

# Defending the EU against *grand corruption*

## Rule of law conditionality mechanism and Poland

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### Introduction

15 June was a historic day for the European Union: the European Commission issued the first bonds<sup>1</sup> that will be used to finance the Recovery and Resilience Facility (Recovery Fund) adopted in December 2020.<sup>2</sup> This is the start of an unprecedented programme of financial assistance which member states want to use to recover together from the economic collapse caused by the pandemic. Responding to the crisis, which is fundamental to the EU's future, its countries are forming ranks and tightening their bonds. This is an unprecedented example of solidarity within the EU.

Yet the EU simultaneously faces another, no less dangerous crisis. In successive countries, there are deep breaches of the rule of law and, with that, the treaty foundations that the functioning of the whole EU is based on. The procedure based on Article 7 of the Treaty on European Union (TEU) and a number of proceedings concerning the (lack of) judicial independence based on Article 258 of the Treaty on the Functioning of the European Union are pending against Poland and Hungary. In

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1 <https://www.euractiv.com/section/economy-jobs/news/commission-convincing-markets-with-first-issuance-of-recovery-bonds/>.

2 [https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility\\_en](https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en). Taking into account the seven-year budget and the recovery fund, the EU will have a total of EUR 1.8 trillion at its disposal in the coming years.

Bulgaria,<sup>3</sup> Romania<sup>4</sup> and Slovenia,<sup>5</sup> practices that are contrary to the principles of the rule of law, democracy and civil rights are becoming more frequent, putting into question the stability of a system that is compatible with the EU's rules.

The convergence of these two crises presents the EU with the risk that overcoming one (economic) may lead to the deepening of the other (democracy). Huge, easily accessible funds could be used to strengthen "grand corruption", a situation in which the state system is based not on the rule of law, but on the discretion and logic of particularism, privileging the rulers and the circles associated with them. This system is based on unequal "access to specific public resources, such as civil service posts, state grants and subsidies, and state companies advertising budgets. This hits media outlets critical of the government hard".<sup>6</sup>

Today, this institutionalised, systemic corruption is the biggest threat to an EU based on the rule of law and democracy. Paradoxically, how the EU operates can support regimes that act contrary to its democratic identity, which is based on the rule of law.<sup>7</sup> It is a self-sustaining spiral of risk: breaches of the rule of law in member states open the way to clientelism and political corruption fuelled by EU funds. This further strengthens the undemocratic or authoritarian tendencies that are the primary source of the breaches that enable this process. An obvious example is Hungary. The oligarchic system there could not have been built so quickly without EU money. This evolution is undermining and could eventually destroy the foundations of solidarity, which needs to be strengthened due to the economic crisis and other challenges.

This text analyses why the existing EU instruments have been unable to prevent this phenomenon and why the risk increases significantly with the launch of the Recovery Fund. We present a new rule of law conditionality mechanism adopted by the EU and the circumstances in which it could be used. We show that the situation in Poland meets the criteria of a "serious risk of impact" on EU finances, which is defined in the EU regulation as a sufficient reason to activate the mechanism. Finally, we argue that the prompt use of the rule of law conditionality mechanism is a necessary measure as the EU defends itself against the exacerbation of "grand corruption" and "authoritarian equilibrium" (Daniel Kelemen) that threaten the future of the EU.

## **Part 1: The EU's response to "grand corruption"**

### **EU mechanisms for combating corruption and the Recovery Fund**

The rules for distributing EU funds are based on the principle of "loyal cooperation" between member states' and EU institutions (Article 4(3) TEU) and the principle of subsidiarity. They offer the possibility of far-reaching control over how they are distributed by member states' governments, while the EU institutions' ability (and political will) to interfere is limited. In principle, corruption falls within the competence of member states, unless it concerns the spending of EU funds. But even then, the EU institutions' ability to act is very limited. The main EU institution established to prosecute corruption

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3 <https://www.politico.eu/article/bulgaria-sinks-under-pre-election-scandals-corruption-gerb-boyko-borissov/>, <https://www.politico.eu/article/us-sanctions-bulgaria-power-brokers-for-graft/>.

4 <https://www.courthousenews.com/eu-court-tells-romania-to-uphold-rule-of-law/>.

5 <https://www.ft.com/content/100454c3-c628-40a0-af6e-392cc79a53f9>.

6 [https://www.batory.org.pl/wp-content/uploads/2020/12/Laying-the-groundwork-for-Grand-Corruption\\_ENG.pdf](https://www.batory.org.pl/wp-content/uploads/2020/12/Laying-the-groundwork-for-Grand-Corruption_ENG.pdf).

7 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3450716](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450716).

offences, OLAF, relies on close cooperation with national authorities – in fact, the system’s effectiveness depends on it. Above all, OLAF can only investigate. When it finds evidence of a crime, it must refer the case to the national prosecutor’s office, which decides whether or not to launch criminal proceedings. Neither OLAF nor the European Commission have any way – other than asking questions – to influence the direction, pace and impact of actions taken by national bodies.<sup>8</sup>

The creation of the European Public Prosecutor’s Office (EPPO) represents some progress but does not fundamentally change the structure of the system. The decision to establish the EPPO was made in 2017 on the basis of treaty provisions on so-called enhanced cooperation. The EPPO is the first EU institution that can conduct proceedings against criminals (including financial ones) on its own; the country’s law enforcement agencies must refrain from taking any action during them. Yet the EPPO’s structure is also dual, with the national authorities playing a very important role. At European level, each country is represented by its own prosecutor. The EPPO will delegate at least two prosecutors to each country to conduct proper investigations. Nevertheless, it is difficult to imagine this being done well without close coordination with national bodies. Moreover, EPPO decisions will be subject to review by national courts. In other words, both at the level of the proceedings and their review in court, the functioning and independence of the judiciary in the member states remains essential.

