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COMMISSION RECOMMENDATION

of 26.7.2017

regarding the rule of law in Poland

complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) On 27 July 2016, the Commission adopted a Recommendation regarding the rule of law in Poland¹, setting out its concerns on the situation of the Constitutional Tribunal and recommending how these should be addressed. On 21 December 2016, the Commission adopted a complementary Recommendation regarding the rule of law in Poland².
- (2) The Recommendations of the Commission were adopted under the Rule of Law Framework³. The Rule of Law Framework sets out how the Commission will react should clear indications of a threat to the rule of law emerge in a Member State of the Union and explains the principles which the rule of law entails. The Rule of Law Framework provides guidance for a dialogue between the Commission and the Member State 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". Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission can initiate a dialogue with that Member State under the Rule of Law Framework.
- (3) 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.
- (4) 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*"), provides a non-exhaustive list of these principles and hence

¹ Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland; OJ L 217, 12.8.2016, p. 53–68.

² Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2017/146; OJ L 22, 27.1.2017, p. 65–81.

³ Communication "*A new EU Framework to Strengthen the Rule of Law*", COM(2014) 158 final.

defines the core meaning of the rule of law as a common value of the Union in accordance with Article 2 TEU. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law⁴. In addition to upholding those principles and values, State institutions also have the duty of loyal cooperation.

- (5) In its Recommendation of 27 July 2016, the Commission explained the circumstances 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.
- (6) 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.
- (7) In its Recommendation of 21 December 2016, the Commission took into account the latest developments in Poland that had occurred since the Commission's Recommendation of 27 July 2016. The Commission found that whereas some of the issues raised in its last 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 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. The Commission invited the Polish Government to solve the problems identified as a matter of urgency, within two 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 on the basis of the Recommendation.
- (8) On 20 February 2017, within the time limit of two months, the Polish Government replied to the Commission's complementary Recommendation. The reply disagrees with all the issues raised in the Recommendation and does not announce any new action to address the concerns identified by the Commission. The reply emphasizes that the appointment of the new President of the Tribunal on 21 December 2016 as well as the entry into force of provisions of the law on Organisation and Proceedings before the Constitutional Tribunal, the law on the Status of Judges of the Constitutional Tribunal and the law Implementing the law on Organisation and Proceedings and the law on the Status of Judges have 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.
- (9) On 21 December 2016, Mr Mariusz Muszyński, who was nominated by the 8th term of the *Sejm* without a valid legal basis and was admitted to take up the function of judge in the Constitutional Tribunal on 20 December 2016 by the then acting President of the Tribunal, was appointed to substitute the new President of the Tribunal in case of her absence.

⁴ See COM(2014) 158 final, section 2, Annex I.

- (10) On 10 January 2017, the Vice-President of the Constitutional Tribunal was obliged by the newly appointed President of the Tribunal to use his remaining leave. On 24 March 2017, the President of the Tribunal prolonged the leave of absence of the Vice-President of the Tribunal until the end of June, despite the request of the Vice-President to resume his work as judge in the Tribunal as of 1 April 2017.
- (11) 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.
- (12) On 16 January 2017, the President of the Venice Commission issued a statement expressing his concerns about the worsening situation within the Tribunal.
- (13) On 20 January 2017, the Government announced a comprehensive reform of the judiciary. The Minister of Justice presented a draft law on the National Council for the Judiciary.
- (14) On 25 January 2017, the Minister of Justice presented a draft law on the National School of Judiciary and Public Prosecution.
- (15) On 10 February 2017, the Court of Appeals in Warsaw referred a question of law to the Supreme Court which relates to the assessment of the legality of the appointment of judge Julia Przyłębska to the office of President of the Constitutional Tribunal. The Supreme Court has not yet rendered a judgement.
- (16) On 24 February 2017, the *Sejm* appointed a new judge in replacement to a judge who resigned from his position in the Constitutional Tribunal to become a judge in the Polish Supreme Court.
- (17) 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.
- (18) On 13 March 2017, the National Council for the Judiciary withdrew four motions lodged with the Constitutional Tribunal due to the changes introduced to the composition of the relevant hearing panels following a decision by the President of the Tribunal.
- (19) On 12 April 2017, a group of 50 members of the *Sejm* presented a draft law amending the law on Common Courts Organisation.
- (20) On 11 May 2017, the *Sejm* adopted 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"). The law was published on 13 June 2017.
- (21) On 16 May 2017, the Commission informed the General Affairs Council on the situation of the rule of law in Poland. There was broad agreement around the table that the rule of law is a common interest and a common responsibility of EU institutions and Member States. A very broad 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.

- (22) 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 recommendation addressed to Poland contains 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 Economic and Financial Affairs Council.⁵
- (23) 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.
- (24) On 5 July 2017, a group of members of the *Sejm* asked the Constitutional Tribunal to establish the unconstitutionality of provisions enabling the Supreme Court to assert the validity of the appointment of the President of the Tribunal by the President of the Republic.
- (25) 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.
- (26) On 13 July 2017, the Commission wrote to the Polish Government to express its concerns about the recent legislative proposals relating to the judicial system and to the Supreme Court, underlined the importance of refraining from adopting these proposals in order to allow for a meaningful dialogue, and invited 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.
- (27) On 15 July 2017, the Senate approved the law amending the law on the National Council for the Judiciary and certain other laws ("law on the National Council for the Judiciary") and the law amending the law on the Ordinary Courts Organisation ("law on Ordinary Courts Organisation").
- (28) 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.
- (29) On 22 July 2017, the Senate approved the law on the Supreme Court.
- (30) 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.
- (31) On 25 July 2017, the President of the Republic signed the law amending the law on the Ordinary Courts Organisation.

⁵ Recital 14 of the 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.

HAS ADOPTED THIS RECOMMENDATION:

1. The Republic of Poland should duly take into account the Commission's analysis set out hereafter and take the measures figuring in section 5 of this Recommendation so that the concerns identified are addressed within the time limit set.

1. SCOPE OF THE RECOMMENDATION

2. The present Recommendation complements the Recommendations of 27 July 2016 and 21 December 2016. It examines which of the concerns raised in those recommendations have been addressed, sets out the remaining concerns and lists a number of new concerns of the Commission with regard to the rule of law in Poland which have arisen since then. On this basis, it makes recommendations to the Polish authorities on how to address these concerns. The concerns 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 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 which entered into force on 20 June 2017;
 - (b) 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.
 - (c) the law amending the law on the Ordinary Courts Organisation ("law on Ordinary Courts Organisation"); approved by the Senate on 15 July 2017 and signed by the President on 25 July;
 - (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.

