

How will Poland's dispute with the EU affect its national politics?

Tensions between the Polish government and the European Union have raised speculation about a potential 'Polexit'. Aleks Szczerbiak writes that although opposition claims that Poland's right-wing ruling party is paving the way for the country's EU withdrawal are unlikely to make much impact beyond hard-core opponents of the government, a delay or loss of EU funds could be much more damaging. While the government will probably secure a short-term deal leading to the release of these funds, ongoing tensions with the EU political establishment are likely to continue, raising difficult questions about the country's future relationship with the Union.

The Polish government has been in an ongoing dispute with the EU political establishment since the right-wing Law and Justice (PiS) party was elected to office in autumn 2015. Initially, this was over the membership and functioning of Poland's constitutional tribunal, a powerful body that rules on the constitutionality of Polish laws, but the dispute escalated in 2017 to include Law and Justice's fiercely contested judicial reform programme.

The EU institutions agreed with the criticisms levelled by Poland's legal establishment and most opposition parties that the reforms undermined judicial independence and threatened the key democratic principle of the constitutional separation of powers. The government's opponents argued that, by putting judicial appointments under political control, these reforms allowed the ruling party to pack the courts and supervisory bodies with its own, hand-picked nominees.

Law and Justice, on the other hand, argued that, following Poland's flawed transition to democracy in 1989, the judiciary, like many key Polish institutions, was expropriated by and represented the interests of an extremely well-entrenched, and often deeply corrupt, post-communist elite, which then co-opted a new legal establishment that perpetuated its legacy. The judicial elite, they said, operated as a 'state within a state' incapable of reforming itself and, in these circumstances, making judges and their supervisory organs more accountable to elected bodies was both justifiable and in line with practices in other established western democracies.

The European Commission took the unprecedented step of initiating an action against Poland under Article 7 of the European treaties, which can be invoked against any EU member state when it is felt there is a 'systemic threat' to democracy and the rule of law, threatening Warsaw with sanctions including the suspension of its European Council voting rights. However, the Commission was unable to secure the qualified majority required among EU states to move beyond the initial stage of the procedure. The Commission, therefore, initiated infringement procedures against Poland in the EU Court of Justice, while some Polish judges also submitted a number of 'prejudicial questions' regarding various aspects of the reforms.

As a consequence, the EU Court issued a series of judgments ordering the Polish government to reverse aspects of its reforms. These included a July ruling calling for the suspension of a newly created disciplinary chamber of the Polish supreme court that, it argued, was incompatible with EU law because it threatened judicial independence. The chamber's activities were partially frozen in August, while Law and Justice indicated that it would be disbanded as it had not, in any case, fulfilled its objectives.

However, this commitment was too vague for the Commission and, at its request, last month the EU Court ordered Poland to pay daily one-million euro fines for non-compliance with the July ruling. The Commission also delayed approval of Poland's draft national recovery plan, without which it cannot access the 57 billion euros it is due from the EU's coronavirus recovery fund, until it complied with the July Court ruling.

Moreover, the Commission could also trigger a new conditionality regulation agreed by the EU last year that allows it to withhold payments from both the coronavirus fund and the Union's regular 2021-27 budget, from which Poland is set to be one of the largest beneficiaries, if perceived 'rule of law' breaches can be shown to have directly endangered the proper use of these funds. However, the regulation's implementation has been delayed pending a challenge to its legality in the EU Court by Poland (and Hungary), with a preliminary ruling expected in December or early next year.

The spectre of 'Polexit'

Last month, the conflict between Warsaw and the EU political establishment escalated following a ruling by Poland's constitutional tribunal in response to a motion filed in March by Law and Justice prime minister Mateusz Morawiecki questioning whether the EU Court had the right to block Warsaw's judicial reforms.

The tribunal ruled that some provisions of the main EU treaty had been interpreted or applied by EU bodies in a way that expanded their legal competencies beyond those transferred to it by Poland. These sections of the treaty, therefore, conflicted with the Polish Constitution which, like any part of the country's legal system, EU regulations that were in force in Poland could not prevail over. The ruling triggered harsh criticisms from the Commission which argued that – by directly challenging the primacy of EU law over national law, and the concomitant notion that all EU Court rulings were binding on member states – it undermined one of the founding principles of the Union's legal order.

Moreover, the Polish opposition accused Law and Justice of engineering the ruling from a compliant tribunal which, given that it was such an apparently open breach of Union rules, raised questions about whether Poland might actually leave the EU, so-called 'Polexit'. They cited statements by some Law and Justice leaders who had openly suggested that Poland should consider alternatives to EU membership, and even compared the Union's institutions to the country's German wartime and Soviet occupations. Given that the vast majority of Poles appear to support the country's EU membership – an October 2021 survey conducted by the CBOS polling agency, for example, found 90% in favour and only 6% against – Polexit is a toxic slogan for any mainstream Polish politician to be associated with.

