Kangaroo Courts and EU Law

On the Court of Justice's Judgment in Commission v. Poland

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Poland's "rule of law crisis" started in December 2015 with the irregular appointment of three individuals to already occupied seats on Poland's Constitutional Court (CT). It will not end with the Court of Justice's judgment of 18 December 2025, finding this body to no longer meet the requirements of an independent and impartial tribunal established by law.

This judgment is itself the fifth infringement ruling finding against Poland for violating inter alia EU rule of law requirements following its previous rulings in respect of (manifestly unconstitutional) laws targeting Poland's Supreme Court; Poland's ordinary courts; the judiciary as a whole via a new disciplinary regime coupled with a "muzzle law".

While the Commission has been successful in each of these actions, due to its "too little, too late" default setting, Polish judges have been forced to submit an exponential number of preliminary ruling requests (more than 50 to date). This means that the Court of Justice is still issuing preliminary rulings in connection to Poland's rule of law crisis (no fewer than five in 2025 alone!). Individual complaints to the European Court of Human Rights (ECtHR) also keep piling up, with a total of 1,222 pending complaints as of 10 December 2025.

This should not surprise, as key systemic rule of law problems remain, with, for instance, each of Poland's courts of last resort still irregularly composed, and the situation of the 3,000 "neo-judges" irregularly nominated by the unconstitutionally recomposed National Council of the Judiciary still unresolved. The Court of Justice's judgment in Case C-448/23 will not, therefore, be the concluding chapter of Poland's rule of law crisis. It does, however, decisively address the status of the body currently masquerading as Poland's CT, although one may question whether the Court did not commit a category error by taking the outputs of such a body seriously. Be that as it may, implementation of the Court's judgment is unlikely to prove straightforward.

The Court of Justice's judgment in a nutshell

The 298-paragraph-long judgment follows the plea structure of the Commission's (belated) action lodged on 17 July 2023 in respect of two "rulings" of Poland's (captured) CT of 14 July and 7 October 2021. Understood as two key steps towards a Polexit from European rule of law requirements, these two "rulings" found several provisions of the EU Treaties and connected judgments of the Court of Justice (allegedly) incompatible with Poland's Constitution.

To put it concisely, the Court upheld the Commission's action in its entirety. The Court first found that Poland's CT violated the principle of effective judicial protection before concluding that it also infringed several fundamental principles of EU law as well as the principle of the binding effect of the Court's case-law. Thirdly and lastly, the CT itself was found no longer to constitute a lawful court due to the grave irregularities that characterised the appointment procedures of three of its members and the selection of its President in December 2015 and 2016, respectively.

In respect of the Commission's first two complaints, the Court's judgment reads like a detailed introductory EU law lecture recalling – at times restating more forcefully – the obligations governing EU membership and the essential characteristics of the EU's legal order.

Unsurprisingly, the Court was able to easily demonstrate how the (lawless) CT had "manifestly" violated EU law in many respects by essentially denying any legal effect to the Court's rulings in the Polish

legal order. To paraphrase the Court, the CT disputed "the very principle" of a Member State's obligation to comply with its EU law obligations, in particular when it comes to the right to effective judicial protection before an independent tribunal.

As this body did so in the name of Poland's constitutional identity, the Court comprehensively outlines why it "cannot validly be argued" that "respect for values and principles such as the rule of law" are liable to affect Polish constitutional identity.

It is only from paragraph 237 that the Court finally tackles the status of Poland's CT following its effective capture in December 2016. With reference to the ECtHR's findings in its judgment of 7 May 2021 in *Xero Flor v. Poland*and its own case law regarding the guarantees which determine what constitutes a (lawful) court, the Court found the *whole* CT to be in breach of the requirements of an independent and impartial tribunal established by law.

Two judgments into one?

This – otherwise compelling – judgment suffers from one main shortcoming in our view, that is, the category error made by the Court when it first addressed the CT's outputs as if they were proper judgments before making clear that the CT as a whole is no court. Regarding the latter, the Court goes (rightly) beyond the case law of the Strasbourg Court, which has limited itself – on the back of some unconvincing reasoning (see here and here) – to the review of the irregularities marring the appointment of the December 2015 individuals.

The status of the CT should have been logically the first point to examine. If no longer a court, this body cannot issue proper judgments. As such, the long developments offered in relation to the duties of national courts may be viewed as off topic, as the CT had long ceased to be a court by the time it issued its two "decisions".

It is as if two-thirds of the Court's judgment is primarily but implicitly aimed at (proper) constitutional/supreme courts and first and foremost, the German FCC in the aftermath of its (in)famous PSSP ruling. By embracing the (misleading) framing adopted by the (fake) CT, the Court unfortunately gives credence that this was a case about the primacy of EU law when it has always been a case of the supremacy of law *tout court*.

