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REASONED PROPOSAL IN ACCORDANCE WITH ARTICLE 7(1) OF THE TREATY ON EUROPEAN UNION REGARDING THE RULE OF LAW IN POLAND

Proposal for a

COUNCIL DECISION

on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law

EXPLANATORY MEMORANDUM

1. INTRODUCTION

(1) The European Union is founded on a common set of values enshrined in Article 2 of the Treaty on European Union ('TEU'), which include the respect for the rule of law. 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 common values of the Union.

(2) Case law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the European Commission for Democracy through Law (*'Venice Commission'*), provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; separation of powers; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law[1]. In addition to upholding those principles and values, State institutions also have the duty of loyal cooperation.

(3) According to Article 7(1) TEU, on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

(4) The present reasoned proposal sets out, in accordance with Article 7(1) TEU, the concerns of the Commission with regard to the rule of law in Poland. It invites the Council to determine, on the basis of the same provision, that there is a clear risk of a serious breach by the Republic of Poland of the rule of law which is one of the values referred to in Article 2 TEU.

(5) The concerns of the Commission relate to the following issues:

(1) the lack of an independent and legitimate constitutional review;

(2) the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland:

(a) the law on the Supreme Court; approved by the Senate on 15 December 2017.

(b) the law amending the law on the Ordinary Courts Organisation ('law on Ordinary Courts Organisation'); published in the Polish Official Journal on 28 July 2017 and in force since 12 August 2017;

[1] See section 2, Annex I of the Communication from the Commission to the European Parliament and the Council of 11 March 2014, '*A new EU Framework to Strengthen the Rule of Law*', COM(2014) 158 final.

(c) the law amending the law on the National Council for the Judiciary and certain other laws ('law on the National Council for the Judiciary'); approved by the Senate on 15 December 2017;

(d) the law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other laws ('law on the National School of Judiciary'); published in the Polish Official Journal on 13 June 2017 and in force since 20 June 2017.

2. FACTUAL AND PROCEDURAL BACKGROUND

(6) Since November 2015, the Commission has been following closely the developments relating to the rule of law in Poland and has taken action. The full account of these developments concerning the rule of law in Poland and the dialogue of the Commission with the Polish Government under the Rule of Law Framework[2] can be found in the Commission Recommendations (EU) 2016/1374[3], (EU) 2017/146[4] and (EU) 2017/1520[5]. An overview of the main developments is presented below.

(7) The Rule of Law Framework provides guidance for a dialogue between the Commission and the Member State concerned to prevent the escalation of systemic threats to the rule of law. The purpose of this dialogue 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 TEU Procedure'. The Framework is to be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law ('national rule of law safeguards')[6]. The Rule of Law Framework has three stages. In a first stage *('Commission assessment')* the Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law. If, as a result of this preliminary assessment, 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 and giving the Member State concerned the possibility to respond. In a second stage *('Rule of Law Recommendation')*, if the matter has not been satisfactorily resolved, the Commission can issue a 'Rule of Law Recommendation' addressed to the Member State. In such a case, the Commission indicates the reasons for its concerns and recommends that the Member State solves the problems identified within a fixed time limit, and informs the Commission of the steps taken to that effect. In a third stage ('*Follow-up to the Rule of Law Recommendation')*, the Commission monitors the follow-up given by the Member

[2] Communication from the Commission to the European Parliament and the Council of 11 March 2014, *'A new EU Framework to Strengthen the Rule of Law'*, COM(2014) 158 final.

[3] Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland (OJ L 217, 12.8.2016, p. 53).

[4] Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 (OJ L 22, 27.1.2017, p. 65).

[5] Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146 (OJ L 228, 2.9.2017, p. 19).

[6] Para 4.1 of the Communication COM(2014) 158 final.

State to the Recommendation. The entire process is based on a continuous dialogue between the Commission and the Member State concerned.

(8) During the last two years, the Commission has made an extensive use of the possibilities provided by the Rule of Law Framework for a constructive dialogue with the Polish authorities. Throughout this process the Commission has always substantiated its concerns in an objective and thorough manner. The Commission has issued a Rule of Law Opinion and three Rule of Law Recommendations. It has exchanged more than 25 letters with the Polish authorities on this matter. A number of meetings and contacts between the Commission and the Polish authorities also took place, both in Warsaw and in Brussels, mainly before the issuing of the first Rule of Law Recommendation. The Commission has always made clear that it stood ready to pursue a constructive dialogue and has repeatedly invited the Polish authorities for further meetings to that end.

2.1. INITIATION OF THE RULE OF LAW FRAMEWORK

(9) Ahead of the general elections for the *Sejm* of 25 October 2015, on 8 October 2015 the outgoing legislature nominated five persons to be 'appointed' as judges of the Constitutional Tribunal 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 2015. Following the general elections, on 19 November 2015, the *Sejm*, 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 2015, the *Sejm* passed a motion annulling the five nominations by the previous legislature and on 2 December nominated five new judges.

(10) The Constitutional Tribunal was seised concerning the decisions of both the previous legislature and the incoming legislature. The Tribunal consequently delivered two judgements, on 3 and 9 December 2015. In its judgment of 3 December 2015[7], the Constitutional Tribunal ruled *inter alia* that the previous legislature of the *Sejm* had been entitled to nominate three judges replacing the judges whose terms expired on 6 November 2015. At the same time, the Tribunal clarified that the *Sejm* had not been entitled to elect the two judges replacing those whose term expired in December. The judgment also specifically referred to the obligation for the President of the Republic to immediately take the oath from a judge elected by the *Sejm*. On 9 December 2015[8], the Constitutional Tribunal *inter alia* invalidated the legal basis for the nominations by the new legislature of the *Sejm* of the three judges for the vacancies opened up on 6 November 2015 for which the previous legislature had already lawfully nominated judges.

(11) On 22 December 2015, the *Sejm* adopted a law amending the law on the Constitutional Tribunal, which concerns the functioning of the Tribunal as well as the independence of its judges[9].

(12) On 23 December 2015, the Commission wrote to the Polish Government, asking about the steps envisaged with respect to the above-mentioned two judgements of the

[7] K 34/15.

[8] K 35/15.

[9] Law of 22 December 2015 amending the Law of 25 June 2015 on the Constitutional Tribunal, published in the Official Journal on 28 December; item 2217.

Constitutional Tribunal. The Commission stated it would expect that the law adopted on 22 December 2015 is not put into force until all questions regarding its impact on the independence and the functioning of the Tribunal have been fully and properly assessed. The Commission recommended that the Polish authorities work closely with the Venice Commission. On 11 January, the Commission received a response from the Polish Government which did not remove existing concerns.

(13) On 23 December 2015, the Polish Government asked for an opinion of the Venice Commission on the law adopted on 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.

(14) In December 2015 and January 2016, a number of particularly sensitive new laws were adopted by the *Sejm*, several among them through accelerated legislative procedures, such as, in particular, a media law[10], a new Civil Service Act[11], a law amending the law on the Police and certain other laws[12] and a law on the Public Prosecution Office[13].

(15) On 13 January 2016, the Commission held a first orientation debate in order to assess the situation in Poland. The Commission decided to examine the situation under the Rule of Law Framework and mandated First Vice-President Timmermans to enter into a dialogue with the institutions of the Republic of Poland in order to clarify the issues at hand and identify possible solutions. On the same day, the Commission informed the Polish Government accordingly.

(16) On 19 January 2016, the Commission wrote to the Polish Government offering to contribute expertise and discuss matters related to the new media law. On 19 January 2016, the Polish Government wrote to the Commission setting out its views on the dispute concerning the appointment of judges, referring *inter alia* to a constitutional custom relating to the appointment of judges.

(17) On 9 March 2016, the Constitutional Tribunal ruled that the law adopted on 22 December 2015 was unconstitutional. That judgment has so far not been published by the Government in the Official Journal, with the consequence that it does not have legal effect. The Government officially justifies its decision by claiming that the Tribunal should have delivered the judgement in the legally prescribed quorum, as provided by the law which was declared unconstitutional. However, in the Constitutional Tribunal there were only 12 lawfully appointed judges, and three remaining judges appointed by the *Sejm* in October 2015 were awaiting to be sworn-in by the President of the Republic.

(18) On 11 March 2016, the Venice Commission adopted its opinion 'on amendments to the Act of 25 June 2015 on the Constitutional Tribunal'[14]. As regards the appointment of judges, the opinion called on the Polish Parliament to find a solution on the basis of the rule of law, respecting the judgments of the Tribunal. It also considered, *inter alia*, that the high attendance quorum, the requirement of two thirds

[10] Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016, item 25.

[11] Law of 30 December 2015 amending the Law on Civil Service and certain other acts, published in Official Journal on 8 January 2016, item 34.

[12] Law of 15 January 2016 amending the Law on Police and other laws, published in Official Journal on 4 February 2016, item 147.

[13] Law of 28 January 2016 on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 177; Law of 28 January 2016 - Regulations implementing the Act - Law on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 178.

[14] Opinion no. 833/2015, CDL-AD(2016)001 ('CDL-AD(2016)001').

majority for adopting judgements and the strict rule making it impossible to deal with urgent cases, especially in their combined effect, would have made the Tribunal ineffective. Finally, it considered that a refusal to publish the judgement of 9 March 2016 would further deepen the constitutional crisis in Poland.

(19) Following the judgment of 9 March 2016, the Constitutional Tribunal resumed the adjudication of cases. The Polish Government did not participate in these proceedings. The Polish Government furthermore refused to publish subsequently delivered judgements by the Constitutional Tribunal.

(20) On 13 April 2016, the European Parliament adopted a Resolution on the situation in Poland, urging the Polish Government to respect, publish and fully implement without further delay the Constitutional Tribunal's judgment of 9 March 2016 and to implement the judgments of 3 and 9 December 2015, and calling on the Polish Government to fully implement the recommendations of the Venice Commission[15].

(21) On 26 April 2016, the General Assembly of the Supreme Court of Poland adopted a resolution attesting that the rulings of the Constitutional Tribunal are valid, even if the Polish Government refuses to publish them in the Official Journal.

2.2. The Rule of Law Opinion

(22) Between February 2016 and July 2016, the Commission and the Polish Government exchanged a number of letters and met at different occasions[16].

(23) Despite the detailed and constructive nature of the exchanges between the Commission and the Polish Government, they were not able to resolve the concerns of the Commission. On 1 June 2016, the Commission adopted an Opinion concerning the rule of law in Poland. Following the dialogue that had been ongoing with the Polish authorities since 13 January 2016, the Commission deemed it necessary to formalise its assessment of the current situation in that Opinion. The Opinion set out the concerns of the Commission and served to focus the ongoing dialogue with the Polish authorities towards finding a solution.

(24) On 24 June 2016, the Polish Government wrote to the Commission acknowledging receipt of the Commission's Rule of Law Opinion of 1 June 2016. The letter informed the Commission about the state of play of Parliamentary work in Poland including on a new law on the Constitutional Tribunal, and expressed the conviction that the work undertaken at the Parliament on a new law on the Constitutional Tribunal was the right way to reach a constructive solution.

(25) On 22 July 2016, the *Sejm* adopted a new law on the Constitutional Tribunal which was published in the Official Journal on 1 August 2016. At various stages of the legislative process the Commission had provided comments and discussed the content of the draft law with the Polish authorities.

2.3 The Rule of Law Recommendation (EU) 2016/1374 (1st Recommendation)

(26) On 27 July 2016, the Commission adopted a Recommendation regarding the rule of law in Poland. In its Recommendation the Commission explained the circumstances

[15] European Parliament resolution of 13 April 2016 on the situation in Poland (2015/3031(RSP)).

[16] Letters from the Commission of 1 February 2016 and 3 March 2016; letters from the Polish Government of 29 February 2016, of 21 March 2016, 31 March 2016 and of 24 June 2016; meetings between the Commission and the Polish Government of 5 April 2016, 24 May 2016 and 26 May 2016.

in which it decided, on 13 January 2016, to examine the situation under the Rule of Law Framework and in which it adopted, on 1 June 2016, an Opinion concerning the rule of law in Poland. The Recommendation also explained that the exchanges between the Commission and the Polish Government were not able to resolve the concerns of the Commission. In its Recommendation, the Commission found that there was a systemic threat to the rule of law in Poland and recommended that the Polish authorities take appropriate action to address this threat as a matter of urgency. In particular, the Commission recommended that the Polish authorities: (a) implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* can take up their judicial functions in the Constitutional Tribunal, and that the three judges nominated by the 8th term of the *Sejm* to already occupied posts without a valid legal basis do not take up their judicial functions; (b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016 and ensure that the publication of future judgments is automatic and does not depend on any decision of the executive or legislative powers; (c) 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; and ensure that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined by requirements inconsistent with the rule of law; (d) 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; (e) refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal.

(27) The Commission invited the Polish Government to solve the problems identified in the Recommendation within three months, and to inform the Commission of the steps taken to that effect. The Commission noted that it remained ready to pursue a constructive dialogue with the Polish Government. The Polish Government in its reply of 27 October 2016 disagreed on all points with the position expressed in the Recommendation and did not announce any new measures to alleviate the rule of law concerns addressed by the Commission

(28) On 30 July 2016, the President of the Republic signed the law of 22 July 2016, which was published in the Official Journal on 1 August 2016.

(29) On 11 August 2016, the Constitutional Tribunal rendered a judgment on the law of 22 July 2016[17]. The judgment held that a number of provisions of that law, all of which were also identified as a concern by the Commission in its 27 July 2016 Recommendation, were unconstitutional[18]. The Polish Government did not recognise the validity of this judgment and did not publish it in the Official Journal.

(30) On 16 August 2016, the Polish Government published 21 judgments of the Tribunal rendered in a period from 6 April 2016 to 19 July 2016. However, the judgments of 9 March 2016 and of 11 August 2016 were not published by the Government.

[17] K 39/16.

[18] The grounds of unconstitutionality were notably the principles of the separation and balance of powers, the independence of courts and tribunals from other branches of power, the independence of judges and the principle of integrity and efficiency of the public institutions.

(31) On 14 September 2016, the European Parliament adopted a Resolution on the situation in Poland[19], *inter alia* calling on the Polish Government to cooperate with the Commission pursuant to the principle of sincere cooperation as set out in the Treaty.

(32) On 14 October 2016, the Venice Commission adopted its opinion on the law of 22 July 2016 on the Constitutional Tribunal[20]. Notwithstanding improvements as compared to the amending law of 22 December 2015, the opinion noted that the new law on the Constitutional Tribunal as adopted would considerably delay and obstruct its work, possibly make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning. The opinion also criticized the system of proposing candidates for the post of President of the Tribunal to the President of the Republic, which could lead to a situation that a candidate is appointed who does not enjoy the support of a substantial number of judges. The opinion also underlined that the problem of the appointment of judges has not been solved as recommended and that the implementation of the provision in the law of 22 July 2016 requiring the Tribunal's President to assign cases to the three December judges would be contrary to the Tribunal's judgments. The opinion concluded that by adopting the law, the Polish Parliament assumed powers of constitutional revision which it did not have when it acted as the ordinary legislature. It considered that the Polish Parliament and the Government continued to challenge the Tribunal's position as the final arbiter of constitutional issues and attributed this authority to themselves: they created new obstacles to the effective functioning of the Tribunal, and acted to further undermine its independence. According to the opinion, by prolonging the constitutional crisis, they obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights. The Polish Government decided not to participate in the sitting of the Venice Commission on 14 October 2016 as it considered that the opinion of the Venice Commission was one-sided and did not take into account the Government's position.

(33) On 31 October 2016, the United Nations Human Rights Committee[21] expressed concerns about the negative impact of legislative reforms, including the amendments to the law on the Constitutional Tribunal of November and December 2015 and July 2016, the disregard of the judgments of the Constitutional Tribunal, the functioning and independence of the Tribunal and the implementation of the International Covenant on Civil and Political Rights. The Committee urged Poland to immediately publish officially all the judgments of the Tribunal, to refrain from introducing measures that obstruct its effective functioning and to ensure a transparent and impartial process for the appointment of its members and security of tenure, which meets all requirements of legality under domestic and international law.

(34) On 7 November 2016, the Constitutional Tribunal rendered a judgment on the constitutionality of the provisions of the law of 22 July 2016 regarding the selection of the President and Vice-President of the Tribunal[22], stating that the constitution

[19] European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774(RSP)).

[20] Opinion no. 860/2016, CDL-AD(2016)026 ('CDL-AD(2016)026').

[21] Concluding observations on the seventh periodic report of Poland.

[22] K 44/16; the Tribunal was forced to change its composition from full bench into a bench of five judges due to the refusal of three judges of the Tribunal to participate in the case and in view of the fact that the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* had not taken up their judicial functions in the Tribunal (see the ordinance of the President of the Constitutional Tribunal of 7 November 2016).

must be interpreted to the effect that the President of the Tribunal shall be appointed by the President of the Republic from amongst candidates which have obtained a majority vote in the General Assembly of the Tribunal.

(35) On 1 and 2 December 2016, the Senate adopted the law of 30 November 2016 on the legal status of judges of the Constitutional Tribunal ('law on the Status of Judges') and the law of 30 November 2016 on organisation and proceedings before the Constitutional Tribunal ('law on Organisation and Proceedings').

