



## Rule of Law: European Commission acts to defend judicial independence in Poland

Brussels, 20 December 2017

**Despite repeated efforts, for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has today concluded that there is a clear risk of a serious breach of the rule of law in Poland.**

The Commission is therefore proposing to the Council to adopt a decision under Article 7(1) of the Treaty on European Union (see Annex II).

The European Commission is taking action to protect the rule of law in Europe. Judicial reforms in Poland mean that the country's judiciary is now under the political control of the ruling majority. In the absence of judicial independence, serious questions are raised about the effective application of EU law, from the protection of investments to the mutual recognition of decisions in areas as diverse as child custody disputes or the execution of European Arrest Warrants.

The Commission has also today issued a complementary (4th) Rule of Law Recommendation, **setting out clearly the steps that the Polish authorities can take to remedy the current situation.** Should the Polish authorities implement the recommended actions, the Commission is ready, in close consultation with the European Parliament and the Council, to reconsider its Reasoned Proposal.

Furthermore, the Commission has decided to take the next step in its infringement procedure against Poland for **breaches of EU law** by the Law on the Ordinary Courts Organisation, referring Poland to the Court of Justice of the European Union.

Whilst taking these unprecedented measures, the **Commission maintains its offer for a constructive dialogue** to remedy the current situation.

### 1. Reasoned Proposal for a Council Decision

Over a period of two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. The common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch.

The Reasoned Proposal sets out the Commission's concerns, recalling the steps taken under the Rule of Law Framework and the numerous contacts with the Polish authorities to try to identify a solution, and invites the Council to find that there is a clear risk of a serious breach of the rule of law. The concerns relate specifically to the lack of an independent and legitimate constitutional review and judicial independence.

Should the Polish authorities implement the remedial actions set out in the Rule of Law Recommendation accompanying its Reasoned Proposal, the Commission is ready to reconsider the Reasoned Proposal.

### 2. Rule of Law Recommendation

The Rule of Law Recommendation adopted today complements three previous Recommendations, adopted on 27 July 2016, 21 December 2016 and 27 July 2017. Today's Recommendation focuses on the fresh concerns raised by the new law on the Supreme Court adopted by the Polish Parliament on 15 December 2017 and the law on the National Council for the Judiciary adopted on 15 December 2017. The Polish authorities have still not addressed the concerns identified in the first three Commission Recommendations, which remain valid.

Today's Recommendation clearly sets out a set of actions that need to be taken by the Polish authorities to address its concerns. The Polish authorities are invited to:

- Amend the Supreme Court law, not apply a lowered retirement age to current judges, remove the discretionary power of the President to prolong the mandate of Supreme Court judges, and remove the extraordinary appeal procedure, which includes a power to reopen final judgments taken years earlier;

- Amend the law on the National Council for the Judiciary, to not terminate the mandate of judges-members, and ensure that the new appointment regime continues to guarantee the election of judges-members by their peers;
- Amend or withdraw the law on Ordinary Courts Organisation, in particular to remove the new retirement regime for judges including the discretionary powers of the Minister of Justice to prolong the mandate of judges and to appoint and dismiss presidents of courts;
- Restore the independence and legitimacy of the Constitutional Tribunal, by ensuring that its judges, President and Vice-President are lawfully elected and by ensuring that all its judgements are published and fully implemented;
- Refrain from actions and public statements which could further undermine the legitimacy of the judiciary.

### **3. Infringement procedure on the basis of EU law**

The College of Commissioners also decided to refer the Polish Government to the European Court of Justice for breach of EU law, concerning the **Law on the Ordinary Courts** and, specifically, the retirement regime it introduces.

The Commission's key legal concern identified in this law relates to the discrimination on the basis of gender due to the introduction of a different retirement age for female judges (60 years) and male judges (65 years). This is contrary to Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Directive 2006/54 on gender equality in employment.

