



Legal opinion on the legal consequences of the Constitutional Tribunal ruling in case K 3/21 on the incompatibility of the provisions of the Treaty on European Union with the Constitution of the Republic of Poland in light of European Union law

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Introduction

1. This legal opinion (referred to as: the Opinion) was commissioned by the Stefan Batory Foundation.
2. The Opinion sets out the legal consequences of the ruling by the Constitutional Tribunal (referred to as: the Tribunal or CT) in case K 3/21 on the incompatibility of the provisions of the Treaty on European Union (the Treaty or TEU) with the Constitution of the Republic of Poland (the Constitution) in light of European Union law.
3. I begin by presenting the conclusions.

In light of European Union law, the Constitutional Tribunal's ruling on case K 3/21 on 7 October 2021, in response to a request submitted by Prime Minister Mateusz Morawiecki on 29 March 2021, has no legal effect.

Firstly, three people appointed to judges' posts that had already been filled properly earlier were involved in the CT ruling: Mariusz Muszyński, Justyn Piskorski and Jarosław Wyrembak. This means that the CT ruling was issued with the involvement of people who were not entitled to adjudicate. As a result, the proceedings in the case are invalid and a so-called non-existent ruling has been issued.

Secondly, the case analysed only seemingly involved checking whether the law is constitutional because, as the Ombudsman and others noted, there is no conflict

Conclusions

1. The CT ruling in case K 3/21 does not have legal consequences.
2. The CT's ruling that Art. 1, first and second paragraphs, in conjunction with Art. 4 (3) TEU, Art. 2 TEU and Art. 19 (1), second paragraph, of the TEU are inconsistent with the Constitution, constitutes a flagrant breach of EU law.
3. Pursuant to the principle of the primacy of the application of EU law over national law, including at the constitutional level, courts should ignore the CT's ruling. Judges' failure to comply with the CT's ruling cannot be the basis for any disciplinary sanctions.
4. As a result of the CT ruling, the European Commission (EC) could initiate proceedings pursuant to Art. 258 TFEU on Poland's failure to meet one of its Treaty obligations. The CT ruling could also induce the EC to trigger the so-called mechanism for protecting the EU budget, referred to in Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general system of conditionality for the protection of the EU budget. Following the CT's ruling, the conditions for activating this mechanism have been met. The CT's decision could also affect the EC's assessment of Poland's National Recovery Plan, in accordance with Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing a Recovery and Resilience Facility.

The facts: The ruling

1. The case was sent to the CT following a motion filed by the Prime Minister on 29 March 2021.
2. **The ruling of 7 October 2021 is fundamentally convergent with the Prime Minister's motion. The CT ruled that:**

between the provisions of the TEU and the norms of the Constitution cited by the prime minister in his request.

The CT ruling stating that Art. 1, first and second paragraphs, in conjunction with Art. 4(3) TEU, Art. 2 TEU and Art. 19(1), second paragraph, of the TEU are inconsistent with the Constitution, constitutes a flagrant breach of EU law.

In particular, it goes against the primacy of EU law over national law, including constitutional-level law. Pursuant to the principle of the primacy of EU law, the fact that a member state invokes provisions of national law, even of a constitutional rank, cannot affect the application of EU law on its territory.

Poland undertook to respect the principle of the primacy of EU law over national law when it joined the EU in 2004. The proceedings at the CT should have been discontinued. The constitutional review of the provisions of the TEU by the CT was itself a breach of EU law. Providing a binding interpretation of EU law is the CJEU's exclusive domain. The CT should have sent the CJEU preliminary questions concerning the interpretation of those specific provisions in the TEU.

The CT is wrong to rule that the CJEU is not entitled to check the organisation and system of the judiciary in Poland. The adoption of this position by the CT shows that it has misunderstood the rules concerning the division and the exercise of power between the EU and the member states completely. When exercising their power to organise the administration of justice, member states are obliged to fulfill their obligations under EU law.

To sum up, courts should ignore the CT ruling, in accordance with the principle of the primacy of the application of EU law over national law, including constitutional-level law. Judges' failure to comply with the CT ruling cannot be the basis for any disciplinary sanctions.

In response to the CT ruling, the European Commission can:

- launch an infringement procedure against the Polish government (based on Art. 258 of the Treaty on the Functioning of the EU).
- trigger the budget protection mechanism (the so-called "money for the rule of law" mechanism).

