

EUROPEAN LAW BLOG

NEWS AND COMMENTS ON EU LAW

[TOPIC](#)

[HOME](#)

[ABOUT](#)

[CONTACT](#)

[NADE](#)

[CONTRIBUTORS](#)

[S](#)

[ARCHIVES](#)

[USEFUL LINKS](#)

Poland's Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls

21 OCTOBER 2021 / BY [MARTA LASEK-MARKEY](#)

On 7 October 2021, [Poland's Constitutional Tribunal declared](#) Articles 1, 2 and 19 of the Treaty on European Union (TEU) to be partially unconstitutional. While the same Treaty provisions had previously been held compatible (see [Case K 18/04](#)) with the Polish Constitution, the composition of the Tribunal itself has since changed dramatically. Its latest decision, issued in response to an application from the Polish Prime Minister, by a panel composed of judges appointed in [violation of the established procedure](#) has twisted the wording of both the EU Treaty and the Polish Constitution to suit the government's power struggle with the Court of Justice of the European Union (CJEU).

About Marta Lasek-Markey

Marta Lasek-Markey is a doctoral researcher in EU Law at Trinity College Dublin. She holds an LL.M. degree from Trinity College Dublin and a Master's degree in Law from the University of Warsaw, Poland. Her PhD project, funded by the Irish Research Council, is a sociolegal study on posted workers in the EU. It uses data obtained from qualitative interviews with a view to identifying those elements of the Posted Workers Directive framework - legal, enforcement-related and

Background

Since the rise into power of the far-right PiS (Law and Justice) party in late 2015, Poland – alongside Hungary – has been clashing with the EU institutions on several fronts: there have been disputes on [women's rights](#) and the rights of members of the [LGBT+ community](#), the [protection of the natural environment](#) and, notably, the [independence of the judiciary](#). While the [Article 7 TEU procedure](#) initiated against the two Member States has stalled due to the requirement of unanimity in the Council, the EU is currently exploring options of financial pressure, such as the so-called '[conditionality mechanism](#)' or the suspension of the [COVID-19 EU recovery fund](#). Simultaneously to these more recent developments, the most effective mechanism of guaranteeing the respect of EU values in Poland and Hungary has traditionally been the CJEU, specifically through the preliminary reference procedure.

The conflict between the CJEU and Poland escalated in March 2021 when the Grand Chamber delivered its judgment in Case [C-824/18](#) regarding the appointment of judges to the Polish Supreme Court. The CJEU's decision effectively set aside a ruling of Poland's [Constitutional Tribunal](#), reiterating that the effects of the principle of primacy of EU law were binding on all bodies of a Member State (paras 140-150). It was in response to this judgment that Poland's Prime Minister, Mateusz Morawiecki, filed a request to the Constitutional Tribunal seeking an interpretation of Articles 1, 2 and 19 TEU. The final verdict was delivered on 7 October 2021, one day

sociological – which may predispose posted workers to a precarious life. Marta previously had a full-time career in journalism in Poland.

Recent Posts

21 OCTOBER

Poland's Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls

21 OCTOBER

Justice should not be blind to something that is obvious to everyone else – An Analysis of Advocate General Bobek's Opinion in Nord Stream 2

19 OCTOBER

From the DSA to Media Data Space: the possible solutions for the access to platforms' data to tackle disinformation

14 OCTOBER

after the CJEU had dismissed Poland's request to cancel its injunction ordering the Member State to suspend the recently established disciplinary regime for judges. This regime [has already been deemed incompatible with EU law by the CJEU](#), notably because it exposes judges to disciplinary proceedings for filing a reference for a preliminary ruling to the Luxembourg court in accordance with Article 267 TFEU.

It must be noted that Poland's Constitutional Tribunal is a judicial body whose primary competence is to scrutinise the constitutionality of legislation. In accordance with Article 194 of Poland's [1997 Constitution](#), it is composed of 15 judges elected by the Parliament for a 9-year term. Back in 2015, shortly before the general election which brought about a change of government, the Parliament elected five judges to replace those whose term was about to expire. However, the President of Poland, Andrzej Duda, refused to swear them into office and, following the victory of PiS in the general election, the newly constituted Parliament elected new judges who were then sworn into office by the President within hours.

