



Commission Recommendation regarding the Rule of Law in Poland: Questions & Answers

Brussels, 27 July 2016

The European Commission has today adopted a Rule of Law Recommendation on the situation in Poland, setting out the Commission's concerns and recommending how these can be addressed.

Why is the Commission adopting a Recommendation regarding the Rule of Law in Poland?

The rule of law is one of the fundamental values upon which the European Union is founded. The Commission, beyond its task to ensure the respect of EU law, is also responsible, together with the European Parliament, the Member States and the Council, for guaranteeing the fundamental values of the Union. Recent events in Poland, in particular the political and legal dispute concerning the composition of the Constitutional Tribunal, the non-publication of judgments rendered by the Constitutional Tribunal, as well as the review of the law on the Constitutional Tribunal and its impact on the effectiveness of constitutional review of new legislation have given rise to concerns regarding the respect of the rule of law.

Following a debate in the College of Commissioners on 13 January, the Commission launched a [dialogue](#) on the situation in Poland under the Rule of Law Framework.

Despite the intensive dialogue with the Polish authorities since 13 January, the crisis concerning the Constitutional Tribunal has not yet been resolved.

On 1 June 2016 the Commission adopted an [Opinion](#) concerning the rule of law in Poland to formalise its assessment of the situation. The Opinion set out the concerns of the Commission and served to focus the ongoing dialogue with the Polish authorities towards finding a solution.

On 22 July, the Polish Parliament adopted a new law on the Constitutional Tribunal. The Commission has assessed the law and reaches the conclusion that a number of important issues of concern remain (see below).

As a second step in the process foreseen under the Rule of Law Framework, the Commission today issued a Recommendation setting out the reasons why the Commission considers that there is still a systemic threat to the rule of law in Poland and recommending how this situation can be addressed.

What action is the Commission recommending that the Polish authorities should take?

The Commission considers it necessary that Poland's Constitutional Tribunal is able to fully ensure an effective constitutional review of legislative acts. In particular the Commission recommends that the Polish authorities:

- implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015. These require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up the post of judge without being validly elected;
- publish and implement fully the judgment of 9 March 2016 of the Constitutional Tribunal, as well as all subsequent judgments and ensure that the publication of future judgments is automatic and does not depend on any decision of the executive or legislative powers;
- ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, including the judgments of 3 and 9 December 2015 and the judgment of 9 March 2016, and takes the Opinion of the Venice Commission fully into account; ensure that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined by requirements, whether separately or through their combined effect;
- ensure that the Constitutional Tribunal can review the compatibility of the new law adopted on 22 July 2016 on the Constitutional Tribunal before its entry into force and publish and implement fully the judgment of the Tribunal in that respect;
- refrain from actions and public statements which could undermine the legitimacy and efficiency of

the Constitutional Tribunal.

The Commission underlines that the loyal cooperation which is required amongst the different state institutions in rule of law related matters is essential in order to find a solution in the present situation. The Commission also encourages the Polish authorities to seek the views of the Venice Commission on the new law adopted on 22 July on the Constitutional Tribunal.

The Commission invites the Polish Government to solve the problems identified in this recommendation within three months of receipt of the recommendation, and to inform the Commission of the steps taken to that effect.

Does the law adopted on 22 July 2016 resolve any issues?

On 22 July the Polish Parliament adopted a new law on the Constitutional Tribunal replacing the Law of 25 June 2015 on the Constitutional Tribunal. The Commission considers that even if certain improvements can be noted as compared to the amending Act adopted on 22 December, and even if certain concerns have indeed been addressed, a number of important concerns already raised remain. In particular, concerns persist as regards the issue of the appointment of judges of the Constitutional Tribunal, the lack of publication and of implementation of the judgments of the Constitutional Tribunal of 9 March and of the judgments rendered since 9 March. In addition, a number of new provisions have been introduced which are also cause for concern. Notably, new provisions on the role of the Public Prosecutor-General, the postponement of deliberations, transitional provisions for pending cases and *vacatio legis* are of concern. Overall, the effects of certain provisions of the law adopted on 22 July, taken separately or in combination, raise concern regarding the effectiveness of constitutional review and the rule of law.

What are the developments in Poland that the College is concerned about?

1. The appointment of judges to the Constitutional Tribunal

Ahead of the general elections for the Sejm (lower chamber of the Polish Parliament) of 25 October 2015, on 8 October the outgoing legislature nominated five persons to be 'appointed' as judges by the President of the Republic. Three judges would take seats vacated during the mandate of the outgoing legislature while two would take seats vacated during that of the incoming legislature which commenced on 12 November.

On 19 November, the new legislature, through an accelerated procedure, amended the Law on the Constitutional Tribunal, introducing the possibility to annul the judicial nominations made by the previous legislature and to nominate five new judges. On 25 November the new legislature annulled the five nominations by the previous legislature and on 2 December nominated five new judges.