2. THE LACK OF AN INDEPENDENT AND LEGITIMATE CONSTITUTIONAL REVIEW

3. In its Recommendation of 21 December 2016,, the Commission recommended that the Polish authorities take the following actions already requested in its Recommendation of 27 July 2016:
 - (a) Implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which requires that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up the post of judge without being validly elected; for this reason, the President of the Republic is required to urgently take the oath of the three judges elected by the previous legislature;

- (b) Publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016 and the judgment of 11 August 2016 concerning the law of 22 July 2016 on the Constitutional Tribunal and other judgments rendered after that date and future judgments;
 - (c) Ensure that any reform of the law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, takes the Opinions of the Venice Commission fully into account and ensures that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined;
 - (d) Refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal.
4. In addition to these actions, the Commission recommended that the Polish authorities:
- (a) Ensure that the Constitutional Tribunal can as a matter of urgency effectively review the constitutionality of the law on the Status of Judges, the law on Organisation and Proceedings and the Implementing law, and that the judgments concerned are published without delay and implemented fully;
 - (b) Ensure that no appointment of the new President of the Constitutional Tribunal take place as long as the judgments by the Constitutional Tribunal on the constitutionality of the new laws have not been published and implemented fully, and as long as the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* have not taken up their judicial functions in the Tribunal;
 - (c) Ensure that as long as a new President of the Constitutional Tribunal has not been lawfully appointed, he is replaced by the Vice-President of the Tribunal and not by an acting President, or by the person appointed as President of the Tribunal on 21 December 2016.
5. The Commission observes that none of the recommended actions set out by the Commission have been implemented:
- (a) 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;
 - (b) Three important judgements of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016 have still not been published and have been removed from the register of the Tribunal which is accessible from its website. Other judgements which were not yet published at the time of the adoption of the Recommendation of 21 December 2016 have by contrast been published on 29 December 2016 in the Journal of Laws;
 - (c) the law on the status of judges, the law on Organisation and Proceedings and the Implementing law, have still not been subject, as a matter of urgency, to the effective review of their constitutionality by the Constitutional Tribunal and the appointment of the new President of the Constitutional Tribunal took place before such review can occur;
 - (d) 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.

6. As explained in its Recommendation of 21 December 2016⁶, 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 "December judges" unlawfully nominated 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 "October judges" 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.
7. 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.
8. These developments have *de facto* led to a complete recomposition of the Constitutional Tribunal outside the normal constitutional process for the appointments of judges.
9. The reply of the Polish authorities received on 20 February 2017 to the Commission's complementary Recommendation 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 argues that the new laws on the Constitutional Tribunal and the appointment of the new President of the Constitutional Tribunal have created the proper conditions for its functioning after a period of paralysis caused by political quarrels of politicians of the opposition. As regards the composition of the Tribunal the reply, like the previous reply to the Recommendation of 27 July 2016, denies any

⁶ See section 5.3 and 5.4 of the Recommendation.

effect to the judgments of the Constitutional Tribunal of 3 and 9 December 2015. Concerning the selection procedure for the President of the Constitutional Tribunal, 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. As to the role of the Vice-President of the Tribunal, the reply 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.

10. In conclusion, 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 guaranteed⁷. This situation is particularly worrying for the respect of the rule of law since, as explained in the previous Recommendations, a number of particularly sensitive new legislative acts have been adopted by the Polish Parliament, such as a new Civil Service Act⁸, a law amending the law on the Police and certain other laws⁹ and laws on the Public Prosecution Office¹⁰, a law on the Ombudsman and amending certain other laws¹¹, a law on the National Council of Media¹² and an anti-terrorism law¹³.
11. 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 2(2) and analysed further below in Section 3 can no longer be verified and guaranteed by an independent constitutional tribunal.

3. THE THREATS TO JUDICIAL INDEPENDENCE

12. The law on the National School of Judiciary, the law on the National Council for the Judiciary, the law on the Ordinary Courts Organisation and the law on the Supreme

⁷ According to Article 188 of the Constitution, the Constitutional Tribunal is to rule 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 Constitution, the Constitutional Tribunal shall also settle disputes over authority between central constitutional organs of the State.

⁸ 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.

⁹ Law of 15 January 2016 amending the law on Police and other laws, published in Official Journal on 4 February 2016, item 147.

¹⁰ 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.

¹¹ Law of 18 March 2016 on the Ombudsman and amending certain other laws. The law was signed by the President of the Republic on 4 May 2016.

¹² Law of 22 June 2016 on the National Council of Media. The law was signed by the President of the Republic on 27 June 2016.

¹³ Law of 10 June 2016 on anti-terrorism. The law was signed by the President of the Republic on 22 June 2016.

Court contain a number of provisions which raise grave concerns as regards the principles of judicial independence and separation of powers.

13. The Commission notes that a number of statements or opinions, including from the Supreme Court, the Ombudsman and the National Council for the Judiciary, have expressed concerns as regards the compatibility of the new laws with the Constitution.

3.1. The assistant judges

14. Under Articles 2(1) and 2(36) of the law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other laws, 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.
15. However, under the Polish legal system, assistant judges do not have the same status as judges¹⁴. 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 Constitution¹⁵.
16. 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) ECHR¹⁶. The European Court of Human Rights has held that the previous regime regarding assistant judges in Poland did not meet these criteria¹⁷.
17. Given their short mandate, the status of assistant judges makes them particularly vulnerable to external influence, notably from the Minister of Justice. The Minister of Justice has a significant influence on the career of assistant judges as is also involved in the subsequent process of the selection and appointment as judge. Assistant judges who would like to become judge have to undergo an entirely new selection and appointment procedure. The assistant judges must first make an application to be appointed judge to the National Council for the Judiciary which will

¹⁴ The 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 as it can only raise an objection within 30 days.

¹⁵ The independence of the judge should be enshrined in the constitution with more specific rules provided at the legislative level (Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities, adopted on 17 Nov. 2010 ('the 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.