(36) On 14 December 2016, the European Parliament held a debate on the situation of the rule of law in Poland. During this debate, the Commission urgently called on the Polish authorities not to put into force the new laws before the Constitutional Tribunal has had the occasion to examine their constitutionality.

(37) On 15 December 2016, the Senate adopted the law of 13 December 2016 implementing the law on Organisation and Proceedings and the law on the Status of Judges ('Implementing law').

(38) On 19 December 2016, the President of the Republic signed the three new laws governing the functioning of the Constitutional Tribunal which were published in the Official Journal. On the same day, the President of the Republic appointed judge Julia Przyłębska, a judge elected by the new *Sejm*, to the position of acting President of the Constitutional Tribunal.

(39) On 20 December 2016, judge Julia Przyłębska admitted the three judges nominated by the 8th term of the *Sejm* without a valid legal basis to take up their function in the Tribunal and convened a meeting of the General Assembly for the same day. In view of the short notice one judge was unable to participate and requested to postpone the meeting for the next day, which judge Julia Przyłębska refused. Out of 14 judges present at the meeting, only three unlawfully appointed judges and three judges appointed by the current governing majority cast their votes[23]. Two candidates were elected: Julia Przyłębska and Mariusz Muszyński, and were presented as candidate to the President of the Republic. On 21 December 2016, the President of the Republic appointed judge Julia Przyłębska to the post of President of the Constitutional Tribunal.

2.4. The Rule of Law Recommendation (EU) 2016/146 (2*nd* Recommendation)

(40) On 21 December 2016, the Commission adopted a second Recommendation regarding the rule of law in Poland. The Commission found that, whereas some of the issues raised in its first Recommendation had been addressed, important issues remained unresolved, and new concerns had arisen in the meantime. The Commission also found that the procedure which had led to the appointment of a new President of the Constitutional Tribunal raised serious concerns as regards the rule of law. The Commission concluded that there continued to be a systemic threat to the rule of law in Poland and invited the Polish Government to solve the problems identified as a matter of urgency, within two months. The Commission noted that it remained ready to pursue a constructive dialogue with the Polish Government on the basis of the Recommendation.

(41) On 20 February 2017, the Polish Government replied to the abovementioned Recommendation. The reply disagreed with the assessments set out in the

[23] Minutes of deliberations of the General Assembly of Judges of the Constitutional Tribunal of 20 December 2016.

Recommendation and did not announce any new action to address the concerns identified by the Commission. The reply emphasized that the appointment of the new President of the Tribunal on 21 December 2016 as well as the entry into force of the three new laws governing the functioning of the Constitutional Tribunal created the proper conditions for the functioning of the Tribunal after a period of paralysis caused by political quarrels of politicians of the opposition in which the former President of the Tribunal was also engaged.

(42) On 10 January 2017, the Vice-President of the Constitutional Tribunal was obliged by the newly appointed President of the Tribunal to take his remaining leave. On 24 March 2017 the mandatory leave was prolonged until the end of June 2017, despite the request of the Vice-President to resume his work as judge in the Tribunal as of 1 April 2017. On 12 January 2017, the Minister of Justice launched a procedure before the Constitutional Tribunal to review the constitutionality of the election, in 2010, of three judges of the Tribunal. Following this procedure, cases have no longer been assigned to these three judges. On 16 January 2017, the President of the Venice Commission issued a statement expressing his concerns about the worsening situation within the Tribunal.

(43) On 20 January 2017, the Polish Government announced a comprehensive reform of the judiciary comprising a set of laws, including draft laws on the National Council for the Judiciary and on Ordinary Courts Organisation to be presented in the course of 2017.

(44) On 1 March 2017, a group of 50 members of the *Sejm* asked the Constitutional Tribunal to establish the unconstitutionality of the provisions of the law on the Supreme Court on the basis of which the First President of the Supreme Court had been elected.

(45) On 11 May 2017, the *Sejm* adopted the law on the National School of Judiciary which was published on 13 June 2017.

(46) On 16 May 2017, the Commission informed the Council on the situation of the rule of law in Poland. There was broad agreement within the Council that the rule of law is a common interest and a common responsibility of EU institutions and Member States. A very large majority of Member States supported the Commission's role and efforts to address this issue. Member States called upon the Polish Government to resume the dialogue with the Commission with a view to resolving the pending issues and looked forward to being updated as appropriate in the General Affairs Council.

(47) On 23 June 2017, the European Council generally endorsed the Country Specific Recommendations addressed to the Member States in the context of the 2017 European Semester. The recommendations addressed to Poland contain a recital underlining that '*Legal certainty and trust in the quality and predictability of regulatory, tax and other policies and institutions are important factors that could allow an increase in the investment rate. The rule of law and an independent judiciary are also essential in this context. Addressing serious concerns related to the rule of law will help improve legal certainty*'. On 11 July 2017, the Country Specific Recommendations were adopted by the Council[24].

[24] Council Recommendation of 13 July 2017 on the 2017 National Reform Programme of Poland and delivering a Council opinion on the 2017 Convergence Programme of Poland.

(48) On 5 July 2017, following the end of the mandate of the previous Vice-President of the Constitutional Tribunal, the President of the Republic appointed a new Vice-President of the Tribunal, Mr. Mariusz Muszyński, despite the fact that he was one of the three judges in the Tribunal appointed unlawfully.

(49) On 12 July 2017, a group of members of the *Sejm* submitted a draft law on the Supreme Court which stipulated, *inter alia*, the dismissal and forced retirement of all Supreme Court judges, save those indicated by the Minister of Justice.

(50) On 13 July 2017, the Commission wrote to the Polish Government expressing its concerns about the recent legislative proposals relating to the judicial system and to the Supreme Court, underlining the importance of refraining from adopting these proposals in order to allow for a meaningful dialogue, and inviting the Polish Foreign Minister and Polish Justice Minister to a meeting to that end at their earliest convenience. On 14 July 2017, the Polish Government wrote to the Commission reiterating its previous explanations on the situation of the Constitutional Tribunal.

(51) On 15 July 2017, the Senate approved the law on the National Council for the Judiciary and the law on the Ordinary Courts Organisation.

(52) On 19 July 2017, the Polish Government replied to the Commission's letter of 13 July 2017, referring to the current legislative reforms of the Polish judiciary and asking the Commission to present its concrete concerns relating to the new laws in order to have a further discussion. The Commission responded to the letters of the Polish Government of 14 and 19 July 2017 by letter of 28 July 2017.

(53) On 22 July 2017, the Senate approved the law on the Supreme Court which was sent to the President of the Republic for signature along with the law on the National Council for the Judiciary and the law on Ordinary Courts Organisation.

(54) On 24 July 2017, the President of the Republic delivered a statement about his decision to refer back to the *Sejm* the law on the Supreme Court and the law on the National Council for the Judiciary.

(55) On 25 July 2017, the President of the Republic signed the law on the Ordinary Courts Organisation.

2.5. Rule of Law Recommendation (EU) 2017/1520 (3rd Recommendation)

(56) On 26 July 2017, the Commission adopted a third Recommendation regarding the Rule of Law in Poland, complementary to its Recommendations of 27 July and 21 December 2016. In this Recommendation, the Commission took into account the developments that had occurred in Poland since the Commission's Recommendation of 21 December 2016. The concerns of the Commission related to the following issues:

(1) the lack of an independent and legitimate constitutional review;

(2) the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland:

(a) the law amending the law on the Ordinary Courts Organisation ('law on Ordinary Courts Organisation'); published in the Polish Official Journal on 28 July 2017 and entered into force on 12 August 2017;

(b) the law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other

laws ('law on the National School of Judiciary'); published in the Polish Official Journal on 13 June 2017 and entered into force on 20 June 2017;

(c) the law amending the law on the National Council for the Judiciary and certain other laws ('law on the National Council for the Judiciary'); approved by the Senate on 15 July 2017; this law was referred back to the *Sejm* on 24 July 2017 and did not enter into force;

(d) the law on the Supreme Court; approved by the Senate on 22 July 2017; this law was referred back to the *Sejm* on 24 July 2017 and did not enter into force.

(57) In its third Recommendation, the Commission considered that the situation of a systemic threat to the rule of law in Poland as presented in its Recommendations of 27 July 2016 and 21 December 2016 has seriously deteriorated. In particular:

(1) The unlawful appointment of the President of the Constitutional Tribunal, the admission of the three judges nominated by the 8th term of the *Sejm* without a valid legal basis, the fact that one of these judges has been appointed as Vice-President of the Tribunal, the fact that the three judges that were lawfully nominated in October 2015 by the previous legislature have not been able to take up their function of judge in the Tribunal, as well as the subsequent developments within the Tribunal described above have *de facto* led to a complete recomposition of the Tribunal outside the normal constitutional process for the appointment of judges. For this reason, the Commission considered that the independence and legitimacy of the Constitutional Tribunal are seriously undermined and, consequently, the constitutionality of Polish laws can no longer be effectively guaranteed. The judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review;

(2) The law on the National School of Judiciary already in force, and the law on the National Council for the Judiciary, the law on the Ordinary Courts Organisation and the law on the Supreme Court, should they enter into force, structurally undermine the independence of the judiciary in Poland and would have an immediate and concrete impact on the independent functioning of the judiciary as a whole. Given that the independence of the judiciary is a key component of the rule of law, these new laws increase significantly the systemic threat to rule of law as identified in the previous Recommendations;

(3) In particular, the dismissal of Supreme Court judges, their possible reappointment and other measures contained in the law on the Supreme Court would very seriously aggravate the systemic threat to the rule of law;

(4) The new laws raise serious concerns as regards their compatibility with the Polish Constitution as underlined by a number of statements, in particular from the Supreme Court, the National Council for the Judiciary, the Polish Ombudsman, the Bar Association and associations of judges and lawyers, and other relevant stakeholders. However, as explained above, an effective constitutional review of these laws is no longer possible;

(5) Finally, actions and public statements against judges and courts in Poland made by the Polish Government and by members of Parliament from the ruling majority have damaged the trust in the justice system as a whole. The Commission underlined the principle of loyal cooperation between state organs

which is, as highlighted in the opinions of the Venice Commission, a constitutional precondition in a democratic state governed by the rule of law.

(58) The Commission invited the Polish Government to solve the problems identified in this Recommendation within one month of receipt of the Recommendation, and to inform the Commission of the steps taken to that effect. In particular, the Commission recommended the Polish authorities to:

(1) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution;

(2) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016;

(3) ensure that the law on the National Council for the Judiciary, the law on Ordinary Courts Organisation and the law on the Supreme Court do not enter into force and that the law on the National School of Judiciary is withdrawn or amended in order to ensure its compliance with the Constitution and European standards on judicial independence;

(4) refrain from any measure interfering with the tenure of the Supreme Court judges and their function;

(5) ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence and is prepared in close cooperation with the judiciary and all interested parties;

(6) refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Courts, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.

(59) The Commission also asked the Polish authorities not to take any measure to dismiss or force the retirement of the Supreme Courts judges as these measures will very seriously aggravate the systemic threat to the rule of law. The Commission indicated that, should the Polish authorities take any measure of this kind, the Commission stands ready to immediately activate Article 7(1) TEU.

(60) On 31 July 2017, the *Sejm* was formally notified the decision of the President of the Republic to veto the law amending the Law on National Council for the Judiciary and the Law on the Supreme Court

(61) On 4 August and on 16 August 2017 the Polish Government wrote to the Commission with a request for clarifications to its Recommendation of 26 July 2017, to which the Commission responded by letters of 8 August and 21 August 2017 respectively.

(62) On 28 August 2017, the Polish Government replied to the Recommendation of 26 July 2017. The reply disagreed with all the assessments set out in the Recommendation and did not announce any new action to address the concerns identified by the Commission.

(63) On 30 August 2017, the opinion of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) concluded that the suspended law on the Supreme Court does not comply with international standards on judicial independence[25].

[25] OSCE Office for Democratic Institutions and Human Rights (ODIHR), 30 August 2017, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland.

(64) On 11 September 2017, the Polish Government initiated a campaign named 'Fair Courts' aimed at gaining social support for the ongoing judicial reform. The National Council for the Judiciary and ordinary courts published several statements rectifying allegations directed against courts, judges and the Council during the campaign.

(65) On 11 September 2017, the Constitutional Tribunal in a panel of five judges declared the unconstitutionality of certain provisions of the Code of Civil Procedure allowing ordinary courts and the Supreme Court to assess the legality of the appointment of the President and the Vice-President of the Tribunal[26].

(66) On 13 September 2017, the Minister of Justice started exercising the powers to dismiss court presidents and vice-presidents pursuant to the law on Ordinary Courts Organisation.

(67) On 15 September and 18 October 2017, the National Council for the Judiciary criticised the Minister of Justice's decisions to dismiss court presidents. The Council indicated that such an arbitrary power of the Minister of Justice violates the constitutional principle of independence of courts and might adversely affect the impartiality of judges.

(68) On 15 September 2017, the *Sejm* appointed a person to an already occupied position of Judge at the Constitutional Tribunal, and the President of the Republic accepted the oath on 18 September 2017.

(69) On 15 September 2017 the *Sejm* adopted the law on the National Freedom Institute – Centre for Civil Society Development which centralises the distribution of funds including for civil society organisations.

(70) On 22 September 2017, the United Nations Human Rights Council discussed the reports on Poland submitted within the framework of the third periodic review which contain recommendations on judicial independence and the rule of law.

(71) On 25 September 2017, the Commission informed the Council on the situation of the rule of law in Poland. There was broad agreement on the fact that the Rule of Law is a common interest and a common responsibility and on the need for Poland and the Commission to engage in a dialogue in order to find a solution.

(72) On 26 September 2017, the President of the Republic transmitted to the *Sejm* two new draft laws on the Supreme Court and on the National Council for the Judiciary.

(73) On 3 October 2017, the *Sejm* sent out the two presidential draft laws on the Supreme Court and the National Council for Judiciary for consultation to relevant stakeholders, including the Ombudsman, the Supreme Court and the National Council for the Judiciary.

(74) On 6 and 25 October 2017, the Supreme Court published its opinions on the two new draft laws on the Supreme Court and the National Council for the Judiciary. The opinions consider that the draft law on the Supreme Court would substantially curb its independence and that the draft law on the Council for the Judiciary cannot be reconciled with the concept of a democratic state governed by the rule of law.

(75) On 11 October 2017, the Parliamentary Assembly of the Council of Europe adopted a resolution on new threats to the rule of law in Council of Europe member States, expressing concerns also about developments in Poland, which put at risk respect for

[26] K 10/17.

the rule of law, and, in particular, the independence of the judiciary and the principle of the separation of powers[27].

(76) On 13 October 2017, the European Network of Councils for the Judiciary (ENCJ) issued an opinion[28] on the new draft law on the National Council for the Judiciary, underlining its inconsistency with European standards on Councils for the Judiciary.

(77) On 23 October 2017, following the third cycle of the Universal Periodic Review of Poland, the United Nations High Commissioner for Human Rights requested that the Polish authorities accept the United Nations recommendations on upholding judicial independence.

(78) On 24 October 2017, the Constitutional Tribunal in a panel including two unlawfully appointed judges declared the unconstitutionality of provisions of the law on the Supreme Court, on the basis of which *inter alia* the current First President of the Supreme Court had been appointed.

(79) On 24 October 2017, the Constitutional Tribunal, in a panel comprising two unlawfully appointed judges, declared the constitutionality of provisions of the three laws on the Constitutional Tribunal of December 2016, including the provisions on the basis of which the two unlawfully appointed judges adjudicating in the case had been allowed to adjudicate in the Constitutional Tribunal. The motion of the Polish Ombudsman on recusal of the two unlawfully appointed judges from this case had been rejected by the Constitutional Tribunal.

(80) On 27 October 2017, the United Nations Special Rapporteur for the Independence of Judges and Lawyers, Mr. Diego García-Sayán, presented his preliminary observations[29], according to which the two draft laws on the Supreme Court and the National Council for the Judiciary raise a series of concerns as regards judicial independence.

(81) On 31 October 2017, the National Council of the Judiciary adopted an opinion on the draft law on the National Council for the Judiciary presented by the President of the Republic. The Council observes that the draft law is fundamentally inconsistent with the Polish Constitution by providing the *Sejm* with the power to appoint judges-members of the Council and by prematurely terminating constitutionally protected terms of office of the current judges-members of the Council.

(82) On 10 November 2017, the Consultative Council of European Judges (CCJE) adopted a statement raising concerns on judicial independence in Poland[30].

(83) On 11 November 2017, the Ombudsman sent a letter to the President of the Republic comprising an assessment of the two new draft laws on the Supreme Court and on the National Council for the Judiciary and recommending that they should not be adopted as they would not guarantee that the judicial branch will remain independent from the executive branch and that citizens will be able to exercise their constitutional right to have access to an independent court.

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[27] PACE, 11 October 2017, Resolution 2188 (2017), New threats to the rule of law in Council of Europe member States: selected examples.

[28] ENCJ, 13 October 2017, Opinion of the ENCJ Executive Board on the request of the Krajowa Rada Sądownictwa (National Council for the Judiciary) of Poland.

[29] United Nations Special Rapporteur on the independence of judges and lawyers, 27 October 2017, Preliminary observations on the official visit to Poland (23-27 October 2017).