On 3 December, the Constitutional Tribunal ruled that the previous legislature was entitled to nominate three judges for seats vacated during its mandate, but was not entitled to make the two nominations for seats vacated during the term of the new legislature. The Constitutional Tribunal also clarified that the President was obliged to take the oath of the three validly elected judges without delay. On 9 December, the Tribunal ruled that the new legislature was not entitled to annul the nominations for the three appointments under the previous legislature, but that it was entitled to appoint the two judges whose mandate began under the incoming legislature.

The consequence of the judgements is that the President of the Republic is obliged to "appoint" (i.e. take the oath of) the three judges nominated by the previous legislature. However, the President of the Republic has in the meantime taken the oath of all five judges nominated by the new legislature. The judgments of the Constitutional Tribunal have thus not been implemented, raising concerns as regards the rule of law, and the correct composition of the Tribunal remains disputed between the institutions of the State.

The law adopted on 22 July on the Constitutional Tribunal does not remove these concerns and is incompatible with the judgments of 3 and 9 December as well as the opinion of the Venice Commission. The law requires the President of the Constitutional Tribunal to assign cases to all judges who have taken the oath before the President of the Republic but have not yet taken up their duties as judges. These provisions would enable the three judges which were unlawfully nominated by the new legislature of the *Sejm* in December 2015 to take up their function while using the vacancies for which the previous legislature of the *Sejm* had already lawfully nominated three judges.

2. The Lack of publication and implementation of the Constitutional Tribunal judgment of 9 March 2016 and of the judgments rendered since 9 March 2016

On 22 December 2015, following an accelerated procedure, a law amending the law on the Constitutional Tribunal, which concerns the functioning of the Tribunal as well as the independence of its judges, was passed by the Polish Parliament. In a letter of 23 December 2015 to the Polish Government, the Commission asked to be informed about the constitutional situation in Poland. On 23

December 2015 the Polish Government asked for an opinion of the Venice Commission on the Law of 22 December 2015. However, the Polish Parliament did not await this opinion before taking further steps, and the Law was published in the Official Journal and entered into force on 28 December 2015.

On 9 March 2016, the Constitutional Tribunal ruled that the Law of 22 December 2015 is unconstitutional. That judgment has so far not been published in the Official Journal. On 11 March, the Venice Commission issued an opinion in which it found the amendments of 22 December to be incompatible with the rule of law. Following the judgment of 9 March 2016, the Constitutional Tribunal started again adjudicating cases. The Polish Government did not participate in these proceedings and the judgments rendered by the Constitutional Tribunal since 9 March 2016 have so far not been published by the Government in the Official Journal.

The refusal to publish the judgment of 9 March creates a level of uncertainty and controversy which adversely affects not only that judgment, but all subsequent and future judgments of the Tribunal. Since these judgments are, following the judgment of 9 March 2016, rendered in accordance with the rules applicable before 22 December 2015, the risk of a continuous controversy about every future judgment undermines the proper functioning of constitutional justice in Poland. The Tribunal has to date rendered 20 rulings since its ruling of 9 March 2016, and none of these rulings have been published in the Official Journal.

The law adopted on 22 July on the Constitutional Tribunal does not remove these concerns.

3. Review of the law on the Constitutional Tribunal and effectiveness of constitutional review of new legislation

The Recommendation sets out the Commission's concerns regarding the impact of recent legislation on the Constitutional Tribunal on the effectiveness of constitutional review. On 22 July the Sejm adopted a new law relating to the functioning of the Constitutional Tribunal, repealing the Law of 25 June 2015 on the Constitutional Tribunal. This law follows the amending Act adopted on 22 December 2015 which was declared unconstitutional by the Constitutional Tribunal.

Law adopted on 22 December 2015

As regards the law adopted on 22 December 2015, the Commission already took the view, as set out in its Opinion of 1 June 2016, that the effect of the amendments concerning the attendance quorum, the voting majority, the handling of cases in chronological order and the minimum delay for hearings, in particular their combined effect, undermined the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution.

Law adopted on 22 July 2016

As regards the law adopted on 22 July 2016, the Commission considers that even if certain improvements can be noted as compared to the amending Act adopted on 22 December 2015, and certain concerns have been addressed, a number of important concerns raised already remain and a number of new provisions raising concern have been introduced (see above). Overall, the effects of certain provisions of the law adopted on 22 July 2016, taken separately or in combination, raise concern regarding the effectiveness of constitutional review and the rule of law.

