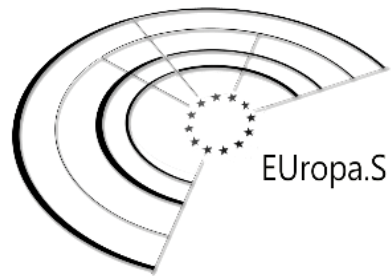


EUropa.S. 2022

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Organized by: Institute of Research &
Training on European Affairs



EUropa.S. 2022
European Court of Justice

Study Guide
Topic: *“Poland is referred to
the ECJ for not complying with
the EU Laws”*

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**European Court of Justice, “Poland is referred to the ECJ for not
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Greeting of the board

Dear participants,

It is our honour to welcome you in this year’s Europa.S and in particular in the European Court of Justice. As an EU institution, first established in 1952, the ECJ has a concrete mission; to ensure that “the law is observed” the same way, in every member state when interpreting and applying in Treaties.

The topic of our agenda “Poland is referred to the ECJ for not complying with EU laws” is a very urgent topic for the European Court of Justice, because it is a clear breach of European Union law. Moreover, the reasons that they talk about POLEXIT would be examined along with the effect that will have on the possible exit of Poland from the European Union.

In the Study Guide you will find useful information about the functioning of the Court and the case in hand. The second part encircles a historical background of the case and legal framework, which we hope to be a stimulus for your own further research. Also, please keep in mind that the information included in the present study guide covers the period of time up until the 12th of December 2022, when it was written. As a result, you shall also beware for potential updates regarding our topic area until the course of the conference.

We would like to thank you in advance for expressing your interest for the European Court of Justice; we are convinced that your passion about the cases of the European Court of Justice is proved by your participation. By participating in Europa.S 2022, you will gain a deeper knowledge on how a European institute actually works. Lastly, we ascertain you that we will have a superb four-day long simulation experience.

We pledge our full devotion on succeeding our goal, which is to facilitate your experience in this simulation. If you want further assistance, all members of the Board are more than eager to answer your questions.

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Best regards,

The Board of the European Court of Justice

Introduction to the European Court of Justice

Composition

With the aim of ending the frequent and bloody conflicts that culminated in the Second World War, European politicians began the process of building what we know today as the European Union. Once the European Union was established in 1951, as the European Coal and Steel Community, the Member States formed a jurisdictional body in 1952 by the Treaty of Paris (1951), the European Court of Justice (ECJ). This body would resolve legal disputes and would function as a basic pillar of unity in the European Union.

The European Court of Justice is composed of 27 Judges and 11 Advocates General. They are appointed by common accord of the governments of the Member States for six years and “[they] are chosen from among individuals whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognized competence”¹. The Judges elect from amongst themselves a President and a Vice-President for a renewable term of three years.

The President not only directs the work of the Court, but also presides at hearings and deliberations of the full Court or the Grand Chamber. On the other hand, the Vice-President assists the President in his duties and replaces him when necessary. Furthermore, the Advocates General help the Court, meaning that they are responsible for presenting, “with complete impartiality and independence”², an “opinion” in the cases which are assigned to them. The Registrar is the institution’s secretary general

¹ CURIA-Presentation-Court of Justice of the European Union, CURIA Europa [accessed 30 November 2021], from https://curia.europa.eu/jcms/jcms/Jo2_7024/en/

² CURIA-Presentation-Court of Justice of the European Union, CURIA Europa [accessed 30 November 2021], from https://curia.europa.eu/jcms/jcms/Jo2_7024/en/

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and manages its departments under the authority of the President of the Court of Justice. Finally, a Judge Rapporteur is assigned to each case, in order to organise the arguments of the parties and to create a draft judgement based on the deliberations taking place prior to the final judgement.

The Court may sit as a full court, in a Grand Chamber of 15 Judges, or in Chambers of three or five Judges. The Statute of the Court prescribes particular cases and the Court considers cases of exceptional importance, in order for the first case of full court to be applied. Respectively, the Court sits in a Grand Chamber, after the request of a Member State or an institution, which is a party to the proceedings, and in extremely complex or important cases.