The packing of the Constitutional Tribunal has been subject to the scrutiny of the European Court of Human Rights (ECtHR) in [Xero Flor v Poland](#), decided in May 2021, where it held that the presence of Judge Mariusz Muszyński, one of the judges elected in 2015 by the new Parliament, constituted a violation of Article 6 of the European Convention on Human Rights (ECHR) as regards the right to a tribunal established by law (paras

Sometimes less is more – a critical view on AG Bobek's Opinion on the seats of EU agencies

13 OCTOBER

Radical rewriting of Article 22 GDPR on machine decisions in the AI era

Share this article

289-291). It is worth pointing out that the current President of the Constitutional Tribunal, Judge Julia Przyłębska, who is widely known to be a close friend of the PiS leader, Jarosław Kaczyński, was also among the five judges appointed in violation of Article 6 ECHR (right to a fair trial). Six years after the 2015 Constitutional Tribunal crisis and with a number of other judges appointed since by the ruling party, some of whom were active PiS politicians and Members of Parliament (MPs) prior to their appointment, the Constitutional Tribunal is widely considered to have lost independence from the executive, its [reputation tarnished](#).

The Constitutional Tribunal's ruling

The Constitutional Tribunal in its judgment in Case [K 3/21](#), issued on 7 October 2021, ruled that Article 1 TEU, read in conjunction with Article 4(3) TEU, as well as Article 2 TEU and Article 19(1) TEU, is incompatible with the Polish Constitution. The case essentially concerned the jurisdiction of the CJEU and the principle of primacy of EU law. The latter principle, which is not laid down in the EU Treaties, dates back to the 1964 judgment in [Costa v ENEL](#) in which the Court of Justice famously held that in case of a conflict between a provision of then-Community law and domestic law, Community law shall prevail. While from the Court of Justice's point of view, the principle of primacy is necessary to ensure the uniformity of EU law across the Union, Member States have found it challenging to reconcile with their own constitutional traditions. Notably, the German Federal Constitutional Court has over the years scrutinised the

principle of primacy and its limits, starting from the famous *Solange* line of cases to [its last year's decision to set aside a CJEU judgment regarding the ECB's decision on the Public Sector Purchase Programme](#), to which the Polish Prime Minister repeatedly referred to in his [application](#) to the Constitutional Tribunal.

The Polish Constitutional Tribunal has never recognised the primacy of EU law over the Constitution. In its judgment in [K 18/04](#), delivered in May 2005, shortly after Poland's accession to the EU, the Tribunal confirmed the Constitution's supreme legal force, explaining that a possible collision between a constitutional norm and a provision of EU law may in no circumstances be resolved by assuming the supremacy of the EU norm. In October 2021, the judge-rapporteur of the Constitutional Tribunal referred to that part of the 2005 judgment in the [oral motives](#) of the latest decision.

In its October 2021 judgment, the Tribunal held that the first and the second subparagraphs of Article 1 TEU have allowed for a new stage of the European integration, whereby the EU institutions act beyond the limits of competences enshrined in the Treaties and transferred by Poland in accordance with Article 90 of the [Polish Constitution](#). In particular, the Tribunal challenged the second subparagraph of Article 1 in which the TEU is described as marking 'a new stage in the process of creating an ever closer union among the peoples of Europe'. According to the judgment, a new stage of integration, in which the CJEU's competences go beyond those conferred on the EU and is causing the Polish State

to lose its sovereignty, is incompatible with Articles 2 and 8 of the Polish Constitution according to which the Republic of Poland is a democratic state, and the Constitution is its supreme law.

The Tribunal has further decided that Articles 2 and 19(1) TEU are inconsistent with the Polish Constitution insofar as they allow lower national courts and the Polish Supreme Court to disapply the Constitution, to set aside the rulings of the Constitutional Tribunal and to examine the legality of the procedure for the appointment of judges, which, according to the Tribunal, is outside the competences of the EU. The Tribunal argues that by deriving a right to examine the organisation and structure of a Member State's judicial system from Article 19(1) TEU, the CJEU has essentially granted itself a new competence. According to the Tribunal, this competence may by no means be derived from Article 2 TEU which is a list of values of merely 'axiological significance' as opposed to setting clear rules.

Commentary

Notwithstanding its political implications or the doubts regarding the Constitutional Tribunal's legitimacy in light of the above-discussed court-packing procedure, it must be observed that in the verdict of 6 October 2021, the Tribunal has manifestly erred in the interpretation of both the Polish Constitution and the TEU. While the 2005 judgment of the Constitutional Tribunal, indeed, rejected the principle of primacy of EU law, it also ruled that the EU Treaties were compatible with the Polish

Constitution. Having scrutinised a number of EU law provisions in response to a reference from a group of opposition MPs challenging Poland's membership in the EU, including Articles 1, 2 and 19 TEU, the Tribunal had already confirmed their compliance with the Constitution back in 2005. Subsequent rulings of the Polish Tribunal, notably those delivered following the adoption of the Treaty of Lisbon ([K 32/09](#) and [SK 45/09](#)), reiterated the *status quo* in this respect. As the wording of the Treaties has not changed since, and neither has that of the Polish Constitution, the 2021 application from the Prime Minister should, therefore, have been declared inadmissible as the same matter had already been dealt with by the Constitutional Tribunal.