¹⁶ Opinion of the Supreme Court of 3 Feb. 2017; Opinion of the National Council for the Judiciary of 10 Feb. 2017.

¹⁷ ECtHR Case *Henryk Urban and Ryszard Urban v Poland*, 23614/08, 28 Feb. 2011; ECtHR Case *Miroslaw Garlicki v Poland*, 36921/07, 14 Sept. 2011; ECtHR Case *Pohoska v Poland*, 33530/06 10 Apr. 2012.

proceed to a full assessment of the candidate and decide whether or not to propose the candidate for the post of judge to the president of the Republic. It is the President of the Republic who appoints the candidate to the post of judge. The legitimate desire of assistant judges to become a judge, in connection with the lack of sufficient guarantees for protecting their personal independence during this period, exposes assistant judges to pressure from the Minister of Justice and may affect their personal independence when they adjudicate cases.

3.2. The court presidents

18. 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 new law on Ordinary Courts Organisation raises concerns with regard to the personal independence of courts president when exercising their judicial function, but also as regards their influence over other judges.
19. Articles 1(6), 17(1) and 18(1) of the new law on Ordinary Courts Organisation provide rules on the dismissal and appointment of court presidents. During a six-month period, the Minister of Justice would be granted the power to appoint and dismiss presidents of courts without being bound by concrete criteria, with no obligation to state reasons, and with no possibility for the judiciary (neither for the National Council for the Judiciary, nor for the board of judges of a concerned court) to block these decisions. In addition, no judicial review is available against a dismissal decision of the Minister of Justice. After the six-month period, the Minister of Justice would be able to appoint presidents of courts at his discretion; only in case of dismissal of a court president, the National Council for the Judiciary would be able, with a qualified majority of two third of all members of the Council, to block the decision of the Minister of Justice¹⁸.
20. The power of the Minister of Justice to arbitrarily dismiss court presidents would allow the Minister of Justice to retain influence over court presidents which may affect their personal independence when they adjudicate cases. 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 State in order to avoid being dismissed as a court president.
21. Also judges who are not court presidents, but would like to become court presidents may be inclined not to go against a position of the Minister of Justice, 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.
22. It should also be noted that court presidents, in their capacity as court managers, have important powers over other judges and may therefore also interfere with the personal independence of these judges. For example, court presidents have the power to replace judges in their function of heads of division or heads of section of courts, power to issue written notification to these heads of division and section involving pecuniary sanctions in case of deficiencies, and the power to transfer judges without their consent within the relevant judicial district.
23. Finally, these provisions raise constitutionality concerns as pointed out notably by the opinions of the Supreme Court, the National Council for the Judiciary and the Ombudsman. In particular, allowing for such possibility of dismissal of court

¹⁸ Art. 1(7) of the law on the Ordinary Courts Organisation.

presidents by the Minister of Justice disregards the principles of judicial independence and separation of powers.

3.3. The appointment and career of judges

24. According to the Polish Constitution the independence of judges is safeguarded by the National Council for the Judiciary¹⁹. 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.
25. 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. 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 authorities²⁰. For the same reason, well established European standards, in particular the 2010 Recommendation of the Committee of Ministers of the Council of Europe, 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"²¹. 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.
26. Until now, 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*²² as well as by establishing a new structure within the Council. 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

¹⁹ Article 186(1) of the Polish Constitution: "The National Council of the Judiciary shall safeguard the independence of the courts and judges".

²⁰ ECtHR Case *Ramos Nunes de Carvalho E Sá v Portugal*, 55391/13, 57728/13 and 74041/13, 21 June 2016, para 77.

²¹ Para 27; see also Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality adopted on 13 April 2016, (CM(2016)36 final) at C item (ii). CCJE Opinion no. 10 on the Council for the Judiciary in the service of society, at 27; various opinion of the Venice Commission and ENCI standards in 'Councils for the Judiciary' Report 2010-11 at 2.3.

²² 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).

standards. The fact that the judges-members will be appointed by the *Sejm* with a 3/5 majority does not alleviate this concern.

27. The fact that according to Article 5(1) of the law amending the law on the National Council for the Judiciary the mandates of all the current judges-members of the National Council for the Judiciary would be terminated prematurely further aggravates these concerns given that the Parliament will immediately gain a decisive influence on the composition of the Council to the detriment of the influence of judges themselves.
28. The politicisation of the National Council for the Judiciary is also aggravated by the new internal structure. According to Article 1(7) of the law amending the law on the National Council for the Judiciary, the Council would be composed of two assemblies: the first with a majority of Members of Parliament, the second with judges appointed by the Parliament. Formally, the Council would remain composed by a majority of judges, but in reality the new "political" assembly could render more difficult the decision making process of the National Council for the Judiciary. If the two assemblies diverged in their assessment of a candidate, the assembly that has a positive opinion could request a re-assessment by the Council in its full composition with a two-third majority of all members of the Council. Such a threshold would be very difficult to meet, also in view of the increased influence of the legislative power on the composition of the Council. This new regime would have a direct impact on the appointment and career of judges in Poland since the judges-members of the Council which are in the second assembly may under certain circumstances no longer have a final say on matters concerning the assessment of candidates for the post of judges²³.
29. 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 public²⁴.
30. The Commission notes that in their opinions concerning the bill, the Supreme Court and the National Council for the Judiciary raised a number of concerns as regards the constitutionality of the new regime. In particular, it was noted that the new rules would render the National Council for the Judiciary dependent on the political decisions of the parliamentary majority. The opinions also underlined that the National Judicial Council is a unitary body that cannot be subdivided in two organs unknown to the Constitution and the bill would change the constitutional order by providing the *Sejm* with a dominating position over the judiciary. Furthermore, the premature termination of the mandate of the judges-members of the Council, and of the functioning of a constitutional organ, would violate the principle of a democratic state governed by the rule of law and the principle of legality. As explained above,

²³ This is contrary to Council of Europe standards: 2010 CoE Recommendation (para 26); Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality adopted on 13 April 2016, (CM(2016)36 final), under C.

²⁴ ECtHR Cases *Morice v France*, 29369/10, 23 Apr 2015, para 78; *Cyprus v. Turkey*, 25781/94, 10 May 2001, para 233.

the Commission recalls that an effective constitutional review of these provisions is currently not possible.