"1. Article 1, first and second paragraphs, in conjunction with Article 4 (3) of the Treaty on European Union (Journal of Laws – Journal of Laws of 2004 No. 90, item 864/30, as amended) – insofar as the European Union, established by equal and sovereign states, creates "an ever closer union among the peoples of Europe", the integration of whom – happening on the basis of EU law and through the interpretation of EU law by the Court of Justice of the European Union – enters "a new stage" in which:

- take the ruling into account when assessing the Polish National Recovery Plan.

Written by Anna Wójcik

a) the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties;

b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application;

c) the Republic of Poland may not function as a sovereign and democratic state – is inconsistent with Article 2, Article 8 and Article 90 (1) of the Constitution of the Republic of Poland.

2. Article 19 (1), second subparagraph, of the Treaty on European Union – insofar as, for the purpose of ensuring effective legal protection in the areas covered by EU law – it grants domestic courts (common courts, administrative courts, military courts, and the Supreme Court) the competence is:

a) bypass the provisions of the Constitution in the course of adjudication – is inconsistent with Article 2, Article 7, Article 8 (1), Article 90 (1) and Article 178 (1) of the Constitution;

b) adjudicate on the basis of provisions which are not binding, having been revoked by the Sejm and / or ruled by the Constitutional Tribunal to be inconsistent with the Constitution – is inconsistent with Article 2, Article 7, Article 8 (1), Article 90 (1) and Article 178 (1), and Article 190 (1) of the Constitution.

3. Article 19 (1), second subparagraph, and Article 2 of the Treaty on European Union – insofar as, for the purpose of ensuring effective legal protection in the areas covered by EU law and ensuring the independence of judges – they grant domestic courts (common courts, administrative courts, military courts, and the Supreme Court) the competence to:

a) review the legality of the procedure for appointing a judge, including the review of the legality of the act in which the President of the Republic appoints a judge – are inconsistent with Article 2, Article 8 (1), Article 90 (1) and Article 179 in conjunction with Article 144 (3) (17) of the Constitution;

b) review the legality of the National Council of the Judiciary's resolution to refer a request to the President of the Republic to appoint a judge - are inconsistent with Article 2, Article 8 (1), Article 90 (1) and Article 186 (1) of the Constitution;

c) determine the defectiveness of the process of appointing a judge and, as a result, to refuse to regard a person appointed to a judicial office in accordance with Article 179 of the Constitution as

a judge, are inconsistent with Article 2, Article 8 (1), Article 90 (1) and Article 179 in conjunction with Article 144 (3) (17) of the Constitution.”¹

On the date that the CT Opinion was prepared, there is no written justification of the CT’s ruling. However, a “communiqué” was published on the CT’s website, containing – it seems – the fundamental theses that underly the CT’s position.² In terms of the subject of the Opinion, the following statements by the CT are of particular importance.

First of all, the CT emphasised that pursuant to Art. 87 sec. 1 of the Constitution, the system of the sources of the law of the Republic of Poland has a hierarchical structure and international agreements ratified with consent expressed in the law, such as the Treaty, are below the Constitution – the highest law in the Polish system of sources of the law – in this hierarchy. As a result, in the CT’s opinion, the CT’s power to adjudicate on the conformity of international agreements with the Constitution, specified in Art. 188 point 1 of the Constitution, also includes the constitutional review of the treaties of the EU’s primary law, which constitute international agreements.

However, in the CT’s opinion, examining the Constitution’s compliance of the norms of the EU’s primary law – that arising directly from the TEU and the Treaty on the Functioning of the European Union (TFEU), but also in the meaning given by the Court of Justice of the European Union (CJEU) – the CT is not interpreting EU law itself. As the CT itself put it, “the Polish Constitutional Tribunal’s thought process consists solely in determining the content of these norms and checking whether they are consistent with the Constitution”.

As the starting point for further considerations, the CT took the statement in the ruling of 11 May 2005 (K 18/04) that the limit of integration would be exceeded by the transfer of state powers to an extent that would prevent Poland from functioning as a sovereign and democratic state.

The CT noted that the powers transferred by the EU’s member states do not include the organisation or system of the judiciary. The organisation or structure of state organs, including courts, does not fall within the “competence of state authorities in certain matters”, as provided for in Art. 90 (1) of the Constitution. At the same time, EU bodies do not have the power to take over competencies or to derive new competencies from existing ones.