Jurisdiction³

In order to fulfill its tasks, the European Court of Justice has been given clear jurisdiction, which exercises on references for preliminary rulings and in various categories of proceedings:

References for preliminary rulings

To ensure the effective application of European Union legislation and to prevent divergent interpretations, the national courts of Member States might refer to the Court in order to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of EU law.

Actions for failure to fulfil obligations

³CURIA-Presentation-Court of Justice of the European Union, CURIA Europa [accessed 30 November 2021], from https://curia.europa.eu/jcms/jcms/Jo2_7024/en/

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These actions enable the Court of Justice to examine whether a Member State has fulfilled its obligations under European Union law.

Actions for annulment

By an action for annulment, the applicant seeks the annulment of a measure, in particular a regulation, directive or decision, adopted by an institution, body, office or agency of the European Union.

Actions for failure to act

These actions enable the lawfulness of the failure of the institutions, bodies, offices, or agencies of the European Union to act to be reviewed.

Appeals

Appeals on points of law only might be brought before the European Court of Justice against judgments and orders of the General Court.

Introduction to the topic

The Court of Justice of the European Union has repeatedly emphasised that all Member States must comply with European law and that no provision of national law (law or constitution) can be an excuse for non-compliance. Despite this explicit provision of the European Union Poland's constitutional court ruled that Polish laws have supremacy over those of the EU in areas where they clash; a decision likely to embolden the country's right-wing government and worsen its already troubled relationship with the EU. The Constitutional Tribunal held that some provisions of the treaties binding EU members and some rulings by the 27-nation bloc's highest court conflict with Poland's Constitution. Two of the 14 judges who considered the case dissented from the majority opinion. There are concerns that the country now could effectively be forced into a "Polexit", as it is no longer playing by the bloc's rules. Large

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demonstrations in support of Polish EU membership took place across Poland and abroad, a sign of Poles' enthusiasm for the European project.

Key terms and definitions

The Treaty of Association 2003: It was the agreement between the members states of the European Union and ten countries (Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovakia), concerning these countries accession into the EU. At the same time, it changed several points which were originally laid down in the Treaty of Nice. The treaty was signed on 16 April 2003 in Athens, Greece and it entered into force on 1 May 2004, resulting in enlargement of the European Union with ten Member States.

Primacy of EU law: EU law has primacy over national law, including constitutional provisions; All rulings by the European Court of Justice are binding on all Member States' authorities, including national courts.

Polexit: A Polish withdrawal from the European Union, or Polexit (a portmanteau of "Poland" and "exit"), is the name given to a hypothetical Polish withdrawal from the European Union. The term was coined after Brexit, the process of Britain's withdrawal from the EU which took place in February 2020.

Rule of law: The rule of law is defined in the Oxford English Dictionary as "[t]he authority and influence of law in society, especially when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes"⁴. The term rule of law is closely related to

⁴ Oxford English Dictionary online [accessed 02 December 2021, spelling Americanized]

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constitutionalism as well as Rechtsstaat and refers to a political situation, not to any specific legal rule⁵.

Judicial independence: The ability of courts and judges to perform their duties free of influence or control by other actors, whether governmental or private. The term is also used in a normative sense to refer to the kind of independence that courts and judges ought to possess.

Legal Framework

Article 2 of the Treaty on European Union

Article 2 states that the EU is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities"⁶. The member states share a "society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"⁷.

Article 7 of the Treaty on European Union

This article is a procedure in the treaties on European Union to suspend certain rights from a member state, as there is no mechanism to expel a state from the union.

⁵ Reynolds, Noel B. (1986), "Constitutionalism and the Rule of Law", all faculty publications (BYU ScholarsArchive [accessed 02 December 2021], from <https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=2470&context=facpub>

⁶ Consolidated Version of the Treaty of the European Union, Official Journal of the European Union [26.10.2012], page 5, [accessed 02 December 2021], from https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

⁷ Consolidated Version of the Treaty of the European Union, Official Journal of the European Union [26.10.2012], page 5, [accessed 02 December 2021], from https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

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The procedure is covered by TEU article 7. It would be enacted where fellow members identify another member as persistently breaching the EU's founding values, as outlined in article 2 of the Treaty on European Union⁸.

