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European Commission contribution for the hearing of Poland on 26 June
2018

Please find annexed a contribution of the European Commission, requested by Coreper on 13 June 2018 and submitted by the Commission on 20 June 2018.

RULE OF LAW IN POLAND / ARTICLE 7 (1) TEU REASONED PROPOSAL

HEARING OF POLAND - 26 JUNE 2018

EUROPEAN COMMISSION CONTRIBUTION

I. STATE OF PLAY

1. Supreme Court: the retirement regime of the current Supreme Court judges, including the First President, and the regime for prolongation of judicial mandates.

(i) Commission Recommendation of 20 December 2017

In its fourth Recommendation of 20 December 2017 regarding the rule of law in Poland ("fourth Recommendation"), the Commission recommends that the Polish authorities ensure that the law on the Supreme Court is amended so as to:

- not apply a lowered retirement age to the current Supreme Court judges¹;
- remove the discretionary power of the President of the Republic to prolong the active judicial mandate of the Supreme Court judges²;

¹ For the motivation, see paragraphs 5-12 of the fourth Recommendation.

² For the motivation, see paragraphs 13-17 of the fourth Recommendation.

(ii) Update of the state of play

Amendments to the law of 8 December 2017 on the Supreme Court have been introduced by the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary, and the law on the Supreme Court, as well as by the law of 10 May 2018 amending the law on Ordinary Courts Organisation, the law on the Supreme Court and certain other laws.

The amendments have introduced a mandatory consultation of the new National Council for the Judiciary by the President of the Republic, when considering the prolongations of mandates of the current Supreme Court judges³. The opinion of the National Council for the Judiciary is not binding and is to be made on the basis of broad criteria, such as 'the interest of the justice system or an important public interest'. Also, deadlines for deciding on the prolongation have been introduced⁴.

³ Article 2(2)(b) and Article 5 of the law of 10 May 2018 amending the law on the Ordinary Courts Organisation, the law on the Supreme Court, and certain other laws.

⁴ Article 2(2)(c) and Article 5 of the law of 10 May 2018 amending the law on the Ordinary Courts Organisation, the law on the Supreme Court, and certain other laws.

Pursuant to the law on the Supreme Court, the current Supreme Court judges who have already attained 65 years of age, or will have attained it by 3 July 2018, have been asked to declare their intention to remain in the Supreme Court by 4 May 2018⁵. 27 current judges of the Supreme Court judges are affected by the lowered retirement age. According to the Supreme Court [as per 13 June], 16 judges reacted in one way or another to the new prolongation regime: nine judges submitted a formal declaration requesting prolongation of their mandate, whilst the remaining seven judges made a general statement that they are fit and ready to continue to occupy their posts without making a formal declaration requesting prolongation due to the unconstitutionality of such procedure and its humiliating character. In its opinion of 10 May 2018⁶, the Supreme Court explicitly stated that the lack of declarations of the other 11 judges cannot be identified with the lack of their will to further adjudicate in the Supreme Court.

Also the First President of the Supreme Court is affected by the new lowered retirement age⁷ and her mandate of a 6-year term of office will be prematurely terminated (two years earlier) - despite the fact that it is the Polish constitution itself which sets the period of that term of office.

⁵ Article 111(1) of the law of 8 December 2017 on the Supreme Court.

⁶ Supreme Court's supplementary opinion of 10 May 2018 on the draft law amending the Law on the Supreme Court.

⁷ Article 111(1) and (4) of the law of 8 December 2017 on the Supreme Court.

(iii) Assessment

As stated by the Commission in the General Affairs Council of 14 May 2018 and in the European Parliament on 13 June 2018, the new laws are not sufficient to remove the concerns.

The discretionary power given to the President of the Republic in charge of deciding on the prolongation of judicial mandates of Supreme Court judges remains a key concern from the point of view of upholding the principles of the separation of powers and judicial independence: the current judges still have no right to serve their full term as originally established. It is not sufficient for those judges that have reached the new retirement age to simply notify their intention to continue to adjudicate, together with a health certificate, and continue to work. The wide discretion remains for the President of the Republic to decide on the prolongation of Supreme Court judges' mandates as there are no specific criteria, and there is no possibility for a judicial review.