[30] CCJE(2017) 9, 10 November 2017, Statement as regards the Situation on the Independence of the Judiciary in Poland.

(84) On 13 November 2017, OSCE-ODIHR adopted an opinion on the new draft law on the Supreme Court asserting that the reviewed provisions are incompatible with international standards on judicial independence[31].

(85) On 15 November 2017, the European Parliament adopted a resolution on the situation of the rule of law and democracy in Poland, expressing support for the Recommendations issued by the Commission, as well as for the infringement proceedings, and considering that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 TEU[32].

(86) On 24 November 2017, the Council of Bars and Law Societies of Europe (CCBE) called on Polish authorities not to adopt the two draft laws on the Supreme Court and on the National Council for the Judiciary as they could undermine the separation of powers guaranteed by the Polish constitution[33]. On 29 November 2017, the Organisation of Judges 'Iustitia', the Helsinki Foundation for Human Rights and Amnesty International issued a joint statement criticising the legislative procedure on the two presidential draft laws.

(87) On 5 December 2017, the European Network of Councils for the Judiciary (ENCJ) adopted a further opinion criticising the draft law on the National Council for the Judiciary for not respecting the ENCJ's standards[34].

(88) On 8 December 2017, the Venice Commission, at the request of the Parliamentary Assembly of the Council of Europe, adopted an opinion on the draft law on the National Council for the judiciary, the draft law on the Supreme Court, and the law on the Ordinary Courts Organisation, as well as an opinion on the law on the public prosecutor's office[35]. The Venice Commission examined the law on Ordinary Courts Organisation, the draft law on the National Council of the Judiciary and the draft law on the Supreme Court proposed by the President of the Republic. It came to the conclusion that the law and the draft laws, especially taken together and seen in the context of the 2016 law on the public prosecutor's office, enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law. It called on the President of the Republic to withdraw his proposals and start a dialogue before the procedure of legislation continues. It also urged the Polish Parliament to reconsider the recent amendments to the law on Ordinary Courts Organisation.

(89) On 8 December 2017, the Council of Europe Commissioner for Human Rights issued a statement regretting the adoption by the *Sejm* of the laws on the Supreme Court and on the National Council for the Judiciary which would further undermine the independence of the judiciary.

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[31] OSCE-ODIHR, 13 November 2017, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017).

[32] European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)).

[33] CCBE, 24 November 2017, Resolution of the Plenary Session of the Council of Bars and Law Societies of Europe (CCBE).

[34] ENCJ, 5 December 2017, Opinion of the ENCJ Executive Board on the adoption of the amendments to the law on the National Council for the Judiciary.

[35] Opinion 904/2017 CDL(2017)035 of the Venice Commission on the draft act amending the Act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts ('CDL(2017)035'), and Opinion 892/2017 CDL(2017)037 of the Venice Commission on the Act on the Public Prosecutor's Office as amended ('CDL(2017)037').

(90) On 8 December 2017, the two draft laws were adopted by the *Sejm*. On 15 December 2017 the two laws were approved by the Senate.

3. THE LACK OF AN INDEPENDENT AND LEGITIMATE CONSTITUTIONAL REVIEW

(91) Over a one-year period, six consecutive laws have been adopted regarding the Polish Constitutional Tribunal. These new laws raised a number of concerns as regards the rule of law which are presented below and have been detailed in the Commission's three Recommendations regarding the Rule of Law in Poland. The Commission underlines in that respect that where a constitutional justice system has been established, its effectiveness is a key component of the rule of law.

3.1. The composition of the Constitutional Tribunal

(92) Despite the judgments referred to in paragraph 10 above, the three judges nominated by the previous legislature have not taken up their function of judge in the Constitutional Tribunal and their oath has not been taken by the President of the Republic. Conversely, the oath of the three judges nominated by the new legislature without a valid legal basis was taken by the President of the Republic and, on 20 December 2016, after the end of the mandate of the former President of the Tribunal, they were admitted to take up their function as judge by the acting President of the Tribunal (see below).

(93) In its three Recommendations, the Commission has recommended that the Polish authorities implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which 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 no longer adjudicate without being validly elected.

(94) In its reply of 27 October 2016 the Polish Government considers that the judgments of 3 and 9 December 2015 of the Tribunal did not specify which judges were to take up their function and considers that the new legislature of the *Sejm* has lawfully nominated the five judges in December 2015. This reasoning raises serious rule of law concerns as it denies any effect of the two December judgments and contradicts the reasoning of the Tribunal as consistently reiterated, including in its judgment of 11 August 2016; in this judgment, the Constitutional Tribunal found unconstitutional a provision of the law of 22 July 2016 on the Constitutional Tribunal which would enable the three judges nominated by the new legislature without a valid legal basis to take up their function while using the vacancies for which the previous legislature of the *Sejm* had already lawfully nominated three judges[36]. The reply concedes that in the operative part of the judgment of 3 December 2015, the Constitutional Tribunal addressed the duty of the President of the Republic to immediately take an oath from a judge elected to the Tribunal by the *Sejm*. It takes however the view that that judgment cannot bind other authorities to apply provisions in the manner specified in a given case. This interpretation limits the impact of the judgments of 3 and 9 December 2015 to a mere obligation for the Government to publish them but would deny them any further legal and operational effect, in particular as regards the obligation for the President of the Republic to take the oath of the judges in question. This interpretation goes against the principle of loyal cooperation between state

[36] The Venice Commission in its opinion of 14 October 2016 also considered that the above provision is not a solution in line with the principle of the rule of law (CDL-AD(2016)026, para 106).

organs which is, as underlined in the opinions of the Venice Commission, a constitutional precondition in a democratic state governed by the rule of law.

(95) Also the Venice Commission considers that a solution to the current conflict over the composition of the Constitutional Tribunal 'must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal' and 'therefore calls on all State organs and notably the *Sejm* to fully respect and implement the judgments'[37].

(96) To conclude, the three judges that were lawfully nominated in October 2015 by the previous legislature have still not been able to take up their function of judge in the Constitutional Tribunal. By contrast, the three judges nominated by the 8th term of the *Sejm* without a valid legal basis were admitted to take up their function by the acting President of the Tribunal. As a consequence, the Polish authorities have still not implemented fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015.

3.2. The publication of the judgments of the Constitutional Tribunal

(97) The Polish Government refuses to publish certain judgments of the Constitutional Tribunal, in particular the judgment of 9 March 2016 which declared unconstitutional the law adopted on 22 December 2015 amending the Law on the Constitutional Tribunal[38].

(98) The Polish Government contested the legality of this judgment, as the Constitutional Tribunal did not apply the procedure foreseen by the law adopted on 22 December 2015. However, the law of 22 December 2015 was itself the subject of constitutional review by the Constitutional Tribunal. Therefore, in its Recommendation of 27 July 2016, the Commission set out that the Constitutional Tribunal was correct not to apply the procedure foreseen by the law adopted on 22 December 2015[39]. This was also recognised by the Venice Commission[40]. The Commission considers that the judgment of 9 March 2016 is binding and must be respected.

(99) The Polish Government also refused to publish other judgments, in particular the judgment of 11 August 2016 concerning the law of 22 July 2016 on the Constitutional Tribunal and the judgement of 7 November 2016 concerning the provisions of the law of 22 July 2016 on the selection of the candidates for the post of President of the Tribunal. These two judgments are of particular importance for the legitimacy and functioning of the Tribunal: the first judgment confirms the reasoning that the three judges nominated by the new legislature without a valid legal basis cannot take up their function as judge, while the second judgment concerns a procedural requirement for the appointment of the President of the Tribunal which was not fulfilled for the appointment of the current President.

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[37] Opinion CDL-AD(2016)001, para 136.

[38] Law of 25 June 2015 on the Constitutional Tribunal, published in Official Journal on 30 July 2015, item 1064, as amended. The law adopted on 22 December 2015 was published in the Official Journal on 28 December; item 2217. The amendments *inter alia* increased the attendance *quorum* of judges for hearing cases, raised the majorities needed in the Constitutional Tribunal to hand down judgments by the full bench, required the handling of cases in chronological order and provided a minimum delay for hearings.

[39] See section 3 of the Recommendation.

[40] Venice Commission stated on this point that 'a simple legislative act, which threatens to disable constitutional control, must itself be evaluated for constitutionality before it can be applied by the Court. […] The very idea of the supremacy of the Constitution implies that such a law, which allegedly endangers constitutional justice, must be controlled – and if need be, annulled – by the Constitutional Tribunal before it enters into force'; opinion CDL-AD(2016)001, para 41.

(100) The refusal of the Government to publish judgments of the Constitutional Tribunal raises serious concerns in regard of the rule of law, as compliance with final judgments is an essential requirement inherent in the rule of law. In particular, where the publication of a judgment is a prerequisite for its taking effect and where such publication is incumbent on a State authority other than the court which has rendered the judgment, an *ex post* control by that State authority regarding the legality of the judgment is incompatible with the rule of law. The refusal to publish the judgment denies the automatic legal and operational effect of a binding and final judgment, and breaches the rule of law principles of legality and separation of powers.

(101) In its three Recommendations, the Commission has recommended that the Polish authorities publish and implement fully the judgements of the Constitutional Tribunal and ensure that the publication of future judgements is automatic and does not depend on any decision of the executive or legislative powers. However, the three important judgements referred to above have still not been published.

3.3. The appointment of the President of the Tribunal and the subsequent developments

(102) In 2016, three laws have been adopted which significantly amended the proceedings for appointing the President of the Constitutional Tribunal. These laws were adopted in view of the ending of the mandate of the former President of the Tribunal in December 2016. The laws established a specific transitory regime by establishing the new function of an acting President of the Tribunal who would operate until a new President was appointed. The acting President would be in charge of leading the new selection process for the appointment of the new President. The role of the Vice President (whose mandate was still active) was reduced by a number of legislative changes[41].

(103) Following her appointment, the new acting President immediately took a number of important decisions, in particular allowing the three judges unlawfully nominated in December 2015 by the new legislature of the *Sejm* to take up office and to participate in the process rendering the entire selection process unconstitutional.

(104) As explained in its Recommendation of 21 December 2016[42], the Commission considers that the procedure which led to the appointment of a new President of the Tribunal is fundamentally flawed as regards the rule of law. The procedure was initiated by an acting President whose appointment raised serious concerns as regards the principles of the separation of powers and the independence of the judiciary as protected by the Polish Constitution. Furthermore, the fact that the procedure allowed the three judges unlawfully nominated in December 2015 by the new legislature of the *Sejm* to participate in the process rendered the entire selection process unconstitutional. Similarly, the fact that the lawfully elected judges in October 2015 could not participate in the process equally had an impact on the outcome, and therefore vitiated the process. Moreover, the very short notice for the convocation of the General Assembly and the refusal to postpone the meeting raised serious concerns. Finally, the election of candidates by six judges only was incompatible with the judgment of the Tribunal of 7 November 2016 according to which Article 194(2) of the Constitution must be understood as providing that the President of the Tribunal shall be appointed by the President of the Republic from amongst candidates which have obtained a majority vote in the General Assembly of the Tribunal.

[41] See section 5.2 of the Recommendation (EU) 2017/146.

[42] See section 5.3 and 5.4 of the Recommendation (EU) 2017/146.

(105) The Commission also notes that following the appointment of the President of the Constitutional Tribunal a number of developments have further undermined the legitimacy of the Tribunal. In particular: the Vice-President of the Tribunal, whose position is recognised in the Constitution, was obliged by the newly appointed President of the Tribunal to use his remaining leave until the end of his mandate; as a consequence of an action brought by the Prosecutor General to challenge the validity of the election in 2010 of three judges of the Constitutional Tribunal, these judges were subsequently excluded from the judicial activities of the Tribunal; the new President of the Tribunal changed the composition of benches hearing cases and cases were reassigned to panels consisting in part of unlawfully appointed judges; requests, in particular from the Ombudsman, aiming at removing judges unlawfully appointed from panels adjudicating cases were dismissed; an important number of judgements was delivered by benches which included unlawfully appointed judges; finally, after the end of the mandate of the Vice-President, an unlawfully appointed judge was appointed as the new Vice-President of the Tribunal.

(106) These developments have *de facto* led to a complete recomposition of the Constitutional Tribunal outside the normal constitutional process for the appointment of judges.

(107) The reply of the Polish authorities to the Commission's complementary Recommendation of 21 December 2016 did not alleviate the concerns of the Commission, and did not announce any concrete measures to address the issues raised. The reply ignores the judgment of 7 November 2016 according to which the Constitution requires that the President of the Tribunal shall be appointed from amongst candidates which have obtained a majority vote in the General Assembly of the Tribunal. The reply also disregards the fact that the Constitution explicitly recognizes the position of Vice-President which is subject to the same appointment procedure as the President of the Tribunal. Regarding the appointment of an acting President of the Constitutional Tribunal, the reply fails to identify any legal basis in the Constitution, and considers that it was an exceptional adjustment mechanism dictated by extraordinary circumstances. Also the reply of the Polish authorities to the Commission's complementary Recommendation of 26 July 2017 did not alleviate the concerns of the Commission.

(108) In its Recommendations, the Commission also raised other concerns related to the three laws adopted in December 2016. The laws contain a number of provisions which do not respect earlier judgments of the Constitutional Tribunal and added new concerns which relate in particular to disciplinary proceedings, the possibility of early retirement, the new requirements for judges of the Tribunal and the significant changes to the internal organisation of the Tribunal.

3.4. The combined effect on the independence and legitimacy of the Tribunal

(109) The Commission considers that as a result of the laws adopted in 2016 and the developments following the appointment of the acting President, the independence and legitimacy of the Constitutional Tribunal is seriously undermined and the constitutionality of Polish laws can no longer be effectively guaranteed[43].

[43] According to Article 188 of the Constitution, the Constitutional Tribunal rules on the conformity of statutes and international agreements to the Constitution; on the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute; on the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes; on the conformity to the constitution of the purposes or activities of political parties; and on complaints concerning constitutional infringements. According to Article 189 of the

(110) In its Recommendation of 26 July 2017, the Commission recommended that the Polish authorities take the following action:

- restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed and by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which 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 no longer adjudicate without being validly elected[44];
- publish and implement fully the judgments of the Constitutional Tribunal.

(111) None of the recommended actions set out by the Commission have been implemented:

(1) The three judges that were lawfully nominated in October 2015 by the previous legislature have still not been able to take up their function of judge in the Constitutional Tribunal. By contrast, the three judges nominated by the 8th term of the *Sejm* without a valid legal basis were admitted to take up their function by the acting President of the Tribunal;

(2) Three important judgements of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016 have still not been published;

(3) After the end of the mandate of the former President of the Constitutional Tribunal, a new President has still not been lawfully appointed. The former President was not replaced by the Vice-President of the Tribunal but by an acting President and, subsequently, by the person appointed as President of the Tribunal on 21 December 2016. The appointment of the new President of the Constitutional Tribunal took place before an effective review of the law on the status of judges, the law on Organisation and Proceedings and the Implementing law could occur.

(112) The fact that the constitutionality of Polish laws can no longer be effectively guaranteed is a matter of particular concern as regards respect of the rule of law since, as explained in the Recommendations of 27 July and 21 December 2016, a number of particularly sensitive new legislative acts have been adopted by the Polish Parliament, such as a new Civil Service Act[45], a law amending the law on the Police and certain other laws[46] and laws on the Public Prosecution Office[47], a law on the Ombudsman and amending certain other laws[48], a law on the National Council of Media[49] and an anti-terrorism law[50].

Constitution, the Constitutional Tribunal also settles disputes over authority between central constitutional organs of the State.

44 See the Recommendation (EU) 2017/146 and the Recommendation (EU) 2016/1374.

45 Law of 30 December 2015 amending the law on Civil Service and certain other acts, published in Official Journal on 8 January 2016, item 34.

46 Law of 15 January 2016 amending the law on Police and other laws, published in Official Journal on 4 February 2016, item 147.

47 Law of 28 January 2016 on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 177; law of 28 January 2016 - Regulations implementing the Act - law on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 178.

48 Law of 18 March 2016 amending the law on the Ombudsman and certain other laws, published in Official Journal on 17 May 2016, item 677.

49 Law of 22 June 2016 on the National Council of Media, published in Official Journal on 29 June 2016, item 929.

(113) Moreover, the adverse impact on the rule of law of the lack of an independent and legitimate constitutional review in Poland is now seriously aggravated by the fact that the constitutionality of the new laws relating to the Polish judicial system mentioned above in paragraph 5(2) and analysed further in Section 4 can no longer be verified and guaranteed by an independent constitutional tribunal.

4. THE THREATS TO THE INDEPENDENCE OF THE ORDINARY JUDICIARY

(114) The law on the Supreme Court, the law on the National Council for the Judiciary, the law on Ordinary Courts Organisation and the law on the National School of Judiciary contain a number of provisions which raise grave concerns as regards the principles of judicial independence and separation of powers.

4.1. The law on the Supreme Court

4.1.1. Dismissal and compulsory retirement of current Supreme Court judges

(115) The law on the Supreme Court lowers the general retirement age of Supreme Court judges from 70 to 65[51]. This measure applies to all judges currently in office. Judges who attained 65 years of age, or will attain that age within 3 months from the entry into force of the law, will be retired[52].

