

# Poland in Europe: disappointment or merely hiccup?

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### Summary

What is Poland's position in the EU in the context of the political and economic developments under the Law and Justice government? Since 2015 the one-party government in Poland has engaged in a policy of a radical change. A set of various reforms have been implemented, some of them highly controversial, such as the reform process in the judiciary. The judicial reforms –or 'take over'– put the Warsaw government on a collision course with the EU institutions over the rule of law. This paper analyses three aspects of the Polish-EU relationship: (1) the state of the rule of law; (2) the economic challenges; and (3) the political position of Poland among EU member states.

## Introduction

Someone once said that Europe starts at the Pyrenees, thus excluding Spain. There is a similar sentiment among many Poles, that Europe is external, Europe is 'them', not a part of 'us'. Such statements fit perfectly in the EU's 'new normal' political environment of the EU, for it carries an introverted anti-globalisation sentiment. In many European nations the crises of the last decade brought about a number of anxieties. Many of them were real, like Spanish unemployment, Greek public debt and economic misery, the Irish property bubble or the brain drain in Romania and Bulgaria. Some of the anxieties were, however, largely imaginary, or, the perception of the significance of problems was largely exaggerated. This is true particularly in relation to the fears of illegal migration to countries that saw very few migrants from the Middle East or Africa, like Poland.

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### Poland: what happened to the golden child of European integration?

To the country that economically grew and developed like no other in the past 20 years, invested in infrastructure and kept its public finances in order? To the country that cut unemployment from 20% to single digits in a decade? To the country that in recent years gave Europe Presidents of the European Parliament, European Council and Council of Ministers? To the country that welcomed millions of visitors in the month-long party of the UEFA championships in 2012? To the country that championed EU values and defended, promoted and helped define them? And to the country where WWII began and Communism ended?

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Today the external perception of Poland is poor. Only in November 2017 *Al-Jazeera*, the *Washington Post*, the *Independent* and many other media asked: why are neo-fascists making a shocking surge in Poland?<sup>1</sup> Even if some exaggerate, there is reason to worry. The rule of law in Poland is questioned by the European Commission and courts in member states. The problem is not the adoption of a single legislation. The problem is that the changes made to the Polish judiciary are systemic. Human rights are being challenged: for instance, the right to assembly. The independence of various authorities –the police, the courts, the public media– has been compromised. In the EU, as a regular member state that defends its priorities, the Polish government is expected to safeguard its interests. Unfortunately, in recent years Polish officials more often than not cause problems. Even in situations when major Polish national interests are concerned, as in the case of the delegated posted workers directive, or the construction of the Nord Stream 2 gas pipeline, the government seems unable to safeguard its interests. The impression the Polish officials give is that they are more often part of the problem rather than actively seeking solutions in a number of policy areas. To name a few: the Union's climate policy, with its principle of decarbonisation of the European energy market; the new arrangements on the relocation of migrants; asylum policy; and the defence of rights of people belonging to sexual minorities.

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<sup>1</sup> *Washington Post*, 13XI/2017, <https://www.washingtonpost.com/news/global-opinions/wp/2017/11/13/why-neo-fascists-are-making-a-shocking-surge-in-poland/>.

In this analysis we shall attempt to draw a balanced picture of Poland in the EU as of 2018. It is a country that has been ruled by a single-party government for the past three years. The party is called Law and Justice (*Prawo i Sprawiedliwość*, PiS), and the government is *de iure* a coalition government comprising PiS and two smaller parties, Solidary Poland (*Solidarna Polska*) and Agreement (*Porozumienie*). *De facto* it is a single political body, and its leader is outside the government. The former Prime Minister (2005-07) Jarosław Kaczyński chairs the Law and Justice party and exercises an undisputed leadership of the political movement that controls both the executive (the President and the government) and the legislative (the Sejm and the Senate) powers.

In 2015 PiS did not control the third power, the judiciary, or the fourth, the media. Not yet, as some critical and cynical voices argued. 'PiS would not dare to control them', PiS counter-argued, all Law and Justice wanted was to reform the judiciary in order to modernise it, and to bring more balanced opinions in the media, since it believed the liberal media were disproportionately negative about it.

As in every other European society, Poland is diverse and much of the criticism it receives abroad is not nuanced enough. We shall examine three aspects of Poland in order to show a more balanced picture. First, the issue of rule of law, and the process on the topic in the context of the already initiated procedure of Article 7 of the EU Treaty. Secondly, the issue of the economy, as the country continues to soar while unemployment is falling to its historically lowest levels, and there is a shortage of labour. And third, we shall examine the position of Poland in the EU and the outlook for the foreseeable future.

### **(1) The rule of law debacle**

Victor Orbán's Hungary has been playing a game with the rule of law for years. Orbán has ruled the country since 2010. The Commission has been in dialogue with the Budapest government over many controversial issues, including the media law, the reform of the judiciary, the independence of the central bank, Hungary's new constitution and many others. Yet the Union was preoccupied with other grave crises, and Hungary –*toutes proportions gardées*– was at the margin of European integration during those years (and the primary focus of the Budapest government was with the economy) and not a member of the Eurozone. Also, since Orbán's party, Fidesz, is a member of the European People's Party, criticism was further toned down. Orbán's Eurosceptic statements of the time were on the fringe of European political life, even though he had had a long history of comparing the EU to the Soviet empire.<sup>2</sup> Until 2015 what happened in Budapest had little impact on the rest of the Union.

In 2015 massive waves of refugees started to pour into Europe. Orbán was one of the most outspoken critics of how Europe responded to the migrant crisis. Most EU leaders perceived the situation as a humanitarian crisis that needed to be addressed as such –

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<sup>2</sup> See 'Orbán compares EU to Soviet Union', *Financial Times*, 15/III/2012, <https://www.ft.com/content/6feaca90-6ecb-11e1-afb8-00144feab49a>.

(cont.)

a perspective led by the German Chancellor Angela Merkel–. Orbán offered a different understanding of the situation: ‘Europe is being threatened by mass migration’.<sup>3</sup>

In the very same year, Poland held double elections. Inspired by Hungary’s leader and adopting his migration scare tactics as a leading campaign issue, Law and Justice was victorious. But migration was not the only factor contributing to the party’s success. Other factors included: (1) society’s general fatigue after eight long years of rule of the centrist Civic Platform (PO) and the farmers’ Polish People’s Party (PSL); and (2) the unfortunate decision of the left-wing parties to run as a coalition instead of a single electoral list – thus excluding themselves from the Sejm, as the threshold for coalitions is higher (8%) than for a single party list (5%)–. With the left out of the Polish parliament, the stronger parties benefitted from extra seats. This was particularly helpful for Law and Justice, which saw 37.6% of the vote provide it with over half of the Sejm’s seats (235 out of 460). Earlier the same year, Andrzej Duda, PiS’ candidate for the Presidency had surprisingly defeated the incumbent Bronisław Komorowski.