In its referral to the European Court of Justice, the Commission will also raise the linked concern that the independence of Polish courts will be undermined by the fact that the Minister of Justice has been given a discretionary power to prolong the mandate of judges which have reached retirement age (see Article 19(1) TEU in combination with Article 47 of the EU Charter of Fundamental Rights).

#### **Next steps**

The Commission's Recommendation invites the Polish authorities to address the problems within three months, and to inform the Commission of the steps taken to that effect. The Commission stands ready to pursue a constructive dialogue with the Polish Government. Should the Polish authorities implement the recommended actions, the Commission is ready, in close consultation with the European Parliament and the Council, to reconsider its Reasoned Proposal.

Under Article 7(1) TEU, the Council must hear Poland's position and obtain the consent of the European Parliament (on the basis of Article 354 TFEU, the European Parliament shall act by a two-thirds majority of votes cast, representing the majority of its component Members), before adopting a Decision by a four-fifths majority (22 of 27 Members of the Council entitled to vote on the basis of Article 354 TFEU), determining that there is a clear risk of a serious breach of the rule of law. The Council may also address recommendations to Poland, acting in accordance with the same voting procedure.

#### **Background**

Article 7(1) of the Treaty on European Union provides for the Council, acting by a majority of four fifths of its members, to determine that there is a clear risk of a serious breach by a Member State of the common values referred to in Article 2 of the Treaty (see Annex II). The Commission can trigger this process by a reasoned proposal.

The rule of law is one of the common values upon which the European Union is founded. It is enshrined in Article 2 of the Treaty on European Union. The European Commission, together with the European Parliament and the Council, is responsible under the Treaties for guaranteeing the respect of the rule of law as a fundamental value of our Union and making sure that EU law, values and principles are respected.

It is up to Poland to identify its own model for its justice system, but it should do so in a way that respects the rule of law; this requires it to safeguard the independence of the judiciary, separation of powers and legal certainty.

A breach of the rule of law in one Member State has an effect on all Member States and the Union as a whole. First, because the independence of the judiciary – free from undue political interference – is a value that reflects the concept of European democracy we have built up together, heeding the lessons of the past. Second, because when the rule of law in any Member State is put into question, the functioning of the Union as a whole, in particular with regard to Justice and Home Affairs cooperation and the functioning of the Internal Market, is put into question too.

The European Commission opened a dialogue with the Polish Authorities in January 2016 under the Rule of Law Framework (see [Memo](#) for more details). The Framework – introduced by the Commission

on 11 March 2014 – has three stages (see graphic in Annex 1). The entire process is based on a continuous dialogue between the Commission and the Member State concerned. The Commission keeps the European Parliament and Council regularly and closely informed. The Commission has attempted to work constructively with the Polish authorities, as they have passed more than 13 laws impacting the Constitutional Tribunal, Supreme Court, ordinary courts, national Council for the Judiciary, prosecution service and National School of Judiciary.