The European Council can vote to suspend any rights of membership, such as voting and representation as outlined above. Identifying the breach requires unanimity (excluding the state concerned), but sanctions require only a qualified majority. The Council acting by majority may alter or lift such sanctions. The state in question would still be bound by the obligations of the treaties.

Article 47 of the Treaty on European Union

In this article is stated that “the European Union has legal personality”⁹.

Article 164 of the Treaty of Rome

According to the article, “The Court of Justice shall ensure that in the interpretation (and application of this Treaty) the law is observed”¹⁰.

Historical Background

Since the right-wing Law and Justice party came to power in Poland in 2015, it has been accused of taking steps to control the judiciary, including placing loyalists on a judicial appointments body, forcing the retirement of some Supreme Court justices, and establishing a legal chamber with the authority to discipline judges and prosecutors. In

⁸ Consolidated Version of the Treaty of the European Union, Official Journal of the European Union [26.10.2012], page 7, [accessed 02 December 2021], from https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

⁹ Consolidated Version of the Treaty of the European Union, Official Journal of the European Union [26.10.2012], page 31, [accessed 02 December 2021], from https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

¹⁰ The Treaty of Rome [25 March 1957], page 54, [accessed 02 December 2021], from <https://netaffair.org/documents/1957-rome-treaty.pdf>

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March, the European Court of Justice ruled that Poland’s new regulations for appointing judges to the Supreme Court could violate EU law, which takes precedence.

The European Court of Justice ruling obliged the government to ditch the new regulations and observe the independence of justice. It prompted Polish Prime Minister, Mateusz Morawiecki, to ask the Constitutional Tribunal to initiate a review of law supremacy, which started in July. The tribunal majority said that Poland's EU membership since 2004 did not give the European Court supreme legal authority and did not mean that Poland had shifted its law sovereignty to the EU. It said no state authority in Poland would consent to an outside limitation of its powers.

Further information: 2015 Polish Constitutional Court crisis. The government of Poland has been making controversial changes to the Polish judiciary, in particular as related to the Polish Constitutional Tribunal, the National Council of the Judiciary, the Supreme Court as well as its Disciplinary Chamber. These have attracted scrutiny from the European Court of Justice, which has been issuing rulings attempting to stop these changes that it sees as undermining the rule of law and judicial independence. The Tribunal's legitimacy is contested after multiple appointments of judges loyal to the ruling nationalist Law and Justice (PiS) party were made, some of which in controversial circumstances. In March 2021, Prime Minister Mateusz Morawiecki asked the Constitutional Tribunal whether the Polish constitution is above EU regulations and EU court rulings and whether the European Court of Justice acted beyond the powers granted by the EU treaties when controlling the judicial reforms in Poland, which the government insisted was the case. On 7 October 2021, Poland's Constitutional Tribunal ruled that some provisions of EU treaties and EU court rulings clashed with the Constitution of Poland, asserting that EU institutions [were acting] beyond the scope of their competences; effectively rejecting the notion of primacy of EU law. BBC News and Foreign Policy reported that this risked Polesit, while the Financial Times called it "legal secession from the EU"¹¹; however, The Economist

¹¹Finance Times [10 October 2021], “A legal secession from the EU will cost Poland dearly” [online], from <https://www.ft.com/content/629fbc8c-a950-478d-8403-a3f8b8b7e24a>

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opined that Polesis is unlikely due to this court ruling, instead talking of a "dirty remain"¹².

Topic Analysis

The importance and the consequences of the ruling

A ruling by Poland’s Constitutional Tribunal that found some provisions of the EU treaty to be incompatible with Poland’s constitution will become law, after it was published in the country’s Journal of Laws.

The new law could further strain relations between Poland and the EU, which are already under pressure. European Commission President, Ursula von der Leyen, had already expressed her grave concern over the ruling and asked her services to carry out an in-depth analysis of the verdict. The ruling, also, fuelled fears that it could lead to a legal Polesis, as Poland would no longer accept the same rules as the other 26 countries of the bloc. Moreover, publishing the ruling removes a possible compromise that could have been struck between Warsaw and Brussels.