3. 4. The retirement age and the power to prolong the mandate of judges

31. Articles 1(26)b-c and 13(1) of the law amending 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.
32. The new retirement regime would adversely impacts on the independence of judges²⁵. 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 judges²⁶. 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.
33. 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 dismissal through the existence of effective safeguards against undue intervention or pressure from the executive²⁷. 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.
34. The Commission notes that the new rules also raise constitutionality concerns. According to the opinion of the Supreme Court²⁸, 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.

²⁵ 2010 Council of Europe Recommendation, para 49.

²⁶ 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).

²⁷ Case C-53/03 *Syfait and Others*, 31 May 2005, para 31; Case C-103/97 *Köllensperger and Atzwanger*, 4 Feb. 1999, para 20.

²⁸ Opinion of the Supreme Court of 28 April 2017.

3.5. The Supreme Court

3.5.1. Dismissal, forced retirement and re-appointment of Supreme Court judges

35. According to Article 87 of the new law on the Supreme Court, on the day following the entry into force of the law, all judges of the Supreme Court would be dismissed and retired²⁹.
36. According to Article 88 of the same law, only the judges indicated by the Minister of Justice would remain initially active for an interim period until the President of the Republic has made a final selection of the judges who will be allowed to stay in office following a special verification procedure. This procedure would require the President of the Republic to choose judges who will remain in office from those Supreme Court judges that are pre-selected by the Minister of Justice and assessed by the National Council for the Judiciary. The law includes vague and undetermined criteria according to which the choice of judges that will remain in office should be made. Any resolutions of the National Council for the Judiciary in this respect would not be binding on the President of the Republic³⁰. According to Article 91 of the law on the Supreme Court, if the judge holding the office of the First President of the Supreme Court is dismissed and retired, the President of the Republic chooses an interim First President of the Supreme Court.
37. The dismissal and forced retirement of all judges of the Supreme Court, considered in connection with the rules allowing for their possible reappointment, would violate the judicial independence of Supreme Court judges. Judges should be protected against dismissal through the existence of effective safeguards against undue intervention or pressure from other State powers³¹. According to the case law on the Court of Justice and the European Court of Human Rights and European standards, judicial independence requires guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute³². The irremovability of judges by the executive during their term of office is a consequence of their independence and thus included in the guarantees of Article 6(1) ECHR³³. 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

²⁹ According to Art. 89(1) judges who are dismissed and retired are entitled to an emolument in the amount equal to remuneration the judge received at the most recent post held in the Supreme Court – until they attain 65 years of age. Art. 89(2) of the law on the Supreme Court provides that judges who are dismissed from the Supreme Court retain the right to apply within 14 days from their retirement to the Minister of Justice for a transfer to a judicial post in an ordinary, military or administrative court. The Minister of Justice has the right to turn down that request.

³⁰ Subsequently, according to Article 95 of the law on the Supreme Court, the Minister of Justice announces vacancies in particular chambers of the Supreme Court, and then proposes one candidate of his own choosing for each announced vacancy to the National Council for the Judiciary. The National Council for the Judiciary assesses each candidacy and makes a proposal to the President of the Republic for the appointment to a post of a Supreme Court judge. In certain cases the National Council for the Judiciary will be able make such a proposal through only one of its Assemblies, thus potentially excluding the Assembly composed of judges-members. The Minister of Justice can make an additional announcement about the remaining vacancies. Then, candidates can lodge their candidacies in a regular procedure with the National Council for the Judiciary assessing them and submitting an application to the President of the Republic for their appointment to posts of Supreme Court judges.

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

³² Case C-222/13 *TDC*, 9 Oct. 2014, paras 29-32; Case C-506/04 *Wilson*, 19 Sept. 2006, para 53; Case C-103/97 *Köllensperger and Atzwanger*, 4 Feb. 1999, paras 20-23; Case C-54/96 *Dorsch Consult*, 12 Sept. 1997, para 36; Case C-17/00, *De Coster*, 29 Nov. 2001, paras 18-21; ECtHR Case *Baka v. Hungary*, 20261/12, 23 June 2016, para 121.

³³ ECtHR Case *Campbell and Fell v The United Kingdom*, A80 (1984), 28 June 1984, para 80.

defence in a democratic society. Judges cannot be dismissed as a group; judges cannot be dismissed for general reasons not related to individual behaviour.

38. These guarantees and safeguards are lacking in the present case and the provisions concerned would constitute a flagrant violation of the independence of judges of the Supreme Court and of the separation of powers³⁴, and therefore of the rule of law.

3.5.2. *Disciplinary proceedings*

39. The law on the Supreme Court would establish a new disciplinary chamber and new rules for disciplinary proceedings against Supreme Court judges³⁵.
40. These new rules on disciplinary proceedings would adversely affect judicial independence. In particular, the involvement of the Minister of Justice in disciplinary proceedings against judges of the Supreme Court would constitute a threat to their independence: the fact that the Minister of Justice would have the power to initiate disciplinary proceedings against Supreme Court judges and also to influence the conduct of the investigations, would provide the Minister of Justice with an additional tool to put considerable pressure on judges.
41. Notably, according to Article 56(5) of the law on the Supreme Court, the Minister of Justice could object to the decision of the disciplinary officer of the Supreme Court who conducts an investigation to terminate this investigation due to a lack of grounds; in such a case the disciplinary officer of the Supreme Court would have to continue conducting the disciplinary proceedings and would be bound by the instructions from the Minister of Justice. Additionally, the Minister of Justice could himself appoint a disciplinary officer on a case-by-case basis³⁶. The appointment of a disciplinary officer by the Minister of Justice would exclude every other disciplinary officer from a given case. Whenever the Minister of Justice has appointed a disciplinary officer, a preliminary investigation must be conducted. According to Article 57(2), the disciplinary officer appointed by the Minister would be bound by the instructions provided by the Minister of Justice in certain cases.
42. The mere threat of disciplinary proceedings being initiated pursuant to the instructions of the Minister of Justice would directly affect the independence of judges of the Supreme Court. The Court of Justice has held that for a court to be

³⁴ The law contradicts with Council of Europe standards. In particular, the new rules contradict the principle of irremovability of judges as a key element of the independence of judges as enshrined in the 2010 Council of Europe Recommendation. Accordingly, Supreme Court judges should have guaranteed tenure, and their mandates should not be prematurely terminated. Also, according to the 2010 Council of Europe Recommendation, 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. The law violates these standards.