Meanwhile, in the CT’s opinion, the treaty norms as understood by the CJEU that the Prime Minister asked it to review directly concern the system of Polish courts. This is a matter of Polish constitutional identity. According to the CT, deriving the CJEU’s competences to control the organisation and system of the judiciary in a member state from Art. 19 (1), second paragraph, of the TEU is an example the creation of new competences by the CJEU. The CT also emphasised that Art. 2 TEU, which lists the values that the EU is based on, cannot be the source of the CJEU’s competence to adjudicate on the Polish court system either. The values listed in Art. 2 TEU only have an axiological meaning; they are not legal principles.

Finally, the CT pointed out that “because all EU law, being hierarchically subordinate to the Constitution, falls within the Constitutional Tribunal’s jurisdiction”, not only normative acts as defined in the

¹ The Constitutional Tribunal discontinued the proceedings in the rest of the case.

² <https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

CJEU's jurisprudence, but the jurisprudence itself, as part of the normative order of the EU, will be subject to the CT's assessment, in terms of its compliance with the Constitution. The CT stipulated that "if the practice of progressive activism by the CJEU, consisting in particular in interfering with the exclusive competences of the Polish state authorities, in undermining the position of the Constitution as the highest-ranking legal act in the Polish legal system, in questioning the universal validity and finality of the Tribunal's judgments, and finally raising doubts about the status of the Tribunal's judges are not abandoned, the Tribunal does not rule out that [...] it will directly assess the conformity of the CJEU rulings with the Constitution, including their removal from the Polish legal system".

Analysis

Introduction

1. Before examining the legal effects of the CT's ruling in case K 3/21 in light of EU law, I would like to draw your attention to two issues. Firstly, three people appointed to judges' posts that had already been filled properly earlier were involved in the CT ruling: Mariusz Muszyński, Justyn Piskorski and Jarosław Wyrembak. This means that the judgment of the Constitutional Tribunal was issued with the participation of persons not entitled to adjudicate.³ As a result, the proceedings in the case are **invalid and a so-called non-existent ruling has been issued**. Secondly, the case analysed seemingly involves checking whether the law is constitutional. I fully support the Polish Ombudsman's view, and the justification of his position presented in front of the CT, that in this case there has been no – and is no – conflict between the provisions of the TEU, the subject of the check, as indicated by the applicant, and the provisions of the Constitution, the benchmark for the check.⁴
2. Moving on to the actual subject of the Opinion, I am of the opinion that the CT ruling constitutes a flagrant breach of EU law and, in particular, a breach of the principle of the primacy of EU law over national law (including at the constitutional level). I will justify this view below and then discuss the consequences of the CT deeming selected provisions of the TEU inconsistent with the Constitution.

Breaches of EU law by the CT

3. The principle of the primacy of EU law over national law (including at the constitutional level) was not enshrined in the founding treaties. However, it is a fundamental principle of EU law; it originates from and has been consistently developed in the CJEU's jurisprudence since the 1960s.⁵ It follows from the CJEU's settled jurisprudence that, **based on the principle of the primacy of EU law, a member state invoking provisions of national law – even constitutional law – cannot affect the effectiveness of EU law on its territory**.⁶ The binding nature of EU law cannot differ from country to country.⁷ All state bodies in member states⁸ are obliged to ensure the effectiveness of EU law that results from the principle of primacy – **including the Prime Minister and the CT**.⁹

3 See, in particular, the CT rulings in cases K 34/15 and K 47/15, as well as the European Court of Human Rights' recent ruling in the case of *Xero Flor v. Poland*.

4 See the Ombudsman's statement on 13 July 2021, VII.510.23.2021.PF, points 89-105.

5 See above-mentioned ruling in case 6/64 *Costa v ENEL*.

6 See, for example, the CJEU's ruling in the case C-399/11 *Melloni*, point 59 and the jurisprudence cited there. Recently, the CJEU confirmed this in the ruling in combined cases C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19 *Asociația "Forumul Judecătorilor din România"*, point 245, among other places.