Crucially, the EPPO only covers countries that decided to join it. Poland and Hungary are not among the sixteen countries that have done so. This means that the new EU institution will not have the right to prosecute crimes in Poland.<sup>9</sup> In addition, the member states and EU institutions have not decided to formally (in the regulation) make permission to use the Recovery Fund conditional on joining the EPPO. The lack of this condition weakens the ability to track irregularities, especially in countries where breaches of the rule of law have been detected, including Poland.<sup>10</sup>

This risk is compounded by the unique system used to manage the Recovery Fund. It is different from the practices used earlier in relation to the “traditional” budget. It is an intervention fund designed to deal with an ongoing, urgent problem: the sharp collapse of many national economies, or their individual sectors, as a result of the pandemic. Consequently, the funds are meant to be distributed rapidly, based on less bureaucratic procedures than in the case of the EU’s Multiannual Financial Framework. This difference is significant and increases the potential risk of abuse.<sup>11</sup>

Funds from the “traditional” EU budget are managed based on a complex administrative system involving member states’ institutions, the European Commission and other EU bodies, including anti-corruption agency OLAF. Above all, this is based on a detailed scrutiny of spending at all stages of the implementation of projects financed by the EU. The preconditions are examined and the Commission only pays out the money when it is satisfied that all documents and procedures in a given member state comply with EU requirements. The Commission examines the selection of projects (including compliance with the principle of non-discrimination) and their contractors, checks the timeliness of

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8 Ibid.

9 Adam Bodnar, the Ombudsman, called for Poland to join the EPPO in parallel with the adoption of its National Recovery Plan, arguing that it would be a clear signal of Warsaw’s readiness to increase the transparency of the system for distributing funds and openness to external checks on it, <https://www.rp.pl/Rzecz-o-prawie/304069994-Adam-Bodnar-Maciej-Taborowski-Uczciwi-nie-musza-sie-bac.html>.

10 This also applies to Slovenia which formally joined the EPPO, but did not delegate its prosecutor to it within the prescribed timeframe (by 1 June 2021), which de facto prevents it from taking action in the country. According to the EPPO chief prosecutor, Laura Codruța Kövesi, this creates a “huge risk” for EU funds, <https://www.politico.eu/article/slovenia-risk-funds-eu-chief-prosecutor-laura-codruta-kovesi/>.

11 Cf. [https://institutdelors.eu/wp-content/uploads/2021/04/PP262\\_Anti-Fraud\\_Rubio\\_EN.pdf](https://institutdelors.eu/wp-content/uploads/2021/04/PP262_Anti-Fraud_Rubio_EN.pdf).

payments to beneficiaries by the national administration, and so on. A key element required at each of these stages is documentation, a so-called audit trail based on the IT system that must be used to perform all the activities. Countries are also obliged to be highly transparent when spending EU funds. Information about them and their beneficiaries is publicly available on the relevant website. This information can be used by social organisations and the media, which improves control at the national level<sup>12</sup>.

In contrast, the management of money from the Recovery Fund and the control of how it is spent are incomparably less formalised and, crucially, left to member states' institutions to a much greater extent. The regulation only contains general provisions on how countries should administer and control the use of money. It is up to them to define key details such as project selection criteria, the rules for monitoring spending and competition procedures. Perhaps the key difference is that the Commission is primarily interested in the projects' results (for example, building a wind farm or renovating a hospital); how they are implemented is not very important, unlike in the case of support from the EU budget. The effects, not the invoices, count. In other words, the state does not have to submit detailed reports and documentation on spending on the project or demonstrate how projects meet EU regulations.

Ultimately, whether a project resulted in the actual implementation of the investment is decisive, not a detailed verification of how this was done and how exactly the funds for this purpose were used. Transparency, monitoring and public consultation have not been defined as criteria for assessing national recovery plans. According to Transparency International, this "stunning lack of transparency commitments totally undermines the important oversight role of civil society and investigative journalists to ensure there is no corruption or abuse in the use of these funds".<sup>13</sup>

### **Avoiding risk: the rule of law conditionality mechanism**

Since 1 January 2021, the EU has had a new instrument for protecting its financial interests. Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, known as the rule of law conditionality, gives the Commission the unprecedented ability to request, in certain situations, that a member state be punished by suspending the payment of some or even all of the budget funds. The Council of the EU then decides by qualified majority (55% of countries representing 65% of the EU population).<sup>14</sup> Contrary to other elements in the EU's range of anti-corruption instruments, this mechanism can be a response to systemic and institutionalised – or "grand" – corruption.

From this point of view, its potentially preventive nature is key. Article 4(2)1 of the regulation states that "appropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or **seriously risk affecting** [emphasis added] the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way. EU institutions (in this case, not only the Commission, but also the Council) can not only react *ex post*, but also examine the "risk" to EU finances resulting from specific breaches of the rule of law. In other words, the Commission need not wait until,

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<sup>12</sup> For more information see: <https://www.cer.org.uk/publications/archive/policy-brief/2021/how-fight-corruption-and-uphold-rule-law>.

<sup>13</sup> [https://www.open-procurement.eu/rrf\\_transparency](https://www.open-procurement.eu/rrf_transparency).

<sup>14</sup> This is a lower threshold than in the Article 7 procedure, where the sanction of breaches of EU rules (including, but not limited to, those that have or are likely to have consequences for EU finances) requires the consent of four-fifths of all member states.

after time-consuming checks, it finds corruption or fraudulent activity to launch a procedure against a member state. It can already do this if it has a justified suspicion that, in a given country, there are not enough safeguards against them or no guarantee of that they will be detected and prosecuted.

The rule of law conditionality mechanism can therefore allow the EU to reduce the two most important deficits in the current system for controlling spending from the EU budget in member states: the lack of effective preventive actions and, most importantly, dependence on potentially ineffective national institutions. The aim is to ensure that they function properly, in accordance with EU law.

Poland and Hungary appealed to the Court of Justice of the European Union (CJEU)<sup>15</sup> against the regulation introducing the rule of law conditionality mechanism. Nevertheless, it became law on 1 January. Moreover, in accordance with EU law, filing a complaint to the CJEU does not suspend the application of the act.<sup>16</sup> Admittedly, the Commission made a political commitment at the EU summit in December 2020 that, until the verdict is issued, it will not ask the Council of the EU to impose penalties on member states. However, this does not mean that it cannot initiate the earlier stages of the procedure foreseen by the regulation (the European Parliament is demanding this).<sup>17</sup> The Commission is also supposed to develop, in agreement with member states, “guidelines” setting out the criteria for applying the new mechanism.