The 2021 judgment has been heavily criticised in a [joint statement issued by 26 retired judges of the Constitutional Tribunal](#), including four former Presidents of the Tribunal, who argued that the judgment's real aim was not to ensure the supremacy of the Polish Constitution. This view was echoed in Judge Piotr Pszczółkowski's [dissenting opinion](#) – one of two delivered with the judgment of 6 October 2021 – who held that the application only formally sought an interpretation of the TEU. Indeed, it appears that what Prime Minister Morawiecki was really looking for – and what he ended up receiving from the Tribunal – was the green light to set aside a number of CJEU judgments that the government does not intend to implement. This, however, is outside the competences of the Constitutional Tribunal, laid down in Article 188 of the Polish Constitution, according to which the Tribunal may

control the conformity of international agreements with the Constitution, but not that of judgments issued by international courts.

Furthermore, in the 2021 judgment, the Constitutional Tribunal has not only stepped outside its own competences, but also outside the scope of the Prime Minister's application. The alleged incompatibility with the Polish Constitution transpired, according to the Tribunal, from the fact that EU law provides a mechanism for ordinary courts to disapply the Constitution. With this statement, the Tribunal has clearly challenged the preliminary reference procedure laid down in Article 267 TFEU, which had not been questioned by the applicant. This has effectively given the Polish government a *carte blanche* to disregard CJEU decisions issued in response to preliminary references made by Polish courts. This puts a serious question mark over the relationship between the EU and a Member State that, while not intending to leave, is 'cherry-picking' the EU law commitments it wants to fulfil.

Lastly, it is worth emphasising that the alleged conflict between the EU law and the Polish Constitution was driven solely by the government and the politically-controlled Constitutional Tribunal. In reality, there is no conflict between the TEU and the Polish Constitution. According to Article 45 of the Polish Constitution, all courts shall be independent and impartial and, as discussed above, the Constitutional Tribunal is currently neither independent nor impartial. Thus, not only has the CJEU in its case law pointed out the violations of EU law

by Poland, but has also (indirectly) highlighted the Member State's violation of its own Constitution.

Conclusion

The President of the European Commission, Ursula von der Leyen, responded to the Polish ruling with a [statement](#) vowing to use all Treaty powers available to ensure the principle of primacy. The Polish judgment has been widely criticised by many Member States and considered by some as a nuclear option that may ultimately lead to 'Polexit'. Indeed, as was held by the Constitutional Tribunal in the above-mentioned 2005 ruling, a potential conflict between the Polish Constitution and EU law may only be resolved in three ways: by changing the provision of EU law at issue, by amending the Constitution, or by withdrawing from the EU. The first two solutions are not an option in the current circumstances. The Polish government would need to bring about a change of the fundamental provisions of the TEU (Articles 1, 2, 19) on which the EU legal system is built, which clearly is not in the interest of the other Member States.

Mr Morawiecki's government also does not intend to amend the Polish Constitution and, quite frankly, there is no need to do it. As this post argues, there is in fact no conflict between the EU Treaties and the Polish Constitution. The third option – withdrawing from the EU – is also not a solution. According to a recent [opinion poll](#), 8 out of every 10 Poles want the country to remain within the EU, and the October judgment of the

Constitutional Tribunal sparked a [mass protest](#) across Poland with a crowd of 100,000 protesters gathering in Warsaw alone. This shows that there is currently no public support for the government to initiate a withdrawal procedure. Prime Minister Morawiecki, whose party's ratings now stand at around [30-35%](#), has since categorically [denied any intention to withdraw from the EU](#) and appears not to realise the implications of [the judgment](#).

By insisting on the incompatibility of the Polish Constitution with EU law, and having received confirmation of this from the Constitutional Tribunal, Mr. Morawiecki's government appears to be boxing itself into a corner of having to choose between these three impossible options.

TOPICS:

[COURTS OF MEMBER STATES / DIRECT EFFECT AND PRIMACY / EU CONSTITUTIONAL LAW](#)

LEAVE A REPLY

Enter your comment here...

EUROPEAN LAW BLOG

The European Law Blog aims to highlight, and comment on, current developments in EU case law and legislation. Our posts are short comments on judgments and legislation and are intended for anyone who wishes to stay informed on EU law.

ENQUIRIES TO:

info@europeanlawblog.eu



© European Law Blog. All Rights Reserved. Privacy Policy



:)