# Don’t Let Money Rule the Law

## How the Polish government uses public and EU funds to destroy the rule of law

## EXECUTIVE SUMMARY

in collaboration with

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**The report takes a closer look at how EU funding is being used by Polish authorities who are entrusted with its management and its spending. With a view to determining to what extent the current deficiencies in the functioning of the rule of law system have affected, or are likely to affect, the way in which EU money is spent in Poland.**

**It reveals that the decay of independent institutions and the absence of effective safeguards have indeed been accompanied by a wave of abuse, including fraud and corruption to the benefit of the ruling circle, derived in large part from the diversion of public, including EU funds.**

**It confirms that a functioning rule of law system is key not only to ensuring respect for democratic and human rights standards, but also to preserving the public budget from abuse. In the case of Poland, the fact that such abuse directly contributes to further backsliding in the rule of law, and to worsening encroachment upon fundamental rights and freedoms, is yet another compelling argument for promptly and effectively correcting it.**

Since the 2015 elections that brought the ruling party to power, Poland has been in a nearly permanent crisis of the rule of law. For the past eight years, the government has undertaken determined efforts to take over or undermine the country's independent institutions. Moreover, it has removed other obstacles to its consolidation of power, including by cracking down on independent media and civil society. This has raised concern both within Poland and internationally. The European Union has attempted to reverse Poland's slide into authoritarianism with a range of warnings and legal measures. Despite achieving results in some areas, and maintaining political pressure on the government, overall this approach has failed to halt the backsliding.

In this report, the International Federation for Human Rights (hereafter FIDH) focuses on the links between the deterioration of the rule of law in Poland and its past and potential future misuse of EU funds. The report reveals that the decay of independent institutions and the absence of effective safeguards has been accompanied by a wave of abuse, including fraud and corruption to the benefit of the ruling circle and its cronies.

Poland is among the largest recipients of EU funds. These funds account for approximately 2% of Poland's GDP, which in 2022 was approximately 651 billion euros. This funding stream represents a significant source of concern and risk for the EU and its financial interests, as well as a powerful lever for exerting pressure on Poland to comply with EU laws, standards, and values. Accordingly, the EU has developed new tools – notably, the Conditionality Regulation. And it has tightened its policy regarding EU funds – notably, under its cohesion policy and the newly created Recovery and Resilience Facility (RRF). Combined with other pre-existing instruments, such as infringement proceedings, and the famous "Article 7 procedure" by which the EU can sanction serious breaches of EU values by Member States, these have the potential to compel Poland to respect rule of law principles or else risk forfeiting access to significant sums of EU money.

The report provides a detailed look at the vast distance separating the current state of affairs in Poland from the reforms that would be required to comply with EU standards, particularly in the management, spending, and oversight of public funds. It thereby sheds light on the momentous decisions facing the EU, as well as Poland's future government(s).

The report is based on combined desk and field research by FIDH and its partner organisations in Poland, and investigative reporting by independent Polish journalists. Based on its findings, it provides detailed recommendations to the Polish government and the European Union.

## Public and EU funds benefit the ruling circle and its friends

The report details and documents numerous instances of dubious, opaque, or outright fraudulent spending by government entities. Either using EU funds directly, or using funds from the same national bodies that receive and serve as managing intermediaries for EU funds. Even in the case of funds that did not originate with the EU, the pattern of their corrupt allocation sheds an accusatory light on State policies regarding fund management, and on the impotence of State oversight institutions to effectively police wrongdoing. These allocation are often into the hands of government allies or family members, or for the purpose of rewarding loyalty to the government or punishing opposition to it.

The report shows that the likelihood that such a broken system could lead to abuse is, in light of these research findings, extremely high.

## The government's strategy may be wearing thin: the CPR, the RFF, and the Conditionality Regulation

Poland continues to refuse to follow the recommendations of EU bodies and the rulings of European courts relating to the rule of law, such as respect for judicial independence and the implementation of robust anti-fraud, anti-corruption and anti-money laundering policies and structures. This steadfast resistance has begun to encounter a growing reluctance on the part of the EU to continuing its largesse towards Poland.