³⁵ Disciplinary procedures against Supreme Court judges concern responsibility for offences against the rules of the service and for compromising the dignity of their office. Article 5 of the law on the Supreme Court stipulates that the disciplinary chamber deals also with disciplinary proceedings against Supreme Court judges, certain disciplinary proceedings against members of legal professions, and with appeals against disciplinary decisions. The law sets a new composition of the Supreme Courts' disciplinary courts: by default, a first instance disciplinary court will be composed of one judge of the disciplinary chamber; a second instance disciplinary court will be composed of three judges. Disciplinary proceedings may be initiated by a motion of a disciplinary officer (Art. 56(1): disciplinary officer appointed by the Supreme Court to a three-year term, and Art. 54(4): disciplinary officer appointed by the Minister on a case-by-case basis).

³⁶ Art. 54(1) of the law on the Supreme Court. The Minister of Justice appoints the disciplinary officers from among prosecutors presented by the State Prosecutor.

independent it should exercise its functions wholly autonomously, without being subordinated to any other body and be thus protected against external interventions or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them³⁷. These conditions are not fulfilled in the present case. As a consequence, Supreme Court judges may feel pressure to follow the position of the executive power when adjudicating cases.

3.5.3. *Legislative process*

43. The Commission notes that the law on the Supreme Court, which is a self-standing new act of more than 110 Articles and which amends six existing laws, would have a serious impact on the independence of the Supreme Court and more generally on the separation of powers and the rule of law in Poland. The Commission regrets that this important law has not been subject to the appropriate preparation and consultations that it should have deserved. On the contrary, the draft was tabled on 12 July 2017 and was adopted on 22 July 2017. The Commission considers that such a fast-track legislative process of the two chambers undermines in itself the trust in the judiciary in Poland and is not in line with the spirit of loyal cooperation between States institutions which should characterise a democratic state governed by the rule of law.

3.6. **Other provisions**

44. The four laws contain a number of other sensitive provisions from the point of view of the rule of law and the separation of powers, in particular regarding the premature termination of mandates of disciplinary officers in courts³⁸, the powers of the Minister of Justice to assess the performance of courts³⁹, the transfer of judges⁴⁰, the structure of the National School for Judiciary⁴¹, the declaration of assets of judges⁴², and the staff of the National Council for the Judiciary and of the Supreme Court⁴³. These issues have been identified in a number of analyses, in particular from the Supreme Court and the National Council for the Judiciary as raising concerns, including questions of compliance with the Constitution⁴⁴. However, as explained above an independent and legitimate constitutional review is currently not possible.

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

³⁸ Article 6 of the law amending the law on the National Council for the Judiciary; Article 100(1) and (2) of the law on the Supreme Court.

³⁹ Article 1(16) of the law amending the law on the Ordinary Courts Organisation.

⁴⁰ Article 1(5)(b) of the law amending the law on the Ordinary Courts Organisation.

⁴¹ Article 1 of the law amending the law on the National School of Judiciary.

⁴² Article 1(33) of the law amending the law on the Ordinary Courts Organisation and article 38 of the law on the Supreme Court.

⁴³ Article 10 of the law amending the law on the National Council for the Judiciary; Article 93 and Article 99 of the law of 20 July on the Supreme Court.

⁴⁴ New provisions on the directors of courts have also been identified as raising concerns (Article 1 of the law of 23 March 2017 amending the law on the Ordinary Courts Organisation).

4. FINDING OF A SYSTEMIC THREAT TO THE RULE OF LAW

45. For the reasons set out above, the Commission considers 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 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 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 stakeholders⁴⁵. 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 underlines the principle of loyal cooperation between state organs

⁴⁵ E.g. Supreme Court opinions of 30 January, 3 February, 28 April and 18 July 2017; National Council for the Judiciary opinions of 30 January, 10 February, 7 March, 12 May, 26 May and 18 July 2017; Ombudsman opinions of 1 February, 12 April, 31 May, 28 June and 18 July 2017; opinion of the Director of the National School of Judiciary and Public Prosecution of 10 February 2017; collective opinions of judges from appeal court areas in Lublin of 6 February 2017; in Gdańsk, Cracow, Białystok, Szczecin, Rzeszów of 7 February 2017; in Warsaw and Poznań of 8 February 2017; resolution of the Presidium of the Chief Bar Association of 3 February 2017; opinion of the Association of Judges "Themis" of 29 January 2017; opinions of the Association of Judges "Iustitia" of 8 February 2017, opinion of the National Association of Court Referendaires of 6 February 2017; opinion of the Association of Alumni and Applicants of the NSJPP of 7 February 2017; opinion of the National Association of Assistants to Judges of 8 February 2017.

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

46. The Commission recalls that where a constitutional justice system has been established, its effectiveness is a key component of the rule of law. 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 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.
47. Notwithstanding the fact that there is a diversity of justice systems in Europe, common European standards have been established on safeguarding judicial independence. It is with great concern that the Commission observes that following the entry into force of the new laws referred to above, the Polish judicial system would no longer be compatible with the European standards in this regard.
48. In that respect, the Commission takes note of the decision of the President of the Republic of 24 July 2017 to refer back to the Sejm the law on the Supreme Court and the law on the National Council for the Judiciary.
49. 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. Certain aspects of the new laws also raise concerns as regards their compatibility with EU law and for this reason the Commission has decided, in addition to the present Rule of Law Recommendation, to launch infringement procedures against Poland when the law on the Ordinary Courts Organisation will be published or should the law on the Supreme Court be signed and published.
50. The Commission underlines that the proper functioning of the rule of law is also essential for the seamless operation of the Internal Market because economic operators must know that they will be treated equally under the law. This cannot be assured without an independent judiciary in each Member State. For this reason, the Council underlined the importance for the Polish authorities to address the serious concerns related to the rule of law in its Country Specific Recommendations addressed to Poland in the context of the 2017 European Semester. The Country Specific Recommendations have been generally endorsed by the European Council on 23 June 2017 and adopted by the Economic and Financial Affairs Council on 11 July 2017⁴⁶.
51. The Commission notes that a wide range of actors at European and international level have expressed their deep concern about the reform of the Polish justice system: representatives of the judiciary across Europe, including the Network of

⁴⁶ Recital 14: "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". 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.