(116) By lowering the retirement age and applying it to current Supreme Court judges, the law terminates the mandate and potentially retires a significant number of current Supreme Court judges: 31 of the 83 (37%) according to the Supreme Court. Applying such a lowered retirement age to current judges of the Supreme Court has a particular strong negative impact on this specific Court, which is composed of judges who are by nature at the end of their career. Such compulsory retirement of a significant number of the current Supreme Court judges allows for a far reaching and immediate recomposition of the Supreme Court. That possibility raises particular concerns in relation to the separation of powers, in particular when considered in combination with the simultaneous reforms of the National Council for the Judiciary. In fact : due to the lowering of the retirement age all new judges will be appointed by the President of the Republic on the recommendation of the newly composed National Council for the Judiciary, which will be largely dominated by the political appointees. A forced retirement of current Supreme Court judges also raises concerns as regards the principle of irremovability of judges, which is a key element of the independence of judges as enshrined in the case law of the Court of Justice and of the European Court of Human Rights[53], and in European standards[54]. In its opinion on the draft law on the Supreme Court, the Venice Commission underlines that the early

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50 Law of 10 June 2016 on anti-terrorist actions, published in Official Journal on 24 June 2016, item 904.

51 Article 37(1) of the law on the Supreme Court. This provision also applies to Supreme Administrative Court judges since Article 49 of the law of 25 July 2002 on administrative court organisation stipulates that matters related to the Supreme Administrative Court that are not governed by that act (the retirement regime is not) are governed *mutatis mutandis* by the law on the Supreme Court.

52 Article 111(1) of the law on the Supreme Court. In addition, according to Article 111(3) of the law on the Supreme Court, all judges of the military chamber (regardless of their age) will be dismissed and retired without the possibility to ask the President of the Republic for prolongation of their active mandate.

53 ECtHR Case *Campbell and Fell v The United Kingdom*, 28 June 1984, para 80; Case *Henryk Urban and Ryszard Urban v Poland*, 30 November 2011, para 45; Case *Fruni v Slovakia*, 21 June 2011 para 145; and Case *Brudnicka and others v Poland*, 3 March 2005, para 41.

54 Para 49 and 50 of the Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities ('2010 CoE Recommendation').

retirement of the currently sitting judges undermines both their security of tenure and the independence of the Court in general[55].

(117) Judges should be protected against dismissal through the existence of effective safeguards against undue intervention or pressure from other State powers[56]. Judicial independence requires guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute[57]. The irremovability of judges during their term of office is a consequence of their independence and thus included in the guarantees of Article 6(1) ECHR[58]. As a consequence, judges must only be dismissed individually, if this is justified on the basis of a disciplinary procedure concerning their individual activity and presenting all guarantees for the defence in a democratic society. Judges cannot be dismissed as a group and judges cannot be dismissed for general reasons not related to individual behaviour. The above guarantees and safeguards are lacking in the present case and the provisions concerned constitute a flagrant violation of the independence of judges of the Supreme Court and of the separation of powers[59], and therefore of the rule of law.

(118) In addition, the mandate of six years of the current First President, established in the constitution, will be prematurely terminated (constitutionally it should end in 2020). If the mandate of the First President is terminated, the appointment of an 'acting First President' by the President of the Republic will occur outside the normal procedure[60]: according to the constitution the First President should be appointed by the President of the Republic from among candidates proposed by the general assembly of the Supreme Court[61]. Such a premature termination of a constitutionally enshrined mandate constitutes a serious violation of the principle of irremovability and security of tenure. The appointment of an acting First President according to an ad hoc procedure without involvement of the judiciary raises serious concerns as regards the principle of separation of powers.

(119) According to the explanatory memorandum of the law, the recomposition of the Supreme Court is indispensable because of the way the Supreme Court handled after 1989 the 'decommunisation' cases and because there are still judges in the Court who either worked for, or adjudicated under, the previous regime[62]. The European Court

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55 CDL(2017)035 para 48.

56 Case C-53/03 *Syfait and Others*, 31 May 2005, para 31; Case C-103/97 *Köllensperger and Atzwanger*, 4 Feb. 1999, para 20.

57 Case C-222/13 *TDC*, 9 October 2014, para 29-32; Case C-506/04 *Wilson*, 19 September 2006, para 53; Case C-103/97 *Köllensperger and Atzwanger*, 4 February 1999, para 20-23; Case C-54/96 *Dorsch Consult*, 12 September 1997, para 36; Case C-17/00, *De Coster*, 29 November 2001, para 18-21; Case C-403/16, *Hassani*, 13 December 2017, para 40; ECtHR Case *Baka v. Hungary*, 20261/12, 23 June 2016, para 121.

58 ECtHR Case *Campbell and Fell v The United Kingdom*, A80 (1984), 28 June 1984, para 80.

59 The new rules contradict the principle of irremovability of judges as a key element of the independence of judges as enshrined in the 2010 CoE Recommendation (para 49). Accordingly, Supreme Court judges should have guaranteed tenure, and their mandates should not be prematurely terminated. Also decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities, and where the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice (para 44-48).

60 According to Article 111(4) of the law on the Supreme Court the President of the Republic will entrust heading of the Supreme Court to a Supreme Court judge of his own choosing. Such an 'acting First President' will exercise their functions until the General Assembly of judges presents 5 candidates to the post of the First President of the Supreme Court (Article 12). The General Assembly of Supreme Court judges will be able to at present these candidates no sooner than at least 110 judges of the Supreme Court have been appointed.

61 Article 183(3) of the Polish constitution stipulates that 'the First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.'

62 Page 2 of the explanatory memorandum.

of Human Rights has clearly underlined that a lustration process must be individualised (e.g. distinctions must be made between different levels of involvement with the former regime) and considers that lustration measures taking place long after the end of the communist regime may be less justified in view of the diminishing risks existing over newly created democracies[63]. There are other proportionate measures which the state could adopt in order to deal with individual judges having a communist background (which would include transparent proceedings applied in individual cases before impartial organs acting on the basis of criteria pre-established by law)[64].

(120) In its opinion on the draft law on the Supreme Court, the Venice Commission considers that it is hard to see why a person who was deemed fit to perform official duties for several more years to come would suddenly be considered unfit. The explanatory memorandum of the law may be understood as implying that, as a result of the reform, most senior judges, many of whom have served under the previous regime, would retire. If this reading is correct, such approach is unacceptable: if the authorities doubt the loyalty of individual judges, they should apply the existing disciplinary or lustration procedures, and not change the retirement age.

(121) The Venice Commission concludes that the early removal of a large number of justices of the Supreme Court (including the First President) by applying to them, with immediate effect, a lower retirement age violates their individual rights and jeopardises the independence of the judiciary as a whole; they should be allowed to serve until the currently existing retirement age[65]. The Venice Commission underlines in particular that the early retirement of the currently sitting judges undermines both their security of tenure and the independence of the Court in general[66].

(122) Finally, these provisions raise constitutionality concerns. As noted by the Supreme Court and the Ombudsman, the dismissal and forced retirement of current Supreme Court judges violate the principle of judicial independence and directly affects the right to an independent court. The Ombudsman notes that the institution of an acting First President of the Supreme Court constitutes a violation of the rule of law by breaching the principle of non-assumption of competences of state powers, the principle of separation and balance of powers, and the principle of judicial independence.

4.1.2. The power to prolong the mandate of Supreme Court judges

(123) According to the law, Supreme Court judges affected by the lowered retirement age and wishing to prolong their active mandate can make a request to the President of the Republic[67].

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63 ECtHR Case *Sõro v. Estonia*, 3 September 2015, para 60-62.

64 Para 44 – 47 and 50 of the 2010 CoE Recommendation.

65 Opinion CDL(2017)035 para 130.

66 Opinion CDL(2017)035 para 48.

67 The request is to be made via the First President of the Supreme Court who provides an opinion on a judge's request. For the prolongation of the First President's mandate, the First President needs to provide to the President of the Republic the opinion of the college of the Supreme Court. In the process of making the decision, the President of the Republic may seek a non-binding opinion of the NCJ (cf. Article 37(2)-(4) in conjunction with Article 111(1) of the law on the Supreme Court. It is noted that according to the Supreme Court's opinion, under the constitution such a decision by the President of the Republic would require a countersignature of the Prime Minister, in accordance with Article 144(1) and (2) of the Polish constitution.

(124) As regards the power of the President of the Republic to decide to prolong the active mandate of Supreme Court judges, there are no criteria, no time-frame for taking a decision and no judicial review provided for in the law. A judge who has asked for the prolongation is 'at the mercy' of the decision of the President of the Republic. In addition, the President of the Republic will be in position to decide *twice* on the prolongation (each time for 3 years). These elements affect the security of tenure and will allow the President of the Republic to exert influence over active Supreme Court judges. The regime is contrary to the 2010 CoE Recommendation which requires that decisions concerning the selection and career of judges should be based on objective criteria pre-established by law and that there should be an independent and competent authority drawn in substantial part from the judiciary authorised to make recommendations or express opinions which the relevant appointing authority follows in practice[68]. It also requires that judges concerned should have the right to challenge a decision relating to their career[69].

(125) The new retirement regime adversely impacts the independence of judges[70]. The new rules create an additional tool through which the President of the Republic can exert influence on individual judges. In particular, the lack of any criteria for prolongation of the mandates allow for undue discretion, undermining the principle of irremovability of judges. While decreasing the retirement age, the law allows judges to have their mandate extended by the President of the Republic for up to 6 years. Also, there is no time-frame for the President of the Republic to make a decision on the extension of the mandate, which allows the President to retain influence over the judges concerned for the remaining time of their judicial mandate. Even before the retirement age is reached, the mere prospect of having to request the President for such a prolongation could exert pressure on the judges concerned.

(126) In its opinion on the draft law on the Supreme Court, the Venice Commission underlines that this power of the President of the Republic gives him excessive influence over Supreme Court judges who are *approaching* retirement age. For this reason, the Venice Commission concludes that the President of the Republic as an elected politician should not have the discretionary power to extend the mandate of a Supreme Court judge beyond the retirement age[71].

(127) The new rules also raise constitutionality concerns. According to the Supreme Court and the Ombudsman's opinions, the new mechanism of prolongation of judicial mandates does not respect the principle of legality and separation of powers.

4.1.3. The extraordinary appeal

(128) The law introduces a new form of judicial review of final and binding judgements and decisions, the extraordinary appeal[72]. Within three years[73] from the entry into

[68] Para 46 and 47. This regime would also raise concerns with the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality CM(2016)36 final (at C. ii; '2016 CoE Action Plan') and CCJE benchmarks (Opinion no. 1 on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, para 25).

[69] Para 48 of the 2010 CoE Recommendation.

[70] Para 49 of the 2010 CoE Recommendation.

[71] Opinion CDL(2017)035 para 51 and 130.

[72] Article 89(1) of the law on the Supreme Court.

[73] Article 115 of the law on the Supreme Court. After the three-year period the appeal would need to be lodged within five years from a moment when the judgement concerned became final and lawful and within one year if the cassation appeal has been made, unless extraordinary appeal is brought to the detriment of the defendant, in such a case the appeal can be lodged no later than one year after the ruling becomes final (or, if the cassation has been lodged, no later than 6 months upon the examination of the cassation); cf. Article 89(4) of the Law on the Supreme Court.

force of the law the Supreme Court will be able to overturn[74] completely or in part[75] any final judgement delivered by a Polish court in the past 20 years, including judgements delivered by the Supreme Court, subject to some exceptions[76]. The power to lodge the appeal is vested in *inter alia* the Prosecutor General and the Ombudsman[77]. The grounds for the appeal are broad: the extraordinary appeal can be lodged if it is necessary to ensure the rule of law and social justice and the ruling cannot be repealed or amended by way of other extraordinary remedies, and either it (1) violates the principles or the rights and freedoms of persons and citizens enshrined in the Constitution; or (2) it is a flagrant breach of the law on the grounds of misinterpretation or misapplication; or (3) there is an obvious contradiction between the court's findings and the evidence collected[78].

(129) This new extraordinary appeal procedure raises concerns as regards the principle of legal certainty which is a key component of the rule of law[79]. As noted by the Court of Justice, attention should be drawn to the importance, both for the EU legal order and national legal systems, of the principle of *res judicata:* 'in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question'[80]. As noted by the European Court of Human Rights, extraordinary review should not be an 'appeal in disguise', and 'the mere possibility of there being two views on the subject is not a ground for re-examination'[81].

(130) In its opinion on the draft law on the Supreme Court, the Venice Commission underlined that the extraordinary appeal procedure is dangerous for the stability of the Polish legal order. The opinion notes that it will be possible to reopen any case decided in the country in the past 20 years on virtually any ground and the system could lead to a situation in which no judgement will ever be final anymore[82].

(131) The new extraordinary appeal also raises constitutionality concerns. According to the Supreme Court and the Ombudsman, the law affects the principle of stability of

[74] If five years have elapsed since the contested ruling became final and the ruling has had irreversible legal effects or if warranted by the principles or the rights and freedoms of persons and citizens enshrined in the Constitution, the Supreme Court may confine itself to confirming that the contested ruling is in breach of the law and indicating the circumstances which led it to issue such a decision (Cf. Article 89(4) and Article 115(2) of the law on the Supreme Court).

[75] Article 91(1) of the law on the Supreme Court.

[76] Criminal cases cannot be extraordinarily appealed from to the detriment of the defendant more than one year after the ruling becomes final (or, if the cassation has been lodged, no later than 6 months upon the examination of the cassation); there is also no possibility of appeals against judgements establishing the nullity of a marriage, annulling a marriage or pronouncing a divorce (only in so far as one or both of the parties remarried after the ruling became final) or a decision on adoption. The extraordinary appeal cannot concern petty offences or minor tax offences; cf. Article 90(3) and (4) of the law on the Supreme Court.

[77] Article 89(2) of the law on the Supreme Court.

[78] Article 89(1) items 1-3 of the law on the Supreme Court.

[79] ECtHR Case *Brumărescu v. Romania*, 28 October 1999, para 61; Case *Ryabykh v. Russia*, 3 March 2003, para 54 and 57; Case *Miragall Escolano and others v Spain*, 25 January 2000, para 33; also *Phinikaridou v Cyprus*, 20 December 2007 para 52.

[80] Case C-224/01 *Köbler*, 30 September 2003, para 38.

[81] *Moreira Ferreira v. Portugal (no. 2)*, 11 July 2017 (final), para 62.

[82] Opinion CDL(2017)035 para 58, 63 and 130.

jurisprudence and the finality of judgements[83], the principle of protecting trust in the state and law as well as the right to have a case heard within a reasonable time[84].

4.1.4. Other provisions

(132) As underlined in the opinion of the Venice Commission and of other bodies[85], a number of other provisions in the Law on the Supreme Court raise concerns as regards the principles of judicial independence and separation of powers.

(133) The new law establishes a new disciplinary regime for Supreme Court judges. Two types of disciplinary officers are foreseen: *the disciplinary officer of the Supreme Court* appointed by the College of the Supreme Court for a four-year term of office[86], and the *extraordinary disciplinary officer appointed on a case-by-case basis by the President of the Republic* from among Supreme Court judges, ordinary judges, military court judges and prosecutors[87]. Under Polish law, only disciplinary officers can decide on the initiation of disciplinary proceedings against judges. The appointment of an extraordinary officer by the President of the Republic occurs without involvement of the judiciary and equals to a request to initiate a preliminary investigation. Appointment of an extraordinary disciplinary officer to an ongoing disciplinary proceeding excludes the disciplinary officer of the Supreme Court from that proceeding[88]. The fact that the President of the Republic (and in some cases also the Minister of Justice[89]) has the power to exercise influence over disciplinary proceedings against Supreme Court judges by appointing a disciplinary officer who will investigate the case ('disciplinary officer') which will exclude the disciplinary officer of the Supreme Court from an on-going proceeding, creates concerns as regards the principle of separation of powers and may affect judicial independence. Such concerns have also been raised in the opinions of the OSCE-ODHIR and of the Supreme Court[90]

(134) The law also removes a set of procedural guarantees in disciplinary proceedings conducted against ordinary judges[91] and Supreme Court judges[92]: evidence gathered

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83 Both principles have been considered to be part of the rule of law by the Constitutional Tribunal; cf. judgements of the Constitutional Tribunal SK 7/06 of 24 October 2007 and SK 77/06 of 1 April 2008.

84 Judgement SK 19/05 of 28 November 2006; SK 16/05 of 14 November 2007.

85 In particular, opinions of the Supreme Court of 6 and 23 October, and 30 November 2017, the opinion of the Ombudsman of 11 November 2017 and the OSCE-ODIHR opinion of 13 November 2017.

86 Article 74 of the law on the Supreme Court.

87 Article 76(8) of the law on the Supreme Court; the President of the Republic can appoint the extraordinary disciplinary officer from among prosecutors proposed by the State Prosecutor if a disciplinary case concerns disciplinary misconduct that satisfies the criteria of an intentional crime prosecuted by public indictment or of intentional tax crimes.