In what exact situations can this mechanism be applied? It can only be launched by the Commission if both of two conditions are met. Firstly, there must be a breach of the rule of law in the member state concerned. Secondly, that breach must affect, or at least pose a serious risk of affecting, in a sufficiently direct way, the sound financial management of the EU budget or the protection of the EU's financial interests.<sup>18</sup> It is therefore crucial to define these three concepts. What points to a breach of the rule of law? What is a risk to the budget? And what does it mean for this risk to have a “sufficiently direct” impact on EU finances?

According to the regulation, the following may indicate that the rule of law has been breached: a threat to judiciary independence, failure to prevent arbitrary or unlawful decisions by the public authorities, including the law enforcement authorities, failure to correct these decisions or the limiting of effective preparatory proceedings if the law is breached, among other things.<sup>19</sup> The infringement cannot be abstract in nature; it must relate to at least one of the elements in the regulation. These include the proper functioning of the investigative services and prosecutor's offices in connection with preparatory proceedings and bringing and supporting accusations in connection with financial irregularities, including tax ones, corruption or other breaches of EU law related to the implementation of the EU budget or the protection of the EU's financial interests, or the effective judicial control of bodies of the above-mentioned services and prosecutor's offices by independent courts.<sup>20</sup> Effective and prompt cooperation with OLAF as part of the preparatory proceedings being conducted by the latter is also one of these elements.<sup>21</sup>

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15 Joined cases C-156/21 and C-157/21.

16 Article 278 of the Treaty on the Functioning of the European Union.

17 <https://www.reuters.com/world/europe/eu-parliament-set-sue-european-commission-over-rule-of-law-inaction-2021-06-09/>.

18 Article 4(1) of the regulation.

19 Article 3 of the regulation.

20 Article 4(2) of the regulation.

21 Ibid.

This means that breaches of the rule of law, in particular those affecting the proper functioning of the public authorities and the effectiveness of judicial review, may seriously harm the EU's financial interests. However, according to Article 4(1) of the regulation, the mere breaching of the rule of law will not be enough to activate the rule of law conditionality mechanism, as long as it does not affect, or at least pose a serious risk of affecting, the sound financial management of the EU budget or the protection of the EU's financial interests – for example, resulting in the EU budget not being implemented (or creating a serious risk that it will not be implemented) in accordance with the principles of economy, efficiency and effectiveness.<sup>22</sup> It is no coincidence that under EU law sound financial management can only be ensured by member states only if public authorities act legally, when financial irregularities are effectively prosecuted by the investigative and prosecution services, and the decisions of the latter can be subject to effective judicial review by independent courts.<sup>23</sup> In other words, the lack of these kinds of safeguards meets the criteria of “risk” as understood in the regulation.

That is not all, though. The impact and the serious risk of affecting the sound management of finances as part of the EU budget or the protection of the EU's financial interests must be linked to the breach of the rule of law in a “sufficiently direct” manner. The regulation does indicate what the EU legislator meant here. The issue will probably be raised in the Commission's guidelines. However, it should be assumed that “direct” impact not only means actual impact, but also potential impact. For example, political interference in the prosecution of crimes other than financial crimes may not meet the criterion of directness. However, if this interference can create an atmosphere of fear or occurs at a higher level of the prosecutor's office or judicial authority, it may be covered by this concept.<sup>24</sup> The more fundamental or systemic the breach is, the more it meets the criterion of directness.<sup>25</sup>

## Part 2: Grand corruption in Poland and EU funds

### The prosecutor's office at the service of the authorities

Poland is a country where important elements of “grand corruption” are systemic. The appointment of the ruling party's nominees for key posts at state-owned companies, administration and civil service took place on an unprecedented scale (although these kinds of practices also existed under previous governments).<sup>26</sup> Unlike in the past, the United Right, which has had an absolute majority in parliament since 2015, took many of these steps through statutory changes that allowed mass layoffs of employees at state institutions (such as TVP, the public television broadcaster, or the prosecutor's office) and for hundreds or even thousands of posts to be filled with their own people in one fell swoop. The creation of various kinds of funds, agencies and foundations dependent on the state, but outside the public administration's structures,<sup>27</sup> served the same purpose. Most of these institutions receive grants from government-controlled entities and how they operate is opaque. Often, they directly

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22 Cf. Article 2 point 59 of Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union.

23 Cf. recital 9 of Regulation 2092/2020.

24 J. Łacny, “The Rule of Law Conditionality Under Regulation No 2092/2020—Is it all About the Money?”, *Hague Journal of the Rule of Law* 2021, no. 13, p. 85.

25 T. Tridimas, “Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?”, *Croatian Yearbook of European Law and Policy* 2020, no. 16, XVI.

26 [https://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Stanowiska\\_publiczne\\_jako\\_lup\\_polityczny.pdf](https://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Stanowiska_publiczne_jako_lup_polityczny.pdf).

27 For example, the Polish National Foundation, the Future Industry Platform Foundation and the National Institute of Freedom Centre for the Development of Civil Society.

pursue the government's interests. For example, the Polish National Foundation financed a large-scale campaign discrediting judges and supporting the changes pushed for by the Ministry of Justice.

In this context, the structure and functioning of the prosecution service are of key importance. Its credibility, independence and efficiency are indispensable for loyal cooperation with EU institutions provided for in the Treaties. As we have seen, the entire system for prosecuting corruption and the fraudulent use of EU funds, in which EU institutions are helpless without the national authorities' assistance, is based on it. This requirement – and its implementation – will be decisive in coming years. A large share of EU funds, especially from the Recovery Fund, will go to state-owned companies, municipalities controlled by the ruling party and companies associated with the government. According to Poland's National Recovery Plan, they will use EU funds to build wind farms, modernise schools and hospitals, as well as install Internet cables. Whether potential abuses are prosecuted will depend primarily on the Polish prosecutor's office.