A new single party government was formed by Beata Szydło. Interestingly, she was Poland’s third female Prime Minister, making the country the first European state with three female heads of government.<sup>4</sup> The Szydło government engaged in a policy of “good change” introducing many new redistributive social policies. Radical changes were proposed in the public administration and the public media. The most controversial changes, however, were in the judicial area under the supervision of new Justice Minister Zbigniew Ziobro (a former Justice Minister in the previous PiS governments and a former MEP). In 2015 Ziobro was the leader of Solidary Poland, one of PiS’s smaller coalition partners. He had a history of dubious legal activity as Justice Minister 2005-07 and the Sejm even considered making him subject to a state tribunal in early 2015, falling five votes short.

Ziobro oversaw the judicial reforms. The first major conflict begun almost immediately after the 2015 parliamentary elections and the formation of the new government. The conflict concerned the nomination of new members of the Constitutional Tribunal. That battle has so far not been satisfactorily resolved, and the situation with the constitutional control in Poland remains unclear –legal experts claim that there is a ‘constitutional crisis’ as many ordinary courts apply the Constitution directly with the absence of the appropriate control from the Constitutional Tribunal. At one point the government refused to publish the Constitutional Tribunal ruling, contrary to what should have been standard procedure. The Constitutional Tribunal’s membership in 2018 included dubious members, leading scholars to question the legality of some of its decisions, among them: can a law adopted by parliament challenge the Constitution?; can the Tribunal rule on the law that concerns the Tribunal itself?; can the President delay the nomination process for political purposes?; and can a new parliament reverse the nomination of a previous

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<sup>3</sup> Victor Orbán, speech in Budapest, 15/III/2016, <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/speech-by-prime-minister-viktor-orban-on-15-march>.

<sup>4</sup> Beata Szydło was Poland’s third female Prime Minister (2015-17), following Hanna Suchocka (1992-93) and Ewa Kopacz (2014-15).

(cont.)

parliament? The 2015-16 impasse continues as it was never adequately resolved, even if the political pressure moved on to other issues.<sup>5</sup>

#### **Article 7 (1) TFEU**

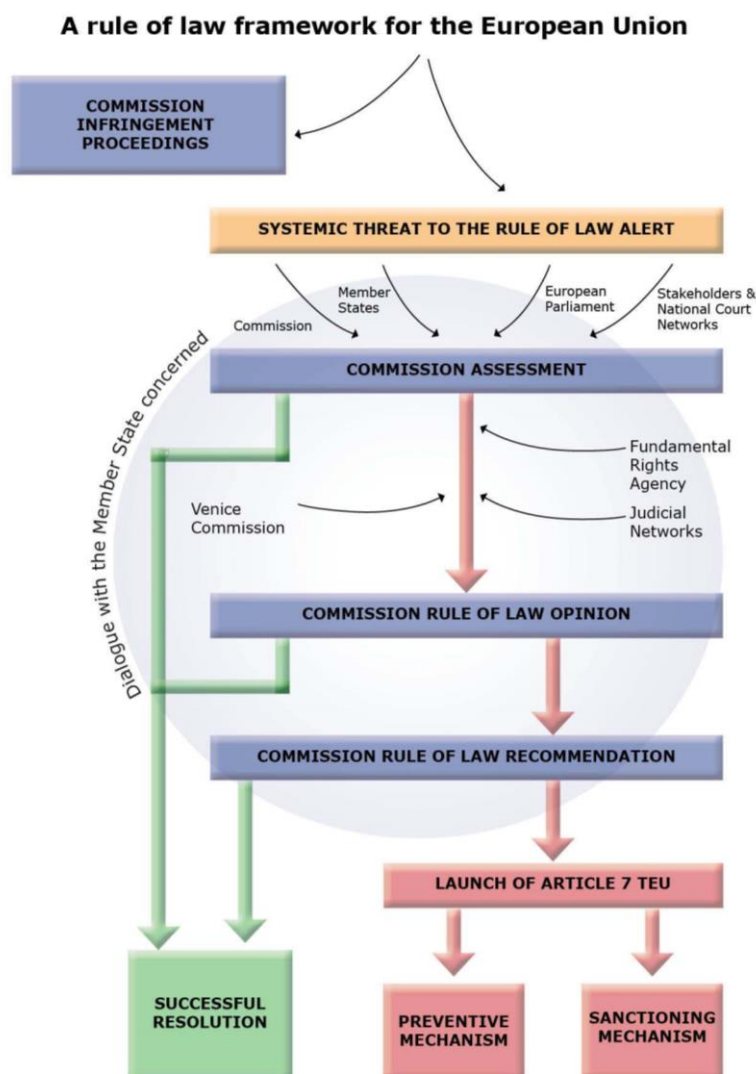
On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

The Constitutional Tribunal debacle saw the first involvement of Europe's institutions. The European Parliament organised its first debate in January 2016, when Prime Minister Szydło addressed the Strasbourg plenary. More debates followed. The European Commission begun its dialogue with the Warsaw government under the newly established rule of law framework already in January 2016. The framework included interaction between the Commission and the government in the form of letters and meetings, and eventually a Commission opinion and recommendations (see Figure 1). The process was led by the Commission's First Vice-President Frans Timmermans. The Commission's concerns about Poland included: (1) the nomination of the members of the Constitutional Tribunal; (2) its independence; (3) the risk of legal duality in light of the government's refusal to publish the Tribunal's ruling; (4) and the risk of the lack of proper judicial control at the highest level in light of many recently adopted laws, covering the public media, the civil service, the prosecution service, the police and the Ombudsman.

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<sup>5</sup> For more on the Constitutional Tribunal Crisis see, for example, Marcin Matczak (2018), *Poland's Constitutional Crisis: Facts and interpretations*, Oxford University, [http://www.fljs.org/sites/www.fljs.org/files/publications/Poland%27s%20Constitutional%20Crisis%20-%20Facts%20and%20interpretations\\_0.pdf](http://www.fljs.org/sites/www.fljs.org/files/publications/Poland%27s%20Constitutional%20Crisis%20-%20Facts%20and%20interpretations_0.pdf); and Piotr Maciej Kaczyński (2017), 'Poland's constitutional conundrum... explained', Euractiv, Brussels, <https://www.euractiv.com/section/justice-home-affairs/opinion/polands-constitutional-conundrum-explained/>.

Figure 1. 'A new EU Framework to Strengthen the Rule of Law'



Source: Annex II, 'A new EU Framework to Strengthen the Rule of Law', European Commission, COM(2014) 158 final.

The dialogue initiated by the Commission proved to be a farce. The government in Warsaw did not engage in any substantial conversation and did not undo any of its controversial measures. Instead, the government defended its legitimate right to reform and accused the Union's institutions of a lack of knowledge first and later of a lack of competence and interfering in domestic affairs. The nature of the Commission's dialogue changed with the formal initiation of Article 7 (1) in December 2017.

The next stage was a short-lived period of a potential new goodwill from Warsaw. The Szydło government was replaced by the government of Mateusz Morawiecki, with many of the old ministers keeping their portfolios. Notable changes included the removal of two controversial Ministers: of Defence and of the Environment. The latter was considered politically responsible for another of Poland's debacles with Europe's institutions on



logging in the Białowieża Forest. The conflict was successfully addressed by the European Court of Justice.<sup>6</sup> Importantly, Ziobro retained his position.