The Common Provisions Regulation (CPR) establishes rules for various EU funds, including the Cohesion Funds, on which Poland has long relied. The CPR has insisted that programmes funded through such funds comply with the EU Fundamental Rights Charter throughout their implementation, and provides for their suspension in the event that this condition is not met. But this report shows that the various bodies and procedures that the CPR has established to ensure compliance with its rules have proved ineffective in safeguarding the EU budget in practice.

The Recovery and Resilience Facility (RFF) is a €672.5 billion fund designed to help Member States deal with the effects of the COVID-19 pandemic. All Member States are required to submit a National Recovery and Resilience Plan, detailing their plans for the funds. The European Commission imposed a further layer of approval on Poland, linking the release of funds to meeting a set of milestones, including rule of law milestones. Poland's intransigence has thus far kept it from receiving all but a fraction of its share of the RFF. As this report shows, rather than undertake reforms to reach these milestones and prove its commitment to effectively implementing them, Poland's government has instead proceeded with projects it had expected would be funded by the RFF. This policy has strained Poland's budget and its credit, while transferring the risk of the funds' contingent non-release to their expected beneficiaries. Meanwhile, the government has been using the blocked funds as a cudgel in a pre-election campaign of anti-EU propaganda.

Another significant addition to the EU's toolbox, which has potential for challenging Poland's drift from EU values, is the Rule of Law Conditionality Regulation (or Mechanism), which entered into force in 2021. It aims at sanctioning rule of law breaches that affect, or risk affecting, the sound financial management of the EU budget or the EU's financial interests. It empowers the European Commission to withhold funding from any Member State in violation. Poland and the notorious "illiberal democracy" of Hungary challenged the Regulation's legality, but it was upheld by the Court of Justice of the European Union in 2022, when, at last, it became applicable. The Mechanism applies a two-part test, requiring both that no other procedures exist that protect the EU budget more effectively, and that a "sufficiently direct link" exist between the rule of law shortcomings and the risks to the EU funds in question. In the case of Poland, the evidence gathered for this report about the abuses of EU funds – or the risk thereof, which suffices – and about the role played in it by public authorities involved in their implementation and/or control argue strongly for the activation of the Mechanism.

## Poland's institutions responsible for preventing mismanagement of public funds are ineffectual or worse

The report also show that the Polish institutions and mechanisms tasked with the prevention, oversight, investigation, and eventual sanctioning of governmental mismanagement or abuse of public funds, have either been neutered by the regime, or else turned into instruments of its partisan governance.

In 2015, the ruling party passed a law that merged the function of Prosecutor General with that of Minister of Justice. It greatly enhanced the power of the holder of this position to intervene directly in the decisions, assignments, promotions and demotions, and even the decisions regarding criminal proceedings of prosecutors throughout the country. These interventions reveal a distinct pattern of political interference in decisions regarding the investigation and prosecution of crimes, including financial crimes, and of punishing or rewarding prosecutors based on their willingness to protect regime figures and allies, and to investigate and prosecute their rivals. The changes introduced in 2015 have stripped Polish courts of the characteristics that would qualify them as independent and effective courts within the meaning of European and international law. As a result, even when cases reach the judicial stage, the now indisputable lack of independence of the Polish judiciary leads to the conclusion that the right to an effective remedy against breaches of the law, including where public and EU funds are involved, is no longer guaranteed in Poland. Moreover, the reforms that the government has recently proposed to meet the rule of law milestones set in the context of RRF negotiations fall short of effectively addressing EU concerns regarding judicial independence.

The study shows that the Central Anti-Corruption Bureau (CBA), for its part, has a tradition of proximity to political power that dates back to the Law and Justice party's first government in the early 2000s, and functions not as an independent agency, but as an arm of the government. Despite its name, the CBA is widely understood to operate as the ruling party's "political police," and to use its ever-growing resources – including the illegal Pegasus spyware – to harass and persecute members of the opposition.