All fraud cases referred by OLAF to Poland are referred to the National Public Prosecutor's Office headed by the deputy public prosecutor general. He appoints the appropriate district prosecutor's office, and even a specific prosecutor, to deal with a case. In 2016, the roles of the minister of justice and prosecutor general were merged. The bans on being a member of a political party and on political activity do not apply.<sup>28</sup> The combination of these functions as a systemic solution raises doubts, but as such need not be proof of a breach of the rule of law. Transparent procedures, an HR policy with clear criteria and clear rules on how the hierarchy in the prosecution service functions can reduce the risk of the abuse of power and of the prosecution, organised in this way, being used for political purposes. The problem is that these safeguards are missing.

The law of 2016 granted the prosecutor general (who is also the minister of justice) a wide range of new powers, giving him full control over the prosecutor's office subordinate to him. A large part of them are discretionary; they depend solely on the will of the person (politician) who performs this function. The prosecutor general appoints, without a competition, the heads of subordinate units – the regional, district and local public prosecutor – at the request of the national prosecutor, who is subordinate to him. He can also dismiss them at any time, as these managerial functions were not secured by a fixed term in office. After the new law entered into force, there was a purge at the prosecutor's office. Zbigniew Ziobro dismissed six of his seven deputies. He replaced the heads of all 11 regional prosecutor's offices and of 44 out of 45 district prosecutor's offices. He dismissed 90% of the heads of the 342 local prosecutor's offices. He replaced the heads of departments at all levels, as well as the directors of departments. Within a few months, he dismissed 1,000 out of 6,100 prosecutors<sup>29</sup>.

The new law abolished competitions for prosecutor positions and promotion does not depend on the objective results of the job assessment; it is subject to a completely discretionary decision by the prosecutor general. The institution of delegating prosecutors to other units (including against their will and without any appeal) based on a decision by the prosecutor general or national prosecutor was introduced. It is the "carrot and stick" method: prosecutors can be delegated to higher units as a reward or to lower or distant units as "exile" or punishment. In this way "an army of obedient, significantly better remunerated public prosecutors delegated to higher units is created (...) who are

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28 Article 97(1).

29 See <https://esiweb.org/publications/where-law-ends-collapse-rule-law-poland-and-what-do>.

entrusted with conducting the most serious proceedings in district and regional public prosecutor's offices and in the National Prosecutor's Office",<sup>30</sup>

Delegation is often used to "discipline" prosecutors for actions that go against the authorities' political interest. The Warsaw prosecutor Ewa Wrzosek, who launched an investigation into the possible threat to the health of millions of citizens caused by the government's decision to hold a presidential election (scheduled for 10 May 2020) during the pandemic, was immediately removed from the investigation which her supervisor discontinued within an hour. Disciplinary charges have been brought against her. In January 2021, she was delegated overnight by the deputy prosecutor general for six months to work at the prosecutor's office in Śrem, 300 km away from Warsaw. She was obliged to arrive there for work at 7 a.m. the day after the decision was announced.

The law on the prosecutor's office allows a superior public prosecutor to take over cases handled by subordinate public prosecutors and perform their activities. He can also request materials from each investigation and transfer cases to other units in the prosecutor's office, including more than once. In both cases, these decisions do not have to result from any objective reasons based on statutory regulations; instead, they are discretionary. This creates the possibility of irregularities in the form of a direct impact on proceedings and intervention by the prosecutor general when they go in the wrong direction, especially in cases with a political context. There are many examples of this kind. The case of Roman Giertych, a lawyer conducting many cases against politicians from the ruling party who was accused of corruption (the court dismissed the claim in this case), was postponed by the National Prosecutor's Office three times. It was dealt with by the prosecutor's office in Warsaw, then in Wrocław and Poznań, and finally ended up in Lublin, where the prosecutor decided not to recognise the final court decision.<sup>31</sup> There are many cases like this.<sup>32</sup>

Cases that are difficult for the authorities are discontinued or the prosecutor's office does not launch any proceedings. Cases concerning the breaching of procedures in parliamentary voting, the organisation of elections without a legal basis,<sup>33</sup> and the government's refusal to print Constitutional Tribunal verdicts to prevent them from being implemented were dismissed. This was also the case for the proceedings concerning the illegal spending of public money from the Justice Fund – intended to assist victims of crimes – controlled by the Ministry of Justice. Instead of going to the rightful recipients, money from the Fund was transferred, as compensation, to municipalities that the European Commission had previously taken money away from because they adopted resolutions that discriminated against the LGBT community and thereby violated EU law which requires equal treatment.<sup>34</sup> This is not the only "European" theme relating to the Fund: an EU directive requires that states have this kind

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30 Lex Super Omnia report <http://lexso.org.pl/2020/10/05/prokuratura-w-pandemii-czy-pandemia-w-prokuraturze-raport-stowarzyszenia-prokuratorow-lex-super-omnia/>.

31 <https://oko.press/prokuratura-ziobry-stawia-sie-ponad-sadem-ws-giertycha/>.

32 The cases of a ruling party politician accused of racist statements (she was dismissed) and a participant of a demonstration against the tightening of the abortion law who was hit by a car by a security service officer were transferred to prosecutors who were "friendly" towards the authorities. <https://wyborcza.pl/7,75398,26258841,jakie-sledztwa-odbiera-sie-prokuratorom-za-ziobry-niezalezosc.html>; <https://wyborcza.pl/7,75398,26622295,prokurator-chciala-scigac-oficera-abw-ktory-wjechal-w-strajk.html>.

33 <https://lodz.wyborcza.pl/lodz/7,35136,26351658,prokuratura-umarza-postepowanie-ws-morawieckiego-i-sasina.html>.