The Morawiecki charm offensive ended with the publication of the government's white paper on judicial reform.<sup>7</sup> It was intended as an argument to win the debate with the Commission and convince the national governments grouped in the Council. Possibly the government's aim was also to win some public support at home by showing it has not been politically cornered. Contrary to expectations, the document convinced no one; it alienated some governments further by pointing to those countries' legal practices out of context. The white paper contributed to heightened criticism in the Council. France and Germany began to offer joint statements on the rule of law in Poland during the Council meetings.<sup>8</sup> One US magazine concluded 'The document admits that Law and Justice lacks the two-thirds majority in the lower house of parliament required to amend the constitution but argues that 'it was necessary to carry out the reform by different means'. Such an approach is a clear demonstration of Law and Justice's thinking, according to which there are no rules worth respecting other than the party's.<sup>9</sup> The same magazine quoted Ziobro as saying 'The whole process of selecting judges was out of the government's control; this has now changed'. This reflects much of the opinion at the time. Since then, the majority view seems to be that what is going on in Poland contradicts the notion of the independence of the judiciary.

### **Article 7 (2) TFEU**

The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

Ever since Article 7 was first considered, and then activated, it was clear that its leverage was limited. The Warsaw government never believed it would ever be applied in its entirety (suspension of voting rights) relying on at least one other member state (Hungary) to veto the European Council's decision –where unanimity is required– to trigger Article 7 (2). Actually, the outcome of the current procedure regarding Poland is far from a foregone conclusion. It seems very few players would like to see a full confrontation (a vote in the European Council). Traditionally, mechanisms such as those included in Article 7 are intended as a preventive and not a punitive measure. As of December 2018 the Commission had triggered Article 7 (1), establishing 'a clear risk of

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<sup>6</sup> Ruling on 17/IV/2018, Case C-441/17,

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd4595f09e35b74e558d388d17bb12b2b2.e34KaxiLc3qMb40Rch0SaxyNc350?text=&docid=201150&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=731345>.

<sup>7</sup> White Paper on the Reform of the Polish Judiciary, Warsaw, 7/III/2018, [https://www.premier.gov.pl/files/files/white\\_paper\\_en\\_full.pdf](https://www.premier.gov.pl/files/files/white_paper_en_full.pdf).

<sup>8</sup> As quoted, *inter alia*, by Jan Strupczewski & Gabriela Baczyńska (2018), "EU ministers question Poland over rule of law concerns", *Reuters*, 18/IX/2018, <https://www.reuters.com/article/us-eu-poland/eu-ministers-question-poland-over-rule-of-law-concerns-idUSKCN1LY1OQ>.

<sup>9</sup> 'It's time to play hardball with Poland', *Foreign Policy*, 14/III/2018, <https://foreignpolicy.com/2018/03/14/its-time-to-play-hardball-with-poland/>.



a serious breach by a Member State of [EU] values'. In this case the Council acts by a majority of 4/5. The last Council debate was in December 2018 and further steps were to be taken in the following months. It is only after such a procedure that Article 7 (2), dubbed the 'nuclear option', can be activated. But before that, however, there were important new developments during the summer of 2018.

### (1.1) The take-over

Law and Justice introduced reforms in the functioning of the Polish judiciary in 2017. The adoption of three acts (on the ordinary courts, the National Council for the Judiciary and the Supreme Court) took place in a heated-up atmosphere. There were warnings from national legal experts and foreign authorities (not only the Commission, but also the Council of Europe's Secretary General Thorbjorn Jagland). The opposition nicknamed the reform a 'deform'. Thousands protested on the streets and in front of court buildings. President Duda placed a rarely-used veto on the Supreme Court draft law before retracting and signing the slightly modified version a few weeks later. Law and Justice achieved its goal: a systemic change in the Polish judiciary.

As in every revolution, it is not simply a matter of changing the law. That is why a major part of the reform was replacing judges, forcing them into retirement, intimidating them or taking control over their appointment. Also, as in every revolution, the initial plan evolved. The adoption of the laws by the parliament was never subject to any major reflection by the Sejm or the Senate. Hence, further amendments to the existing laws continued to be made until the end of 2017 and in 2018.

As of the end of 2018, there were outstanding issues of concern that were addressed by the European Commission. The first set of problems referred to the Supreme Court. In order to control it politically the newly changed laws foresaw some of its members being forced into early retirement. The Supreme Court President's term in office was established directly by the Constitution but the new rule forced him into retirement. This issue was subject to a temporary ECJ ruling and the Polish parliament retracted the law of November 2018 (see below). The ruling party defined the size of the Supreme Court in such a way that it could manipulate it for political gain. The introduction of the 'extraordinary appeal' also seems problematic, as virtually any final court ruling can be challenged in the future. With changes to the extraordinary appeal, its application has been limited, but the Commission and many other bodies argue that its very existence is problematic. For example, the Venice Commission of the Council of Europe considered in December 2017 that the Polish extraordinary appeal procedure has 'a lot of similarities' with the 'system of extraordinary appeals against final judgments' which 'existed in many former communist countries'.<sup>10</sup>

The next set of problems concerned the National Council for the Judiciary (NCJ). This institution is responsible for ensuring the independence of judges. For instance, it elects and promotes judges, and takes care of their training and of the flow of information within the community. In December 2017 the parliament adopted yet another novelty in the law,

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<sup>10</sup> Venice Commission Opinion 904/2017, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e).

dismissing the NCJ's members (who are judges themselves) and replacing them with new politically-appointed members. The Venice Commission outlined why the changes were controversial. The most important problem was the Council's high degree of politicisation.<sup>11</sup> The Polish government defended itself (in the 2018 white paper, for example) by saying that in many other countries judges are also politically appointed. The statement was met with bewilderment by the representatives of the governments named by the government –Spain, the Netherlands, Denmark and Germany– and the Association of Polish Judges *Iustitia* counterargued the government's point by showing judicial involvement and concluded: 'The argument that "all significant changes are perfectly in line with the rule of law" is completely groundless'.<sup>12</sup>

The other outstanding issues include the unresolved situation in the Constitutional Tribunal and another new law that gave the Justice Minister an extraordinary right to dismiss the head or deputy of any of the ordinary courts in the country within six months. The Minister applied the law in over 130 cases, replacing the incumbents. This further undermined the independence of the local judiciaries, while the newly appointed judges frequently lacked the support of the other judges, as they were politically appointed by the Minister without an adequate prior judicial screening.<sup>13</sup>

In 2018 the situation became more acute. The government in Warsaw showed no more scruples in the process of taking over full control of the judiciary. At the same time, the Article 7 procedure proved lengthy and potentially inconclusive as its most important weapon (suspension of voting rights) requires unanimity. In July 2018 Poland's Supreme Court issued a pre-judicial question to the Court of Justice of the European Union (ECJ), halting the application of some of the laws. The most visible was the participation of the Supreme Court's President or her absence from the work of the institution. The issue of the suspension of laws approved by parliament by the Supreme Court was unheard of in Poland, hence the fiercely negative reaction of the government to the judges' pre-judicial question. The Minister of Justice asked Poland's Constitutional Tribunal whether the pre-judicial questions were in line with the Polish Constitution. The request was private and made public only a week ahead of the local elections scheduled for 21 October 2018. Virtually overnight the Polish general public introduced a new word in their vocabulary: 'pre-judicial'. The debate was whether the Polish government would in fact respect the suspension of the laws by the Supreme Court, when the European Commission in September 2018 took Poland to the ECJ over the issue of 'violations of the principle of judicial independence created by the new Polish Law on the Supreme Court',<sup>14</sup> the same issue the Polish Supreme Court was asking.