7 See ruling in case 6/64 *Costa v ENEL*.

8 See, for example, the CJEU's ruling in the case C-573/17 *Popławski*, point 54 and the jurisprudence cited there.

9 See, for example, the CJEU's ruling in the case C-573/17 *Popławski*, point 54 and the jurisprudence cited there.

4. **Poland undertook to respect the principle of the primacy of EU law over national law by joining the EU in 2004.** Pursuant to Art. 2 of the treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the EU is founded, “from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act” (emphasis added by the author). This relationship also includes the CJEU’s jurisprudence, as acts of one of the institutions of the Communities (now the EU), including the entire jurisprudence regarding the principle of the primacy of EU law over national law. This was reflected in the declaration No. 17 attached to the Treaty of Lisbon ratified by Poland amending the Treaty on European Union and the Treaty establishing the European Community drawn up in Lisbon on 13 December 2007, which states that “in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law”.
5. **The Prime Minister’s decision that the TEU’s provisions can be assessed by the CT in terms of their compliance with the Constitution was therefore a denial of the principle of primacy and, as such, a breach of EU law.** The Prime Minister violated the obligation to ensure the effectiveness of EU law, which aims to enable courts and administrative authorities to apply the provisions of EU law. On the contrary, the Prime Minister’s intention was to deprive EU law – to the extent specified in his request on 29 March 2021 – of effectiveness in Polish territory. This conclusion is not altered by the fact that the request did not state clearly what the consequences of the CT’s ruling should be, if it decides that the Treaty’s provisions are inconsistent with the Constitution. In its ruling in case SK 45/09, the CT noted that while, in the case of acts of Polish law, provisions inconsistent with the Constitution lose their binding force (Art. 190 (1) and (3) of the Constitution), this kind of consequence would be impossible in the case of acts of EU law because their binding force is not decided on by the Polish authorities. The CT then stated that a CT ruling on EU secondary legislation’s non-compliance with the Constitution (which, ultimately, did not come about) “would only deprive the EU secondary legislation of the possibility of being applied by the Polish authorities and of having legal effects in Poland”.
6. **From the perspective of EU law, there is no doubt that the CT was not entitled to assess the conformity of the TEU’s provisions with the Constitution at the Prime Minister’s request and deprive the TEU’s provisions of the possibility of having legal effects in Poland. This means that the CT proceedings should have been discontinued pursuant to Art. 59 (1) point 2 of the law of 30 November 2016 on the organisation and mode of proceedings at the CT,** according to which “the Tribunal shall issue a decision to discontinue the proceedings at a closed session if issuing a ruling is inadmissible”. It should be emphasised that the **constitutional review of the TEU’s provisions by the CT was itself a breach of EU law.** The CT’s ruling that Art. 1, first and second subparagraphs, in conjunction with Art. 4 (3) TEU, Art. 2 TEU and Art. 19 (1), second paragraph, of the TEU are inconsistent with the Constitution only made this breach more serious.
7. Contrary to what the CT has claimed, I believe that **Art. 188 point 1 of the Constitution does not grant the CT the power to adjudicate on whether the TEU, as an international agreement, complies with the Constitution.** The obligation to ensure the effectiveness of EU law required that the CT interpret this provision in pro-EU way; that is, by ruling out the possibility of assessing

whether the TEU's provisions are constitutional. In my opinion, any other interpretation of Art. 188 point 1 of the Constitution constitutes a breach of the principle of the primacy of EU law. Significantly, the CT itself indicated in the ruling in case K 18/04 that "the Constitutional Tribunal is not authorised to independently assess the constitutionality of the EU's primary law. However, this kind of power is applicable in relation to the Accession Treaty, as a ratified international agreement (Art. 188 point 1 of the Constitution)".¹⁰