As regards the mandatory consultation of the National Council for the Judiciary, it is noted that the opinion of the National Council for the Judiciary is to be based on vague criteria and is not binding on the President of the Republic. In any case, due to its new politically composed structure which violates European standards on judicial independence, the involvement of the National Council for the Judiciary can no longer constitute an effective safeguard.

As a result, 27 current judges of the Supreme Court, including the First President, are at risk of forced retirement on 3 July 2018. This would constitute an irreversible violation of the rule of law.

2. The National Council for the Judiciary: election regime of the judges-members of the National Council for the Judiciary, premature termination of the mandates of the former judges-members.

(i) Commission Recommendation of 20 December 2017

In its fourth Recommendation, the Commission recommends that the Polish authorities ensure that the law on the National Council for the Judiciary is amended so that the mandates of judges-members of the National Council for the Judiciary are not terminated⁸ and the new appointment regime is removed in order to ensure election of judges-members by their peers⁹.

(ii) Update of the state of play

No amendments have been adopted to address the above concerns. On 6 March 2018, 15 new judges-members¹⁰ were elected by the Sejm according to the new regime (judges-members are no longer elected by judges). The four-year mandates of the previous 15 judges-members, established in the constitution, were prematurely terminated on the same day. The first meeting of the new National Council for the Judiciary took place on 27 April 2018.

⁸ For the motivation, see paragraphs 29-30 of the fourth Recommendation.

⁹ For the motivation, see paragraphs 31-35 of the fourth Recommendation.

¹⁰ The Constitution stipulates that the National Council for the Judiciary is composed of 25 members: 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); 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).

(iii) Assessment

As stated by the Commission at the General Affairs Council of 14 May 2018 and in the European Parliament on 13 June 2018, the concerns expressed by the Commission fully remain.

In particular, the politicization of the National Council for the Judiciary undermines its role as an effective safeguard of judicial independence. The new election regime of the judges-members of the National Council does not comply with European standards requiring that judges-members of Councils for the Judiciary are elected by their peers. No changes have been introduced in that respect. No remedy is foreseen to address the premature termination of the four-year mandates of the former judges-members of the National Council for the Judiciary.

The conditions under which the Sejm elected the judges-members and the first meeting of the National Council for the Judiciary illustrate its politicisation and lack of legitimacy. While in Poland there are over 11.000 judges, only 18 candidates have been proposed for the 15 posts in the Council.

3. Ordinary Court judges: retirement regime of current ordinary court judges, regime for prolongation of judicial mandates and situation of Ordinary Court judges already affected by the new retirement regime.

(i) Commission Recommendation of 20 December 2017

In its fourth Recommendation, the Commission recommends that the law on Ordinary Courts Organisation is amended so as to remove the new retirement regime for judges of ordinary courts, including the discretionary power of the Minister of Justice to prolong their mandate; also, the situation of the ordinary court judges who have already been forced to retire because they were affected by the lowered retirement age should be addressed¹¹.

(ii) Update of the state of play

Amendments have been introduced by the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary, and the law on the Supreme Court.

The retirement age of female judges at ordinary courts has been aligned with the retirement age of male judges (65 years of age)¹²; female judges at the ordinary courts have been given a right to early retirement on request upon the attainment of the age of 60¹³.

¹¹ For the motivation, see paragraph 47(f) of the fourth Recommendation and paragraphs 146-150 of the Reasoned Proposal.

¹² Article 1(4)(a) of the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the Supreme Court.

¹³ Article 1(4)(c) of the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the Supreme Court.

The power to prolong mandates of ordinary court judges has been transferred from the Minister of Justice to the National Council for the Judiciary¹⁴. The already wide discretion to decide on the prolongation of mandates has been broadened¹⁵. There is no judicial review of the decision concerning the prolongation.

(iii) Assessment

The alignment of the retirement age for female and male judges at 65 years of age is to be welcomed. However, as stated by the Commission in the General Affairs Council of 14 May 2018 and in the European Parliament on 13 June 2018, the new laws are not sufficient to remove the concerns.

The amendments do not address the key concern which is that the current ordinary court judges still have no right to serve their full term as originally established. The wide discretion to decide on the prolongation of mandates of ordinary court judges remains and has even been broadened; there is no timeframe for the National Council for the Judiciary to make a decision and judges concerned continue to adjudicate whilst remaining 'at the mercy' of the Council; there is no judicial review of the National Council for the Judiciary decision.