Presidents of the Supreme Judicial Courts of the European Union and the European Network of Councils for the Judiciary, the Venice Commission, the Commissioner for Human Rights of the Council of Europe, the United Nations Human Rights Committee as well as numerous civil society organisations such as Amnesty International and the Human Rights and Democracy Network. The European Parliament has also expressed its concerns, including in two resolutions supporting the Commission's views.

5. RECOMMENDED ACTION

52. The Commission recommends that the Polish authorities take appropriate action to address this systemic threat to the rule of law as a matter of urgency.
53. In particular the Commission recommends that the Polish authorities take the following actions:
 - (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 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 elected⁴⁷;
 - (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 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;
 - (d) refrain from any measure interfering with the tenure of the Supreme Court judges and their function;
 - (e) 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;
 - (f) 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.
54. The Commission underlines that the loyal cooperation which is required amongst the different state institutions in rule of law related matters is essential in order to find a solution in the present situation. The Commission also encourages the Polish authorities to seek the views of the Venice Commission on the law on the National School of Judiciary, the law on the National Council for the Judiciary, the law on the Ordinary Courts Organisation and the law on the Supreme Court as well as on any new legislative proposal aiming to reform the justice system in Poland.

⁴⁷ See the Recommendation (EU) 2017/146 and the Recommendation (EU) 2016/1374.

55. The Commission invites the Polish Government to solve the problems identified in this Recommendation within one month of receipt of this Recommendation, and to inform the Commission of the steps taken to that effect.
56. The Commission invites the Polish authorities to use the opportunity of the Polish President's decision to refer back to the *Sejm* the law on the National Council for the Judiciary and the law on the Supreme Court to ensure that any reforms of the judiciary in Poland take account of the concerns expressed in this Recommendation.
57. The Commission also recalls that Recommendations adopted under the rule of Law Framework do not prevent Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU⁴⁸.
58. The Commission asks in particular 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. Should the Polish authorities take any measure of this kind, the Commission stands ready to immediately activate Article 7(1) TEU.
59. On the basis of this Recommendation, the Commission continues to be ready to pursue a constructive dialogue with the Polish Government.

Done at Brussels, 26.7.2017

For the Commission
Frans TIMMERMANS
First Vice-President

⁴⁸ Section 4.1. of the Communication "A new EU Framework to Strengthen the Rule of Law", COM(2014) 158 final.



La Commissione europea interviene per tutelare lo Stato di diritto in Polonia

Bruxelles, 26 luglio 2017

La Commissione europea è intervenuta oggi per tutelare lo Stato di diritto in Polonia.

La Commissione ha formulato gravi preoccupazioni sulla prevista riforma del sistema giudiziario in Polonia in una **raccomandazione sullo Stato di diritto** indirizzata alle autorità polacche. Secondo la valutazione della Commissione la riforma in questione amplifica la minaccia sistemica allo Stato di diritto in Polonia già evidenziata nella procedura relativa allo Stato di diritto avviata dalla Commissione nel gennaio 2016. La Commissione ha invitato le autorità polacche a risolvere tali problemi entro un mese. La Commissione chiede in particolare alle autorità polacche di non adottare alcuna misura finalizzata a destituire o a costringere alle dimissioni i giudici della Corte suprema. Qualora siano adottate siffatte misure, la Commissione è pronta ad avviare immediatamente la **procedura ex articolo 7, paragrafo 1**^[1] - un avvertimento formale dell'UE che può essere emesso dai quattro quinti degli Stati membri in sede di Consiglio dei ministri.

La Commissione ha deciso inoltre di avviare una **procedura di infrazione** nei confronti della Polonia per violazione del diritto dell'UE. Il collegio procederà immediatamente all'invio di una lettera di costituzione in mora non appena sia pubblicata la legge sull'organizzazione dei tribunali ordinari.

Allo stesso tempo la Commissione ribadisce la propria offerta di proseguire il dialogo costruttivo con il governo polacco.

Il presidente **Jean-Claude Juncker** ha dichiarato: *"La Commissione è determinata a difendere lo Stato di diritto in tutti gli Stati membri, trattandosi di un principio fondamentale alla base dell'Unione europea. Un sistema giudiziario indipendente è un prerequisito essenziale per l'appartenenza all'Unione. L'UE non può pertanto accettare un sistema che consenta di destituire i giudici in modo arbitrario. L'indipendenza dei tribunali è alla base della fiducia reciproca tra gli Stati membri e i sistemi giudiziari. Qualora il governo polacco intenda procedere con misure che minano l'indipendenza del sistema giudiziario e dello Stato di diritto in Polonia, l'attivazione dell'articolo 7 sarà una scelta inevitabile."*

Il primo vicepresidente **Frans Timmermans** ha dichiarato: *"Le raccomandazioni che abbiamo indirizzato alle autorità polacche sono chiare. È ora di ripristinare l'indipendenza del Tribunale costituzionale e di revocare le leggi di riforma del sistema giudiziario o di renderle conformi alla costituzione polacca e alle norme europee in materia di indipendenza del sistema giudiziario. I tribunali polacchi, al pari di quelli di tutti gli Stati membri, sono tenuti a intervenire efficacemente nei casi di violazione del diritto dell'UE, agendo in tali circostanze come "giudici dell'Unione", e devono conformarsi ai requisiti di indipendenza del sistema giudiziario in linea con il trattato e la Carta dei diritti fondamentali dell'Unione europea. È nostra intenzione risolvere questi problemi insieme e in modo costruttivo. La Commissione continua ad essere aperta al dialogo con le autorità polacche e accoglie con favore tutte le iniziative volte a modificare le leggi in questione in linea con le sue raccomandazioni."*

1. La raccomandazione sullo Stato di diritto

La raccomandazione sullo Stato di diritto, adottata oggi, integra due precedenti raccomandazioni, adottate rispettivamente il 27 luglio e il 21 dicembre 2016, e riguarda l'assenza di una revisione costituzionale indipendente e legittima in Polonia. Al momento attuale le autorità polacche non sono intervenute per risolvere gli aspetti problematici indicati nelle prime due raccomandazioni. Dette autorità hanno inoltre adottato ulteriori misure che aggravano le preoccupazioni sull'indipendenza del sistema giudiziario e aumentano in modo significativo la minaccia sistemica allo Stato di diritto in Polonia.

