending laws breach the EU treaties and the Charter of Fundamental Rights of the European Union.</p> <p>June 24th 2019</p> | None |
| C-192/18 Commission v Poland | <p>Poland’s ‘new law on the ordinary courts’ (law of July 12th 2017) did the following:</p> <ul style="list-style-type: none"> Lowered the age of retirement of judges in all Polish courts Set different retirement ages for men and women Gave the Minister of Justice the power to extend the time of service of judges if they so wished <p>The Commission argued that this law breached the EU treaties and EU laws on equality and non-discrimination.</p> | <p>The new law on the ordinary courts breaches the EU treaties and EU law.</p> <p>November 5th 2019</p> | None |

| Case | Summary | Ruling (with date) | Fines and other measures |
|--|--|--|---|
| C-791/19 Commission v Poland | <p>Poland's 'new law on the Supreme Court' (law of December 8th 2017); a later amending law of May 10th 2018; the 'new law on the ordinary courts' (law of July 12th 2017); and the 'new law amending the law on the National Council of the Judiciary and certain other laws' (law of December 8th 2017) introduced a new disciplinary regime for judges of ordinary courts and the Supreme Court. The regime includes the possibility of disciplinary proceedings against judges for the content of their rulings; and allows the new disciplinary chambers to trigger proceedings against Polish judges for submitting preliminary questions to the ECJ.</p> <p>The Commission argued that these laws breach the EU treaties.</p> | <p>The disciplinary regime of judges breaches the EU treaties.</p> <p>July 15th 2021</p> | <p>While awaiting the verdict, the Commission asked the ECJ for interim relief measures. The ECJ asked Poland in April 2020 to comply with the ruling and stop applying disciplinary proceedings. The ECJ issued an order formally asking Poland to comply with the ruling.</p> <p>Poland ignored the order.</p> <p>On September 7th 2021, the Commission asked the ECJ to impose financial penalties on Poland for failure to comply.</p> |
| Case C-204/21 Commission v Poland | <p>Poland's newest judicial reform, the so-called muzzle law (law on the judiciary of December 20th 2019), allowed for a new, politically appointed disciplinary chamber in the Supreme Court to determine whether judges should be subjected to disciplinary proceedings, including because of the content of their rulings.</p> <p>The Commission argued that this law breached the EU treaties and EU laws.</p> | <p>Pending</p> | <p>On July 14th 2021, the ECJ granted interim measures to the Commission and ordered Poland to stop applying the muzzle law.</p> <p>Poland ignored the order.</p> <p>On September 7th 2021, the Commission asked the ECJ to impose financial penalties on Poland for failure to comply.</p> <p>On October 27th 2021, the ECJ imposed a fine of €1 million per day on Poland for failure to comply.</p> |

The Strasbourg-based European Court of Human Rights (ECtHR – a non-EU court) [ruled separately](#) in May 2021 that the political appointment of judges to Poland’s Constitutional Court violated Polish law; and issued a further [ruling in July 2021](#) saying that the disciplinary chamber of the Polish Supreme Court was illegally constituted.

The Polish government did not comply with any of the ECJ rulings censuring its judicial reforms. Instead, it asked its Constitutional Court (now judged illegitimate by the ECtHR) to rule on whether the ECJ had the right to rule on Poland’s judicial system. The EU has a rather straight-forward pecking order: EU law prevails over domestic law when a conflict arises in those areas where member-states have either devolved competences to Brussels or share them with it. Article 19 of the Lisbon treaty says that member-states are required to provide “effective legal protection” in fields where EU law applies. This includes ensuring that all national courts are independent and able to do their job.

Unsurprisingly, the Constitutional Court said in July 2021 that Poland was not required to comply with ECJ rulings; and in October, that the EU treaties were against some parts of the Polish constitution. The October ruling implied that Poland was no longer bound by EU rules, and sparked discussion of whether the Polish government was seeking to ‘Polexit’ from the Union. Legal hawks have even (wrongly) [suggested](#) that the EU should interpret the ruling as a formal notice to leave under Article 50 of the Lisbon treaty.

There is little doubt that Morawiecki agrees with his friendly Constitutional Court – he launched the case. But it is less clear what he wants to achieve in Europe. The ruling adds to the issues on which Warsaw and Brussels are at loggerheads:

- ★ The Commission is in the middle of taking action against Poland under Article 7 of the Treaty on European Union, which allows for the voting rights of a member-state to be suspended in the event of a serious and persistent breach of EU values (though it is very unlikely that this penalty will be applied to Poland, as it requires the unanimous agreement of all member-states, which Hungary opposes).
- ★ The European Commission has also withheld cohesion funds from some Polish cities that have declared themselves ‘LGBTQI-free zones’ (although these cities later backtracked), arguing that these breach EU fundamental rights.
- ★ The Commission has still not approved Poland’s national recovery plan, delaying much needed pandemic relief that should come to it via the Next Generation EU fund.
- ★ Finally, the EU has passed a law, which Poland and Hungary are challenging in the ECJ, that allows the Commission to freeze funds if member-states seriously violate the EU values set out in Article 2 of the Lisbon treaty (the so-called conditionality mechanism).

Morawiecki is unlikely to win any further concessions from Brussels or other EU capitals, especially now that Germany’s Chancellor Angela Merkel, a proponent of dialogue, is on her way out. But he does not care. His plan is not to win hearts and minds in Brussels, but at home. He has moved from a relatively moderate position to the extreme right of the Law and Justice party in a [bid to out-manoeuvre](#) Zbigniew Ziobro, the eurosceptic justice minister who engineered Poland’s judicial reform. Ziobro left Law and Justice in 2011 to found his own party and has positioned himself as a candidate to succeed party leader (and Poland’s de facto ruler) Jarosław Kaczyński.