34 <https://www.gov.pl/web/sprawiedliwosc/wsparcie-z-funduszu-sprawiedliwosci-dla-gmin-ktore-pominieto-w-unijnym-programie-partnerstwo-miast> Wsparcie dla gminy Tuchów było trzy razy większe niż suma, o którą ona zawnioskowała.



of institution to assist aggrieved parties.<sup>35</sup> The prosecutor's office twice refused to launch proceedings against Lux Veritatis, a foundation close to the authorities associated with the fundamentalist Catholic Radio Maryja, which social organisations accuse of misappropriating public money.<sup>36</sup>

The law of 2016 not only gave the prosecutor general extensive powers to shape staffing policy at the prosecutor's office as he sees fit, but also to grant financial awards. According to the information collected by the Lex Super Omnia organisation, the vast majority of the people awarded come from the highest echelons of the prosecutor's office, with prosecutors performing official duties at the National Prosecutor's Office in the lead. Information on promotions and bonuses is not available to the public. "Every year, the National Prosecutor's Office consistently refuses to provide information on the personal data of public prosecutors who received financial awards, their size, or those who obtained the title of public prosecutor at the National Prosecutor's Office or have been delegated to this unit."<sup>37</sup>

The right of access to public information about the prosecutor's office activities was significantly limited by the reform of the Code of Criminal Procedure which entered into force on 22 June 2021. The amendment to Article 156 means that only the prosecutor can decide whether the files of discontinued cases will be made available to the media or NGOs and that his decisions cannot be appealed against. In the past, it was possible to appeal to an administrative court against a negative decision. In other words, if there are suspicions that a given case was discontinued for political reasons, it is up to the prosecutor who issued it to decide whether or not the grounds for this decision can be verified.<sup>38</sup>

How the system functions does not guarantee that any irregularities related to the spending of money from the Recovery Fund, which is poorly controlled by the EU, will be properly prosecuted. In a hypothetical case of the embezzlement of EU money by a company controlled by the State Treasury or whose owner is a friend of a politician in the ruling party, the prosecutor general can appoint any prosecutor anywhere in Poland to deal with it. Given that all the prosecutors are dependent on the will of the prosecutor general when it comes to promotion, remuneration, business trips, and so on, the possibilities when it comes to choosing the "right" investigators – that is, ones who are servile towards the authorities – are almost endless. There are already precedents that confirm these fears.

The case of PiS MEP Ryszard Czarnecki, which OLAF referred to the National Prosecutor's Office in May 2019, went to the District Prosecutor's Office in Zamość. OLAF examined Czarnecki's expenses and concluded that in 2009–2018 the MEP was unduly reimbursed around EUR 100,000 in expenses (according to reports in the media) for work trips.<sup>39</sup> After examining the case, certain that it had been used inappropriately, the Parliament's administration ordered that Czarnecki return the money.<sup>40</sup> The Zamość prosecutor's office has been considering Czarnecki's case for two years. No indictment has been filed yet. The head of the regional prosecutor's office in Zamość was promoted to the post by the

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35 <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A32012L0029>.

36 <https://www.money.pl/gospodarka/sprawa-tadeusza-rydzyka-wyborcza-prokuratura-broni-ojca-dyrektora-6643401008438144a.html>.

37 Lex Super Omnia report.

38 <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8070574,reglamentowany-dostep-do-akt-prokuratura-pozza-kontrola-mediow.html>.

39 <https://oko.press/unijni-sledczy-podejrzewaja-ze-ryszard-czarnecki-wyludzil-pieniadze-z-parlamentu-europejskiego/>.

40 <https://businessinsider.com.pl/twoje-pieniadze/ryszard-czarnecki-musi-oddac-pieniadze-za-podroze/k3q5f7x>.

prosecutor general in February 2019, three months before the case came to him.<sup>41</sup> Before that, he was just a deputy district prosecutor in a provincial town.

In autumn 2019, the prosecutor's office discontinued the investigation into another case concerning the possible embezzlement of EU money, the beneficiary of which was Ziobro's Solidarna Polska party.<sup>42</sup> In 2013, it organised a party convention in Kraków, financing it with funds from MELD, the European party that Solidarna Polska belonged to, which were meant to be spent on a climate conference. Polish *Newsweek* covered the story extensively in 2016. Climate issues did not play any role at the convention which was very much a party event. Moreover, money also went to companies directly associated with the party's politicians based on principles that are an insult to good management. For example, one company received EUR 11,500 for the production of 10,000 pens – an amount at least ten times higher than the market price.<sup>43</sup> Shortly afterwards, Solidarna Polska politicians and their family members donated substantial sums to the party's election fund. Meanwhile, completely different decisions were made in a very similar case considered by Danish law enforcement authorities. Morten Messerschmidt, a politician from Solidarna Polska's sister party, the Danish People's Party, also used MELD funds illegally for a party convention. Unlike the Polish prosecutor's office, the Danish law enforcement authorities charged him and, in April 2021, the parliament in Copenhagen waived his immunity without any objections.

There is no doubt that the politicised functioning of the prosecution service and other state institutions substantially increases the risk of corruption, which is reflected in citizens' views. According to the latest study by Transparency International, Poles are increasingly concerned about corruption and do not trust the authorities to fight it. Nearly three quarters (72%) of Poles are convinced that corruption is a big problem Poland. More than a third (37%) of Poles believe that corruption increased over the twelve months before the study was conducted. Poles included the government administration (34% of responses), the prime minister (32%) and the parliament (31%) among the most corrupt public institutions. At the same time, exactly two-thirds of respondents in Poland stated that the government is not coping well with corruption.<sup>44</sup>

## Judges under pressure from the authorities

The role of the minister of justice / prosecutor general is not limited to the prosecution service. How the prosecutor's office functions is of fundamental importance for the entire system of the rule of law in Poland. In an opinion published in 2017, the Venice Commission pointed out that the reform of the prosecutor's office in 2016 had a direct negative impact on judicial independence and therefore on the separation of powers and the rule of law.<sup>45</sup> Since then, this assessment has not only been confirmed, but the situation has worsened significantly. In May 2021, CJEU Advocate General Michał Bobek issued an opinion in which, referring to the powers and functioning of the Polish prosecutor's office, he stated that "the minimum guarantees necessary to ensure the indispensable separation of powers between the executive and the judiciary are no longer present".<sup>46</sup>

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41 <https://www.kronikatygodnia.pl/wiadomosci/14658,mariusz-rymarz-nowy-po-prokurator-okregowy>

42 <https://wyborcza.pl/7,75398,26252621,prokuratura-umarza-sledztwo-w-sprawie-partii-ziobry-i-przemilcza.html>.