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<sup>11</sup> *Ibid.*

<sup>12</sup> Association of Polish Judges *Iustitia* (2018), 'Response to the White Paper Compendium on the Reforms of the Polish Justice System, presented by the Government of Poland to the European Commission', 16/III/2018, <https://www.iustitia.pl/informacje/2172-response-to-the-white-paper-compendium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission>.

<sup>13</sup> Data from Agnieszka Grzelak (2018), 'Odpowiedź Polski na czwarte zalecenie Komisji Europejskiej w sprawie praworządności', Jan Barcz & Anna Zawidzka-Łojek (Eds.), *Sądowe mechanizmy ochrony praworządności w Polsce w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości UE*, Warsaw.

<sup>14</sup> European Commission Press Release, Brussels, 24/IX/2018.

(cont.)

A pre-judicial request from the Polish Court coincided with the infringement case from the European Commission. The latter also asked for interim measures to be taken by the ECJ, since the Polish government had proved it was not respecting Europe's institutions. In October, the Court issued an injunction stopping the new laws from taking effect until the case is heard and ordered the reinstatement of the sacked judges.<sup>15</sup>

Following the ECJ's temporary injunction a new discussion started: how to respond. At first, the government seemed unsure if the Court ruling could be ignored. There was silence. One of the Brussels newspapers concluded on President Duda's remarks in Berlin: 'What he [Duda] didn't say: that Warsaw planned to comply with the ruling'.<sup>16</sup>

The ruling is temporary until the case is fully heard and most likely decided upon in March 2019. The ECJ argued that the moment the temporary injunction was issued no new steps were necessary; the judges, including the Supreme Court's President, were reinstated, that is, until the final ruling. Law and Justice officials were unconvinced and decided that the ECJ's temporary decision needed to be transposed into national legislation. The corresponding act of parliament was adopted by the Sejm on 21 November 2018. The President signed the act on the last possible day on 17 December 2018.

### (1.2) The (temporary) fall out

Law and Justice lives by a philosophy that puts national law above European legislation. Yet, the PiS rejects all accusations of wanting to leave the EU. The opposition media reported that the November 2018 'step back' was a result of a conflict between the Justice Minister ('the hawks') and the Prime Minister ('the dove'). The conflict was settled by the party's leader Jarosław Kaczyński, who for the first occasion in a long time decided that the state should comply with EU rules, rather than challenging them.

The government denies that it pursues a policy of 'Polexit' and Jarosław Kaczyński commented 'lies, lies, lies'.<sup>17</sup> The government continues to aim to reform the judiciary, says the Union has no competence in the area but –a novelty– added it would respect the ECJ's rulings.

However, the PiS's approach is to disagree with a direct application of the ECJ's ruling and the need for transposition. This is more than the ECJ expected –the temporary ruling was confirmed in a permanent act by the two legislative chambers–. The formalities may not be that important as what is important is for different philosophies to converge into a holistic and unified approach. This may well be an anticipation of the upcoming final ruling on the issue of the retirement of judges.

It may also signal an important change: the Warsaw government does not argue with the Court of Justice: it argues its case before the Court and accepts its final say. Hence the

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<sup>15</sup> Ordonnance de la Vice-Présidente de la Cour, 19/X/2018, Case C-619/18 R, Commission v Poland.

<sup>16</sup> Politico (2018), *Brussels Playbook*, 24/X/2018.

<sup>17</sup> Jarosław Kaczyński in Radom, as reported on 28/X/2018.

November 2018 act of parliament is an important sign of what might happen to all the other elements of the systemic changes that are considered problematic by the plaintiffs.

It may well be that the government took its decision in the aftermath of the local and regional elections. Yet that time could have been given to consider the alternative to respecting the ECJ's ruling. Should the Polish government not respect the final ruling, it would be a major break in the European judicial system. There are lawyers who argue that this would be an effective 'Polexit', with Poland out of the EU. The reason for it is the existence of the Union of law, which is based on mutual values, such as trust between the various legal systems in the EU's member states. The moment the independence of the Polish judiciary is questioned there is no trust in the Polish judiciary. The ordinary cooperation of other member states' courts (on European Arrest Warrants, for instance) would cease, while judicial administrative cooperation would be discontinued. There have already been significant cases. First, an Irish court considered whether there would be free and fair trials in Poland. In another instance, a Spanish court asked a court in Rzeszów four questions on its independence before examining the case. Interestingly, the Spanish court argued it was obliged to ask the question following the ECJ's July 2018 ruling, which was given in response to the Irish case. In January 2019 the Dutch courts stopped the transfer of 11 suspects to Poland on the grounds that it was unclear if they would receive a fair trial. The ECJ said that any extradition must be preceded by an evaluation of whether the jurisdiction to which the suspect was to be released was independent and impartial in accordance with article 47 of the Charter of Fundamental Rights of the EU (effective remedy and fair trial).

What the ECJ's ruling will be is difficult to say. What we know is that the very concept of the rule of law has been redefined and –in legal terms– completely Europeanised. In its ruling on Case C-64/16, of February 2018, the ECJ decided that all courts in the EU, national and European, form a judicial system. Hence they need to be organised by the same standards, and the independence of the judiciary is definitely one of them:

'According to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premis[e] that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU.'<sup>18</sup>

It is important to note that it is very likely that in November 2018 Poland entered a course of eventual convergence with the trend towards European judicial integration. The way might be bumpy not only in Poland but in other member states, too, but at least it seems for now that Poland, which had at one time contemplated going in a different direction, will now not do so. This is not to say that the Polish judiciary is perfect and does not need reforms: it did and still does.

The situation in the first weeks of 2019 is going against the interests of Poland's hawkish Justice Minister. It has been suggested that his recourse to the Constitutional Tribunal

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<sup>18</sup> Judgment of the Court, 27/II/2018, Case C-64/16, para. 30.

to rule on the compatibility of the Union treaties with the Polish Constitution contributed to the weaker-than-expected performance of the ruling party in the local and regional elections of October and November 2018. Following elections, PiS rules in nine of 16 of the country's regional governments, but it has lost most of its mayors. The governing party lost support in all major cities and the largest city with a PiS Mayor has a population of around 65,000.