Neither Morawiecki, nor PiS (nor, certainly, a majority of Poles) want to take Poland out of the EU, at least for now. Then again, David Cameron did not intend Britain to leave the Union. PiS may be [putting on a show](#) for a local audience, but it could misjudge the ending – particularly if the party’s hawks succeed in radicalising both voters and party members. The European Union should also tread carefully. The EU will not stop democratic backsliding in Poland and elsewhere by judicial and financial sanctions alone. To solve a problem like Poland, the EU needs a three-pronged strategy.

The first element of this plan should be peer pressure. Poles may have voted PiS into office, but they did not wake up one day and decide openly to disregard European law and court rulings. This is the government’s strategy, not Poland’s. The first response should therefore come from Morawiecki’s European counterparts. EU leaders and European Council President Charles Michel missed an opportunity to call Morawiecki’s bluff during the latest EU summit. But they can fix this.

The most outrageous claim of the Constitutional Court’s recent ruling, and an easy one to debunk, is that Article 1 of the Lisbon treaty, which officially establishes the European Union, is [against the Polish constitution](#). Unlike previous decisions by [other high courts in Germany and France](#), the Polish Constitutional Court is questioning the validity of parts of the EU treaties, not of specific EU laws or the actions of particular EU institutions. EU leaders should publicly defend the EU’s legal order – an institution that is not able, and willing, to defend its governing rules is opening itself to all sorts of abuse.

In the medium term, the Commission should take a number of legal steps, none of them risk-free. First, it could trigger the EU’s conditionality mechanism against Poland. The agreement not to use it until the ECJ had ruled on its legality was only political, not legally-binding. The Commission could, on paper, move ahead and lawfully activate the mechanism, which could eventually lead to the freezing of funds to Poland. But doing so would be tricky.

While Poland and Hungary’s legal case against the conditionality mechanism is dishonest, their legal arguments are not totally outlandish. In fact, the Council of Ministers’ legal service expressed similar reservations about the conditionality mechanism in a recently-disclosed confidential [opinion](#). The Commission would find itself in a delicate position if it decided to trigger actions against Poland without awaiting the court’s verdict. Such a move would fuel PiS’ narrative of a “Brussels conspiracy”, whereby the Commission does not even need to wait for a ruling as it is sure the ECJ would decide in its favour. It could, ironically, call into question the independence of the EU’s highest court.

The ECJ may decide in the Commission’s favour; it may think that the conditionality mechanism needs some tweaks; or it may strike down the law altogether. While it waits, the Commission should use the time to gather evidence and prepare a case against Poland and other governments if needed. It could even send a formal notification to Poland to ask the government to answer some questions and to provide further evidence. This would help the Commission to put pressure on Poland and placate the European Parliament while still respecting the political agreement. In any case, the Commission would need to ask for the approval of the Council of Ministers to trigger sanctions under the conditionality mechanism.

Another option for the Commission is to further delay, or deny, approval of Poland’s national recovery plan. Strictly speaking, the process to approve national recovery plans has nothing to do with EU values. Under the Recovery and Resilience Facility (RRF) regulation (the law governing how the recovery fund works), EU member-states have to submit plans to the Commission explaining how they would use EU money to meet a set of criteria to modernise their economy (the so-called targets and milestones). The

Commission has three months to green-light plans. So far, it has approved all but those of Poland and Hungary. Warsaw says that the Commission is breaching EU rules as Poland submitted its plan in May and Brussels has kept mum on the reasons why the plan has not been approved (or rejected) yet.

Morawiecki and Polish government officials are sure that the Commission will eventually approve their plan. PiS needs the money to carry out its trademark '[Polish Deal](#)' – a much touted plan to boost the economy. But Poland's latest court offensive makes it easier for the Commission to hold up payments without having to resort to rule of law measures. Article 19 of the RRF regulation allows the Commission to check whether the money will be used efficiently, including by preventing and correcting fraud and corruption. Article 22 allows the EU to inspect whether the money has been used correctly. Because both an EU and a non-EU court have declared that Polish courts are not independent, and, as such, unable to properly do their job, and because Poland is not a member of the European Public Prosecutor's Office, an EU body with powers to prosecute criminals for the misuse of EU funds, the Commission could argue that there is no way to prevent misappropriation of the recovery fund in Poland. Alternatively, the Commission could approve the plan but request a reversal of PiS' judicial reforms as a condition of disbursement – Commission President Ursula von der Leyen recently [hinted](#) this could be a way forward. A little-known legal clause in the RRF also allows a member-state to ask the European Council to request the Commission stop payments to another member-state because of breaches of EU principles.

Eventually, the EU will need to change the way it thinks about the relationship between EU values, the Union's legal order and its member-states' rights and obligations. The internal market and the area of freedom, security and justice brings benefits to individuals, firms and governments across the EU. But they rely on trust that rights and obligations will be treated in equivalent ways in the courts of all member-states. If a member-state's courts have to do the government's bidding, then that equivalence can no longer be guaranteed.

The problem of Poland cannot be solved without the Polish people. The current Polish government may have been successful in dismantling the country's judiciary, but Poland still has a strong, albeit [increasingly struggling](#), civil society, a handful of reliable, non-state controlled media outlets and overwhelming public support for EU membership. The European Union should be firm in defending its rules and values while making it clear to Poles that they are an integral part of the Union. To make PiS accountable for the confrontation with the EU, Brussels and EU capitals need to be unambiguous: in standing up to the current Polish government, the EU is on the side of the Polish people because this is their European home, too.

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