8. I am aware that the CT's previous jurisprudence also shows that, in the event of a contradiction between EU law and the Constitution, this contradiction cannot be resolved in the Polish legal system by recognising the primacy of an EU norm in relation to a constitutional norm, and cannot result in a constitutional norm losing its binding force and being replaced by an EU norm, or limit the scope of this norm's application to an area not covered by EU law. In this situation, the Polish legislator would have to choose between amending the Constitution, changing the EU's regulations or, ultimately, leaving the EU.¹¹
9. As I indicated above, there was no contradiction of this kind in the case analysed. Had the CT been consistent, it would have discontinued the proceedings – if not because the adjudication was inadmissible, then because it was redundant, pursuant to Art. 59 sec. 1 point 3 of the above-mentioned law of 30 November 2016 on the organisation and mode of proceedings at the CT. Since the CT did not do so, in the light of the CT's earlier jurisprudence, it may be necessary to decide between amending the Constitution (but what would have to be changed?), changing the EU regulations (which is unrealistic) or leaving the EU.
10. At the same time, it is impossible to understand the CT's claim that, when examining the TEU's provisions' compliance with the Constitution, the CT was not interpreting EU law itself, just determining the content of the norms of EU law and checking whether they are consistent with the Constitution. The CT seems to be referring to its case law on the admissibility of issuing so-called interpretative judgments, where the CT is adjudicating on "a specific way of understanding a provision of the law [that] has already established itself in an obvious way", which means that "this provision – through its application – has acquired this content".¹² The literature on the subject indicates that, in that case, the CT is "not establishing a 'new', 'own' interpretation of the provision being analysed, but merely stating whether the provision (or more precisely: the normative message derived from it, accepted by the courts as part of existing jurisprudence) is consistent with the relevant constitutional models".¹³ As a consequence, an interpretative ruling serves to eliminate this provision, which is being considered from among the possible interpretative variants, and is inconsistent with the Constitution.¹⁴
11. The Prime Minister essentially "encouraged" the CT to issue this kind of interpretative ruling, indicating in his request that he was asking about the constitutionality of Art. 1, first and second paragraphs, in conjunction with Art. 4 (3) TEU, Art. 19 (1), second paragraph in conjunction with Art. 4 (3) TEU, and Art. 19 (1), second paragraph in connection with Art. 2 TEU "understood" in

10 CT ruling in case K 18/04, point III.1.2.

11 *Ibid.*, point III.6.4.

12 CT ruling in case K 33/99.

13 See W. Białogłowski, *Wznowienie postępowania w następstwie wydania przez TK wyroku interpretacyjnego* in M. Bernatt, J. Królikowski, M. Ziółkowski (eds.), *Skutki wyroków Trybunału Konstytucyjnego w sferze stosowania prawa*, Warszawa 2013, p. 197.

14 T. Woś, *Wyroki interpretacyjne i zakresowe w orzecznictwie Trybunału Konstytucyjnego*, "Studia Iuridica Lublinensia" 2016, Vol. XXV, 3, p. 987.

a certain way. Leaving aside the discussion on the admissibility of the CT issuing so-called interpretative rulings,¹⁵ it should be noted that the “determination of the content of the norm” referred to by the CT is ultimately nothing else than the interpretation of the norm. The CT is an authority that applies the law and must interpret the law in this process.¹⁶ **Meanwhile, the binding interpretation of EU law is the CJEU’s exclusive domain.** Pursuant to Art. 19 paragraph 3 b) in connection with Art. 19 paragraph 1, second sentence of the TEU, it is the CJEU that ensures the legal interpretation of the Treaties by issuing preliminary rulings (Art. 267 TFEU) on the interpretation of EU law at the request of courts in member states.

12. **In the event of doubts as to the interpretation of the TEU’s provisions cited in the Prime Minister’s request, the CT – as a body whose judgments are not subject to appeal under domestic law within the meaning of Art. 267 TFEU – should have sent the CJEU preliminary questions concerning the interpretation of those provisions in the TEU.**¹⁷ The CT’s failure to send these questions to the CJEU created the risk that it would misinterpret EU law – which was ultimately case; for example, it is inadmissible that the CJEU’s interpretation of Art. 1, first and second paragraphs in conjunction with Art. 4 (3) TEU, Art. 19 (1), second paragraph, in connection with Art. 4 (3) TEU and Art. 19 (1), second paragraph, in connection with Art. 2 TEU leads to the conclusion that member states cannot function as sovereign and democratic states. It is worth mentioning in this context that, in a relatively recent ruling, the CJEU ruled that, in the French Conseil d’État’s lack of referral to the CJEU as part of the preliminary ruling procedure on the interpretation of tax regulations – in a situation where the interpretation of EU law adopted by the Conseil d’État in its rulings was not so obvious that it left no room for any reasonable doubt – the French Republic had failed to fulfil its obligations under Art. 267, third paragraph, TFEU.¹⁸
13. Regardless of the above, the CT is **wrong to claim that the CJEU is not entitled to check the organisation and system of the judiciary in Poland** as the powers conferred by the EU member states do not include organisation or system of the judiciary. **The CT’s claim shows that it has misunderstood the rules concerning the division and exercise of powers between the EU and the member states completely.** There is no doubt in the CJEU’s jurisprudence that the organisation of the judiciary in the member states is within the latter’s powers. Yet when exercising this power, the member states must comply with their obligations under EU law. By requiring the member states to abide by these obligations, the EU is in no way trying to exercise that power itself or to attribute it to itself.¹⁹
14. As a result, while member states retain the right to set the retirement age for judges, states that, for example, lower the age for incumbent judges appointed to the court before a certain date and granting the executive the discretionary right to extend the judges’ right to remain in active service after reaching the new retirement age, must bear in mind that that these kinds of actions will be treated as a violation of Art. 19 (1), second paragraph, of the TEU.²⁰ Likewise, member states retain the right to lay out the rules on judges’ disciplinary liability, for example. However, states that allow, in the case of judges at common courts, the content of court judgments to be