43 <https://www.newsweek.pl/newsweek-print/zbigniew-ziobro-i-jacek-kurski-partyjny-kongres-za-pieniadze-z-euoparlamentu/bgzkmd9>.

44 [https://www.batory.org.pl/blog\\_wpis/globalny-barometr-korupcji-co-nam-mowi-o-europie-i-o-polsce/](https://www.batory.org.pl/blog_wpis/globalny-barometr-korupcji-co-nam-mowi-o-europie-i-o-polsce/).

45 <http://lexso.org.pl/2017/12/18/opinia-komisji-weneckiej-w-sprawie-ustawy-prawo-o-prokuraturze-ze-zmianami/>.

46 Advocate General's Opinion in joined cases C-748/19 to C-754/19.

In a ruling issued in 2018, the CJEU established a fundamental principle: that, as the ultimate guardian of the rule of law across the EU, it has the obligation to ensure that all EU citizens are provided with effective judicial protection in their national courts. The ruling stressed that courts in member states must be “protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions.”<sup>47</sup> These kinds of systemic guarantees of judicial independence do not exist in Poland.

The minister of justice and the prosecutor general play a key role in the entire judiciary, with more power over courts than anywhere in the EU. The minister appoints the heads of local, district and appeals courts. This is a key power because court heads have considerable influence over the professional lives of subordinate judges and how the courts function. The minister can also dismiss court head on vague grounds such as “serious or persistent failure to carry out official duties”, when staying in the post “is incompatible with the good of the administration of justice”, or when the effectiveness of administrative supervision is particularly low. Only the National Council of the Judiciary (KRS) can block the dismissal of a court head by a two-third majority (17 out of 25 members). This is unlikely, given that all the KRS judges were dismissed in 2018 and replaced with new ones appointed by the parliamentary majority of the United Right which Ziobro belongs to. In addition, Ziobro is a member of the KRS himself. The KRS – which should guard judicial independence, according to the Polish constitution – was suspended by the European Network for Councils of the Judiciary due to its dependence on politicians.<sup>48</sup> The CJEU<sup>49</sup> and the Polish Supreme Court<sup>50</sup> also expressed their opinion on the matter: in their view, the KRS in its present composition and form is not independent of the legislature and the executive.

The minister also decides on the delegation of judges to higher courts – and can end these delegations arbitrarily at any time. In the opinion cited, Bobek, the CJEU advocate general, deemed it contrary to EU law. Yet according to Deputy Minister of Justice Łukasz Piebiak, “judges should always stand on the side of the state (...) Judges’ conduct is dangerous when judges turn against the legislative and executive authorities”. With other officials from the Ministry of Justice, Piebiak organised a campaign slandering judges critical of the current government. Piebiak used access to classified material to collect information about the private life of 20 judges and made it available to pro-government activists, who shared it on social media. Two members of the KRS and a Supreme Court judge appointed by PiS were also involved in this campaign. Piebiak revealed in his emails that he had informed his “boss” about everything. Piebiak left his post as deputy minister in 2019. Yet in May 2021, the KRS made him a judge at the Supreme Administrative Court, one of the most important courts in Poland.

The minister of justice has full authority over disciplinary proceedings against judges. He has the right to designate every person involved in the investigation, prosecution and settlement of disciplinary charges against judges of common courts in Poland. He appoints disciplinary commissioners who launch proceedings against judges and oversees their work. Even if their investigation is discontinued, the minister can appoint another disciplinary officer to investigate the same allegations and issue binding instructions on how the investigation should be conducted. In this way, the minister can prosecute any judge until the desired result is achieved – all the more so because he appoints not only the disciplinary commissioners (prosecutors), but also the disciplinary court judges who review

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47 Judgement in case C-64/16 Associação Sindical dos Juizes Portugueses, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210088en.pdf>.

48 <https://oko.press/krs-zawieszona-w-europejskiej-sieci-rad-sadownictwa-czarny-dzien-dla-polski/>.

49 Ruling in joined cases C-585/18, C-624/18 and C-625/18.

50 See, for example, the ruling of 5 December 2019, file no. III PO 7/18.

disciplinary cases. He can assign disciplinary cases to judges who well-disposed towards him politically. Although they are appointed for a six-year term, the minister can increase their number at any time. He can reward them easily in the future for favourable rulings because he decides on the appointment of court presidents.

Disciplinary proceedings are conducted *en masse* against judges critical of the changes in the judiciary. Judges who take part in public discussions on constitutionalism, submit questions for a preliminary ruling to the CJEU, or even issue rulings that the authorities do not approve of, are being prosecuted.<sup>51</sup> The so-called muzzle law foresees penalties for judges who apply the criteria of judicial independence as defined by the CJEU. According to the Commission, this act will “diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments”.<sup>52</sup> All these actions have one common denominator: they serve to intimidate judges and have a chilling effect, discouraging them from fighting for independence.

The Polish government is also striving to establish a constitutional barrier against the application of CJEU rulings on matters relating to the rule of law and the administration of justice. In April 2021, Prime Minister Mateusz Morawiecki sent the Constitutional Tribunal a request asking it to deem incompatible the CJEU's interpretation of the treaty provisions on “effective legal protection” (Article 19) and “sincere cooperation” (Article 4) and on the application of the “interim measures instrument in relation to Poland's courts. The Tribunal is controlled by the government and serves as its instrument. In December 2017, the European Commission had warned that in Poland “the constitutionality of laws can no longer be verified and guaranteed by an independent constitutional tribunal”. If the Tribunal agrees with the Polish government, it will grant objection to all EU institutions' efforts to protect the rule of law in Poland the highest constitutional sanction. This stems from efforts to have full freedom to shape how the judiciary functions, including when it comes to the independence of judges. In terms of EU funds, this could mean a lack of independent judicial control over the distribution and spending of funds, while refusing to recognise EU bodies' right to take any kind of preventive action.