## **(2) Economic performance: continued convergence**

The Polish economy has never been better. There are reports on regular basis arguing that Poland in 2019 is at its the richest and wealthiest ever and that the gap with the world's wealthiest economies has been significantly reduced. Since the dissolution of the Soviet empire the formerly communist economies have been classified as being 'in transition'. For the EU the transition ended with the country's entry to the single market, when 'convergence' started. For other players, the end of Poland's transition to a developed market should be considered on a case by case basis. As far as Poland is concerned the UN (Human Development Index), World Bank (high-income economies), OECD (membership) and DAC (Development Assistance Committee donor countries) all consider the country to be already amongst the world's richer nations. On the other hand, the IMF still classifies Poland as a developing nation. The most recent to upgrade Poland to developed status has been the FTSE.<sup>19</sup> All of this plays into Poland's growing self-confidence (or lack of it), when on a good day a Polish worker hears his country is rich and developed and on another day he gets paid wages that are still only a fraction of what his Western European counterparts get.

The frustration is, simply speaking, a matter of time: it takes time to catch up properly, without short cuts. It may well be that Poles are short on patience because thus far Poland has been catching up quite successfully. In 2017 it had reached 70% of the EU's average GDP purchasing power parity, when in 2006 it was only 51%. In the same period, for example, Denmark retained its level of 125% of the EU average while Greece dropped from 96% to 67%.<sup>20</sup> Generally speaking all macroeconomic indicators in Poland are in order, with the economy growing consistently for over 25 years in succession. During the most severe year of the world economic crisis (2009) the Polish economy still grew by 2.8%. The politicians dubbed it 'the green island' for it was the only EU member state to grow that year. Since the end of the economic crisis (2013) Poland has been back to 3%-5% annual economic growth, often doubling the EU average and always above it.

A fast-growing economy like the Polish one is the result of the conservative economic policy of all Warsaw governments since 2004, which have kept public finances in relative order. There were problems along the way<sup>21</sup> but the constitutional limitation of 60% on public debt was a major guarantor of a stable macroeconomic environment. Another

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<sup>19</sup> 'Poland: the journey to developed market status', 2018, <https://www.ftserussell.com/files/research/poland-journey-developed-market-status>.

<sup>20</sup> Eurostat, 'GDP per capita in PPS', <https://ec.europa.eu/eurostat/web/products-datasets/-/tec00114>.

<sup>21</sup> Poland was subject to the excessive deficit procedure in 2004-08 and 2009-15.

(cont.)



anchor in this regard was the independent central bank. Unlike Hungary, thus far Poland has seen no attempt to curtail its national central bank's independence. The central bank emits the currency, the złoty, and works to keep the inflation at a stable and low level.<sup>22</sup>

The banks operating in Poland have not been exposed to dramatic situations as in other European countries. In a way, their exposure was of a different nature. It was not their performance in the Polish market that was creating problems. In fact, Polish banks are usually highly ranked in the EBA-run 'stress tests for banks'.<sup>23</sup> It was the stability of the parent institution (an Italian, Spanish or Irish bank) that was the source of instability. By articulating this situation as problematic, the Warsaw governments since 2015 have been advocating a policy of 'repolonisation' of banks, without undermining the rules of ownership. The governments were successful and the ratio of Polish ownership of the banks operating in Poland increased to over 50%, and thereby limited their exposure to external shocks. The most significant in the process was UniCredit's withdrawal from Poland in 2016-17 due to internal difficulties. The Italian multinational sold its Polish subsidiary Pekao SA (the second-largest operating bank in Poland) to a consortium of financial investors led by the largest national insurer, PZU.<sup>24</sup>

With access to the European single market and with stable public finance and banking system, there is a steady inflow of capital and investment into Poland and other countries in similar situations. By the end of 2016 foreign direct investments reached a level of €159 billion, with one year recording €12.6 billion.<sup>25</sup> In addition to private investors, starting with the 2007-13 multiannual financial framework, Polish governments have been involved in designing and implementing many major investments in the country. The most visible is probably the country's road network. As of 2018 Poland has around 3,700km of highways, compared with 631km in 2004. A further 1,200km of highways are currently under construction. Most of the highway network has been co-financed by EU funds. The objective is to build a network of 7,800km of highways resulting on not only better transport possibilities but also better business opportunities for some of the more remote areas.

The opening of the EU's single market and engaging in major investments has led to much job creation. The labour situation changed from being an employers' market in the early 2000s to an employees' market by the late 2010s. In early 2004 unemployment was over 20%, with some 3 million unemployed, while in 2018 there were 600,000 jobless (or 3.5%, according to Eurostat). In 2005 there were 12.9 million jobs but by 2018 there were almost 16 million. As of 2016 the economy started to experience problems with the labour force. Since then around 1 million non-EU workers (mostly Ukrainians)

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<sup>22</sup> Formal independence has not been compromised yet political clientelism and corruption were exposed in the November 2018 scandal, which led to the resignation of the head of the Financial Supervision Authority.

<sup>23</sup> European Banking Authority (2018), '2018 EU-wide stress test. Results', 2/XI/2018, <https://www.eba.europa.eu/documents/10180/2419200/2018-EU-wide-stress-test-Results.pdf>.

<sup>24</sup> 'Repolonisation' is sometimes confused with the 'nationalisation' of banks. There are private banks in Poland owned by Polish nationals. The ambiguity of the term 'repolonisation' has led some PiS politicians to argue for the nationalisation *also* of banks owned by Polish nationals.

<sup>25</sup> Polish National Central Bank data from the Polish Investment & Trade Agency, [https://www.paih.gov.pl/poland\\_in\\_figures/foreign\\_direct\\_investment](https://www.paih.gov.pl/poland_in_figures/foreign_direct_investment).

have arrived in Poland, in addition to around 200,000 other EU citizens residing in the country. Salaries have improved considerably, too. In 2018 the average salary was around €1,100 and the minimum wage €490, compared with respectively €530 and €190 in 2004.

However, a nuanced approach is required when studying salary and employment figures. The average salary was around €1,100 (gross) yet the median salary was only €800 (gross) in 2016, while the dominant net income was only around €350/month. There are still many who struggle with a limited income. It may well be that there are jobs today where they were almost none 15 years ago, but they do not pay much. As for unemployment figures, the overall 3.5% (Eurostat) unemployment rate across the country is very low, but there are places with high unemployment: some 120 out of 315 counties recorded unemployment above 10% in December 2017 (against the 6.6% country average, according to GUS),<sup>26</sup> with four at above 20%. The city of Radom (with a population of 220,000) has over 13% unemployment (GUS, December 2017).