Effectiveness of constitutional review of new legislation

The Commission considers that as long as the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review, there will be no effective scrutiny of the compliance of legislative acts with fundamental rights. This raises serious concerns in respect of the rule of law, notably as a number of particularly sensitive new legislative acts have been adopted recently by the *Sejm* for which constitutional review should be available, such as, in particular, a media law, a law amending the law on the Police and certain other laws, a new Civil Service Act, a law on the National Council of Media and a new anti-terrorism law.

What has the Commission done so far to address this issue?

First Vice-President **Timmermans** has been entrusted by President **Juncker** with responsibility for the EU's Rule of Law Mechanism (see below) and with upholding the respect for the rule of law. The Commission's intention is to clarify the facts, in consultation with the Polish Government.

In light of the situation regarding the **Constitutional Tribunal**, First Vice-President **Timmermans** wrote to the Polish Government on 23 December 2015 to request further information about the state of play. The letter requested that the Polish Government explain the measures they envisage to take with respect to the different Constitutional Tribunal judgements.

In his letter, the First Vice-President also recommended that the Polish Government consult the Venice Commission before enacting the proposed changes to the Law on the Constitutional Tribunal. The Polish Government requested a legal assessment from the Venice Commission on 23 December, but

proceeded with the conclusion of the legislative process before receiving the Venice Commission's opinion.

On 13 January 2016, the College of Commissioners held a [first orientation debate](#) on the situation as regards the rule of law in Poland. This was followed by extensive exchanges in writing between the Commission and the Polish authorities.

On 19 January, the Commission took part in a European Parliament Plenary debate on the situation in Poland with Polish Prime Minister Beata Szydło. The Commission explained its concerns and stressed that its analysis in the dialogue with Poland under the rule of law framework would be objective, non-partisan and evidence-based.

First Vice-President **Timmermans** was in Warsaw on 5 April and on 24 May for exchanges with his Polish counterparts on how to resolve the situation. Extensive exchanges took place between the Commission and the Polish Government in meetings at various levels. However, despite these exchanges it was not possible to find a solution to the issues identified by the Commission. Further meetings took place between the College meetings of 18 May and 1 June, but did not result in significant and concrete progress on the matter.

On 1 June the Commission adopted an [Opinion](#) concerning the rule of law in Poland to formalise its assessment of the current situation in that Opinion. On 24 June 2016 the Polish Government wrote to the Commission acknowledging receipt of the Commission's Rule of Law Opinion of 1 June. Subsequently, the dialogue between the Commission and the Polish Government continued.

On 22 July 2016 the *Sejm* adopted a new law on the Constitutional Tribunal. The Commission provided comments and discussed the content of the draft law with the Polish authorities at various stages of the legislative process.

What is the Rule of Law Framework?

On 11 March 2014, the European Commission adopted [a new Framework for addressing systemic threats to the Rule of Law](#) in any of the EU's 28 Member States. The Framework establishes a tool allowing the Commission to enter into a dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law.

The purpose of the Framework is to enable the Commission to find a solution with the Member State concerned in order to prevent the emergence of a systemic threat to the rule of law that could develop into a "clear risk of a serious breach" which would potentially trigger the use of the 'Article 7 Procedure'. Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission can launch a 'pre-Article 7 Procedure' by initiating a dialogue with that Member State through the Rule of Law Framework.

The Rule of Law Framework makes transparent how the Commission exercises its role under the Treaties, and aims at reducing the need for recourse to the Article 7 Procedure.

The Rule of Law Framework has three stages (see also graphic in Annex 1):

- **Commission assessment:** The Commission will collect and examine all the relevant information and assess whether there are clear indications of a systemic threat to the rule of law. If, on this evidence, the Commission believes that there is a systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending a "Rule of Law Opinion", substantiating its concerns.
- **Commission Recommendation:** In a second stage, if the matter has not been satisfactorily resolved, the Commission can issue a "Rule of Law Recommendation" addressed to the Member State. In this case, the Commission would recommend that the Member State solves the problems identified within a fixed time limit, and informs the Commission of the steps taken to that effect. The Commission will make public its recommendation.
- **Follow-up to the Commission Recommendation:** In a third stage, the Commission will monitor the follow-up given by the Member State to the recommendation. If there is no satisfactory follow-up within the time limit set, resort can be had to the 'Article 7 Procedure'. This procedure can be triggered by a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission.

The entire process is based on a continuous dialogue between the Commission and the Member State concerned. The Commission will keep the European Parliament and Council regularly and closely informed.

At which stage are we under the Rule of Law Framework?

The adoption of the Rule of Law Recommendation is part of the second stage of the procedure. The Polish authorities have now been invited to solve the problems identified in this Recommendation

within three months of its receipt, and to inform the Commission of the steps taken to that effect.

What is the Article 7 Procedure?