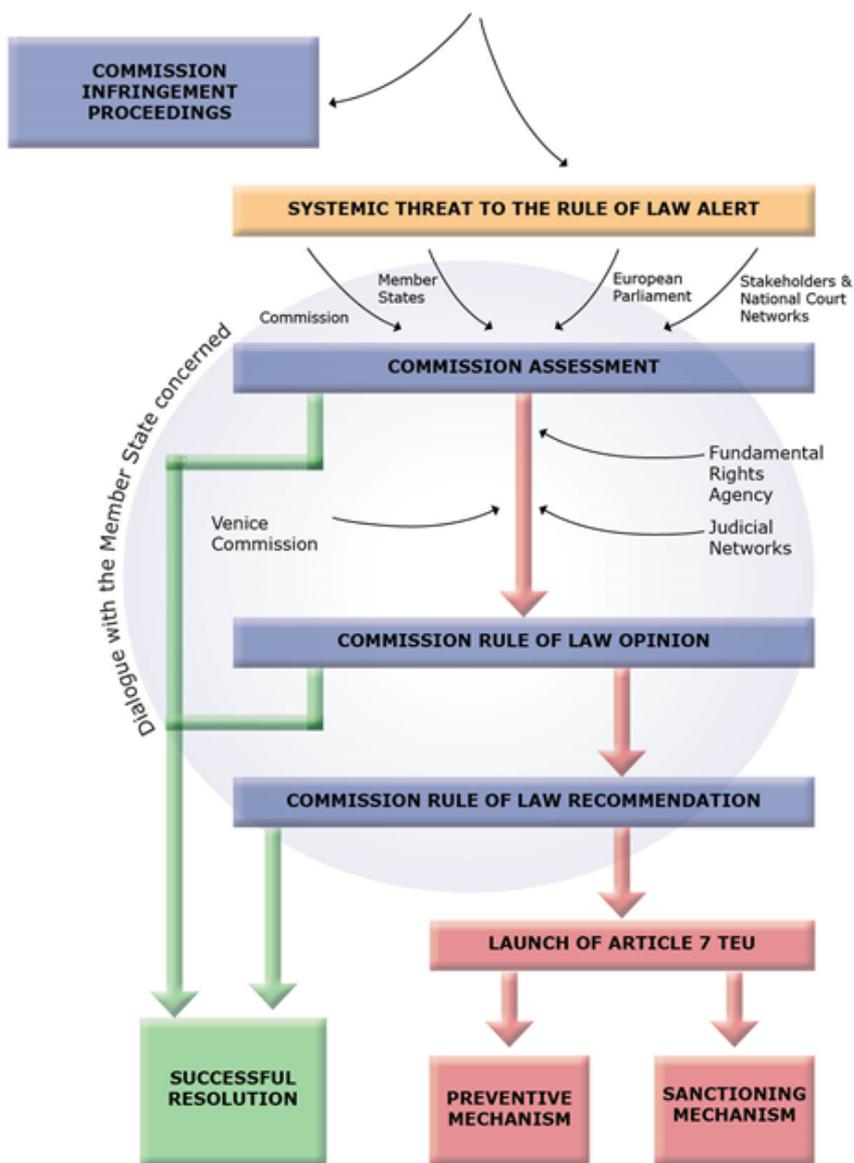
The European Parliament has consistently supported the Commission's concerns, including in the three Resolutions of [13 April](#) 2016, [14 September](#) 2016 and [15 November](#) 2017. In addition, on 16 May 2017, the Commission informed the General Affairs Council of the situation in Poland. A very broad majority of Member States supported the Commission's role and efforts to address this issue, and called upon the Polish Government to resume the dialogue with the Commission. The Commission provided a further update to the General Affairs Council on 25 September 2017, and there was broad agreement on the need for Poland to engage in a dialogue to find a solution.

A wide range of other actors at European and international levels have expressed their deep concern about the reform of the Polish justice system: representatives of the judiciary across Europe, including the Network of 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.

**For more information:**

- [MEMO/17/5368](#)
- [Reasoned Proposal under Article 7\(1\) for a Council Decision](#)
- [Fourth Rule of Law Recommendation](#)
- [Opinion of the Venice Commission on the laws on the Supreme Court, Ordinary Courts and National Council of Judiciary](#)
- [Press release on third Rule of Law Recommendation, 26 July 2017](#)
- [Remarks of First Vice-President Timmermans after College discussion of 19 July 2017](#)
- [Commission Recommendation regarding the Rule of Law in Poland of 21 December 2016](#)
- [Press release on second Rule of Law Recommendation, 21 December 2016](#)
- [Memo on second Rule of Law Recommendation, 21 December 2016](#)
- [Commission Recommendation regarding the Rule of Law in Poland of 27 July 2016](#)
- [Press release on first Rule of Law Recommendation, 27 July 2016](#)
- [Memo on first Rule of Law Recommendation, 27 July 2016](#)

**Annex I – Rule of Law Framework**



## Annex II – Article 7 of the Treaty on European Union

1. 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.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

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