Not surprisingly, Law and Justice bent over backwards to stress that it remained strongly committed to Polish EU membership. Indeed, although it has often been labelled as Eurosceptic, the dominant view within the party is still that it can achieve its objectives by pursuing a 'twin-track' approach to its relations with the Union. On the one hand, Law and Justice recognises that the EU political establishment has a different interpretation of how its judicial reforms impact upon the rule of law. At the same time, it has tried to present Poland as a positive and constructive EU member, and de-couple the dispute over rule of law compliance from attempts to develop closer economic ties and pragmatic day-to-day working relations with the Commission and major European powers.

More broadly, Law and Justice wants a fundamental reform of the European project to bring the EU back to what the party sees as its original role: a looser alliance of economically co-operating sovereign member states with a more consensual decision-making process. The party says that it fully respects the primacy of EU laws over national ones, but only where this jurisdiction has been explicitly granted to the Union in the treaties. The functioning of national judicial systems, Law and Justice argues, is an area that remains solely within the competence of member states. It also points to the fact that other European constitutional courts, notably Germany's, have challenged the supremacy of EU law; although the government's critics argue that these rulings were fundamentally different from the Polish one.

Loss of EU funds would be politically costly

The opposition argues that, even if Law and Justice says it has no plans to lead Poland out of the EU, it could set in train a dynamic that eventually leads to Polexit, much as David Cameron's attempts to renegotiate the UK's relationship with the EU when he was British prime minister culminated in Brexit. In fact, an October survey conducted by the IBRiS agency for the 'Rzeczpospolita' newspaper found Poles to be evenly divided on whether the tribunal ruling was a precursor to Polexit: 43% of respondents agreed, 45% disagreed.

The same survey also found that 80% of supporters of the liberal-centrist Civic Platform (PO), Poland's governing party between 2007-15 and currently the main opposition grouping, agreed with this proposition compared to only 12% of Law and Justice voters. This suggested that the Polexit narrative was more likely to consolidate the opposition's electoral base than cut through to and win over wavering pro-EU Law and Justice supporters.

Potentially much more serious for Law and Justice would be a further delay in the approval, or possibly even loss, of EU funds. Polish support for EU membership is now driven increasingly by the tangible material benefits that the Union is felt to deliver. Among these are the sizeable fiscal transfers that Poland receives, particularly EU regional aid of which Warsaw is currently the largest beneficiary. A September IBRiS survey for 'Rzeczpospolita', found that the largest number of respondents (68%) cited fiscal transfers as the main benefit of Poland's EU membership.

For sure, some in the governing camp have started to argue that the delay in coronavirus recovery fund payments is not a problem, as Poland's strong economic position means that similar investment funding could be obtained from private financial markets at equally attractive lending rates. However, the party made maintaining Poland's high level of fiscal transfers one of its main EU policy goals, and ran a very high-profile advertising campaign promoting the fact that it secured them as part of the 2021-27 budget round. This makes it difficult for Law and Justice to now claim that the country does not really need these funds.

So how is this issue likely to play out? Law and Justice remains committed to deepening and pushing forward with its judicial reforms as a key element of its radical state reform programme. If the Commission continues to try and cut Warsaw off from EU funds, then the Polish government could retaliate by itself blocking areas of EU decision-making that require unanimity. However, Law and Justice is, apparently, keen to reach a compromise with Brussels as long as it does not involve abandoning the core principle at the heart of its judicial reform programme: that elected politicians be given a greater say in determining the composition of the key bodies that oversee the Polish courts.

At the same time, the Commission and major EU powers also appear to want to de-escalate the conflict by agreeing 'milestones' with Poland that would enable pay-outs of EU funds. A short-term compromise would involve the Commission ignoring the constitutional tribunal ruling and approving the country's recovery plan as long as Warsaw shows in detail how it will abide by the Court's rulings and dismantle the contested disciplinary chamber. Law and Justice is likely to do this as part of a broader judicial overhaul radically reducing the supreme court's size and competencies.

Is Law and Justice's EU strategy sustainable?

In that case, the opposition's Polexit narrative could quickly run out of steam. However, below the radar a debate is slowly emerging about Poland's future EU membership among right-wing commentators and within the ruling camp; particularly politicians linked to 'Solidaristic Poland' (SP), Law and Justice's smaller governing partner led by justice minister Zbigniew Ziobro.

Some Polish conservatives argue that the cultural liberal-left consensus is so powerfully entrenched within the EU political establishment that it will continue to weaponise issues such as rule of law compliance and use the Union's legal framework to marginalise and undermine traditionalist right-wing groupings like Law and Justice.

They say that, whatever compromises Law and Justice may be able to secure in the short-term, these ongoing tensions mean that the party will, sooner-or-later, have to face some fundamental questions about whether its twin-track strategy, to which the linkage of EU funds to rule of law conditionality represents a major challenge, is really sustainable in the longer-term; in particular if the cost-benefit analysis of the tangible material benefits that the EU was felt to deliver were to shift against the Union's favour.

Note: This article first appeared at Aleks Szczerbiak's [personal blog](#). It gives the views of the author, not the position of EUROPP – European Politics and Policy or the London School of Economics. Featured image credit: [European Council](#)