La raccomandazione della Commissione sullo Stato di diritto inviata oggi alla Polonia riguarda **quattro nuovi atti legislativi** adottati dal parlamento polacco e che, secondo la valutazione della Commissione, aumenteranno la minaccia sistemica allo Stato di diritto: la legge sulla Corte suprema, la legge sul Consiglio nazionale della magistratura (sulle quali il presidente della Repubblica ha messo il veto il 24 luglio), la legge sull'organizzazione dei tribunali ordinari (firmata dal presidente della Repubblica il 25 luglio, in attesa di pubblicazione ed entrata in vigore) e la legge sulla scuola nazionale della

magistratura (già pubblicata e in vigore dal 13 luglio). Tali leggi, nella loro forma attuale, comprometteranno in modo strutturale l'indipendenza del sistema giudiziario in Polonia, con un forte e immediato impatto negativo sul funzionamento indipendente del sistema giudiziario.

In particolare, la destituzione di giudici della Corte suprema aggraverà in modo serio la minaccia sistemica allo Stato di diritto. La Commissione chiede pertanto alle autorità polacche di non adottare alcuna misura finalizzata a destituire o a costringere alle dimissioni i giudici della Corte suprema. In caso di adozione di tali misure da parte delle autorità polacche, la Commissione è pronta ad attivare il meccanismo di cui all'**articolo 7, paragrafo 1, del trattato sull'Unione europea**.

Sulla base della sua raccomandazione sullo Stato di diritto la Commissione invita il governo polacco a risolvere i problemi individuati nella raccomandazione entro **un mese** e a informarla delle misure adottate in tal senso.

2. Procedura di infrazione sulla base del diritto dell'UE

Il collegio dei commissari ha inoltre deciso di predisporre una procedura d'infrazione per possibile violazione del diritto dell'UE. Il collegio è pronto a inviare una **lettera di costituzione in mora** in relazione alla **legge sull'organizzazione dei tribunali ordinari** all'atto della pubblicazione ufficiale di quest'ultima. La principale preoccupazione di natura giuridica sollevata dalla Commissione fa riferimento alla discriminazione di genere derivante dall'introduzione di una differente età pensionabile per i magistrati donna (60 anni) e uomo (65 anni), in violazione dell'articolo 157 del trattato sul funzionamento dell'Unione europea (TFUE) e della direttiva 2006/54 sulla parità di trattamento fra uomini e donne in materia di occupazione e impiego. Nella lettera di costituzione in mora la Commissione esprimerà le proprie riserve sul fatto che, assegnando al ministro della Giustizia il potere discrezionale di prorogare il mandato dei giudici che anno raggiunto l'età pensionabile e di destituire o nominare i presidenti dei tribunali, si comprometterà l'indipendenza dei tribunali polacchi (cfr. l'articolo 19, paragrafo 1, del trattato sull'Unione europea (TUE) in combinato disposto con l'articolo 47 della Carta dei diritti fondamentali dell'Unione europea).

Prossime tappe

La raccomandazione della Commissione invita il governo polacco a risolvere entro un mese i problemi individuati e a informare la Commissione delle misure adottate in tal senso. La Commissione è pronta a proseguire il dialogo costruttivo con il governo polacco. Per quanto riguarda la procedura di infrazione, la Commissione invierà una lettera di costituzione in mora non appena sia pubblicata la legge sull'organizzazione dei tribunali ordinari.

Contesto

Lo Stato di diritto è uno dei valori comuni sui quali si fonda l'Unione europea. Esso è sancito all'articolo 2 del trattato sull'Unione europea. La Commissione europea, congiuntamente al Parlamento europeo e al Consiglio, è competente in virtù dei trattati a garantire il rispetto dello Stato di diritto quale valore fondamentale della nostra Unione e assicurare che le normative, i valori e i principi dell'UE siano rispettati. Gli eventi in Polonia hanno portato la Commissione ad avviare un dialogo con il governo polacco nel gennaio 2016 ai sensi del quadro sullo Stato di diritto. Il quadro – introdotto dalla Commissione l'11 marzo 2014 – si articola in tre fasi (v. grafico all'allegato 1). L'intero processo si basa su un dialogo continuo tra la Commissione e lo Stato membro interessato. La Commissione tiene informati il Parlamento europeo e il Consiglio con regolarità e in modo puntuale.

Il Parlamento europeo ha sempre sostenuto le preoccupazioni della Commissione, anche nelle due risoluzioni del [13 aprile](#) e del [14 settembre](#) 2016. Il 16 maggio 2017 la Commissione ha informato il Consiglio Affari generali della [situazione in Polonia](#). Una maggioranza molto ampia di Stati membri ha sostenuto il ruolo della Commissione e gli sforzi per risolvere tale questione e ha invitato il governo polacco a riprendere il dialogo con la Commissione.

Vari altri soggetti, a livello europeo e internazionale, hanno espresso profonda preoccupazione sulla riforma del sistema giudiziario polacco: rappresentanti della magistratura di tutta Europa, compresa la rete dei presidenti delle Corti supreme dell'Unione europea e la rete europea dei Consigli di giustizia, la commissione di Venezia, il Commissario del Consiglio d'Europa per i diritti umani, il Consiglio per i diritti umani delle Nazioni Unite nonché numerose organizzazioni della società civile quali Amnesty International e la Rete per i diritti umani e la democrazia.

Per maggiori informazioni:

- [Raccomandazione della Commissione del 26 luglio 2017](#)
- [Osservazioni del vicepresidente Timmermans dopo la discussione del Collegio del 19 luglio 2017](#)
- [Raccomandazione della Commissione relativa allo Stato di diritto in Polonia del 21 dicembre 2016](#)

- [Comunicato stampa sulla seconda raccomandazione relativa allo Stato di diritto del 21 dicembre 2016](#)
- [Nota sulla seconda raccomandazione relativa allo Stato di diritto del 21 dicembre 2016](#)
- [Raccomandazione della Commissione relativa allo Stato di diritto in Polonia del 27 luglio 2016](#)
- [Comunicato stampa sulla prima raccomandazione relativa allo Stato di diritto del 27 luglio 2016](#)
- [Nota sulla prima raccomandazione relativa allo Stato di diritto del 27 luglio 2016](#)

[1] L'articolo 7, paragrafo 1, del trattato sull'Unione europea prevede che il Consiglio, deliberando alla maggioranza dei quattro quinti dei suoi membri, può constatare che esiste un evidente rischio di violazione grave da parte di uno Stato membro dei valori di cui all'articolo 2 del trattato (cfr. allegato II). La Commissione può avviare tale procedura mediante proposta motivata.