Poland's labour market has a strong European affiliation. Between 2004 and 2018 around 2.5 million Polish citizens have used EU-created opportunities to seek legal employment outside of their country. Their main destinations have been the UK, Germany, Ireland and the Netherlands. The large-scale inflow of Poles into the UK might have contributed to the Brexit debate in that country.<sup>27</sup>

The brain drain of the best educated, most mobile part of the society is an issue of European integration that has not been studied sufficiently. Since their accession to the EU most Central- and Eastern-European countries, as well as the Baltic nations, have seen their citizens emigrate. In certain countries the brain drain coincided with the depopulation caused by low fertility rates, which only strengthened the negative trend. To date Poland has not lost as many citizens as, for example, Bulgaria or Lithuania. However, the depopulation of some smaller towns and villages is already visible. It is highly likely the trend will continue in the future, as the regions of growing population in Poland are mostly certain major cities and their immediate neighbourhoods. Only a few regions are not depopulating.

Of the challenges relating to the Polish economy in the immediate future two are worth mentioning. First is the challenge of innovation. Over the previous two decades the main problems of the economy have been lack of capital and employment problems. The answers to both challenges came with investment. However, the economy has not necessarily become innovative. In the European Innovation Scoreboard 2018 Poland ranks 25<sup>th</sup>, improving slightly, but still a laggard.<sup>28</sup> This indicator will be crucial in order to overcome a more general challenge, the risk of a mid-size developed country gap.

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<sup>26</sup> There is major discrepancy between Eurostat and the Polish Statistical Office (GUS) due to the different methodology applied.

<sup>27</sup> Rohit Sudarshan (2016), 'Understanding the Brexit vote: the impact of Polish immigrants on Euroscepticism', Humanity in Action, <https://www.humanityinaction.org/knowledgebase/772-understanding-the-brexit-vote-the-impact-of-polish-immigrants-on-euroscepticism>.

<sup>28</sup> European Innovation Scoreboard 2018, <https://ec.europa.eu/docsroom/documents/30201/attachments/1/translations/en/renditions/native>.



This is exactly the last, and ultimately the most important challenge ahead of Poland's economy. How to make the next step in the development of its wealth? If Poland can develop its economy to Western European levels and can become globally competitive, its employees' salaries would rise to an adequate level, which would mean the country has finalised not only its economic transition but also reached full convergence. High levels of employment, capital, investment and innovation require an even better organisation of state governance, investment in social issues, such as welfare, but also achieving less tangible goals, such as social trust, which has traditionally been low in Poland.<sup>29</sup>

### **(3) Poland's position in the EU**

The Polish elites have been concerned about the country's influence and position in Europe since the beginning of its statehood, and in more modern times since the regaining of independence 100 years ago in 1918. The Polish struggle for subjectification in its international relations was won but short-lived, with its regained sovereignty stifled by totalitarian regimes. Only since 1989 have Poles slowly started to regain control over their future and their sovereignty. The big question of the day was the international recognition of the border with Germany, and after guarantees were made Poland started its march towards the 'West'. What became apparent, however, is the very definition of sovereignty. Subjectification of the state does not mean –as it did 100 years before– to separate the state from other states and organising life within its borders without interference. The understanding of sovereignty in that way can only be applied today in places like North Korea, but most of the world understands it differently. Today state sovereignty and subjectification are a result of a strong embodiment in a network of international relations in order to provide a state with security and a base on which to build the wealth of the nation. Thanks to this modern approach many Western European and East Asian nations have managed to develop a solid status. Some of these states have historically been poor, like Singapore, South Korea, Ireland and Spain but today are among the world's wealthiest. The traditional Polish foreign policy was to join the old Western structures and create new networks. This was uncontested until the EU's 2004 enlargement.

Not everybody has been convinced by the newly-defined sovereignty. Those who believed that Poland's entry into the West's institutions was final –joining NATO and the EU– have been proved wrong since the value of EU membership is increasingly being questioned. The issue of subjectification within the European context is no longer about what one wants to do but on participating in the game of interests and reaching compromises which are beneficial for the country and its citizens. The rules might be overly complicated for the man in the street but should be known in detail by those who decide, be it politicians or civil servants at the highest levels of government.

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<sup>29</sup> According to CBOS (an opinion poll institution), around 25% of Poles are open towards unknown people while 68% are sceptical. CBOS (2018), 'O nieufności i zaufaniu', Warsaw, March, [https://www.cbos.pl/SPISKOM.POL/2018/K\\_035\\_18.PDF](https://www.cbos.pl/SPISKOM.POL/2018/K_035_18.PDF).

There is an old saying in Poland that runs 'nothing about us without us'. To be at the negotiating table when rules concerning Poland are decided is of the utmost importance. It means that major powers should not decide anything on behalf of Poland without the latter's representatives being present. In the EU context the saying is even more pertinent. Poland today has an impact and influence, a say on many issues, which are not necessarily directly applicable to Poland itself. EU membership for any country is an opportunity to maximise its national interests. What are Poland's national interests? While some enjoy a broad political consensus, others are highly polemical, as if after 15 years of EU membership there is still no agreement on the subject. Is defending the coal industry and polluted air truly in the national interest of Poland, or is it a result of more or less effective lobbying?<sup>30</sup>

Today Poland co-decides on everything in the Union, from milk quotas, shark fishing, the external borders of the EU in the Mediterranean and state aid in Slovakia to mobilisation of the globalisation fund for a community in Spain affected by unemployment. Poland co-decides about Polish problems and the problems of other Europeans according to the same set of rules. It upholds the principle of non-discrimination as regards Polish nationals abroad and cannot allow the discrimination of other EU citizens in Poland. It supports sanctions against Russia in the context of the conflict in Ukraine and supports sanctions against the Assad regime in Syria. It negotiates consumer protection rules in the digital market context, the position of social media actors and other policy issues such as the use of plastic and the noise levels of aircraft. It co-decides about temporary issues and the future agenda, such as 5G, or electromobility, or copyright in the digital era. Poland, along with other member states, co-decides about everything that happens in the Union: a new style 'Nothing about us without us'.

Is Poland effective? The answer is 'yes'. The Warsaw government voted in favour in 97.5% of occasions in the EU Council in 2004-09 and 97% in 2009-15, a very high indicator. To be outvoted in the EU is incidental. It does not mean that the Polish government has always been proactive in all issues, but with time the level of proactiveness has increased. In the first period (2004-09) Poland was the third most outvoted country in the Council after the UK and Austria, yet the level of cohesiveness in the Council was very high. In the following six years Poland became the sixth most outvoted country, after the UK, Austria, Germany, the Netherlands and Denmark. This means that the Warsaw government could identify more frequently than other nations within a negotiated compromise.<sup>31</sup> This is undoubtedly related to the major injection of expertise and experience gained by Poland's civil service during the Council Presidency back in 2011.

There is an argument used in the context of the EU that in fact it is the Germans who rule the Union and nothing can be done without them. It is as true as the following one: in football, can a team win if its best player has been thrown out from the field in the 10<sup>th</sup> minute? Our team plays with 10 players and its best footballer is out of the pitch. Its

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<sup>30</sup> 'Air Quality in Europe - 2017 Report', EEA Report nr 13/2017, [https://www.eea.europa.eu/publications/air-quality-in-europe-2017/at\\_download/file](https://www.eea.europa.eu/publications/air-quality-in-europe-2017/at_download/file).