The situation from Brussels’ perspective

In Brussels, it is believed that the Polish verdict brought the country closer to a “Polesis”. Government spokesman Piotr Mueller said the verdict had no effect on areas of EU treaties such as competition, trade, consumer protection, and the exchange of services and goods. He claimed that top countries, Germany, France, Spain, and other EU nations also have upheld the primacy of national laws.

According to Laurent Pech, professor of European Law at Middlesex University, who spoke to Euronews, “Polesis has already begun. It began again in July once [the Polish

¹² The Economist [14 October 2021], “Poland is a problem for the EU precisely because it will not leave” [online], from <https://www.economist.com/europe/2021/10/14/poland-is-a-problem-for-the-eu-precisely-because-it-will-not-leave>

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government] denied the validity of all ECJ orders”¹³. Furthermore, Jakub Jaraczewski, research coordinator at Democracy Reporting, insisted that “this is simply not acceptable or appropriate with being a member of the European Union and I would not confer with this Polesit as Poland quitting the European Union”. The researcher added that it may occur “a type of ‘authorised Polesit’, a removal of Poland from elements of the European Union’s authorised sphere”. However, such a decision would not be popular, since an estimated 80% of Polish citizens support the country’s EU membership.

Jakub Jaraczewski stated that “some individuals within the Polish authorities might imagine that [by publishing the judgement] they are going to make the European Commission step down and unlock the restoration fund”. He added that “they have massively underestimated the potential authorised and political fallout of this resolution”¹⁴.

Furthermore, one crucial development is how Polish judges will react to the ruling not simply in Warsaw, but additionally in small cities. It is going to be questioned whether or not they have the integrity and bravery to struggle with the Polish Constitutional Tribunal ruling and respect the premises of EU legislation, regardless of the hazard of not only getting disciplinary proceedings towards them, but also being intimidated and harassed by the federal government.

How could Brussels respond?

According to experts, who were interviewed by TV5, said the EU had a wide range of legal, financial, and political tools available to respond to the Polish verdict.

¹³Euronews [08 October 2021], “Polesit: Will Poland's 'nuclear strike' on EU's legal order leads to the country quitting the bloc?” [online], from <https://www.euronews.com/2021/10/08/polesit-will-poland-s-nuclear-strike-on-eu-s-legal-order-lead-to-the-country-quitting-the->

¹⁴Euronews [08 October 2021], “Polesit: Will Poland's 'nuclear strike' on EU's legal order leads to the country quitting the bloc?” [online], from <https://www.euronews.com/2021/10/08/polesit-will-poland-s-nuclear-strike-on-eu-s-legal-order-lead-to-the-country-quitting-the->

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For example, the European Commission has yet to unlock the payment of billions of euros to the country from the EU COVID-19 recovery fund. It may as well refuse to sign up on the 57€ billion slated for Poland. European Commission Executive Vice President, Valdis Dombrovskis, stated “We are seeking additional clarifications from Poland concerning compliance, making sure that all conditions of the regulations are being met. We need to receive those assurances before we are able to conclude positively on this”¹⁵. Some politicians claim that the delay is caused by Brussels’ worries about the condition of the rule of law in Poland.

On the legal side, the European Commission has already completed a crucial factor by going to the European Court of Justice. In fact, the ECJ had several cases regarding Poland pending before it, and it could take them as an opportunity to suspend, for instance, common judicial cooperation mechanisms with Warsaw such as the European arrest warrant. Last but not least, different EU Member States may take motion; not simply politically, but additionally convey circumstances towards Poland to the ECJ over harm to the rule of legislation and the frequent EU authorised order”. In other words, if the Polish Constitutional Court had its method, then many different constitutional courts would observe, and it might undermine the ideas of EU legislation. Therefore, efficient communication, both from the EU executives and influential Member States, would be essential to uphold the EU legal order.

The right to a fair trial¹⁶

According to the article 47 of the EU Charter of Fundamental Rights;

1. National courts may be required to lay down new remedies other than those laid down by national law
2. National authorities are obliged to justify their actions so that a judicial review is possible

¹⁵Varga, J. [15 October 2021], “Time for some perspective: The Polish court was not controversial” [online], from <https://www.euractiv.com/section/justice-home-affairs/opinion/time-for-some-perspective-the-polish-court-was-not-controversial/>

¹⁶Pliakos, A. (2012). “The Law of the European Union” Athens: Nomiki Bibliothiki Group, p. 82, 137

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3. The breach of the obligations, which arise from EU law, by a Member State gives rise to a claim for compensation for the victims of the damage suffered, regardless of whether the institution belongs to the executive, legislature, or judiciary power.

