

De facto differentiation in action: Why Poland will stay in the EU, with or without the blessing of Brussels

*Tensions between the Polish government and the European Union have raised speculation about a potential 'Polexit'. **Tobias Hofelich** writes that while there is no mechanism for expelling a member state, inaction risks undermining the EU's legal framework and pushing the principle of differentiated integration to its limits.*

The Polish Constitutional Court's ruling of 7 October sent shockwaves across the European Union. The judges declared that the Polish constitution has primacy over some key areas of EU law, including the provision that binds member states to take 'appropriate measures' to fulfil their obligations under EU law. This unprecedented judicial ruling challenges the very foundation of the EU as a community of law, and its magnitude [is still under assessment](#) in Brussels. In the meantime, lawmakers and scholars alike are discussing whether the future of Poland lies inside or outside the EU. Is this the beginning of 'Polexit'?

German legal experts [suggest](#) that exit is the only logical consequence because the court ruling effectively renders the Polish constitution incompatible with the EU Treaties, and neither are likely to be rewritten. Such exit warnings have been [echoed](#) by the European Parliament's largest faction, the European People's Party (EPP), and French Europe Minister [Clement Beaune](#). The Polish opposition, led by former EU Council President Donald Tusk, has adopted this rhetoric and organised mass protests across the country.

This exit-talk begs the question of how this could unfold. The EU Treaties know no legal mechanism to expel a member state. The only way to leave the Union is a self-induced exit under Article 50. The Polish government, however, rejects the very idea of it. Well aware of the overwhelming public support for EU membership and its financial benefits, the leadership of the governing Law and Justice Party has categorically [ruled out](#) a withdrawal from the EU.

In principle, the EU could test its arsenal to provoke a member state into withdrawal. To that end, the EU's bazooka is Article 7 which, in short, allows for the suspension of voting rights if a member state breaches 'the principles on which the EU is founded.' While the EU already loaded the barrel when the procedure was initiated in 2017, the trigger remains blocked as long as Hungary [sides with](#) its Polish brother-in-arms on such issues of mutual interest.

More immediate pressure could be built up by withholding Poland's share of the Covid-19 recovery fund, which amounts to around €57bn. This would put a serious dent in the Polish government's budget plans, possibly deep enough for the politically motivated constitutional court to change its mind. But the Commission has been hesitant to further escalate the situation as Warsaw might retaliate by using its veto power to force the EU into a standstill.

Far more likely than Polexit is what The Economist [calls](#) a 'dirty remain' in reference to the various options of 'hard' or 'soft exit'. Rather than leaving the Union, the Polish government would then seek to remodel it from within. In principle, this is not a new approach, but Warsaw intends to rewrite the rules of procedure for how this can be achieved.

Several member states have in the past asked for and received special treatment in specific sectors. For instance, the UK was granted its infamous budget rebate and Denmark was conceded opt-outs from entire policy areas in Economic and Monetary Union and Justice and Home Affairs. Because the EU is home to 27 member states with diverse policy preferences, ambitions and visions for the EU, differentiation in both depth and scope of integration is often viewed as a pragmatic necessity to move ahead with European integration. The court ruling, however, does not indicate dissatisfaction with specific EU policies. Instead, it underlines the Polish government's categorical rejection of the EU's founding principles.

Another key difference is that member states, thus far, have cherry-picked within the boundaries of the EU's rules and procedures and received legal opt-outs after negotiations in the EU Council. The Polish government has skipped negotiations altogether and created facts first. For years, Poland has been in open defiance of EU law and granted itself opt-outs in areas as technical as [coal mining regulation](#) as well as in relation to more fundamental aspects of EU integration like the rule of law or the protection of minorities such as the [LGBTQ community](#) and [migrants](#).

Scholarly research [refers](#) to such instances of deliberate and sustained non-compliance with EU law as *de facto* differentiation. To date, there have only been a few mostly innocuous cases in which member states have treated EU law like a self-service restaurant. There are even [tolerated arrangements](#) like Sweden's refusal to adopt the euro despite being legally bound to do so. But Poland, and by extension also Hungary, seem to have fully embraced this practice, testing the EU's boundaries by challenging its very foundations.

As the Article 7 procedure is blocked, and neither the imposition of fines nor threats to withhold funds have had sufficient deterrent effects, Warsaw is likely to continue its nationalist agenda from within the EU. While Brexit has shown that the departure even of key member states and subsequent contestation from abroad are manageable, the erosion of EU law and incessant challenges to the authority of the Commission from within pose a serious threat to the Union.

If the EU fails to quell Warsaw's latest insurgence against the supremacy of EU law and gives the impression that member states can do what they want, it risks contagion and losing control over its legal framework. While challenges to EU law have been made by other national supreme courts, they were always restricted to specific pieces of legislation rather than a full sweep. But the threat of resurgent nationalism, which is arguably the root cause of Poland's actions, is also very real in other member states.

Yet, unable to expel recalcitrant member states, harsh treatment could trigger adverse effects. Built on the principle of unanimous decision-making, deep trenches between member states can cripple the EU's ability to shape policy in times of serious global challenges such as climate change. Ultimately, the EU will have to balance the objective of remaining a functional political entity with the equally important task of repressing illiberal, unlawful behaviour among its members.

Note: This article gives the views of the author, not the position of EUROPP – European Politics and Policy or the London School of Economics. Featured image credit: [European Council](#)