## Conclusions

So far, Poland has been considered a country that uses EU funds efficiently and prevents corruption, fraud and financial embezzlement. Poland does well in OLAF's and the European Commission's reports. Yet the destruction of the rule of law described above – especially in terms of the prosecution service, judicial independence and the transparency of public life – has gone so far that the risk of worsening “grand corruption”, including using EU funds, is growing. How the Recovery Fund is managed further increases the risk that the system that threatens the foundations of the EU will be consolidated. As the experience of Hungary shows, the persistence of institutionalised forms of “grand corruption” makes it impossible for the EU institutions to counteract its consequences, which are disastrous for the EU.

“Grand corruption” using EU funds can have many faces. Classic examples – bribes, set tenders, and so on – are just some of them. A system without checks and balances also allows for more sophisticated methods of political corruption and the strengthening of undemocratic or authoritarian practices. One example is the Government Fund for Local Initiatives (RFIL) which provides funds for local

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51 Cf. <https://esiweb.org/sites/default/files/reports/pdf/ESI-Batory%20Polands%20courts%20under%20siege%20-%202022%20March%202019.pdf>.

52 <https://ruleoflaw.pl/venice-commission-opinion-on-the-muzzle-law/>.

governments that are distributed by the government.<sup>53</sup> According to journalists at TVN24, funds from the RFIL (PLN 12 billion) were separated from the Covid-19 Countermeasure Fund (worth PLN 121.5 billion) created by the government during the pandemic. This was made up of the state-owned development bank BGK bonds (PLN 112 billion) and funds from the state budget, as well EU funds (PLN 9.5 billion in total),<sup>54</sup> which is significant in the context of this analysis. A committee appointed by the prime minister, consisting of his representatives and those of several ministries, was responsible for allocating the funds. Its composition was not revealed. This handful of people processed 10,000 applications and distributed the funds completely freely, without limits, precise criteria, justification or explanation. According to the authors of a report on how the RFIL functions, the committee “never even held a meeting and only needed a very short time (a day) in a written procedure to formally approve funding recommendations elaborated by the Chancellery staff whose names have not been disclosed”.<sup>55</sup>

The analysis of how the funds were distributed shows that municipalities “linked to the opposition received three times less funds per capita than municipalities which are supportive of the ruling party”. In municipalities with PiS mayors, the average subsidy amounted to over PLN 250 per capita; in municipalities run by the opposition, it was ten times lower. Moreover, over a third of all the funds transferred to towns with district rights went to towns in the constituency of Prime Minister Mateusz Morawiecki, whose office decided on the allocation of the funds.<sup>56</sup> The key point is not that perhaps a small share of the EU funds might have been spent based on the party criterion, but the mechanism used to do so. The non-transparent system of various funds, makes it impossible to determine precisely which funds were spent in which way.

The risks for the Recovery Fund are further increased by problems with transparency and access to public information. In addition to its refusal to join the EPPO, Poland does not use the EU ARACHNE system which collects data on spending from cohesion funds and is meant to help EU bodies identify potential irregularities. ARACHNE is not compulsory, but most EU countries participate in this system. Poland is also one of the few countries that did not include any mechanisms designed to foster transparency in how money from its Recovery Plan is spent.<sup>57</sup> Poland has not committed to publish reports on spending from the Recovery Fund, make data freely available, create a website that collects this kind of information, disclose the final beneficiaries of the funds and explain what they were spent on, or publish audit reports.<sup>58</sup> This means that access to the information needed to assess how the money was spent and its implications could be limited for social organisations and the media.

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53 J. Flis, P. Swianiewicz, Rządowy Fundusz Inwestycji Lokalnych – reguły podziału, Stefan Batory Foundation, <https://www.batory.org.pl/wp-content/uploads/2021/01/Rzadowy-Fundusz-Inwestycji-Lokalnych-regu%C5%82y-podzia%C5%82u.pdf>, J. Flis, P. Swianiewicz. The Central Government Fund for Local Investments III – patterns taking hold, Stefan Batory Foundation, [https://www.batory.org.pl/wp-content/uploads/2021/05/The-Government-Fund-for-Local-Investment-III\\_patterns-taking-hold.pdf](https://www.batory.org.pl/wp-content/uploads/2021/05/The-Government-Fund-for-Local-Investment-III_patterns-taking-hold.pdf).

54 TVN24, “Czarno na białym” programme, 5 May 2021, <https://tvn24.pl/go/programy,7/czarno-na-bialym-odcinki,11367>.

55 D. Sześciło, A. Gąsiorowska, R. Lapszyński, S. Zakroczyński, Central Government Fund for Local Investments: a needs-based or a politics-based scheme?, Stefan Batory Foundation, [https://www.batory.org.pl/wp-content/uploads/2021/05/Central-Government-Fund-for-Local-Investments\\_.pdf](https://www.batory.org.pl/wp-content/uploads/2021/05/Central-Government-Fund-for-Local-Investments_.pdf).

56 [https://www.batory.org.pl/wp-content/uploads/2021/05/Central-Government-Fund-for-Local-Investments\\_.pdf](https://www.batory.org.pl/wp-content/uploads/2021/05/Central-Government-Fund-for-Local-Investments_.pdf).

57 This also applies to Germany, Austria, Croatia, Denmark and Slovakia.

58 [https://www.open-contracting.org/wp-content/uploads/2021/06/RRF\\_report.pdf](https://www.open-contracting.org/wp-content/uploads/2021/06/RRF_report.pdf).

A situation in which a unique programme of European solidarity – like the Reconstruction Fund – could serve purposes contrary to the EU's principles and values would be a historic failure for Poland and the EU. This risk exists and the EU institutions should take the steps necessary to counter it.

Firstly, the European Commission and the member states must use the rule of law conditionality mechanism as an instrument in the fight against “grand corruption”. The Commission's guidelines for applying this mechanism which are undergoing consultations with the member states and are set to be adopted this autumn, must precisely define how its function resulting from the regulation will be performed. In particular, the guidelines should define the types of breaches of the rule of law, the “serious risk of impact” on EU finances and the meaning of “sufficiently direct”. These terms cannot be applied restrictively to the text of the regulation. Their definition should make it possible, and even necessary, for the Commission to take action within the framework of the budgetary protection mechanism procedure whenever systemic breaches of the rule of law create a risk that EU funds could be used in a way contrary to the EU's objectives. Any other solution – for example, only using this instrument in the case of specific cases of corruption – would be contrary to the regulation's objectives and render the instrument meaningless.