<sup>31</sup> Data from Simon Hix, Sarah Hagemann and Doru Frantescu (2016), 'Would Brexit matter? The UK's voting record in the Council and the European Parliament', [votewatch.eu](http://votewatch.eu), Brussels.

morale is down. Is there a chance to win? Yes. Is the chance high? Probably not. Or, using a different argument: it depends on how the opposite team plays. Germany is the EU's largest country, but it does not enjoy a monopoly. Germany has the power of veto when Poland and Spain do, when decisions are consensual. In other cases there is a vote, and the culture of work in the Council is such that a broad compromise is expected even if a consensus is formally unnecessary. This Council working culture explains such a high level of conformity in the Council of Ministers.

Which have been the spectacular successes of Poland on the European agenda? The most obvious are the highest political positions for Poles: Presidents of the European Parliament (Jerzy Buzek, 2009-11) and the European Council (Donald Tusk, 2014-19). No other EU member states from Central Europe have held these positions.

Personalities being one issue, agenda-setting is another. Even here, the Polish contribution has been significant. Just to name a few examples: (1) the Polish-Swedish initiative to create the Eastern Partnership, which is an important forum for dialogue between the EU and states in Eastern Europe and the Southern Caucasus; (2) the creation of the Energy Union and the development of the an EU energy policy, which had been lacking having the competence to develop a policy for over 20 years; (3) the location of one of the main EU agencies, FRONTEX (the European Border and Coast Guard Agency) in Warsaw already in 2005; and (4) the negotiation of the MFF 2014-20, which saw the Polish negotiators receiving a larger budgetary contribution for Poland than in the previous period, while the EU budget itself was smaller, and the Poland of 2013 was richer than the Poland of 2006.

This positive activity is important, but it is sometimes necessary to support initiatives that are in line with the national interest (and avoid problems). Before 2004 the EU was internally divided over the issue of US intervention in the Middle East. Since 2004 all EU member states have been interested in being united in their relationship with the US. Even the 2018 US embargo on steel and aluminium has failed to break the EU's unity. Another important development has been the EU's position on Russia. In the past many Western European countries had a nuanced approach towards the Kremlin's policies, and even today if some leaders are publicly critical about prolonging the sanctions against Russia, when it comes to a vote –thanks to the arguments of countries like Poland and others– the critical approach prevails.

The last set of issues proving a successful activity was the prevention of initiatives that were counter to the national interest. In Poland's case this was largely successful until 2017: it managed to take off the Union's agenda ideas such as the marginalisation of the non-Eurozone states by creating a Eurozone budget and a Eurozone parliament.<sup>32</sup>

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<sup>32</sup> Poland was successful in preventing the creation of a separate 'Eurozone Parliament' or 'Eurozone Budget', ideas which never went beyond conceptualisation, even if they still return to the public discourse from time to time. In the first years of the crisis Poland and Germany promoted the concept of 'pre-ins' states to differentiate themselves from the UK and Denmark ('non-Eurozone'), which meant that Poland should not be treated separately from the Eurozone, because countries like Poland would eventually become part of the Eurozone, hence the rules for the Eurozone should be recreated with the contribution and participation of Poland (and other 'pre-ins'). No new structures were to be created in the process. More on this issue in Agata Gostyńska & Nicolai von Ondarza (2012), 'Bridging a differentiated Union: the (cont.)

Unfortunately, Poland's success came to an end first with the energy projects (Nord Stream 2, despite Warsaw being supported by the European Commission on the issue) and then when the rule of law debacle began to take its toll. The Warsaw government, instead of being proactive in promoting its interests, took to the defensive. There are few governments in Europe that are open to arguments by Warsaw when the Polish government's officials, the country's President and the leader of the ruling party use anti-European rhetoric. Occasionally, Polish officials sometimes fall into ridicule, as when the government vetoed the adoption of the 2017 Annual Report on the Application of the Charter on Fundamental Rights in the EU. Despite having no legal significance, the document was vetoed by Poland. The Austrian Council Presidency published the document as the Presidency's Conclusions instead of the Council's Conclusions, which is only a procedural difference.<sup>33</sup> Vetoing in Council documents that do not carry legal or added-value political value is extremely rare.

There have been many other failures to protect national interests, four being of particular interest. First, the controversial directive on delegated posted workers had been under negotiation for a long time and the member states were deeply divided over the issue. In the final months an agreement was reached thanks to a diplomatic offensive by France, whose President toured many Central and Eastern European capitals to lobby for the French position, but omitted Warsaw. Objectively, Poland was very important, as the directive addressed the issue (posting of workers) that was highly popular among Polish companies. Emmanuel Macron did not go to Warsaw because his coalition was aiming to outvote Poland. He was successful, with only two countries voting against the agreement (Poland and Hungary) and four other states abstaining on 21 June 2018.

Secondly, in the upcoming MFF negotiations post 2020, Luxembourg's Prime Minister Xavier Bettel, called in his address to the European Parliament to link the expenditure on cohesion policy (Poland being the EU's largest beneficiary) with each country's compliance with the rule of law.<sup>34</sup> His was not a lone voice: in November 2018 the European Parliament called for a closer link between the Union's budget and the record of the member states as regards the rule of law<sup>35</sup> and in January adopted the same position on a legislative file negotiation.<sup>36</sup> Poland was clearly not the only country with problems in this regard, as it is becoming an ever more frequent issue. This has been another important case in which Warsaw has failed to prevent hostile ideas from becoming mainstream.

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Polish-German tandem in Euro-Plus governance', Policy Paper nr 48, Polish Institute of International Affairs, Warsaw, December.

<sup>33</sup> '2017 Annual Report on the Application of the EU Charter of Fundamental Rights', <http://data.consilium.europa.eu/doc/document/ST-13093-2018-INIT/en/pdf>.

<sup>34</sup> Xavier Bettel (2018), 'Discours de Monsieur le Premier ministre devant le Parlement européen Strasbourg', 30/V/2018, <https://gouvernement.lu/dam-assets/documents/actualites/2018/05-mai/discours-du-premier-ministre-xavier-bettel-a-strasbourg.pdf>.

<sup>35</sup> European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886(RSP)).

<sup>36</sup> 'European Parliament negotiating decision of 17 January 2019 on the Protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' (2018/0136(COD)).

Third, in March 2017 the President of the European Council was re-elected by 27 votes to one, the one vote against the candidacy of Donald Tusk, a Polish citizen, being Poland's. The Polish Foreign Minister at the time, Witold Waszczykowski, concluded the re-election was the result of a German diktat, although it could equally well be considered it was a diktat of Malta, Cyprus, Hungary or Finland, who all voted in Donald Tusk's favour. The entire episode was an objective manifestation of Warsaw's isolation in EU affairs.