This is why it would have been preferable to first address the issue of whether the CT remains a court and better contextualise the CT's anti-rule of law "outputs" when doing so. This would have enabled a reader not familiar with Poland's autocratisation episode to understand that the captured CT's main purpose has been to provide a veneer of legality to arbitrariness in repeated violations of the rule of law principles enshrined in EU law *but also* Polish law and ECHR law. Had the Court briefly recalled the ECHR-related Polexit decisions of 2021 and 2022, it would have been more easily obvious that the CT has never attempted to defend Poland's constitutional identity or the supremacy of the country's Constitution but engaged in the gross violation of both.

That said, the Strasbourg Court has similarly struggled to address the CT's lawlessness. On the one hand, it has firmly held that the mere presence of a single irregularly appointed individual to vitiate "the legal force" to be attached to any "judgment" issued by such a body. On the other hand, it has recently criticised the delay in the publication of the CT's abortion ruling – issued by an irregularly composed bench – for creating a lack of foreseeability. This makes little sense as this was a delay created by a bench of the CT not capable of issuing judgments having legal force according to the ECtHR's own findings.

Beyond the category error and framing issues, one may also regret the Court's lack of clarification regarding the outputs of a body "infected" with illegality. While a previous judgment of 4 September 2025 would suggest that all courts must consider the "judgments" of such a body null and void in EU law-governed disputes, not addressing this aspect head-on is bound to make the task of implementing this judgment even more challenging.

Similarly, the Court could have been clearer regarding the findings potentially applicable to the situation of the current "President" (Święczkowski) of the body masquerading as the CT. By focusing on the

specific features of the defective appointment of the previous "President" (Przyłębska) – and assessing the situation as it existed at the time the Commission lodged its action – it is difficult to clearly ascertain whether the Court's findings are transferable to the situation of the current "President". It seems that, in an attempt to strengthen its argument, the Court relied on the minutiae of the (irregular) election process when it could have simply stated that the mere presence of the unlawfully appointed "judges" in any such process constitutes a breach of Article 19(1) TEU. The Court's test – not presented as such however – regarding the "use of the powers and functions associated with the position" of CT President "as an instrument for influencing the judicial activity of that court or for the political control of that activity" could nevertheless be potentially used to assess the (lawless) actions of the current "President" to lead to a similar conclusion.

A rocky road to implementation

Implementing the CJEU judgment will be a tall order for the current Polish government. Shortly after taking power in December 2023, the centre-left ruling coalition set out to restore the rule of law, but quickly ran into a massive hurdle – the hostile President of Poland, Andrzej Duda, an ally of the previous ruling party, who sought to block almost all reforms to the judiciary having previously engaged in repeated violations of Polish and European rule of law requirements and connected rulings. Two bills regarding the Constitutional Tribunal were stopped dead in their tracks by Duda, and a proposed constitutional amendment aimed at reconstituting the CT as a proper court went nowhere as the ruling coalition lacked the elevated support in the parliament necessary to even pass such an amendment.

Unfortunately, the 2025 presidential election arguably led to an even more problematic outcome: the new President, Karol Nawrocki, also a PiS ally, adopted a fully confrontational stance against the Tusk government, making it clear that no rule-of-law-related legislation would see his signature. The Polish rule-of-law restoration process has thus stalled.

Some solutions might nonetheless be available to the Polish government over time. The ruling coalition has, insofar, refused to fill the growing list of vacant seats at the CT, but that might change in the coming months as we approach the point in time when the majority of seats would be empty – as of now, this is most likely to happen in February 2027. Such a majority could pave the way for action within the CT that could hasten the restoration of its independence, such as disciplinary action against discredited members and the CT President. However, here too the President of Poland might pose an obstacle, for while the judges of the CT are elected by the lower house of the Polish parliament, the President also plays a role in the process, administering the oath of office to the elected judges.

While the drafters of the Polish Constitution intended this role of the President to be ceremonial and not as a veto power, it has already been previously abused by President Duda, who refused to swear in judges appointed "in advance" by the outgoing parliamentary majority in 2014. Worries persist that President Nawrocki might follow suit in a context where Polish law provides no clear answers on how to proceed if such a situation arises. Some have suggested administering the oath before a notary public or sending a recording of the oath to the President by mail, but given the polarised political landscape, Poland could well end up with a "dualist" constitutional court, with some judges respected by the government and the parliamentary majority, while others by the President and the parliamentary opposition.

Any prolonged inability to implement the judgment – while Poland remains unable to implement the ECtHR's pilot judgment in Wałęsa – is bound to place the European Commission in an uncomfortable position. This will be however, the Commission's own fault as it did not have to (prematurely) close Article 7(1) TEU procedure and do away with its key leverage by unlocking all previously frozen EU funding on the basis of mere promises. As Polish authorities are unlikely to face genuine pressure amid persistent non-implementation, authoritarian actors and their proxies will have a field day arguing that EU institutions

enforce compliance with EU rule-of-law requirements only when it suits them.

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