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Advocate General's Opinion in Case C-448/23 | Commission v Poland (*Ultra vires* review of the Court's case-law – Primacy of EU law)

Rule of law: Advocate General Spielmann considers that the action brought by the European Commission concerning the Polish Constitutional Court is well founded

The position adopted by that court in its judgments of 14 July and 7 October 2021 constitutes an unprecedented revolt and seriously undermines the primacy, autonomy and effectiveness of EU law

On 14 July and 7 October 2021, the Polish Constitutional Court delivered two judgments disputing the compatibility of EU law and judgments of the Court of Justice with the Constitution of that Member State.

In its judgment of 14 July 2021, that court declared that the interim measures imposed by the Court ¹ relating to the organisation of justice infringed the principle of conferral of powers and Polish constitutional identity. Faced with this alleged conflict of rules, it declared the primacy of the Constitution as the supreme source of law in Poland. It concluded that, in so far as the Court acted *ultra vires* in imposing obligations on Poland, by adopting the abovementioned interim measures, the second subparagraph of Article 4(3) TEU, read in conjunction with Article 279 TFEU was contrary to the Constitution of that Member State.

In the judgment of 7 October 2021, that court declared unconstitutional certain provisions of EU law, ² as interpreted by the case-law of the Court, which inter alia allow national courts to review the lawfulness of judicial appointments. In practice, that would amount to ordering the Polish courts not to apply EU law and not to observe the obligations arising from its primacy.

On 15 February 2023, ³ the Commission brought an action for failure to fulfil obligations before the Court, raising three objections.

First, according to the Commission, the abovementioned two judgments call into question effective legal protection in the fields covered by EU law. Second, they undermine the principles of primacy, autonomy, effectiveness and uniform application of EU law as well as the binding nature of the Court's judgments. Third, the Commission complains of irregularities in the appointment of three judges ⁴ and of the President of the Polish Constitutional Court, ⁵ with the result that that court no longer satisfies the requirements of an independent and impartial tribunal, previously established by law within the meaning of EU law.

In today's Opinion, **Advocate General Dean Spielmann proposes that the Court should declare that Poland has failed to fulfil its obligations under EU law.**

In his view, **the judgments at issue fundamentally depart from the case-law of the Court concerning the guarantee of effective judicial protection.** ⁶ In particular, they refuse to disregard national provisions, including constitutional provisions, which are contrary to EU law. They also reject the judicial review of judicial appointments, although this is essential in order to guarantee the independence and impartiality of courts, as required by EU law.

There is no doubt that by these judgments, the Polish Constitutional Court launched **a frontal attack on the fundamental principles of the EU legal order and the authority of the judgments of the Court**. Their infringement cannot in any case be justified by provisions of national law, including those of a constitutional nature. Similarly, invoking the constitutional identity of the Member State cannot call into question the fundamental principles of EU law.

First, it does not follow from a systematic interpretation and application of the clause on national identities, as provided for in Article 4(2) TEU, that the Court perceives it as a factor capable of limiting the inviolable principle of primacy. Secondly, Article 4(2) TEU cannot be regarded as being at odds with Article 2 TEU and the fundamental values enshrined therein. In that regard, the Advocate General emphasises that **in any event, it is for the Court to settle definitively any conflict between EU law and the constitutional identity of a Member State**.

As regards the composition of the Polish Constitutional Court, the Advocate General recalls that that question falls within the fundamental requirement of an independent and impartial tribunal previously established by law. The appointment of members of a court must be carried out in such a way as to dispel any reasonable doubt concerning the imperviousness of that body to external factors and its neutrality with respect to the interests before it. That requirement also applies to the court in question, since it may be called upon to rule on questions relating to the application and interpretation of EU law.

Relying on the facts put forward by the Commission,⁷ and accepted by the Polish Government,⁸ **the Advocate General considers that the appointment of three judges of the Polish Constitutional Court in December 2015 and of its President in 2016 was characterised by several irregularities which may be classified as manifest and serious**. Accordingly, the Polish Constitutional Court cannot be regarded as an independent and impartial tribunal established by law within the meaning of EU law.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under EU law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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¹ The order of the Court of 8 April 2020, *Commission v Poland (Disciplinary regime for judges)*, [C-791/19 R](#) (See press release [No 47/20](#)) required Poland immediately to suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court. That measure

sought to enable EU law to be fully applied and to preserve the independence of the Polish courts, given that the status of the Disciplinary Chamber, as the court having jurisdiction to rule in disciplinary cases concerning the judges of the Supreme Court and of the ordinary courts, was called into question.

² Inter alia, the second subparagraph of Article 19(1) TEU.

³ See [the press release](#) of the Commission.

⁴ In December 2015, the Eighth Legislature of the Sejm (Lower Chamber of the Polish Parliament) elected three persons to replace judges whose terms of office had expired, even though the Seventh Legislature had already elected three other judges to the same positions in October 2015. In its judgments of 3 and 9 December 2015, the Polish Constitutional Court ruled that the election of the three judges by the Eighth Legislature was contrary to the Constitution. However, the three persons elected in December 2015 were sworn in before the President of Poland and authorised to sit, while the judges elected in October 2015 were unable to take up their office.

⁵ The general assembly convened to appoint the candidates to that post did not include all the judges of the Constitutional Court (one being absent). Of the fourteen judges present, eight refused to take part in the vote, demanding a postponement to allow a fifteenth judge to attend. The candidate for the presidency, who was subsequently appointed by the President of Poland, was elected with five votes, three of which were from judges whose appointment had previously been contested.

⁶ Judgments of the Court of 2 March 2021, *A.B. and Others. (Appointment of judges to the Supreme Court – Actions)*, [C-824/18](#) (see press release [No 31/21](#)) and of 6 October 2021, *W. Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, [C-487/19](#) (see press release [No 173/21](#)).

⁷ See footnotes on page 4 and 5.

⁸ During the proceedings, Poland first disputed the Commission's position. However, in January 2024, that Member State fully accepted the failures to fulfil obligations for which it was criticised.