A fourth case took place in August 2018. A civil society activist, Lyudmila Kozłowska, a Ukrainian citizen and the wife of the Polish activist Bartosz Kramek, was traveling to Brussels. On arrival at the airport she was informed that she had to be deported from the Schengen area because the Polish government had issued a highest-level alert about her being persona non grata in the EU. The Schengen Information System (SIS) is a very important and useful system of sharing security information between member states, which functions because member states trust one another and abide by each other's alerts. Or least they used to until the Kozłowska case arose. She was arrested at Brussels airport on 13 August and extradited to Ukraine the following day. In Poland the opposition was outraged that the system had been abused in retaliation for Kozłowska and Kramek's critical views of the government. The Polish authorities stepped in with a formal response from the counterintelligence unit of the Agency of Internal Security (ABW) that there were substantial doubts related to the financing of the foundation led by Kozłowska.

A month later, Ludmyla Kozłowska spoke at an event in Berlin's Bundestag about the rule of law in Poland, having entered the EU on a German visa. Two weeks later she spoke at an event at the European Parliament in Brussels on the invitation of MEPs, entering the EU on a Belgian visa. Since then she has visited France and the UK. In all situations the Polish Foreign Ministry reacted by accusing the corresponding authorities of undermining the Schengen area's security. The entire situation suggests that either the Polish government is engaged in the political persecution of its opponents (Kozłowska was unable to appeal the administrative decision) or at the very least that it is being completely unsuccessful in convincing its allies and partners about its security concerns.

## **(4) Conclusions**

### **Looking for the light at the end of the tunnel**

The jury is out. Following Brexit, which is scheduled for 29 March 2019, Poland will become the EU's 5<sup>th</sup> largest state by population (8.5%) and by the size of its economy (6%).<sup>37</sup> It will be the Union's largest non-Eurozone state. Yet it is in no position to fill the void left by the exit of the UK. The entire Visegrad Group combined (Poland, the Czech Republic, Hungary and Slovakia) accounts for only a third of the British economy. The UK is more populous, more economically affluent, a former colonial superpower and a permanent member of the UN Security Council with a nuclear arsenal. Poland is the largest country located in the eastern part of the EU. Still, if particular difficulties of certain

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<sup>37</sup> Data from Eurostat, 2017, GDP PPP.



smaller nations can be contained at a local level, such as with Greece, or marginalised, as with Hungary, this cannot be said of larger nations, like the UK, Italy or Poland. It was unclear for many years to the Poles themselves if Poland was the smallest among the big states in the Union or the largest of the smaller states. Today we know for certain: what happens in Poland has significance beyond its borders and cannot be contained or marginalised. The rule of law debate and its effects have the power to generate substantial changes in the European integration process.

Several different outcomes of the current situation are possible. The first is a stronger judicial control in Europe, with a much greater 'Europeanisation' of the judiciary in its member states. This would imply a stronger and more clearly articulated oversight by the ECJ and by national courts over each other. The new system can –and probably should– result in a much stronger independence of the judiciary in all EU states and a stronger defence of individual freedoms, especially in the digital context.

A second outcome would be a theoretical question of 'in or out' in a system with such a stronger judicial protection. However, countries are not asked to choose, as this is simply the natural evolution of the European judicial system following the ECJ's 2018 ruling. It is expected that member states just comply. Should a country opt to be out of it, it would be forced to exit the Union. This applies to Poland as much as to any other member state. As the President of the ECJ remarked: 'The country that is not ready to continue to comply with the rulings of the ECJ follows the Brexit-type process, the process of leaving'.<sup>38</sup>

A third outcome is the risk of a smaller Union a few years down the road, a 'fortress Europe' limited to a few Western European nations. To date, the impact of Brexit has largely been contained. But will it continue to be contained when states like Poland are confronted not only with a migration scare but also with the imposition of a rule by the ECJ (as it is presented as such) and smaller financial transfers post-2020? If the Union were to also lose Poland, this would have significant consequences. The uniqueness of the UK helped contain Brexit to a single country. There are many other states in Central Europe in Poland's position: Article 7 has been initiated on Hungary in 2018 and there is already debate about the rule of law situation in Romania, Malta, Slovakia and Bulgaria.

A final outcome could be a forced 'Polexit', desired by none, that would generate a profound disappointment with Central Europeans in Western Europe. Ever since 1989 there has been an understanding that we are all and always have been Europeans: North, South, East and West alike. Europeans may differ or vary but at the end of the day we all share the same values. There has been a mistrust in some Western European nations (most visibly in France and the Netherlands) towards the people 'from the East'. Today this sceptical perspective could be summarised in the view that 'the people in Eastern Europe are interested only in money and do not share our values'. If this proves to be the case, there will be no room for Central Europeans (the EU's 'East') in the family of (Western) European nations.

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<sup>38</sup> Koen Lenaerts, as quoted in Deutsche Welle, 'Prezes TSUE: Niestosowanie się do decyzji Trybunału to krok do wyjścia z UE', 25/X/2018, <https://p.dw.com/p/379mK>.

Will the Western European sceptics be proved right? In an ideal situation, the current Warsaw government should alter its current approach regarding the rule of law and subject its judicial reforms to the ECJ's scrutiny and ultimately comply with its upcoming final ruling.

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### Poland first.

Global trends have tended to somehow gravitate around this country in the middle of the Old Continent. The First World War violently gave birth to a number of new independent states. The largest was Poland, a complex nation with ethnic minorities comprising 32% of the population. The Second World War broke out in Poland while communism in Europe ended with the emergence of Solidarność and the Round Table negotiations in 1989. Poland was the most important country in the process of NATO's Eastern enlargement. It was a crucial partner in the EU's 2004 'Big Bang' enlargement. It was the first victim of the new wave of populisms that came to power in Europe: before the Brexit vote and Italy's 2018 elections, Poland had become a victim to the new Eurosceptic populism. Will it be the first to leave it behind too?

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Nevertheless, the signal that 'not all is lost in the East' was sent on 21 October 2018, not by the political class –government or opposition– but directly by the sovereign Polish nation. Poles massively went to the polls in the local and regional elections. In some areas the turnout was over 70%, with the country average at 55%. Normally the turnout in local and regional elections has been in the mid-40%, but this time 2 million more people showed up than in previous local elections. This is the first sign that apathy towards voting is on the way out, as it was traditionally related in Poland to the post-communist belief that 'votes don't matter'. A further note of encouragement was the result of the vote, with the ruling party receiving fewer votes than expected –the party, the opposition, the general public and political commentators all expected a much better outcome for Law and Justice–. The turnout in local elections was higher than the turnout in the parliamentary elections in 2015 (51%), while the Sejm and Senate elections usually enjoy much higher turnouts than the local vote. The turnout in the parliamentary elections in 2019 is expected to exceed 60%, which could lead to an outcome in which Law and Justice either loses power (the party has a solid, but not extendable, base of around 3 to 3.5 million voters) or is forced into a coalition with a partner. Either way, single party rule is expected to come to an end.

In addition, there is the country's economic development. Thus far the Polish economy has not suffered visibly any major negative impact of the judicial reform debacle. It will take at least until the end of the next decade for the 'catch up' process to be completed in terms of the relative socio-economic equality between Poland and its Western European partners. Until then it is the obligation of every Polish government to ensure stability for economic growth and a fair redistribution of its fruits.