The Procedure foreseen under Article 7 of the Treaty on European Union (TEU) aims at ensuring that all EU Member States respect the common values of the EU, including the Rule of Law. It foresees two legal possibilities in such a situation: a preventive mechanism in case of a "clear risk of a serious breach of the [Union's] values" (Article 7(1) TEU) and a sanctioning mechanism in the case of "the existence of a serious and persistent breach" of the Union's values, including the Rule of Law (Article 7(2) and Article 7(3) TEU). Article 7 TEU has so far not been used.

The preventive mechanism allows the Council to give the EU Member State concerned a warning before a serious breach has actually materialised. The sanctioning mechanism allows the Council to act if a serious and persistent breach is deemed to exist. This may include the suspension of certain rights deriving from the application of the treaties to the EU country in question, including the voting rights of that country in the Council. In such a case, the 'serious breach' must have persisted for some time.

The Article 7 Procedure can be triggered by one third of the Member States, by the European Parliament (in case of the preventive mechanism of Article 7(1) TEU) or by the European Commission.

To determine that there is a clear risk of a serious breach of the rule of law, the Council, after obtaining the consent of the European Parliament, must act with a decision of 4/5 of its members, and must reach the same threshold if it wishes to address recommendations to the Member State concerned. The Council must hear the Member States concerned before adopting such a decision.

To determine the existence of a serious and persistent breach of the rule of law, the European Council must act by unanimity, after obtaining the consent of the European Parliament. The Member State concerned must first be invited to offer its observations.

To sanction a Member State for a serious and persistent breach of the rule of law, the Council must act by qualified majority. To revoke or amend these sanctions the Council must also act by qualified majority.

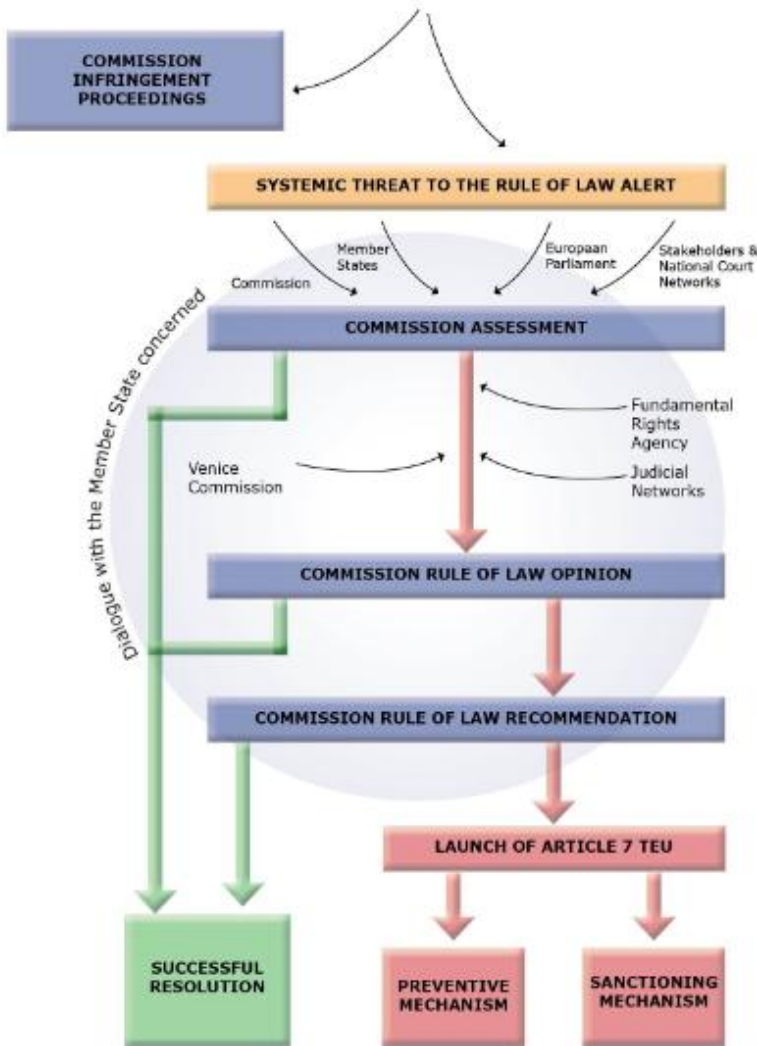
In accordance with Article 354 of the Treaty on the Functioning of the European Union, the Member of the European Council or the Council representing the Member State in question shall not take part in the vote, and the Member State concerned shall not be counted in the calculation of the majorities for these determinations.

Has the Article 7 Procedure ever been used?

Since 2009, the European Union has been confronted on several occasions with events in some EU countries, which revealed specific rule of law problems. The Commission has addressed these events by exerting political pressure, as well as by launching infringement proceedings in case of violations of EU law. The preventive and sanctioning mechanisms of Article 7 have so far not been resorted to.

ANNEX I

A rule of law framework for the European Union



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MEMO/16/2644

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