88 Article 76(8) of the law on the Supreme Court.

89 According to article 76(9) of the law on the Supreme Court, the Minister of Justice can notify the President of the Republic about the need to appoint an extraordinary disciplinary officer if there is a case of disciplinary misconduct that satisfies the criteria of an intentional crime prosecuted by public indictment or intentional tax crime. It appears that whether a case satisfies these criteria will be determined autonomously by the Minister of Justice and the President of the Republic as their decisions on appointing the extraordinary disciplinary officer cannot be appealed from.

90 OSCE-ODIHR opinion of 13 November 2017; para 119-121 ; Supreme Court opinion of 6 October, page 34.

91 According to Article 108(17)-(19) of the law on the Supreme Court, the Minister of Justice is given the power to set the number of and appoint disciplinary judges for ordinary court judges without consulting the judiciary. Additionally, the Minister of Justice would be able to personally control disciplinary cases conducted against ordinary court judges through disciplinary officers and an extraordinary disciplinary officer of the Minister of Justice appointed by himself (including under certain circumstances also from the prosecutors). Disciplinary officers appointed by the Minister of Justice would be able to reopen closed investigations at request of the Minister of Justice.

92 According to the law, provisions enshrined in the Law on Ordinary Court Organisation including those concerning procedural aspects of disciplinary proceedings apply mutatis mutandis to Supreme Court judges; cf. Article 72(1) and Article 108 in conjunction with Article 10(1) of the law on the Supreme Court. The law on the Supreme Court amends in its Article 108 the law on Ordinary Courts Organisation.

in violation of the law could be used against a judge[93]; under certain conditions evidence presented by the judge concerned could be disregarded[94]; the time-barring for disciplinary cases would be suspended for the period of disciplinary proceedings, which means that a judge could be subject to a proceeding for an indefinite duration[95]; finally, disciplinary proceedings could continue even if the judge concerned was absent (including when the absence was justified)[96]. The new disciplinary regime also raises concerns as to its compliance with the due process requirements of Art. 6(1) ECHR which are applicable to disciplinary proceedings against judges[97].

(135) The law modifies the internal structure of the Supreme Court, supplementing it with two new chambers. A new chamber of extraordinary control and public matters will assess cases brought under the new extraordinary appeal procedure[98]. It appears that this new chamber will be composed in majority of new judges[99] and will ascertain the validity of general and local elections and examining electoral disputes, including electoral disputes in European Parliament elections[100]. In addition, a new autonomous[101] disciplinary chamber composed solely of new judges[102] will be tasked with reviewing in the first and second instance disciplinary cases against Supreme Court judges[103]. These two new largely autonomous chambers composed with new judges raise concerns as regards the separation of powers. As noted by the Venice Commission, while both chambers are part of the Supreme Court, in practice they are above all other chambers, creating a risk that the whole judicial system will be dominated by these chambers which are composed of new judges elected with a decisive influence of the ruling majority[104]. Also, the Venice Commission underlines that the law will make the judicial review of electoral disputes particularly vulnerable to political influence, creating a serious risk for the functioning of Polish democracy[105].

(136) The law introduces lay judges, to be appointed by the Senate of the Republic[106], to proceedings before the Supreme Court concerning the extraordinary appeals and disciplinary cases examined by the Supreme Court. As observed by the Venice

[93] Article 108(23) of the law on the Supreme Court in terms of Article 115c added to the law on Ordinary Courts Organisation.

[94] If the evidence was presented after time prescribed, cf. Article 108(22) of the law on the Supreme Court.

[95] Article 108(13) item *b* of the law on the Supreme Court.

[96] Article 108(23) of the law on the Supreme Court.

[97] ECtHR Case *Vilho Eskelinen* and others v Finland, 19 April 2007 para 62; Case *Olujić v Croatia*, 5 February 2009, para 34-43; Case *Harabin v Slovakia*, 20 November 2012 para 118-124; and Case *Baka v Hungary*, 23 June 2016, para 100-119.

[98] Article 26 and Article 94 of the law on the Supreme Court.

[99] Article 134 of the law on the Supreme Court; the former chamber of labour, social security and public affairs is split into two chambers, the chamber of labour and social security and the new chamber of extraordinary control and public affairs; this new chamber will be composed by new judges as all current judges are transferred to the chamber of labour and social security; current Supreme Court judges can request a transfer to this new chamber.

[100] A full list of tasks dealt with by this chamber is found in Article 26.

[101] The president of the disciplinary chamber is autonomous vis-à-vis the First President of the Supreme Court and budget of that chamber can be substantially increased in comparison to the overall budget of the Supreme Court (cf. Article 7(2) and (4), and Article 20 of the law on the Supreme Court).

[102] According to Article 131 of the law on the Supreme Court, until all the judges of the Supreme Court in the Disciplinary Chamber have been appointed, other Supreme Court judges cannot be transferred to a post in that Chamber.

[103] A full list of tasks dealt with by the disciplinary chamber is found in Article 27 of the law on the Supreme Court.

[104] Opinion CDL(2017)035 para 92.

[105] Opinion CDL(2017)035 para 43.

[106] Article 61(2) of the law on the Supreme Court.

Commission, introducing lay judges to the two new chambers of the Supreme Court puts the efficiency and quality of justice in danger[107].

4.2. The law on the National Council for the Judiciary

(137) According to the Polish Constitution the independence of judges is safeguarded by the National Council for the Judiciary[108]. The role of the National Council for the Judiciary has a direct impact on the independence of judges in particular as regards their promotion, transfer, disciplinary proceedings, dismissal and early retirement. For example, the promotion of a judge (e.g. from district court to regional court) requires the President of the Republic to once again appoint the judge, and therefore the procedure for judicial assessment and nomination involving the National Council for the Judiciary will have to be followed again. Also assistant judges who are already performing tasks of a judge must be assessed by the National Council for the Judiciary prior to their appointment as judge by the President of the Republic.

(138) For this reason, in Member States where a Council for the Judiciary has been established, its independence is particularly important for avoiding undue influence from the Government or the Parliament on the independence of judges[109].

(139) The law on the National Council for the Judiciary increases the concerns regarding the overall independence of the judiciary by providing for the premature termination of the mandate of all judges-members of the National Council for the Judiciary, and by establishing an entirely new regime for the appointment of its judges-members which allows a high degree of political influence.

(140) According to Article 6 of the law on the National Council for the Judiciary the mandates of all the current judges-members of the National Council for the Judiciary will be terminated prematurely. This termination decided by the legislative powers raises concerns for the independence of the Council and the separation of powers. The Parliament will gain a decisive influence on the composition of the Council to the detriment of the influence of judges themselves. This recomposition of the National Council for the Judiciary could already occur within one and a half month after the publication of the law[110]. The premature termination also raises constitutionality concerns, as underlined in the opinion of the National Council for the Judiciary, of the Supreme Court and of the Ombudsman.

(141) Also, the new regime for appointing judges-members of the National Council for the Judiciary raises serious concerns. Well established European standards, in particular the 2010 Recommendation of the Committee of Ministers of the Council of Europe,

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[107] Opinion CDL(2017)035 para 67.

[108] Article 186(1) of the Polish Constitution: 'The National Council of the Judiciary shall safeguard the independence of the courts and judges'.

[109] For example, in the context of disciplinary proceedings against judges conducted by a Council, the European Court of Human Rights has questioned the level of influence of the legislative or executive authorities given that the Council was composed by a majority of members appointed directly by these authorities; ECtHR Case *Ramos Nunes de Carvalho E Sá v Portugal*, 55391/13, 57728/13 and 74041/13, 21 June 2016, para 77.

[110] Mandates of current judges-members would expire on the day preceding the beginning of a joint term of office of the new judges-members of the Council, but no later than 90 days from the entry into force of the law. The timeline is as follows: within three days following publication of the law, the Marshal of the *Sejm* announces the start of the nomination procedure. Within 21 days from this announcement candidates to posts of judges-members of the Council are presented to the Marshal of the *Sejm* by the authorized entities (groups of at least 25 judges or 2000 citizens). Upon the lapse of this 21days term, the Marshal transmits the list of candidates to parliamentary clubs which will have seven days to propose up to nine candidates from that list. Subsequently the appointment procedure according to regular provisions takes place (see below); cf. Article 6 and 7 of the law amending the Law on the National Council for the Judiciary and Article 1(1), and (3) in terms of added Articles 11a and 11d of the Law amending the Law on the National Council for the Judiciary.

stipulate that 'not less than half the members of [Councils for the Judiciary] should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary'[111]. It is up to the Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary. However, where such a Council has been established, as it is the case in Poland, its independence must be guaranteed in line with European standards.

(142) Until the adoption of the law on the National Council for the Judiciary, the Polish system was fully in line with these standards since the National Council for the Judiciary was composed of a majority of judges chosen by judges. Articles 1(1) and 7 of the law amending the law on the National Council for the Judiciary would radically change this regime by providing that the 15 judges-members of the National Council for the Judiciary will be appointed, and can be re-appointed, by the *Sejm*[112]. In addition, there is no guarantee that under the new law the *Sejm* will appoint judges-members of the Council endorsed by the judiciary, as candidates to these posts can be presented not only by groups of 25 judges, but also by groups of of at least 2000 citizens[113]. Furthermore, the final list of candidates to which the *Sejm* will have to give its approval *en bloc* is pre-established by a committee of the *Sejm*[114]. The new rules on appointment of judges-members of the National Council for the Judiciary significantly increase the influence of the Parliament over the Council and adversely affect its independence in contradiction with the European standards. The fact that the judges-members will be appointed by the *Sejm* with a three fifths majority does not alleviate this concern, as judges-members will still not be chosen by their peers. In addition, in case such a three fifths majority is not reached, judges-members of the Council will be appointed by the *Sejm* with absolute majority of votes.

(143) This situation raises concerns from the point of view of the independence of the judiciary. For example, a district court judge who has to deliver a judgment in a politically sensitive case, while the judge is at the same time applying for a promotion to become a regional court judge, may be inclined to follow the position favoured by the political majority in order not to put his/her chances to obtain the promotion into jeopardy. Even if this risk does not materialise, the new regime does not provide for sufficient guarantees to secure the appearance of independence which is crucial to maintain the confidence which tribunals in a democratic society must inspire in the public[115]. Also assistant judges will have to be assessed by a politically influenced National Council for the Judiciary prior to their appointment as judge.

(144) The Venice Commission concludes that the election of the 15 judicial members of the National Council of the Judiciary by Parliament, in conjunction with the immediate replacement of the currently sitting members, will lead to a far reaching

[111] Para 27; see also C item (ii) of the 2016 CoE Action Plan; para 27 of the CCJE Opinion no. 10 on the Council for the Judiciary in the service of society; and para 2.3 of the ENCJ 'Councils for the Judiciary' Report 2010-11.

[112] The Constitution stipulates that the National Council for the Judiciary is composed of ex officio members (the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and a presidential appointee) and elected members. The elected members consist of four deputies '*chosen by the Sejm*', two senators '*chosen by the Senate*' and 15 judges ('*chosen from amongst*' the common, administrative and military courts and the Supreme Court).

[113] Article 1(3) of the law on the National Council for the Judiciary adding an Article 11a(2) and (3): it is noted that each group (of judges and of citizens) may lodge more than one nomination for a judge-member of the Council.

[114] If parliamentary clubs do not present, in total, 15 candidates, the Presidium of the *Sejm* will choose them in order to create a list of 15 candidates which is then transmitted to the *Sejm* committee (cf. Article 1(3) adding Article 11c and Article 11d(1)-(4)).

[115] ECtHR Cases *Morice v France*, 29369/10, 23 April 2015, para 78; *Cyprus v. Turkey*, 25781/94, 10 May 2001, para 233.

politicisation of this body. The Venice Commission recommends that, instead, judicial members of the NCJ should be elected by their peers, as in the current Act[116]. It also observed that the law weakens the independence of the Council with regard to the majority in Parliament and contributes to a weakening of the independence of justice as a whole[117].

(145) In their opinions concerning the draft law, the Supreme Court, the National Council for the Judiciary and the Ombudsman raised a number of concerns as regards the constitutionality of the new regime. In particular, the National Council for the Judiciary notes that under the Polish constitution, the Council serves as a counterweight to the parliament which has been constitutionally authorized to decide on the content of law. The political appointment of judges-members and the premature termination of mandates of the current judges-members of the Council therefore violates the principles of separation of powers and judicial independence. As explained in the previous Recommendations, an effective constitutional review of these provisions is currently not possible.

4.3. The law on Ordinary Courts Organisation

4.3.1. Retirement age and the power to prolong the mandate of judges

(146) Articles 1(26)b-c and 13(1) of the law on Ordinary Courts Organisation stipulate that the retirement regime applicable to ordinary judges will be reduced from 67 to 60 for female judges and from 67 to 65 for male judges and the Minister of Justice will be granted the power to decide on the prolongation of judicial mandates (until the age of 70) on the basis of vague criteria. Pending this decision the judges concerned remain in office.

(147) The new retirement regime would adversely impact on the independence of judges[118]. The new rules create an additional tool through which the Minister of Justice can exert influence on individual judges. In particular, the vague criteria for prolongation of the mandates allow for undue discretion, undermining the principle of irremovability of judges[119]. While decreasing the retirement age, the law allows judges to have their mandate extended by the Minister of Justice for up to ten years for female judges and five years for male judges. Also, there is no time-frame for the Minister of Justice to make a decision on the extension of the mandate, which allows the Minister of Justice to retain influence over the judges concerned for the remaining time of their judicial mandate. Even before the retirement age is reached, the mere prospect of having to request the Minister of Justice for such a prolongation could exert pressure on the judges concerned.

(148) By decreasing the retirement age of judges while making prolongation of the judicial mandate conditional upon the decision of the Minister of Justice, the new rules undermine the principle of irremovability of judges which is a key element of the independence of judges according to the case law of the Court of Justice and of the European Court of Human Rights. Among the requirements of an independent court, the Court of Justice stated that judges should enjoy personal and operational independence in the exercise of their duties and should also be protected against

[116] Opinion CDL(2017)035 para 130.
[117] Opinion CDL(2017)035 para 31.
[118] 2010 CoE Recommendation, para 49.
[119] According to the law, the Minister of Justice decides on whether or not to prolong mandate of a judge, 'taking under consideration rational use of common court personnel and the needs resulting from the workload of particular courts' (cf. art. 1(26)(b) of the law).

dismissal through the existence of effective safeguards against undue intervention or pressure from the executive[120]. The provisions concerned are also not in line with the European standards according to which judges should have guaranteed tenure until a mandatory retirement age, where such retirement age exists. The Venice Commission shares the concerns of the Commission[121].

(149) The Commission notes that the new rules also raise constitutionality concerns. According to the opinion of the Supreme Court[122], allowing the Minister of Justice to decide on the prolongation of a judge's mandate, in combination with lowering the retirement age of judges, violates the principle of irremovability of judges (art. 180(1) of the Constitution). As explained above, the Commission recalls that an effective constitutional review of these provisions is currently not possible

(150) The reply of the Polish authorities to the Commission's Recommendation of 26 July 2017 does not alleviate the concerns of the Commission and does not announce any concrete measures to address the issues raised by the Commission. The reply ignores the pressure the Minister of Justice can exert on individual judges before deciding on giving his consent for the judges concerned to remain in office after they have reached the retirement age.

4.3.2. The court presidents

(151) In the Polish legal system, court presidents have a dual role: they do not only have a responsibility as court managers, but they also perform judicial functions. The law on Ordinary Courts Organisation raises concerns with regard to the personal independence of court presidents when exercising their judicial function.

Power to dismiss

(152) Articles 17(1) and 18(1) of the law on Ordinary Courts Organisation include rules on the dismissal of court presidents and vice-presidents. During a six-month period following the entry into force of the law, the Minister of Justice is granted the power to dismiss presidents of courts without being bound by concrete criteria, with no obligation to state reasons, and with no possibility for the judiciary to block these decisions. In addition, no judicial review is available against a dismissal decision of the Minister of Justice.

(153) The concern of the Commission relates to the powers of the Minister of Justice during this six-month period. After this six-month period, according to Article 1(7), the Minister of Justice will still be able to dismiss presidents of courts, but the National Council for the Judiciary would have to be consulted by the Minister of Justice and would be able to block the planned dismissal by a resolution adopted by two thirds majority of vote[123].

Power to appoint

(154) According to Article 1(6) of the law on Ordinary Courts Organisation, the Minister is granted the power to appoint presidents of courts. The only applicable criteria are that the court president must be appointed from among appeal court or regional court judges, for the position of president of an appeal court; from among appeal court,

[120] Case C-53/03 *Syfait and Others*, 31 May 2005, para 31; Case C-103/97 *Köllensperger and Atzwanger*, 4 February 1999, para 20.
[121] Opinion CDL-AD(2017)035, para 100-109.
[122] Opinion of the Supreme Court of 28 April 2017.
[123] Article 1(7) of the law on Ordinary Courts Organisation provides that if the NCJ fails to deliver an opinion within 30 days of the day on which the Minister of Justice presents the planned dismissal, this shall not be an obstacle to the dismissal.

regional court or district court judges, for the position of president of a regional court; and from among regional court or district court judges, for the position of president of a district court. There is no obligation for the Minister of Justice to consult the judiciary for such decision. Only after the appointment of the court president, the Minister presents the new president to the general assembly of judges of the relevant court. This power of the Minister of Justice to appoint a court president does not change after the lapse of the six months period.