The Supreme Audit Office (NIK) is charged by Poland's constitution with monitoring and reporting on the activities of government bodies, organizations, and individuals, as well as other non-State entities, concerning the extent to which they use State or municipal property or funds and meet their financial obligations to the State. It is designed to be independent, and to present a credible alternative, yet still State-sponsored, source of information about national finances and the functioning of State-controlled entities. In practice, however, its power has been undermined by the government, which has denied it funds, the right to appoint its chosen personnel, as well as access to the information and cooperation necessary for its audits. Moreover, when NIK investigators dare to attempt to audit State-owned companies close to the ruling coalition – as in the case of the oil and media conglomerate Orlen – they are likely to find themselves under investigation by the public prosecutor's office.

To complete this portrait of Poland's institutional ability and willingness to prevent and punish financial abuse of public, including EU funds, it must be noted that Poland's refusal to join or fully cooperate with the European Public Prosecutors' Office (EPPO) or the European Anti-Fraud Office (OLAF) likewise imposes severe limitations on any meaningful scrutiny by these bodies. It is therefore impossible to avoid the conclusion that Poland lacks effective safeguards to protect its public funds, including EU funds, from abuse.

# KEY RECOMMENDATIONS

**FIDH calls on the government of Poland to:**

- **Restore judicial independence in Poland.** This will require freeing the Constitutional Court, the National Council of the Judiciary, and the Supreme Court from undue political influence, as well as halting disciplinary actions against judges based on political reasons.
- **Restore prosecutorial independence in Poland.** This will require separating the functions of Prosecutor General and Minister of Justice and reducing their powers; freeing the public prosecutor's office to impartially investigate and prosecute misuse of State (and EU) funds; and reinstating all prosecutors disciplined since 2016 for political reasons.
- **Restore the State's capacity to fight corruption, fraud, and mismanagement of public funds.** This will require permitting and requiring the Central Anti-Corruption Bureau (CBA) and the Supreme Audit Office (NIK) to perform their investigations effectively and independent of any political influence.
- **Guarantee the lawful, transparent, and accountable management of EU funds.** This will require respecting the Charter of Fundamental Rights of the EU when spending and overseeing Cohesion Policy Funds and other funds under shared management. But also respecting rules governing Monitoring Committees, including by excluding organisations from them that do not comply with European human rights, equality, and anti-discrimination standards. And enacting and implementing reforms that would meet the milestones established by the European Commission as a precondition for releasing RRF funding to Poland.
- **Enact a comprehensive institutional and organizational reform of the public finance system** with a view to reducing funds, agencies and redefining the "state budget" into a "budget of the entire central sector' to increase transparency over public finances and parliamentary and democratic control over budget.
- **Stop the harassment of independent media and civil society organisations.** This will require halting politically-motivated legal proceedings and smear campaigns against them; providing them with funding on an equal and neutral basis; and halting the use of spyware and surveillance technology against them, the opposition, and private citizens.
- **Comply with both national and European court decisions and the recommendations of the EU.** This will require restoring judicial independence and other fundamental elements of the rule of law.

**FIDH calls on the European Union, its institutions, and Member States to:**

- **Continue monitoring Poland's respect for the rule of law and adherence to EU laws and values.** This responsibility belongs to the European Commission, the European Anti-Fraud Office (OLAF), the European Public Prosecutor's Office (EPPO), the European Parliament, the Council of the European Union, and the EU Member States.
- **Continue making the release of EU funds conditional upon rule of law reforms that Poland has failed to enact and/or implement**. This includes cohesion policy funds under the Common Provisions Regulation, and funds under the EU Recovery and Resilience Facility (RRF).
- **Activate the Conditionality Regulation to sanction rule of law breaches that have an impact on the EU budget.** If Poland's rule of law breaches are deemed to affect or, risk affecting, the EU budget and the EU's financial interests, the Conditionality mechanism is the necessary and appropriate response to sanction these rule of law violations, in combination with other instruments that target breaches of EU values, including the rule of law and human rights, that have no direct link to the EU budget.
- **Advance and consider expanding the scope of scrutiny under Article 7.1 TEU.** This review should include developments that have occurred with regard to the rule of law and other Article 2 TEU values since the procedure was launched in December 2017. It should complement other mechanisms whose aim is to sanction specific breaches of the rule of law and other EU values, such as the Conditionality Mechanism, infringement proceedings, and other procedures under relevant EU legislation, and build on the scrutiny they bring to bear.

Report available at: https://www.fidh.org/IMG/pdf/pologne815a.pdf