

How will the Russia-Ukraine war affect Poland's rule of law dispute with the EU?

The imperative to maintain European unity in the face of Russian aggression has put the EU political establishment under pressure to deescalate its rule of law conflict with Poland's ruling party, Law and Justice. Aleks Szczerbiak writes that the Polish government appears willing to compromise as long as it does not have to abandon the core of its judicial reform programme. But the vagueness of the European Commission's reconstruction plan 'milestones', and the fact that payments will only be released in tranches, mean that it can still use the Covid-19 recovery fund as a conditionality tool.

Last month, after a year of deadlock, the Polish government, led since autumn 2015 by the right-wing Law and Justice (PiS) party, finally reached an agreement with the European Commission over Poland's EU coronavirus recovery fund national reconstruction plan (KPO). This paves the way for the conditional release of 34.5 billion euros in grants and loans that has been allocated to the country as part of the fund. The money had been withheld due to a long-running row between Warsaw and the EU political establishment over rule of law issues, particularly Law and Justice's fiercely contested judicial reforms.

The EU institutions have agreed with Poland's legal establishment and most opposition parties that these reforms undermine judicial independence and threaten the key democratic principle of the constitutional separation of powers. Law and Justice, on the other hand, argues that following Poland's flawed transition to democracy in 1989, the judiciary, like many key institutions, was expropriated by an extremely well-entrenched, and often deeply corrupt, post-communist elite. It accuses the EU political establishment of bias and double standards, and of using the rule of law issue as a pretext to victimise Law and Justice because the party rejects the EU's liberal-left consensus on moral-cultural issues, which it feels undermines Poland's traditional values and national identity.

In 2017, the 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, it was unable to secure the qualified majority required among EU states to move beyond the initial stage of the procedure. The Commission, therefore, initiated legal 'infringement procedures' against Poland, as a consequence of which the EU Court of Justice issued a series of judgments ordering the Polish government to reverse aspects of its reforms.

These included a July 2001 ruling calling for the suspension of a newly created supreme court disciplinary chamber for judges that, the Court argued, was incompatible with EU law because it threatened judicial independence. While Law and Justice indicated that it planned to disband the chamber – which, it said, had anyway not fulfilled its objectives – this commitment was too vague for the Commission. Brussels, therefore, delayed approval of Poland's national recovery plan until it complied with the ruling of the EU Court, which, at the Commission's request, also ordered Poland to pay fines of a million euros per day for non-compliance. The disciplinary chamber's fate thus became central to the dispute between Law and Justice and the EU political establishment.

Deescalating the conflict

However, the rule of law issue has become an awkward one for the EU given Poland's centrality to the West's response to Russia's invasion of Ukraine. Poland's critical geographical location, together with the fact that it is NATO's largest member and top defence spender in the region, mean that it has become pivotal to the alliance's security relationship with Moscow.

The country has been one of the main hubs for channelling military and humanitarian aid to Ukraine, and a prime destination for refugees fleeing from the conflict with more than 3.5 million people crossing its eastern border. At the same time, Poland's credibility and international standing have been enhanced by the fact it proved more perceptive than the main EU powers in correctly warning about Russian President Vladimir Putin's expansionist designs in the region.

As a consequence, in order to maintain European unity and solidarity in the face of Russian aggression, the EU political establishment has come under pressure to deescalate the conflict with Poland and accept its national reconstruction plan. However, in doing so the Commission has also set out 'milestones' that have to be fulfilled for the conditional release of Covid-19 recovery fund payments. These include: the dismantling of the supreme court disciplinary chamber, the creation of a new (and apparently more impartial) disciplinary system for judges, and a review of the cases of those judges previously sanctioned by the chamber.

Last month, the Polish parliament approved a law proposed by Law and Justice-backed President Andrzej Duda aimed specifically at trying to meet the EU Court and Commission's central concerns. The supreme court amendment law replaces the disciplinary chamber with a new body, the professional responsibility chamber, appointed in a two-stage procedure: initially 33 candidates drawn by lot from among the 90 supreme court judges, and the final eleven then selected by the President. The legislation envisages a swift review by the new body of all the disciplinary chamber's earlier cases where judges have been disciplined or had their immunity lifted.

Ignoring the key issue?

The Commission's decision to approve Poland's national reconstruction plan has been strongly criticised by both the European Parliament and many anti-Law and Justice legal experts and commentators. They see it as a short-term political deal and have warned that the supreme court amendment law is insincere in that it simply replaces the disciplinary chamber with a similar body that has a different name and is chosen by the government-allied President, while suspended judges will not necessarily be reinstated and will only have their cases reviewed. They have accused the Commission of abandoning the most effective instrument that it had for exerting pressure on Law and Justice, arguing that the 'milestones' are too vague and open to political interpretation.