15 See, for example, M. Dąbrowski, *Spór o wyroki interpretacyjne Trybunału Konstytucyjnego – głos w dyskusji*, “Przegląd Prawa Konstytucyjnego” 2017, nr 2, pp. 29–54.

16 *Ibid.*, p. 40.

17 In the past, the CT had sent a question for a preliminary ruling in case C-390/15 *RPO*.

18 Ruling in case C-416/17 *Commission v France*.

19 See ruling in case C-619/18 *Commission v Poland*, point 52 and the jurisprudence cited there.

20 *Ibid.*

potentially classified as a disciplinary offense without ensuring that these judges' disciplinary cases were examined within a reasonable time, or envisaging that the disciplinary court will conduct the proceedings despite the justified absence of the accused judge who had been notified or his defenders, and thereby not ensuring the accused common court judges' right to defence, must bear in mind that these kinds of actions will be treated as a violation of Art. 19 (1), second paragraph, of the TEU.²¹

The consequences of the breaching of EU law by the CT

15. Moving on to describe the consequences of the CT breaching EU law, it should be emphasised that they can be considered on two levels: **internal** and **external**. The internal one refers to the principles that courts must abide by when applying the TEU provisions challenged by the CT. The external ones refers to how the EU institutions, in particular the European Commission, could react to the CT ruling.

15. **Internally**, the scope of the principle of the primacy of EU law over national law means that **the CT ruling should not have any legal effects. As a consequence, domestic courts are obliged to ignore the CT ruling**. While the CJEU is settling a dispute, national courts are bound by its interpretation of the contested provisions of EU law and, in a given case, **should not take into account** the **assessment** of a higher court or **constitutional court** in a given state, if, with this interpretation in mind, they consider the higher court or constitutional court's assessment inconsistent with EU law.²² At the same time, as is clear from the CJEU's settled jurisprudence, any court practice limiting the effectiveness of that law is inconsistent with the requirements resulting from the very nature of EU law.²³

17. **Judges' failure to comply with the CT ruling cannot be the basis for any disciplinary sanctions**, in particular those resulting from the act of 20 December 2019 amending the act – the Law on the System of Common Courts, the act on the Supreme Court and certain other acts. It should be emphasised that the CJEU has ordered Poland to suspend the application of a number of provisions of this act.²⁴

18. **Externally, the direct consequence could be the European Commission deciding to initiate proceedings pursuant to Art. 258 TFEU concerning Poland's failure to fulfil one of its obligations under the Treaties**. Member states are responsible for their authorities' actions and the courts are no exception.²⁵ In this context, it should be noted that, in June 2021, the Commission has decided to initiate proceedings and send a letter of formal notice to Germany for breaching the fundamental principles of EU law, in particular the principles of autonomy, primacy, effectiveness and the uniform application of EU law, as well as respecting the CJEU's jurisdiction. This happened as a result of the German Federal Constitutional Court's ruling on 5 May 2020 on the European Central Bank's Public Sector Asset Purchase Programme. In this ruling, the Federal Constitutional

21 C-791/19 *Commission v Poland*.

22 See the ruling in case C-416/10 *Križan*, points 69–70.

23 See, for example, the ruling in case C-556/17 *Torubarov*, point 73 and the jurisprudence cited there.

24 See decision in case C-204/21 *Commission v Poland*. The CT ruling in case P 7/20 of 14 July 2021, which states that that Art. 4 (3), second sentence, of the TEU in conjunction with Art. 279 TFEU, to the extent that the CJEU imposes *ultra vires* obligations on the Republic of Poland as an EU member state by issuing interim measures relating to the system and jurisdiction of Polish courts and the mode of procedure at Polish courts, is inconsistent with Art. 2, Art. 7, Art. 8 (1) and Art. 90 (1) in connection with Art. 4 (1) of the Constitution and in this respect is not covered by the principles of priority and direct application set out in Art. 91 (1–3) of the Constitution, is ineffective in this regard.