Allegato II - Articolo 7 del trattato sull'Unione europea

1. Su proposta motivata di un terzo degli Stati membri, del Parlamento europeo o della Commissione europea, il Consiglio, deliberando alla maggioranza dei quattro quinti dei suoi membri previa approvazione del Parlamento europeo, può constatare che esiste un evidente rischio di violazione grave da parte di uno Stato membro dei valori di cui all'articolo 2. Prima di procedere a tale constatazione il Consiglio ascolta lo Stato membro in questione e può rivolgergli delle raccomandazioni, deliberando secondo la stessa procedura.

Il Consiglio verifica regolarmente se i motivi che hanno condotto a tale constatazione permangono validi.

2. Il Consiglio europeo, deliberando all'unanimità su proposta di un terzo degli Stati membri o della Commissione europea e previa approvazione del Parlamento europeo, può constatare l'esistenza di una violazione grave e persistente da parte di uno Stato membro dei valori di cui all'articolo 2, dopo aver invitato tale Stato membro a presentare osservazioni.

3. Qualora sia stata effettuata la constatazione di cui al paragrafo 2, il Consiglio, deliberando a maggioranza qualificata, può decidere di sospendere alcuni dei diritti derivanti allo Stato membro in questione dall'applicazione dei trattati, compresi i diritti di voto del rappresentante del governo di tale Stato membro in seno al Consiglio. Nell'agire in tal senso, il Consiglio tiene conto delle possibili conseguenze di una siffatta sospensione sui diritti e sugli obblighi delle persone fisiche e giuridiche.

Lo Stato membro in questione continua in ogni caso ad essere vincolato dagli obblighi che gli derivano dai trattati.

4. Il Consiglio, deliberando a maggioranza qualificata, può successivamente decidere di modificare o revocare le misure adottate a norma del paragrafo 3, per rispondere ai cambiamenti nella situazione che ha portato alla loro imposizione.

5. Le modalità di voto che, ai fini del presente articolo, si applicano al Parlamento europeo, al Consiglio europeo e al Consiglio sono stabilite nell'articolo 354 del trattato sul funzionamento dell'Unione europea.

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Remarks of Frans Timmermans on European Commission action to preserve the rule of law in Poland

Brussels, 26 July 2017

Thank you very much and good afternoon to all of you. Here we are again.

After last week's College we discussed the concerns the Commission has about the reform of the Polish judiciary and the state of our Rule of Law dialogue with the Polish authorities.

Last week the College expressed grave concerns about 4 legislative acts recently proposed in Poland.

We have now finalised a comprehensive legal analysis, confirming that the 4 laws, as adopted by the Polish Parliament, would have a very significant negative impact on the independence of the Polish judiciary and would increase the systemic threat to the rule of law.

So as announced last week, I am here to tell you how the Commission has decided to address this issue.

In this past week, some things have changed in Poland, and some things have not.

We extended our hand to the Polish authorities for a dialogue aimed at redressing the situation and urged the Polish authorities to put the new laws on hold and re-engage.

That is not quite what has happened, but we must acknowledge and welcome that President Duda has announced his decision to veto 2 of the 4 laws.

However, the fact that 2 of the 4 laws have been signed and that work will continue on the matters addressed in the other 2, means that we must set out clearly our concerns in an additional Rule of Law Recommendation today.

The Commission recommends the Polish authorities to solve all the problems identified within one month.

Today's third Recommendation builds on the two previous Recommendations from 2016 which focused on the systemic threat to the rule of law from measures that have undermined the independence and legitimacy of the Constitutional Tribunal.

Given that independence of the judiciary is also a key component of the rule of law, the current reforms increase significantly the systemic threat to rule of law identified in the previous Recommendations.

The new concerns raised by all 4 laws on the judiciary are included in our Recommendation, allowing the Polish authorities to take them into account in any future reforms of the judiciary to uphold the rule of law and to comply with EU law and with European standards on judicial independence.

I saw some remarks in the media from Polish authorities saying: "Well, they need to be precise in what they want from us, the Commission." I think we have been very precise in our Recommendation.

I explained the College's substantial concerns last week - and our Recommendation will be published - so I will not repeat all the details here but rather let you read them yourselves.

However, let me stress one important point.

The College discussed last week the option of using Article 7 if the situation did not improve, and our Recommendation gives a clear indication of what actions by the Polish authorities would bring us to that point.

The Recommendation does not prevent Article 7 being activated directly in case a sudden deterioration requires immediate and stronger action

The Commission's Recommendation asks the Polish authorities not to take any measure to dismiss or force the retirement of Supreme Court judges.

If such a measure is taken the Commission is ready to immediately trigger the Article 7(1) procedure.

The College also agreed last week to prepare infringement proceedings for breaches of EU law, to be adopted where we have clear legal grounds concerning laws already in force.

The Law on the Ordinary Courts Organisation has been signed by the President of the Republic. It raises concerns which would justify the launching of an infringement procedure as soon as it is published.

One of our legal concerns is gender discrimination through the introduction of a different retirement age for female and male judges. Now the retirement age is the same, 67, and they introduce a different retirement age. This, in our view, is in violation of Article 157 of the Treaty on the Functioning of the European Union, and Directive 2006/54 on gender equality in employment.

The Commission also believes that the discretionary powers of the Minister of Justice to prolong the mandate of judges who have reached the retirement age, as well as his discretion to dismiss and appoint court presidents, would undermine the independence of Polish courts.

These powers would violate the obligation to provide an effective remedy as required by Article 19(1) of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights.

Given that we have clear legal grounds, and that we are just waiting for the publication of this law before the possible breach of EU law becomes a reality, the Commission today empowered me - in agreement with President Juncker - to send a Letter of Formal Notice once the Law on the Ordinary Courts Organisation has been published.

And we will give the Polish authorities one month to reply, from the date this letter is sent.

For now, this is where we stand.

And let me just underline that the Commission's hand is still extended to the Polish authorities, in the hope of a constructive dialogue.

In the meanwhile, we will watch developments vigilantly and act accordingly.

Thank you very much.

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