For its part, the Commission has stressed that Poland will not receive the first Covid-19 fund payments until the end of 2022 or early 2023, so it will have the opportunity to assess whether the necessary reforms really have been undertaken. If it does not believe that sufficient progress has been made, the Commission can recommend freezing the payments.

For Law and Justice this could mean high profile conflicts with the EU political establishment in the runup to the next parliamentary election, scheduled for autumn 2023. A foretaste of this came at the beginning of this month when Commission President Ursula von der Leyen stated that, in her view, the supreme court amendment law did not sufficiently ensure that Polish judges will be able to question another judge's status or decisions without risking being subject to a disciplinary offence.

Nonetheless, many of Law and Justice's critics also believe that the Commission's 'milestones' ignore the core issue at the heart of the judicial reforms: the status of the national judicial council (KRS), a key body that oversees the appointment and supervision of judges in Poland. The council was reconstituted by Law and Justice so that elected politicians rather than the legal profession now have the decisive influence in determining its composition.

The government's critics argue that, by ignoring this issue, the Commission has not gone far enough in restoring the rule of law and protecting the judiciary from political interference. Law and Justice, on the other hand, argues that giving elected politicians a greater say in the appointment of supervisory bodies such as the national judicial council is essential because the Polish judicial elite has operated as a 'state within a state' that is incapable of reforming itself. Making judges and their supervisory organs more accountable to elected bodies is therefore both justified and in line with practices in other established western democracies.

Too many concessions to Brussels?

Law and Justice has also been keen to end the deadlock on this issue because it urgently needs the Covid-19 recovery fund money, not least to improve its chances of re-election in next year's parliamentary poll.

The government feels that a swift, large-scale inflow of euros would not only help to finance an investment boost, but also contribute to strengthening the Polish zloty and thus lower the price of imported goods, thereby helping to reduce the rate of inflation which last month hit a quarter-century high of 15.6%. Law and Justice has also 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 had secured them as part of the Union's 2021-27 budget round.

At the same time, while Law and Justice remains committed to a wide-ranging judicial overhaul as a key element of its radical state reform programme, the governing camp is divided over how far to concede to the EU political establishment and whether to push ahead with and deepen the reforms. The ruling party is under particular pressure from 'Solidaristic Poland' (SP), Law and Justice's junior governing partner led by justice minister Zbigniew Ziobro, on whose 20 deputies it relies for its parliamentary majority.

Ziobro, who has introduced many of the government's most controversial policies including the judicial reforms, has been staking out a series of hard-line right-wing conservative policy positions and criticising the government for being excessively compromising and ideologically timid.

Specifically, Solidaristic Poland accuses Polish prime minister Mateusz Morawiecki of making too many concessions to the EU institutions, which it argues are engaged in a 'hybrid war' against Poland, and it took Law and Justice several months to persuade Ziobro and his allies to finally accept Duda's supreme court amendment law. Indeed, Ziobro is planning further judicial reforms, including a proposal to streamline the Polish court system, which the government's critics argue would facilitate a further turnover of judges.

An uneasy and unstable truce

The rule of law dispute, therefore, appears to have reached an uneasy, and somewhat unstable, truce. On the Polish side, notwithstanding Ziobro's plans, the Law and Justice leadership seems to want to let the issue rest rather than pushing ahead with new judicial reform initiatives, at least until after next year's parliamentary election. The ruling party is clearly prepared to compromise with Brussels as long as this 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.

For the moment at least, the EU political establishment does not appear to have made scrapping the re-constituted national judicial council one of its explicit 'milestones' for un-locking Covid-19 funding. This will slowly but surely change the nature and composition of Poland's legal elites, and could cause a major headache for any future government comprising the current opposition parties as to what to do with the thousands of 'new' judges appointed by the re-constituted council, and what the legal status of their countless court rulings will be.

However, there are still question marks over whether the supreme court amendment law will fully satisfy the Commission, and whether it will use the fact that recovery fund payments are only to be released in tranches as a means of exerting further pressure on Law and Justice. The Commission's 'milestones' are formulated in such a way that they will provide a great deal of room for manoeuvre to interpret whether or not they have been implemented.

As von der Leyen's recent evaluation of Duda's law shows, the Commission also appears prepared to defend Polish judges who question the status and rulings of their 'new' colleagues appointed by the re-constituted national judicial council. Even if the Commission does not itself directly challenge the legitimacy of this body, this still could cause major problems for Law and Justice – and, indeed, for the overall coherence of the Polish justice system.

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](#)