25 See, L. Prete, *Infringement Proceedings in EU Law*, Alphen aan den Rijn 2017, p. 45–51.

Court found the CJEU to have overstepped its powers in its ruling in the case C-493/17 Weiss, among other things. In the Commission's opinion of the Commission, the ruling constitutes "a serious precedent, both for the future practice of the German Constitutional court itself, and for the supreme and constitutional courts and tribunals of other Member States".²⁶ Germany was given two months to reply to the concerns raised by the Commission. The proceedings in the case are still pending.

19. **The CT ruling could also prompt the Commission to launch the so-called the mechanism for the protection of the Union's budget, referred to in Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general conditionality system for the protection of the EU budget.**²⁷ Pursuant to Regulation 2020/2092, if a breach of the rule of law in a member state is deemed to affect or seriously risk affecting – in a sufficiently direct manner – the sound management of finances as part of the EU budget or the protection of the EU's financial interests, it may result in the Council of the European Union adopting, at the Commission's request, measures to protect the EU budget; for example, in the form of suspending EU funds.
20. In my opinion, following the CT ruling, the conditions for activating the above-mentioned mechanism have been met. It is true that the validity of Regulation 2020/2092 was questioned in the CJEU by Poland and Hungary;²⁸ nevertheless, in accordance with Art. 278 TFEU, an appeal to the CJEU does not suspend the application of an act. The Commission's political commitment at the European Council summit in December 2020 not to propose the measures referred to in Regulation 2092/2020 is not a legal obstacle to launching the procedure for adopting legal remedies either.²⁹ On October 21, 2021, the European Parliament issued a resolution on the rule-of-law crisis in Poland and the primacy of EU law (2021/2935 (RSP)), in which it called on the Commission to initiate the procedure provided for in Regulation 2092/2020.³⁰
21. Finally, **the CT ruling could also have an impact on the Commission's assessment of the Polish National Recovery Plan, in accordance with Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing a Recovery and Resilience Facility.** Pursuant to Art. 17 (3) of Regulation 2021/241, recovery and resilience plans must be consistent with the respective country-specific challenges and priorities identified as part of the European Semester for the coordination of economic policy. In the case of Poland, the Council Recommendation of 20 May 2020 on Poland's national reform programme for 2020, which contains the Council's opinion on the Convergence Program for 2020 presented by Poland indicated that "in addition to longstanding concerns over the rule of law in Poland raised by the Commission, a number of which were already addressed in rulings of the Court of Justice of the European Union, recent developments raise further concerns, putting at risk the functioning of the Polish and the Union's legal order," among other things.³¹ Poland was recommended to adopt measures in 2020 and 2021 to "enhance the investment climate, in particular by **safeguarding judicial**

26 *June infringements package: key decisions* [2021], https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743.

27 <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A32020R2092>.

28 See cases C-156/21 and C-157/21 *Hungary and Poland v Parliament and Council*.

29 See the European Council conclusions, 10–11 December 2020, point 2 c).

30 Media reports indicate that the Commission will wait for the CJEU ruling, though. See <https://www.euractiv.pl/section/instytucje-ue/news/ue-praworzadnosc-mechanizm-ursula-von-der-leyen-polska-morawiecki-merkel-macron/>.

31 European Commission, *Council Recommendation on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland*, Point (25), https://ec.europa.eu/info/sites/default/files/2020-european-semester-csr-comm-recommendation-poland_en.pdf.

independence” (emphasis added).³² There is no doubt that the CT ruling does not eliminate the concerns referred to in the Recommendation or help protect judicial independence; rather, it worsens the situation in this area significantly.

Reservations

1. The opinion only concerns the provisions of European Union law, with the reservations and notes included in the text.
2. The opinion only covers matters explicitly mentioned in point I (Introduction), with the reservations and notes included in the text.
3. I am not expressing an opinion about the facts.
4. In this opinion, the author is expressing his own views; they cannot be attributed to the institutions at which he is employed.

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³² *Ibidem*, Point 4.

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