Secondly, the Commission should promptly launch the rule of law conditionality mechanism procedure against Poland. The crisis of the rule of law has reached a stage that exhausts the signs of “risk” that constitute the basis for triggering the mechanism (we do not consider other countries in this study, though Poland is certainly not the only country with the problems described here). The threat of the withdrawal of funds or suspension of payments may be the only way to halt the destruction of the rule of law, which cannot be reversed if action is taken too late. The fact that corruption in Poland has not yet gone as far as in Hungary should not incline the Commission to refrain from applying the rule of law conditionality mechanism. On the contrary, it should draw conclusions from the effects of how the Orbán government's embezzlement of funds has long been ignored and not allow EU funds to help transform another member state into an undemocratic oligarchy. If the Council of the EU decides to use the measures provided for in the regulation (including the suspension of payments), it will be necessary to protect the beneficiaries of the funds (companies, municipalities, citizens, social organisations, and so on). According to the regulation, when funds for a member state are withheld due to a “risk” caused by “breaches of the rule of law”, the beneficiaries of the funds still have the right to demand payment from the country's government. This applies to all those that have already signed subsidy agreements and been added to the catalogue of beneficiaries, as well as, for instance, farmers entitled to subsidies. The Commission should ensure that this provision is enforced.

Thirdly, when analysing Poland's Recovery Plan, the Commission should focus primarily on ensuring the most effective control and monitoring mechanisms by social organisations and the media. In a situation where the EU instruments will have, as can be expected, very limited effectiveness, the greatest responsibility rests with Polish civil society, which can play a key role. In particular, taking into account the fundamental problems of the rule of law repeatedly identified by the Commission in its official documents and by CJEU in its rulings, the Commission should oblige the Polish government to ensure the greatest possible transparency in access to information on how money from the Recovery Fund is spent. All the data on contracts concluded by public institutions, information on fund beneficiaries, audit reports submitted to the Commission, and so on, must be publicly available. Countries should also be required to use the ARACHNE system when using the Recovery Fund, so that the Commission can monitor spending on an ongoing basis. The point of reference for the Commission when assessing Poland's Recovery Plan must also be the Recovery Fund implementation act, in which an effective

monitoring system must be ensured (a Monitoring Committee with broad powers independent of the government, involving representatives of local government and social organisations),<sup>59</sup> along with precise criteria and rules for selecting projects that are in line with the EU's objectives.

Fourth, the Commission must require the Polish government to make specific commitments to "protect the independence of the judiciary",<sup>60</sup> one of the four recommendations for Poland as part of the European Semester. Although, in their national recovery plans, each country is required to present actions that aim to implement these recommendations, Poland's plan lacks any reference to this key point from the perspective of the EU's financial interests.

Fifth, the Commission should only recommend that Poland's Recovery Plan be approved on the condition that Prime Minister Morawiecki's request to the Constitutional Tribunal asking it to declare the primacy of the Polish constitution over the EU treaty is withdrawn. The Commission should demand that this request be withdrawn, in line with the letter sent to the Polish authorities in early June 2021.<sup>61</sup> A situation in which the state openly questions the primacy of European law is a fundamental threat not only to the financial interests of the EU, but also to the interests of its citizens, especially Polish citizens. Full freedom to shape the judiciary could mean the lack of independent judicial control of the distribution and spending of EU funds, with EU bodies unable to take steps to prevent them from being embezzled.

Sixth, the Commission and the member states should take up the following proposal put forward by the European Stability Initiative think-tank: failure to comply with CJEU rulings concerning Article 19 (effective legal protection) should result – at the Commission's request – in the loss of access to EU funds, unless a qualified majority in the Council of the EU opposes it. This rule would significantly strengthen the most important instrument for protecting the rule of law at the EU's disposal: the anti-infringement procedure (with regard to judicial independence), with a key role for CJEU rulings. Its purpose would not be to punish states; instead, it would deter them from breaching the fundamental principle that CJEU rulings must be respected, especially in matters concerning the foundations of the EU, i.e. the rule of law (hence the extraordinary financial sanction). Any government that dares to raise its hand against judicial independence will have to reckon with the fact that it ultimately will face a CJEU ruling and the real threat of a hefty penalty for ignoring it.<sup>62</sup>

Finally, in the face of the expected threats, the Commission should make every effort to make best use of the newly-created "Citizens, Equality, Rights and Values" (CERV) programme, which was designed to support social organisations that promote European values, including the rule of law.<sup>63</sup> Grants from the EUR 1.5 billion fund will be awarded directly by the Commission based on competitions. The crucial factor will be whether the funds are made available to organisations that deal with problems at the national and local level, rather than big European networks, which was the case so far.<sup>64</sup> In this context, the Commission's announcement that a significant share of the funds will be distributed to

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59 The assumptions for the implementation act, along with the composition and tasks of the Monitoring Committee, were presented by the organisers of the National Recovery Plan civic hearings: the Polish Federation of NGOs and the Stocznia Foundation [https://ofop.eu/wp-content/uploads/2021/05/Wdrozenia-KPO\\_propozycje-organizacji-spolecznych-10-maja-2021.pdf](https://ofop.eu/wp-content/uploads/2021/05/Wdrozenia-KPO_propozycje-organizacji-spolecznych-10-maja-2021.pdf).

60 <https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:52020DC0521&from=EN>.

61 <https://wyborcza.pl/7,75399,27183609,bruksela-chce-wycofania-z-tk-wniosku-o-uznanie-wyzszosci-prawa.html>.

62 <https://www.esiweb.org/publications/article-19-mechanism-need-robust-defence-eu-rule-law>.

63 <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/programmes/cerv>.

64 <https://publicystyka.ngo.pl/przelom-w-unijnym-wsparciu-dla-spoleczenstwa-obywatelskiego>.

grassroots organisations through national and regional operators is a positive sign. In this way, local organisations (such as watchdogs) will have a better chance of getting support for acting in the EU's strategic interest, counteracting institutionalised "grand corruption".

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