Effects of the powers to dismiss and appoint

(155) Given that court presidents are active judges, the above powers to arbitrarily dismiss, during the six-month period, and appoint court presidents allow the Minister of Justice to retain influence over court presidents which may affect their personal independence when exercising judicial functions. For example, a court president who is called upon to deliver a judgment in a sensitive case against the State may feel the pressure from the Minister of Justice to follow the position of the Government in order to avoid being dismissed as a court president, rather than adjudicating the case independently on the basis of its merits. Judicial independence requires that judges are not subordinated to any other body when adjudicating cases and be protected against external interventions or pressure liable to jeopardise their independent judgment as regards proceedings before them[124].

(156) Also for judges who seek to become court presidents, such discretionary power of the Minister of Justice may influence the way they adjudicate cases, in particular on sensitive political cases in order not to reduce their chances of being appointed court presidents. Their personal independence would as a result be equally affected, when adjudicating cases.

(157) In addition, it should be noted that court presidents, in their capacity as court managers, have important powers over other judges. The discretionary power of the Minister of Justice to dismiss and appoint court presidents could influence the way court presidents use these powers as court managers over other judges. This could result in an interference with the personal independence of these judges. The powers granted to the Minister of Justice will therefore have an indirect effect also on the independence of the judges who are subject to the authority of the court presidents exposed to the influence of the Minister of Justice. For example, court presidents have the power to replace judges in their function of heads of division or heads of section of courts[125], the power to issue written notification to these heads of division and section which may be coupled with a reduction in the post allowance received by these heads of division and section in case of deficiencies[126], and the power to transfer judges without their consent within the structure of a court over which they preside (which covers the relevant judicial district of a given court, and may comprise places of work located in different cities)[127].

[124] Case C-503/15 *Margarit Panicello*, 16 February 2017, para 37-38; Case C-203/14 *Consorci Sanitari del Maresme*, 6 October 2015, para 19; Case C-222/13 *TDC*, 9 October 2014, para 30; Joined Cases C-58/13 and C-59/13 *Torresi*, 17 July 2014, para 22; Case C-506/04 *Wilson*, 19 September 2006, para 51.

[125] According to Articles 17(2) and 18(2) of the law on Ordinary Courts Organisation the power of presidents of appeal and regional courts to replace judges in their function of heads of division, deputy heads of division, heads of section and inspecting judges is granted for six months following the entry into force of the law.

[126] Article 1(13)(b) of the law on Ordinary Courts Organisation.

[127] Article 1(5)(b) of the law on Ordinary Courts Organisation.

(158) In its opinion[128], the Venice Commission underlined that the new law enables the executive powers to interfere in a severe and extensive manner in the administration of justice and poses a grave threat to the judicial independence as a key element of the rule of law. The law does not sufficiently protect court presidents against arbitrary dismissals, and the decision of the Minister of Justice to appoint/dismiss a court president should be subject to approval by the National Council for the Judiciary or by the general assembly of judges of the respective court, taken by a simple majority of votes. Also, in the Rules of Procedure the Minister of Justice is competent to set 'detailed rules on the assignment of cases' and the 'method of random of allocation of cases' and may also fix special rules where the random allocation of cases is impossible or inefficient. As underlined by the Venice Commission, this power may be used to interfere with the system of random allocation of cases; setting of the method of distribution of cases should not be within the discretionary power of the Minister of Justice[129].

(159) Moreover, opinions of the Supreme Court, the National Council for the Judiciary and the Ombudsman have pointed out that the provisions concerned raise constitutionality concerns. In particular, allowing for such possibility of dismissal of court presidents by the Minister of Justice disregards the principles of judicial independence and separation of powers. However, in the current circumstances the constitutionality of these provisions can no longer be verified and guaranteed by an independent constitutional tribunal.

(160) The European Court of Human Rights has established a clear link between the dismissal from the position of court president and judicial independence. In the Baka case, the European Court of Human Rights found that the premature removal of the applicant from his position as President of the Supreme Court, even though the applicant remained in office as judge, defeated rather than served the very purpose of maintaining the independence of the judiciary[130].

(161) According to the available information, the Minister of Justice has so far dismissed 24 and appointed at least 32 court presidents (this figure includes appointments to regular vacant posts).

(162) The reply of the Polish authorities to the Commission's Recommendation of 26 July 2017 does not alleviate the concerns of the Commission, and does not announce any concrete measures to address the issues raised by the Commission. The reply denies that the powers of the Minister of Justice interfere with the independence of court presidents as judges ruling on cases and underlines that the powers of the Minister only concern the administrative activities of court presidents. However, the reply ignores that the power to arbitrarily dismiss court presidents during the six-month period allows the Minister to retain influence over court presidents which may affect their personal independence when adjudicating cases.

4.3.2. Other concerns

(163) The Minister of Justice may address to a president of a lower court 'written remarks' concerning the alleged mismanagement by the latter of his court. As a result of such 'written remarks', the president of the lower court may suffer a reduction of the post

[128] Opinion CDL-AD(2017)035, para 125.
[129] Opinion CDL-AD(2017)035, para 120.
[130] ECtHR, Case *Baka v. Hungary*, 20261/12, 23 June 2016, para 172.

allowance for up to 50% for up to six months[131]. The Minister himself may issue a 'written notice' addressed to the president or vice-president of the court of appeal, and reduce the post allowance accordingly. Since any reduction of the emoluments of a judge as a consequence of the judge's behaviour is to be regarded as a disciplinary sanction[132], the Minister of Justice should not be able to decide on such reduction single-handedly without any underlying judicial decision.

4.4. Other legislation

4.4.1. The law on the National School for Judiciary

(164) Other legislation has been adopted by the new legislature which raises concerns as regards judicial independence and separation of powers.

(165) Under Articles 2(1) and 2(36) of the law on the National School of Judiciary, assistant judges are entrusted with the tasks of judge in district courts for a period of four years. In particular, assistant judges will be allowed to act as single judges in district courts.

(166) However, under the Polish legal system, assistant judges do not have the same status as judges[133]. Assistant judges are appointed for the limited term of four years and after 36 months they can start applying for new proceedings to become judges. Assistant judges are not subject to the same guarantees for protecting judicial independence as those applicable to judges – for example as regards the appointment, which is not subject to the same procedure as for judges. Unlike the position of judges, the position of assistant judges performing judicial functions is not envisaged in the Constitution. This implies that their status, as well as the guarantees for their independence, can be modified by ordinary law, and do not require any change of the Constitution[134]. The fact that assistant judges are allowed to act as single judges in district courts makes the issue of their independence even more important.

(167) During the legislative process of the law on the National School of Judiciary concerns have been expressed by the Supreme Court and the National Council for the Judiciary as to whether the guarantees for independence of assistant judges comply with the Constitution and are sufficient to meet the requirements of a fair trial enshrined in Article 6(1) ECHR[135]. The European Court of Human Rights has held that the previous regime regarding assistant judges in Poland did not meet these criteria[136].

(168) The reply of the Polish authorities received on 28 August 2017 to the Commission's Recommendation of 26 July 2017 does not alleviate the concerns of the Commission and does not announce any concrete measures to address the issues raised by the Commission.

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[131] The Minister of Justice can exert influence on appeal court presidents by assessing their performance; while a negative assessment could result in financial penalties imposed on presidents of courts, a positive assessment could result in an increase of the post allowance of presidents; Article1(13)-(15) of the law on Ordinary Courts Organisation.

[132] Opinion CDL-AD(2017)035, para 114–117.

[133] Assistant judges, even though they are entrusted with the duties of a judge, are appointed by the Minister of Justice directly with a minimal involvement of the National Council for the Judiciary.

[134] The independence of the judge should be enshrined in the constitution with more specific rules provided at the legislative level (see e.g. 2010 CoE Recommendation, para 7). It should also be noted that the Supreme Court and the National Council for the Judiciary in their opinions raised questions of constitutionality of this law.

[135] Opinion of the Supreme Court of 3 February 2017; opinion of the National Council for the Judiciary of 10 February 2017.

[136] ECtHR Case *Henryk Urban and Ryszard Urban v Poland*, 23614/08, 28 February 2011; ECtHR Case *Mirosław Garlicki v Poland*, 36921/07, 14 September 2011; ECtHR Case *Pohoska v Poland*, 33530/06 10 April 2012.

4.4.2. Other laws

(169) The laws on the Public Prosecution Office[137] merged the office of the Minister of Justice and that of the Public Prosecutor General, and increased significantly the powers of the Public Prosecutor General in the management of the prosecutorial system, including new competences enabling the Minister of Justice to directly intervene in individual cases.

(170) As underlined by the Venice Commission[138], while recognising that the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts, taken together, the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary pursuant to the law on the Organisation of Ordinary Courts and the weak position of checks to these powers, result in the accumulation of too many powers for one person. This has direct negative consequences for the independence of the prosecutorial system from political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland.

5. FINDING OF A CLEAR RISK OF A SERIOUS BREACH OF THE VALUES REFERRED TO IN ARTICLE 2 OF THE TREATY ON EUROPEAN UNION

(171) According to Article 7(1) TEU, on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure[139].

(172) The Commission is of the opinion that the situation described in the previous sections represents a clear risk of a serious breach by the Republic of Poland of the rule of law referred to in Article 2 TEU. The Commission comes to this finding after having considered the facts set out above.

(173) The Commission observes that within a period of two years more than 13 consecutive laws have been adopted affecting the entire structure of the justice system in Poland: the Constitutional Tribunal, the Supreme Court, the ordinary courts, the national Council for the Judiciary, the prosecution service and the National School of Judiciary. The common pattern of all these legislative changes is that the executive or legislative powers have been systematically enabled to interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies. The legislative changes and their combined effects put at serious risk the independence of the judiciary and the separation of powers in Poland which are key components of the rule of law. The Commission also observes that such intense legislative activity has been conducted

[137] Law of 28 January 2016 on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 177; law of 28 January 2016 - Regulations implementing the Act - law on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 178.

[138] Opinion CDL-AD(2017)037, para 28 and 115.

[139] See also Communication from the Commission of 15 October 2003: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final.

without proper consultation of all the stakeholders concerned, without a spirit of loyal cooperation required between state authorities and without consideration for the opinions from a wide range of European and international organisations.

(174) The Commission has carried out an extensive dialogue with the Polish authorities since January 2016 in order to find solutions to the concerns raised. Throughout this process the Commission has always substantiated its concerns in an objective and thorough manner. In line with the Rule of Law Framework, the Commission has issued an Opinion followed by three Recommendations regarding the rule of law in Poland. It has exchanged numerous letters and held meetings with the Polish authorities. The Commission has always made clear that it stood ready to pursue a constructive dialogue and has repeatedly invited the Polish authorities for further meetings to that end. However, in spite of these efforts, the dialogue has not removed the Commission's concerns.

(175) Despite the issuing of three Recommendations by the Commission, the situation has deteriorated continuously. In particular:

(1) The unlawful appointment of the President of the Constitutional Tribunal, the admission of the three judges nominated by the 8th term of the *Sejm* without a valid legal basis, the fact that one of these judges has been appointed as Vice-President of the Tribunal, the fact that the three judges that were lawfully nominated in October 2015 by the previous legislature have not been able to take up their function of judge in the Tribunal, as well as the subsequent developments within the Tribunal described above have *de facto* led to a complete recomposition of the Tribunal outside the normal constitutional process for the appointment of judges. For this reason, the Commission considers that the independence and legitimacy of the Constitutional Tribunal are seriously undermined and, consequently, the constitutionality of Polish laws can no longer be effectively guaranteed. The judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review.

(2) The law on the National Council for the Judiciary and the law on the Supreme Court, also in combination with the law on the National School of Judiciary, and the law on the Ordinary Courts Organisation significantly increase the systemic threat to the rule of law as identified in the previous Recommendations. The main concerns are summarised as follows:

(a) As regards the Supreme Court,

– the compulsory retirement of a significant number of the current Supreme Court judges combined with the possibility of prolonging their active judicial mandate, as well as the new disciplinary regime for Supreme Court judges, structurally undermine the independence of the Supreme Court judges, whilst the independence of the judiciary is a key component of the rule of law;

– the compulsory retirement of a significant number of the current Supreme Court judges also allows for a far reaching and immediate recomposition of the Supreme Court. That possibility raises concerns in relation to the separation of powers, in particular when considered in combination with the simultaneous reforms of the National Council for the Judiciary. In fact all new Supreme Court

judges will be appointed by the President of the Republic on the recommendation of the newly composed National Council for the Judiciary, which will be largely dominated by the political appointees. As a result, the current parliamentiary majority will be able to determine, at least indirectly, the future composition of the Supreme Court to a much larger extent than this would be possible in a system where existing rules on the duration of judicial mandates operate normally – whatever that duration is and with whichever state organ the power to decide on judicial appointments lies;

– the new extraordinary appeal procedure raises concerns in relation to legal certainty and, when considered in combination with the possibility of a far reaching and immediate recomposition of the Supreme Court, in relation to the separation of powers.

(b) As regards ordinary courts,

– by decreasing the retirement age of judges while making prolongation of the judicial mandate conditional upon the discretionary decision of the Minister of Justice, the new rules undermine the principle of irremovability of judges which is a key element of the independence of judges;

– the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts without being bound by concrete criteria, with no obligation to state reasons, with no possibility for the judiciary to block these decisions and with no judicial review available may affect the personal independence of court presidents and of other judges.

(c) As regards the National Council for the Judiciary,

– the concerns concerning the overall independence of the judiciary are increased by the termination of the mandate of all judges-members of the National Council for the Judiciary and by the reappointment of its judges-members according to a process which allows a high degree of political influence.

(176) The new laws raise serious concerns as regards their compatibility with the Polish Constitution as underlined by a number of opinions, in particular from the Supreme Court, the National Council for the Judiciary and the Ombudsman. However, as explained in the Rule of Law Recommendation of 26 July 2017, an effective constitutional review of these laws is no longer possible.

(177) Actions and public statements against judges and courts in Poland made by the Polish Government and by members of Parliament from the ruling majority have damaged the trust in the justice system as a whole. The Commission underlines the principle of loyal cooperation between state organs which is, as highlighted in the opinions of the Venice Commission, a constitutional precondition in a democratic state governed by the rule of law.

(178) Given that the independence of the judiciary is a key component of the rule of law, these new laws, notably their combined effect, will increase significantly the systemic threat to rule of law as identified in the previous Recommendations. In this respect the Venice Commision underlined that the combination of the changes

proposed amplifies the negative effect of each of them to the extent that it puts at serious risk the independence of all parts of the judiciary in Poland[140].

(179) The fact that the Polish authorities, following the suspension of the laws on the Supreme Court and the National Council for Judiciary adopted in July 2017, have not used this occasion to take into account the concerns expressed by the Commission in its third Recommendation as well as by other actors, in particular the Venice Commission, clearly shows a lack of willigness on the side of the Polish authorities to address the concerns.

(180) The consequences of the situation are particularly serious:

(1) As the independence and legitimacy of the Constitutional Tribunal are seriously undermined, the constitutionality of Polish laws can no longer be effectively guaranteed. This situation is particularly worrying for the respect of the rule of law since, as explained in the Commission's Recommendations, a number of particularly sensitive new legislative acts have been adopted by the Polish Parliament, such as a new Civil Service Act[141], a law amending the law on the Police and certain other laws[142], laws on the Public Prosecution Office[143], a law on the Ombudsman and amending certain other laws[144], a law on the National Council of Media[145] and an anti-terrorism law[146].

(2) Respect for the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States.

(3) The Commission underlines that the proper functioning of the rule of law is also essential in particular for the seamless operation of the Internal Market and an investment friendly environment[147], because economic operators must know that they will be treated equally under the law. Respect for the rule of law is also essential for mutual trust in the area of justice and home affairs, in particular for effective judicial cooperation in civil and criminal matters which is based on mutual recognition. This cannot be assured without an independent judiciary in each Member State.

(181) The Commission recalls that where a constitutional justice system has been established, its effectiveness is a key component of the rule of law.

(182) The Commission also underlines that whatever the model of the justice system chosen, the independence of the judiciary must be safeguarded as a matter of EU

[140] Opinion CDL-AD(2017)035, para 131.

[141] Law of 30 December 2015 amending the law on Civil Service and certain other acts, published in Official Journal on 8 January 2016, item 34.

[142] Law of 15 January 2016 amending the law on Police and other laws, published in Official Journal on 4 February 2016, item 147.

[143] Law of 28 January 2016 on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 177; law of 28 January 2016 - Regulations implementing the Act - law on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 178.

[144] Law of 18 March 2016 amending the law on the Ombudsman and certain other laws, published in Official Journal on 17 May 2016, item 677.

[145] Law of 22 June 2016 on the National Council of Media, published in Official Journal on 29 June 2016, item 929.

[146] Law of 10 June 2016 on anti-terrorist actions, published in Official Journal on 24 June 2016, item 904.

[147] Council Recommendation of 11 July 2017 on the 2017 National Reform Programme of Poland and delivering a Council opinion on the 2017 Convergence Programme of Poland; recital 14; OJ C 261, 9.8.2017, p. 88–91.

law. It is up to the Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary the role of which is to safeguard judicial independence. However, where such a Council has been established by a Member State, as it is the case in Poland where the Polish Constitution has entrusted explicitly the National Council for the Judiciary with the task of safeguarding judicial independence, the independence of such Council must be guaranteed in line with European standards.