4. National courts must take into account of the EU law, if this applies to national law

The European Commission has adopted a reasoned proposal pursuant to Article 7.1, as a proposal for a Council Decision establishing a clear risk of a serious breach of the rule of law by Poland. The European Commission’s concerns are about the following issues;

1. the lack of independence and legal review of constitutionality
2. the voting procedure on new laws on the Polish Judiciary by the Polish Parliament, which will raise serious concerns about the independence of the judiciary and significantly increase the systemic threat to the rule of law in Poland

It is about a fully substantiated proposal, which analyses a wide range of issues in the light of the breach of principles and make up the concept of the rule of law.

What other Member States think of the Polish Constitutional Crisis?

Judit Varga, the Justice Minister of Hungary, claimed that the ruling of the Polish Constitutional Crisis is “another nail in the coffin of democracy in Poland. They might think but the only thing they forget is the fact the EU treaties do not actually give European Institutions unlimited power. What is more, they clearly set out the boundaries between national constitutions and EU law”¹⁷.

¹⁷Varga, J. [15 October 2021], “Time for some perspective: The Polish court was not controversial” [online], from <https://www.euractiv.com/section/justice-home-affairs/opinion/time-for-some-perspective-the-polish-court-was-not-controversial/>

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The Dutch Prime Minister claims that there is no way that the pandemic recovery funding can go to Poland as long as this issue remains unresolved. Until the leader of Roth’s SPD manages in the weeks or months ahead to cobble together a new government, Angela Merkel is still in charge of the outgoing coalition. The Christian-Democrat chancellor, who grew up experiencing the brutality of a divided Europe, insists on dialogue over confrontation with her central European neighbours, by emphasising the importance of a constructive discussion between the EU Member States¹⁸.

On the other hand, Macron didn’t make any statement concerning the issue. However, he met the Polish Prime Minister, stressed his concerns, and declared that he is open for dialogue too.

The Prime Minister of the Netherlands is very determined to nip this situation in the bud. He feels a particular responsibility to protect the funding that he was sceptical about last year. It is a big amount of money that is being guaranteed by all EU Member States credit. Therefore, he does not like the possibility that this mechanism, by which the other Member States would vote on whether to disperse the funding, could be ignored, especially when something as major as this is currently happening.

Conclusion

Undoubtedly, the decision of Poland to have laws superior to the European law will have a big effect on the other Member States. The European Union itself has made significant efforts to persuade Poland to obey its laws. It is neither the first nor the last time that Poland and European Union are in dispute. Is this the first step for Poland to

¹⁸France 24 [21 October 2021], “Dutch PM Rutte says EU leaders need to be tough on Poland” [online], from <https://www.france24.com/en/video/20211021-dutch-pm-rutte-says-eu-leaders-need-to-be-tough-on-poland>

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exit the European Union? Or Poland is going to make significant changes to the European law, as we know it?

Questions Raised

1. What is your opinion concerning the “supremacy” of the Polish constitution over EU law?
2. Does the existing EU’s legal framework need reform? If so, why and on what grounds?
3. Do you think that Poland’s decision will affect other sectors that guarantee smooth cooperation with the other Member States (e.g., economy, trade, exchange of goods and services)?
4. Do you consider that the Polish Constitutional Crisis is the first step to “Polexit”?
5. Do you believe that “Brexit” can be compared to a possible “Polexit”? If so, in what aspects do they display similarities (if any) and in what aspects do they display differences?
6. Do you believe that the penalties, which are already imposed in Poland, are ethically right?
7. Do you think that additional penalties should be imposed? If so, what kind of penalties?
8. If Poland’s judicial independence is recognized, how could the ECJ oversee it?
9. Do you consider necessary the creation of a body that expels countries from the EU? If so, what should be the criteria for its creation?
10. Do you think that the creation of an additional institution would help ECJ with ad-hoc problems, such as the Polish one?

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