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The case for activating the rule of law conditionality regulation in respect of Poland

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After several years of rule of law backsliding, Poland's rule of law crisis has mutated into breakdown mode.

To mention but a few crucial aspects which will be further detailed in this study, the EU currently includes a Member State where each of the apex courts is irregularly composed; where the investigation and prosecution services have been instrumentalised following the entry into force of a law which the Venice Commission described as “unacceptable in a State governed by the rule of law”; where every single judicial appointment procedure is inherently defective due to the involvement of an unconstitutionally reconstituted body; and where core EU *and* ECHR binding requirements relating to effective judicial protection have been held “unconstitutional” resulting in national authorities no longer recognising as binding the rule of law related orders and judgments of both the European Court of Justice and the European Court of Human Rights.

The EU has sought to rely on multiple instruments to address Poland's rule of law crisis ever since the Commission used, for the very first time, its Rule of Law Framework in January 2016, which is informally known as the EU's “pre-Article 7 TEU procedure”.

As of 1 September 2023, Poland is the only EU Member State which has been subject to both the pre-Article 7 TEU procedure (January 2016-December 2017) and Article 7(1) TEU procedure (December 2017-ongoing). In addition to the activation of these two exceptional procedures, other preventive tools of a cyclical nature which apply to all EU Member States have been used: In 2020, the Council used the European Semester mechanism to adopt a Country Specific Recommendation (CSR) concerning judicial independence in Poland. This subsequently led the Council in June 2022 to condition Poland's access to EU recovery funding to meeting a number of “rule of law milestones”. The following month, the Commission adopted multiple CSRs as part of its Annual Rule of Law Report (ARoLR) cycle, all of which were reiterated in this year's edition of the ARoLR published in July 2023.

When it comes to rule of law response tools, the European Commission has made an extremely parsimonious use of the infringement procedure (Article 258 TFEU) with a total of five infringement actions lodged with the Court of Justice (the most recent one was lodged in July 2023) since the end of

2015. The Commission did, however, make a bolder use of the horizontal enabling condition relating to the Charter in 2022.

By contrast, the Commission has refused to activate Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget (informally known as the “Rule of Law Conditionality Regulation” or “Conditionality Regulation”) after sending a request for information to Polish authorities on 17 November 2021 pursuant to Article 6(4) of this Regulation.

The case for activating the Conditionality Regulation was already compelling at the time of the Commission’s request for information sent to Polish authorities on 17 November 2021. It is overwhelming in September 2023.

When it comes to making the case of activating the Conditionality Regulation, it is sufficient to highlight how current Polish authorities’ breaches of the rule of law have resulted in the systemic undermining of the proper functioning of three crucial institutions from the point of view of the sound financial management of the EU and the protection of EU’s financial interests in Poland:

- (i) the Supreme Audit Office (SAO);
- (ii) prosecution services and
- (iii) the judiciary.

These three institutions significantly impact both the sound financial management of the EU budget and the protection of the financial interests of the EU. This is because each of them is responsible for a different stage of safeguarding the EU budget and its financial interests:

- (i) The SAO examines and reports on actual or potential breaches of financial discipline, which may involve EU funds or the effective collection of Poland’s contribution to the EU budget;
- (ii) The prosecution services are expected to investigate impartially and effectively potential irregularities and wrongdoings, for instance, in cases relating to the management of EU funds or cases of corruption, fraud and conflict of interest in relation to the implementation of EU funds, and must determine whether these irregularities and wrongdoings ought to be subject to criminal prosecution without undue interference and pressure from, inter alia, the country’s executive;
- (iii) The courts deal with criminal, civil, or tax cases, and only lawfully established and independent courts can provide effective judicial review in cases relating, inter alia, to financial management of the EU budget or the protection of the EU’s financial interests of the EU, and, where relevant, impose effective and dissuasive penalties.

As will be detailed in this study, current Polish authorities’ actions and omissions amount to repeated breaches of the principles of the rule of law which fall within the different categories provided for in the Conditionality Regulation. At a minimum, these actions and omissions *seriously risk* affecting the sound financial management of the EU budget or the protection of the EU’s financial interests in a sufficiently direct way.

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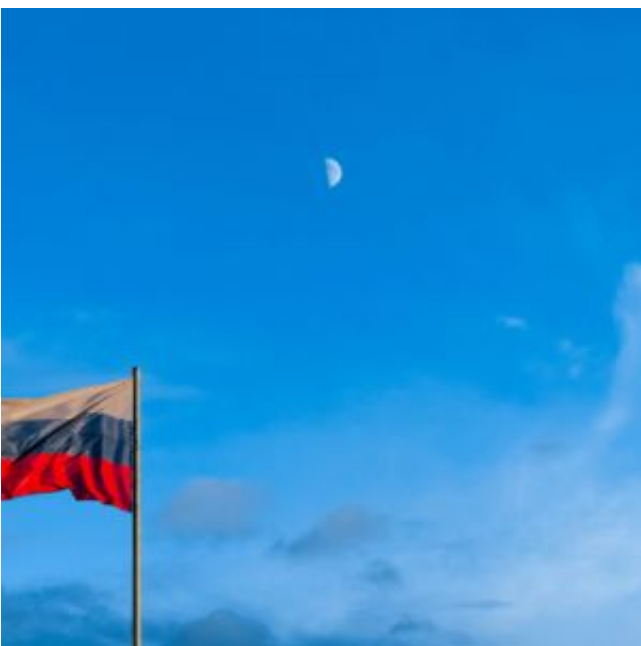
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