(183) The Commission also notes that a wide range of actors at European and international level have expressed their deep concern about the situation of the rule of law in Poland[148] and that the European Parliament stated that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 TEU[149].

(184) After two years of dialogue with the Polish authorities which has not led to results and has not prevented further deterioration of the situation, it is necessary and proportionate to enter into a new phase of dialogue formally involving the European Parliament and the Council.

(185) In view of the foregoing, and in accordance with Article 7(1) TEU, the Commission submits the present reasoned proposal to the Council, inviting the Council to determine that there is a clear risk of a serious breach by the Republic of Poland of the rule of law which is one of the values referred to in Article 2 TEU and to address appropriate recommendations to Poland in this regard. A proposal for a Council decision regarding such a determination is attached to this reasoned proposal.

(186) The present reasoned proposal in accordance with Article 7(1) TEU is issued at the same time as the Commission's Recommendation of 20 December 2017 regarding the rule of law in Poland. The Commission is ready, in close consultation with the European Parliament and the Council, to reconsider the present reasoned proposal should the Polish authorities implement the recommended actions set out in that Recommendation within the time prescribed therein.

[148] The Venice Commission, the Commissioner for Human Rights of the Council of Europe, the Consultative Council of European Judges, the United Nations Human Rights Committee, the United Nations Special Rapporteur on the independence of judges and lawyers, the Network of Presidents of the Supreme Judicial Courts of the European Union, the European Network of Councils for the Judiciary, the Council of Bars and Law Societies of Europe as well as numerous civil society organisations such as Amnesty International and the Human Rights and Democracy Network.

[149] Para 16 of the Resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland; the Resolution instructed the Committee on Civil Liberties, Justice and Home Affairs to draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) TEU.

2017/0360 (APP)

Proposal for a

COUNCIL DECISION

on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 7(1) thereof,

Having regard to the reasoned proposal from the European Commission[1],

Having regard to the consent of the European Parliament[2],

Whereas:

(1) The European Union is founded on the values referred to in Article 2 of the Treaty on European Union ('TEU'), which are common to the Member States and which include respect for the rule of law.

(2) In its reasoned proposal, the Commission presents its concerns related to the lack of an independent and legitimate constitutional review and to the adoption by the Polish Parliament of the law on the Supreme Court[3], the law on Ordinary Courts Organisation[4], the law on the National Council for the Judiciary[5] and the law on the National School of Judiciary[6] which contain provisions raising serious concerns as regards judicial independence, the separation of powers and legal certainty. In particular, the main concerns relate to the new retirement regimes of Supreme Court judges and ordinary court judges, a new extraordinary appeal procedure in the Supreme Court, the dismissal and appointment of presidents of ordinary courts and the termination of the mandate and the appointment procedure of judges-members of the National Council for the Judiciary.

(3) The Commission also noted that the Polish authorities have failed to take the actions recommended in its Recommendation of 27 July 2016[7], and complementary

1 [INSERT Reference]

2 OJ C […], […], p. […].

3 The law on the Supreme Court, adopted by the *Sejm* on 8 December 2017 and approved by the Senate on […]

4 The law amending the law on the Ordinary Courts Organisation adopted by the *Sejm* on 12 July 2017 and published in the Official Journal on 28 July 2017.

5 The law amending the law on the National Council for the Judiciary and certain other laws adopted by the *Sejm* on 8 December 2017 and approved by the Senate on […].

6 The law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other laws adopted by the *Sejm* on 11 May 2017 and published in the Official Journal on 13 June 2017.

7 Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland; OJ L 217, 12.8.2016, p. 53.

Recommendations of 21 December 2016[8] and 26 July 2017[9] in order to address the systemic threat to the rule of law identified in those Recommendations.

(4) On 20 December 2017, in parallel to its reasoned proposal under Article 7(1) TEU, the Commission adopted a further Recommendation regarding the rule of law in Poland. However, Poland failed to take the recommended actions within the time set in that Recommendation.

(5) The dialogue which the Commission conducted with the Polish authorities under the Rule of Law Framework since 13 January 2016 has thus not alleviated the concerns referred to above.

(6) On 15 November 2017, the European Parliament adopted a resolution stating that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 TEU.

(7) A wide range of actors at European and international level have expressed their deep concern about the situation of the rule of law in Poland, including the Venice Commission, the Commissioner for Human Rights of the Council of Europe, the Consultative Council of European Judges, the United Nations Human Rights Committee, the United Nations Special Rapporteur on the independence of judges and lawyers, the Network of Presidents of the Supreme Judicial Courts of the European Union, the European Network of Councils for the Judiciary, the Council of Bars and Law Societies of Europe as well as numerous civil society organisations.

(8) On [….] 2018, the Council has heard the Republic of Poland in accordance with the second sentence of Article 7(1) TEU.

(9) Whatever the model of the justice system chosen in a Member State, the rule of law enshrined in Article 2 TEU implies requirements relating to the independence of the judiciary, the separation of powers and legal certainty.

(10) It gives rise to great concern that, as a consequence of the recently adopted laws referred to above, the legal regime in Poland would no longer comply with these requirements.

(11) Respect for the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States.

(12) The proper functioning of the rule of law is also essential for the seamless operation of the Internal Market because economic operators need to have the certainty that they will be treated equally under the law.

(13) Respect for the rule of law is essential for mutual trust in the area of justice and home affairs, in particular for effective judicial cooperation in civil and criminal matters which is based on mutual recognition.

(14) The principle of loyal cooperation between state organs is a constitutional precondition in a democratic state governed by the rule of law.

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[8] Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374; OJ L 22, 27.1.2017, p. 65.

[9] Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146; OJ L 228, 2.9.2017, p. 19.

(15) For those reasons, it should be determined, in accordance with Article 7(1) TEU, that there is a clear risk of a serious breach by the Republic of Poland of the rule of law as one of the values referred to in Article 2 TEU.

HAS ADOPTED THIS DECISION:

Article 1

There is a clear risk of a serious breach by the Republic of Poland of the rule of law.

Article 2

The Council recommends that the Republic of Poland take the following actions within three months after notification of this Decision:

(a) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed, by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which 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 no longer adjudicate without being validly elected;

(b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016;

(c) ensure that the law on the Supreme Court, the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the National School of Judiciary are amended in order to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty;

(d) ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties, including the Venice Commission;

(e) refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.

This Decision is addressed to the Republic of Poland.

Done at Brussels,

For the Council
The President

RACCOMANDAZIONI

RACCOMANDAZIONE (UE) 2019/534 DELLA COMMISSIONE

del 26 marzo 2019

Cibersicurezza delle reti 5G

LA COMMISSIONE EUROPEA,

visto il trattato sul funzionamento dell'Unione europea, in particolare l'articolo 292,

considerando quanto segue:

(1) La Commissione ha riconosciuto come il dispiegamento della 5ª generazione (5G) delle tecnologie di rete costituisca un fattore abilitante fondamentale per lo sviluppo dei servizi digitali del futuro nonché una priorità per la strategia per il mercato unico digitale. La Commissione ha adottato il piano d'azione per il 5G al fine di garantire che l'Unione disponga delle infrastrutture di connettività necessarie per la sua trasformazione digitale dal 2020 ([1]).

(2) Le reti 5G si baseranno sull'attuale 4ª generazione (4G) delle tecnologie di rete, fornendo nuove capacità di servizio e diventando l'infrastruttura centrale nonché il fattore abilitante per un'ampia parte dell'economia dell'Unione. Una volta lanciate, le reti 5G costituiranno la struttura portante di una vasta gamma di servizi essenziali per il funzionamento del mercato interno e per il mantenimento e la gestione di funzioni economiche e sociali vitali, quali l'energia, i trasporti, i servizi bancari e sanitari e i sistemi di controllo industriale. Anche l'organizzazione dei processi democratici, quali le elezioni, si baserà sempre di più sulle infrastrutture digitali e sulle reti 5G.

(3) Poiché molti servizi essenziali dipendono dalle reti 5G, le conseguenze di malfunzionamenti sistemici e diffusi sarebbero particolarmente gravi. Pertanto garantire la cibersicurezza delle reti 5G è una questione di importanza strategica per l'Unione, in un momento in cui gli attacchi informatici sono più numerosi e sofisticati che mai.

(4) Date la natura interconnessa e transnazionale delle infrastrutture alla base dell'ecosistema digitale e la natura transfrontaliera delle minacce in questione, eventuali vulnerabilità e/o incidenti di cibersicurezza significativi riguardanti le reti 5G che si verificano in uno Stato membro inciderebbero sull'Unione nel suo complesso. Per questo motivo è opportuno prevedere misure che siano alla base di un elevato livello comune di cibersicurezza delle reti 5G.

(5) Gli Stati membri hanno confermato la necessità di un'azione a livello di Unione. Secondo quanto riportato nelle conclusioni del 21 marzo 2019, il Consiglio europeo attende con interesse la raccomandazione della Commissione su un approccio concertato in materia di sicurezza delle reti 5G ([2]).

(6) Garantire la sovranità europea dovrebbe essere un obiettivo fondamentale, nel pieno rispetto dei valori europei di apertura e tolleranza ([3]). Anche gli investimenti esteri nei settori strategici, l'acquisizione di beni, tecnologie e infrastrutture critici nell'Unione e la fornitura di apparecchiature fondamentali possono mettere a rischio la sicurezza dell'Unione.

(7) La cibersicurezza delle reti 5G riveste un'importanza fondamentale per garantire l'autonomia strategica dell'Unione, come riconosciuto nella comunicazione congiunta «UE-Cina – Una prospettiva strategica» ([4]).

(8) Anche nella risoluzione del Parlamento europeo sulle minacce per la sicurezza connesse all'aumento della presenza tecnologica cinese nell'Unione si invita la Commissione e gli Stati membri ad agire a livello di Unione ([5]).

(9) La presente raccomandazione affronta i rischi di cibersicurezza nelle reti 5G presentando orientamenti sulle opportune misure di analisi e gestione dei rischi a livello nazionale, sullo sviluppo di una valutazione dei rischi coordinata a livello europeo e sulla definizione di un processo per lo sviluppo di un insieme di strumenti comuni volti a garantire la migliore gestione dei rischi.

(10) Le reti di comunicazione elettronica sono protette da un solido quadro legislativo dell'Unione.

([1]) COM(2016) 588 final.
([2]) Conclusioni del Consiglio europeo del 21 e 22 marzo 2019.
([3]) Stato dell'Unione 2018 – L'ora della sovranità europea, 12 settembre 2018.
([4]) JOIN(2019) 5 final.
([5]) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0156+0+DOC+PDF+V0//IT.

(11) Il quadro dell'Unione nel settore delle comunicazioni elettroniche ([6]) promuove la concorrenza, il mercato interno e gli interessi degli utenti finali e con il codice europeo delle comunicazioni elettroniche ([7]) persegue un ulteriore obiettivo in materia di connettività, articolato in termini di risultati: ampio accesso alla connettività fissa e mobile ad altissima capacità e diffusione della stessa per tutti i cittadini e le imprese dell'Unione, tutelando nel contempo gli interessi dei cittadini. La direttiva 2002/21/CE impone agli Stati membri di garantire il mantenimento dell'integrità e della sicurezza delle reti di comunicazione pubbliche e di assicurare che le imprese che forniscono reti pubbliche di comunicazione o servizi di comunicazione elettronica accessibili al pubblico adottino adeguate misure di natura tecnica e organizzativa per gestire adeguatamente i rischi per la sicurezza delle reti e dei servizi. Essa prevede inoltre che le competenti autorità nazionali di regolamentazione abbiano la facoltà di impartire istruzioni vincolanti al fine di garantire il rispetto di tali obblighi.

(12) La direttiva 2002/20/CE del Parlamento europeo e del Consiglio ([8]) consente inoltre agli Stati membri di vincolare l'autorizzazione generale a condizioni relative alla sicurezza delle reti pubbliche contro l'accesso non autorizzato, al fine di tutelare la riservatezza delle comunicazioni conformemente alla direttiva 2002/58/CE del Parlamento europeo e del Consiglio ([9]).

(13) Per sostenere l'attuazione di tali obblighi, l'Unione ha istituito una serie di organismi di cooperazione. L'Agenzia dell'Unione europea per la sicurezza delle reti e dell'informazione (ENISA), la Commissione, gli Stati membri e le autorità nazionali di regolamentazione hanno elaborato orientamenti tecnici per le autorità nazionali di regolamentazione in materia di notifica degli incidenti, misure di sicurezza, minacce e risorse ([10]). Il gruppo di cooperazione istituito dalla direttiva (UE) 2016/1148 del Parlamento europeo e del Consiglio ([11]) («il gruppo di cooperazione») riunisce le autorità competenti al fine di sostenere e facilitare la cooperazione, in particolare fornendo orientamenti strategici per le attività della rete dei gruppi di intervento per la sicurezza informatica in caso di incidente, che agevola la cooperazione operativa a livello tecnico.

(14) Il futuro quadro europeo di certificazione della cibersicurezza ([12]) dovrebbe fornire uno strumento di sostegno essenziale per promuovere livelli coerenti di sicurezza. Esso dovrebbe consentire lo sviluppo di sistemi di certificazione della cibersicurezza per rispondere alle esigenze degli utenti di apparecchiature e software legati al 5G. L'importanza fondamentale di tali infrastrutture dovrebbe far sì che lo sviluppo dei pertinenti sistemi europei di certificazione della cibersicurezza per i prodotti, i servizi o i processi delle tecnologie dell'informazione e della comunicazione usati per le reti 5G sia considerato una priorità immediata. Gli Stati membri e gli operatori del mercato dovrebbero impegnarsi attivamente nello sviluppo di tali sistemi di certificazione, anche fornendo sostegno per la definizione di profili di protezione specifici per le reti 5G.

(15) In assenza di una legislazione armonizzata dell'Unione, gli Stati membri possono specificare, mediante regolamenti tecnici nazionali adottati in conformità alla legislazione dell'Unione, che un sistema europeo di certificazione della cibersicurezza dovrebbe essere obbligatorio. Gli Stati membri ricorrono inoltre ai sistemi europei di certificazione della cibersicurezza nel contesto degli appalti pubblici e della direttiva 2014/24/UE del Parlamento europeo e del Consiglio ([13]) e potrebbero sostenere lo sviluppo di meccanismi di assistenza, quale un polo di assistenza, per l'acquisto di soluzioni di cibersicurezza da parte di acquirenti pubblici.

(16) Nel garantire la sicurezza delle reti 5G è fondamentale un livello elevato di protezione dei dati e della vita privata. Sono state inoltre definite norme a livello di Unione che garantiscono la sicurezza del trattamento dei dati personali, anche nelle comunicazioni elettroniche. Il regolamento generale sulla protezione dei dati ([14]) sancisce l'obbligo di trattare i dati personali in modo da garantirne la sicurezza, anche al fine di prevenire l'accesso non

([6]) Direttiva 2002/21/CE del Parlamento europeo e del Consiglio, del 7 marzo 2002, che istituisce un quadro normativo comune per le reti ed i servizi di comunicazione elettronica (direttiva quadro) (GU L 108 del 24.4.2002, pag. 33) e le direttive specifiche.

([7]) Direttiva (UE) 2018/1972 del Parlamento europeo e del Consiglio, dell'11 dicembre 2018, che istituisce il codice europeo delle comunicazioni elettroniche (GU L 321 del 17.12.2018, pag. 36).

([8]) Direttiva 2002/20/CE del Parlamento europeo e del Consiglio, del 7 marzo 2002, relativa alle autorizzazioni per le reti e i servizi di comunicazione elettronica (direttiva autorizzazioni) (GU L 108 del 24.4.2002, pag. 21).

([9]) Direttiva 2002/58/CE del Parlamento europeo e del Consiglio, del 12 luglio 2002, relativa al trattamento dei dati personali e alla tutela della vita privata nel settore delle comunicazioni elettroniche (direttiva relativa alla vita privata e alle comunicazioni elettroniche) (GU L 201 del 31.7.2002, pag. 37).

([10]) https://resilience.enisa.europa.eu/article-13.

([11]) Direttiva (UE) 2016/1148 del Parlamento europeo e del Consiglio, del 6 luglio 2016, recante misure per un livello comune elevato di sicurezza delle reti e dei sistemi informativi nell'Unione (GU L 194 del 19.7.2016, pag. 1).

([12]) Proposta di regolamento del Parlamento europeo e del Consiglio relativo all'ENISA, l'agenzia dell'Unione europea per la cibersicurezza, che abroga il regolamento (UE) n. 526/2013, e relativo alla certificazione della cibersicurezza per le tecnologie dell'informazione e della comunicazione («regolamento sulla cibersicurezza») [COM(2017) 477 final - 2017/0225 (COD)].

([13]) Direttiva 2014/24/UE del Parlamento europeo e del Consiglio, del 26 febbraio 2014, sugli appalti pubblici e che abroga la direttiva 2004/18/CE (GU L 94 del 28.3.2014, pag. 65).

([14]) Regolamento (UE) 2016/679 del Parlamento europeo e del Consiglio, del 27 aprile 2016, relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati e che abroga la direttiva 95/46/CE (regolamento generale sulla protezione dei dati) (GU L 119 del 4.5.2016, pag. 1).

autorizzato ai dati personali o agli strumenti di trattamento dei dati e l'utilizzo non autorizzato degli stessi. La direttiva relativa alla tutela della vita privata nel settore delle comunicazioni elettroniche stabilisce norme specifiche in materia di protezione della riservatezza delle comunicazioni e delle apparecchiature terminali degli utenti finali. Essa impone inoltre ai fornitori dei servizi l'obbligo di adottare misure tecniche e organizzative appropriate per salvaguardare la sicurezza dei servizi da essi offerti.

(17) L'Unione ha inoltre adottato uno strumento che proteggerà le infrastrutture e le tecnologie critiche, quali quelle utilizzate nelle comunicazioni, consentendo agli Stati membri di controllare gli investimenti esteri diretti per motivi di sicurezza o di ordine pubblico e creando un meccanismo di cooperazione tramite il quale gli Stati membri e la Commissione saranno in grado di scambiare informazioni e manifestare preoccupazione in merito a investimenti specifici ([15]).

(18) Gli Stati membri e gli operatori stanno attualmente adottando importanti misure preparatorie volte a consentire il lancio su larga scala delle reti 5G. Diversi Stati membri hanno espresso preoccupazione riguardo ai potenziali rischi di sicurezza relativi alle reti 5G nell'ambito dell'esecuzione di procedure per la concessione di diritti d'uso di bande di frequenza radio designate per le reti 5G ([16]) e stanno studiando misure per affrontare tali rischi.

(19) Per affrontare i rischi di cibersicurezza nelle reti 5G si dovrebbe tener conto dei fattori sia tecnici che di altro tipo. I fattori tecnici possono includere le vulnerabilità di cibersicurezza che possono essere sfruttate per l'accesso non autorizzato alle informazioni (ciberspionaggio, per motivi tanto economici quanto politici) o per altri scopi dolosi (attacchi informatici volti a distruggere sistemi e dati o a provocarne il malfunzionamento). Aspetti importanti di cui tenere conto dovrebbero essere la necessità di proteggere le reti nel corso del loro intero ciclo di vita e la necessità di considerare tutte le pertinenti apparecchiature, anche nelle fasi di progettazione, sviluppo, appalto, diffusione, funzionamento e manutenzione delle reti 5G.

(20) Altri fattori possono includere requisiti normativi o di altro tipo imposti ai fornitori di apparecchiature per le tecnologie dell'informazione e della comunicazione. Una valutazione dell'importanza di tali fattori dovrebbe tener conto, tra l'altro, del rischio generale di influenza da parte di un paese terzo, in particolare in relazione al suo modello di governance, all'assenza di accordi di cooperazione sulla sicurezza o di disposizioni analoghe, quali le decisioni di adeguatezza, tra l'Unione e il paese terzo interessato per quanto riguarda la protezione dei dati, e dovrebbe esaminare se tale paese sia parte di accordi multilaterali, internazionali o bilaterali in materia di cibersicurezza, lotta alla criminalità informatica o protezione dei dati.

(21) Dovrebbe essere effettuata e completata una valutazione dei rischi a livello nazionale, come passo importante verso lo sviluppo di un approccio dell'Unione in materia di cibersicurezza delle reti 5G. Ciò aiuterebbe gli Stati membri ad adeguare le misure nazionali in materia di requisiti di sicurezza e di gestione dei rischi alla luce di tale valutazione.

(22) È opportuno sviluppare un coordinamento per garantire l'efficacia delle misure volte ad affrontare tali minacce di cibersicurezza, misure che sono essenziali per il corretto funzionamento del mercato interno e per la protezione dei dati personali e della vita privata.

(23) Le valutazioni nazionali dei rischi dovrebbero costituire la base per una valutazione dei rischi coordinata a livello di Unione, costituita da una mappatura del panorama delle minacce e da una revisione congiunta condotta dagli Stati membri, con il sostegno della Commissione e in collaborazione con l'Agenzia dell'Unione europea per la cibersicurezza (ENISA).

(24) Tenendo conto delle valutazioni dei rischi a livello nazionale e di Unione, il gruppo di cooperazione dovrebbe istituire un insieme di strumenti che identifichino i tipi di rischi di cibersicurezza e le possibili misure di attenuazione dei rischi in settori quali la certificazione, le prove e i controlli degli accessi. Tale insieme di strumenti dovrebbe inoltre identificare eventuali misure specifiche adeguate per far fronte ai rischi individuati da uno o più Stati membri. Il gruppo di cooperazione dovrebbe avvalersi del sostegno dell'Agenzia dell'Unione europea per la cibersicurezza (ENISA), di Europol, dell'Organismo dei regolatori europei delle comunicazioni elettroniche (BEREC) e del Centro dell'UE di situazione e intelligence. Tale insieme di strumenti dovrebbe orientare la Commissione in merito allo sviluppo di requisiti minimi comuni a ulteriore garanzia di un elevato livello di cibersicurezza delle reti 5G in tutta l'Unione.

(25) Nell'adottare misure volte ad affrontare i rischi di cibersicurezza si dovrebbe prendere in considerazione la promozione della cibersicurezza mediante la selezione di fornitori diversi al momento della costruzione di ogni singola rete.

([15]) Regolamento (UE) 2019/452 del Parlamento europeo e del Consiglio, del 19 marzo 2019, che istituisce un quadro per il controllo degli investimenti esteri diretti nell'Unione (GU L 79I1 del 21.3.2019, pag. 1).

([16]) La procedura d'asta per almeno una banda di frequenze è prevista per il 2019 in 11 Stati membri: Austria, Belgio, Francia, Germania, Grecia, Irlanda, Lituania, Paesi Bassi, Portogallo, Repubblica ceca, Ungheria. Altre sei aste sono previste per il 2020: Spagna, Malta, Lituania (frequenze diverse), Slovacchia, Polonia, Regno Unito. *Fonte:* http://5gobservatory.eu/observatory-overview/observatory-reports/.

(26) La presente raccomandazione lascia impregiudicate le competenze degli Stati membri per quanto riguarda le attività relative alla sicurezza pubblica, alla difesa, alla sicurezza nazionale e alle attività dello Stato in materia di diritto penale, compreso il diritto degli Stati membri di escludere determinati fornitori dai loro mercati per motivi di sicurezza nazionale,

HA ADOTTATO LA PRESENTE RACCOMANDAZIONE:

I. **OBIETTIVI**

(1) Al fine di sostenere lo sviluppo di un approccio dell'Unione volto a garantire la cibersicurezza delle reti 5G, la presente raccomandazione individua le azioni che dovrebbero essere adottate per consentire:

a) agli Stati membri di valutare i rischi di cibersicurezza che interessano le reti 5G a livello nazionale e adottare le necessarie misure di sicurezza;

b) agli Stati membri e alle istituzioni, alle agenzie e ad altri organismi pertinenti dell'Unione di elaborare congiuntamente una valutazione dei rischi coordinata a livello di Unione basata sulla valutazione nazionale dei rischi;

c) al gruppo di cooperazione istituito dalla direttiva (UE) 2016/1148 (gruppo di cooperazione) di individuare un'eventuale serie comune di misure da adottare per attenuare i rischi di cibersicurezza relativi alle infrastrutture alla base dell'ecosistema digitale, in particolare le reti 5G.

II. **DEFINIZIONI**

(2) Ai fini della presente raccomandazione, si intende per:

a) «reti 5G»: un insieme di tutti gli elementi pertinenti delle infrastrutture di rete per le tecnologie delle comunicazioni mobili e senza fili utilizzati per la connettività e per servizi a valore aggiunto con caratteristiche di prestazione avanzate, quali capacità e velocità di trasmissione dei dati molto elevate, comunicazioni a bassa latenza, affidabilità ultra-elevata o capacità di supportare un numero elevato di dispositivi connessi. Tale insieme può includere elementi di rete tradizionali basati sulle precedenti generazioni di tecnologie delle comunicazioni mobili e senza fili, come il 4G o il 3G. Le reti 5G dovrebbero essere intese in modo da includere tutte le parti pertinenti della rete;

b) «infrastrutture alla base dell'ecosistema digitale»: le infrastrutture utilizzate per consentire la digitalizzazione in un'ampia gamma di applicazioni critiche nell'economia e nella società.

III. **AZIONE SU SCALA NAZIONALE**

(3) Entro il 30 giugno 2019 gli Stati membri dovrebbero effettuare una valutazione dei rischi dell'infrastruttura della rete 5G, anche identificando gli elementi più sensibili in relazione ai quali le violazioni della sicurezza avrebbero un impatto negativo significativo. Entro la stessa data gli Stati membri dovrebbero altresì rivedere i requisiti di sicurezza e i metodi di gestione dei rischi applicabili a livello nazionale, al fine di tenere conto delle minacce di cibersicurezza che possono derivare da: i) fattori tecnici, quali le caratteristiche tecniche specifiche delle reti 5G, e ii) altri fattori, come il quadro giuridico e politico cui possono essere soggetti i fornitori di apparecchiature per le tecnologie dell'informazione e della comunicazione in paesi terzi.

(4) Sulla base di tale valutazione e revisione nazionale dei rischi e tenendo conto delle azioni coordinate in corso a livello di Unione, gli Stati membri dovrebbero:

a) aggiornare i requisiti di sicurezza e i metodi di gestione dei rischi applicati alle reti 5G;

b) aggiornare i pertinenti obblighi imposti alle imprese che forniscono reti pubbliche di comunicazione o servizi di comunicazione elettronica accessibili al pubblico a norma degli articoli 13 *bis* e 13 *ter* della direttiva 2002/21/CE;

c) vincolare a condizioni l'autorizzazione generale riguardante la sicurezza delle reti pubbliche contro l'accesso non autorizzato e chiedere alle imprese che parteciperanno alle prossime procedure per la concessione di diritti d'uso delle frequenze radio nelle bande 5G di assumersi impegni per quanto riguarda la conformità ai requisiti di sicurezza per le reti a norma della direttiva 2002/20/CE;

d) applicare altre misure preventive volte ad attenuare i potenziali rischi di cibersicurezza.

(5) Le misure di cui al punto 4 dovrebbero includere maggiori obblighi per fornitori e operatori al fine di garantire la sicurezza di parti sensibili delle reti, nonché obblighi, se del caso, quali quelli di fornire alle autorità nazionali competenti informazioni pertinenti sulle modifiche previste delle reti di comunicazione elettronica, e requisiti volti a garantire che specifici componenti e sistemi informatici siano sottoposti a prove preliminari da parte di laboratori nazionali di audit/certificazione per motivi di sicurezza e integrità.

(6) Due o più Stati membri dovrebbero effettuare revisioni congiunte di sicurezza, utilizzando e condividendo le adeguate strutture e competenze tecniche relative alle infrastrutture alla base dell'ecosistema digitale e delle reti 5G, ad esempio quando la stessa impresa utilizza o costruisce un'infrastruttura di rete in più di uno Stato membro o laddove le configurazioni di rete siano molto simili. L'Agenzia dell'Unione europea per la cibersicurezza (ENISA), Europol e l'Organismo dei regolatori europei delle comunicazioni elettroniche (BEREC) dovrebbero dare la priorità alle richieste di sostegno da parte degli Stati membri in questo settore. I risultati di tali revisioni dovrebbero essere trasmessi al gruppo di cooperazione e alla rete dei gruppi di intervento per la sicurezza informatica in caso di incidente.

IV. **AZIONE COORDINATA A LIVELLO DI UNIONE**

(7) Al fine di sviluppare un approccio comune per affrontare i rischi di cibersicurezza per quanto riguarda le reti 5G, gli Stati membri dovrebbero cominciare ad operare nell'ambito di un apposito flusso di lavoro nell'ambito del gruppo di cooperazione entro il 30 aprile 2019. Gli Stati membri dovrebbero invitare le autorità competenti a partecipare, se del caso, ai lavori del gruppo di cooperazione.

Valutazione dei rischi coordinata a livello europeo

(8) Gli Stati membri dovrebbero scambiarsi informazioni sia tra di essi sia con gli organismi pertinenti dell'Unione al fine di sviluppare una consapevolezza comune dei rischi di cibersicurezza esistenti e potenziali associati alle reti 5G.

(9) Gli Stati membri dovrebbero trasmettere le valutazioni nazionali dei rischi alla Commissione e all'Agenzia dell'Unione europea per la cibersicurezza (ENISA) entro il 15 luglio 2019.

(10) L'Agenzia dell'Unione europea per la cibersicurezza (ENISA) dovrebbe completare una mappatura specifica del panorama delle minacce per le reti 5G. Il gruppo di cooperazione e la rete di gruppi di intervento per la sicurezza informatica in caso di incidente, istituiti a norma della direttiva (UE) 2016/1148, dovrebbero sostenere questo processo.

(11) Tenendo conto di tutti questi elementi, ed entro il 1º ottobre 2019, gli Stati membri, con il sostegno della Commissione e insieme all'Agenzia dell'Unione europea per la cibersicurezza (ENISA), dovrebbero completare una revisione congiunta dell'esposizione a livello di Unione ai rischi relativi alle infrastrutture alla base dell'ecosistema digitale, in particolare delle reti 5G.

(12) Tale revisione congiunta dovrebbe dare la priorità a un'analisi dei rischi applicabile agli elementi particolarmente sensibili o vulnerabili inclusi negli elementi fondamentali delle reti 5G, ai centri di gestione e manutenzione, nonché agli elementi della rete di accesso 5G utilizzati per le applicazioni industriali.

(13) In una seconda fase, tale revisione congiunta dovrebbe essere estesa ad altri elementi strategici della catena del valore digitale.

Un insieme di strumenti comuni a livello di Unione per affrontare i rischi

(14) I lavori del gruppo di cooperazione dovrebbero individuare le migliori pratiche applicate a livello nazionale del tipo previsto al punto 4. Sulla base di tali migliori pratiche nazionali, entro il 31 dicembre 2019 dovrebbe essere concordato un insieme di possibili misure di gestione dei rischi adeguate, efficaci e proporzionate al fine di attenuare i rischi di cibersicurezza individuati a livello nazionale e di Unione, che orienterà la Commissione nello sviluppo di requisiti minimi comuni a ulteriore garanzia di un elevato livello di cibersicurezza delle reti 5G in tutta l'Unione.

(15) Tale insieme di strumenti dovrebbe comprendere:

a) un inventario dei tipi di rischi di sicurezza che possono incidere sulla cibersicurezza delle reti 5G (ad esempio rischio relativo alla catena di approvvigionamento, rischio di vulnerabilità del software, rischio relativo al controllo degli accessi, rischi derivanti dal quadro giuridico e politico cui possono essere soggetti i fornitori di apparecchiature per le tecnologie dell'informazione e della comunicazione in paesi terzi); e

b) una serie di possibili misure di attenuazione (ad esempio, certificazione da parte di terzi per hardware, software o servizi, prove o controlli di conformità ufficiali per hardware e software, processi volti a garantire l'esistenza e l'applicazione del controllo degli accessi e che identifichino prodotti, servizi o fornitori considerati potenzialmente non sicuri ecc.). Tali misure dovrebbero riguardare tutti i tipi di rischi di sicurezza individuati in uno o più Stati membri in seguito alla valutazione dei rischi.

(16) Una volta sviluppati i sistemi europei di certificazione della cibersicurezza pertinenti per le reti 5G, gli Stati membri dovrebbero adottare, in conformità al diritto dell'Unione, regolamenti tecnici nazionali che prevedano la certificazione obbligatoria dei prodotti, dei servizi o dei sistemi delle tecnologie dell'informazione e della comunicazione contemplati da tali sistemi.

(17) Gli Stati membri, insieme alla Commissione, dovrebbero individuare le condizioni riguardanti la sicurezza delle reti pubbliche contro l'accesso non autorizzato alle quali vincolare l'autorizzazione generale, e i requisiti di sicurezza delle reti al fine di chiedere alle imprese che parteciperanno alle prossime procedure per la concessione di diritti d'uso dello spettro nelle bande 5G di assumersi impegni a norma della direttiva 2002/20/CE. Questi ultimi dovrebbero riflettersi, ove possibile, nelle misure di cui al punto 4, lettera c).

(18) Gli Stati membri dovrebbero cooperare con la Commissione al fine di sviluppare requisiti di sicurezza specifici che potrebbero applicarsi nel contesto degli appalti pubblici relativi alle reti 5G. Tali requisiti dovrebbero includere requisiti obbligatori per l'attuazione di sistemi di certificazione della cibersicurezza negli appalti pubblici, nella misura in cui tali sistemi non sono ancora vincolanti per tutti i fornitori e gli operatori.

V. **RIESAME**

(19) Gli Stati membri dovrebbero cooperare con la Commissione per valutare gli effetti della presente raccomandazione entro il 1º ottobre 2020, al fine di determinare modi opportuni di procedere. Tale valutazione dovrebbe tenere conto dei risultati della valutazione dei rischi coordinata a livello di Unione e dell'insieme di strumenti dell'Unione.

Fatto a Strasburgo, il 26 marzo 2019

Per la Commissione
Julian KING
Membro della Commissione