Whilst the transfer of the power to decide on the prolongation of ordinary courts judges to the National Council for the Judiciary is a step in the right direction, this is undermined by the politicisation of that body as a result of the appointment of the judges-members by the Sejm (see point II above).

¹⁴ Article 1(4) (a) of the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the Supreme Court.

¹⁵ Article 1 (4)(b) of the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the Supreme Court.

4. Disciplinary regime, including the new autonomous disciplinary chamber in the Supreme Court.

(i) Commission Recommendation of 20 December 2017

In its fourth Recommendation, the Commission underlines that the disciplinary regime established by the law on the Supreme Court raises a number of concerns in particular related to the autonomy of the new disciplinary chamber in the Supreme Court¹⁶, the removal of a set of procedural guarantees in disciplinary proceedings conducted against ordinary judges and Supreme Court judges¹⁷ and the influence of President of the Republic and the Minister of Justice on the disciplinary officers¹⁸.

(ii) Update of the state of play

The law of 12 April 2018 amending the law on the Supreme Court introduce a provision enabling current judges of the Supreme Court to become judge in the disciplinary chamber from the start of its functioning¹⁹ (instead of having in this chamber only newly appointed judges selected by the new Council for the Judiciary).

¹⁶ For the motivation, see paragraph 25 of the fourth Recommendation.

¹⁷ For the motivation, see paragraph 24 of the fourth Recommendation.

¹⁸ For the motivation, see paragraph 23 and 24 of the fourth Recommendation.

¹⁹ Article 1(14) of the law of 12 April 2018 amending the law on the Supreme Court.

(iii) Assessment

As stated by the Commission in the General Affairs Council of 14 May 2018 and in the European Parliament on 13 June 2018, the amendment is not sufficient to remove the concerns. The new provision renders it in practice hardly possible for current Supreme Court judges to participate from the start as judges in the disciplinary chamber: whilst it is normally the First President of the Supreme Court who decides on transfers of Supreme Court judges between chambers, the new provisions require the consecutive consent of three Presidents of the Supreme Court, the National Council for the Judiciary and, finally, of the President of the Republic.

The other concerns have not been addressed either. The disciplinary regime has been identified as a serious concern with regard to the separation of powers not only in the reasoned proposal but also by the Venice Commission and the recent GRECO report published on 29 March 2018 which requests "to amend the disciplinary procedures applicable to Supreme Court judges in order to exclude any potential undue influence from the legislative and executive powers in these procedures".

5. Extraordinary appeal procedure

(i) Commission Recommendation of 20 December 2017

In its fourth Recommendation, the Commission recommends that the Polish authorities ensure that the law on the Supreme Court is amended so as to remove the extraordinary appeal procedure²⁰.

(ii) Update of the state of play

Amendments have been introduced by the law of 10 May 2018 amending the law on Ordinary Courts Organisation, law on the Supreme Court and certain other laws. This law has not removed the extraordinary appeal procedure.

According to the amendments, the extraordinary appeal procedure can be triggered if it is necessary in order to ensure compliance with the principle of a democratic state ruled by law and implementing the principles of social justice²¹. Moreover, if the verdict challenged by the extraordinary appeal has already led to irreversible legal effects, the Supreme Court can declare that the verdict was issued in breach of the law - but the judgement will not be repealed²². This also applies to cases which could ‘undermine international commitments of Poland’.

²⁰ For the motivation, see paragraphs 18-21 of the fourth Recommendation.

²¹ Article 2(3)(a) of the law of 10 May 2018 amending the law on the Supreme Court and certain other laws.

²² Article 2(3)(b) and Article 2(5)(b) of the law of 10 May 2018 amending the law on the Supreme Court and certain other laws.

(iii) Assessment

As stated by the Commission in the General Affairs Council of 14 May 2018 and in the European Parliament on 13 June 2018, the new laws are not sufficient to remove the concerns.

The changes do not eliminate the broadness of the criteria governing the extraordinary appeal: they remain almost the same; in particular they still refer to 'social justice' albeit in a different wording. The Venice Commission explicitly criticised such references²³. Also, the 20-year reach of the extraordinary appeal has not been eliminated, which means that the extraordinary appeal could result in the repeal of final judgments dating back to October 1997.

The new condition which was introduced aiming at avoiding that the extraordinary appeal will result in the repeal of judgements infringing international obligations lacks real impact: such repeal is nevertheless possible if justified by principles or rights established in the Polish constitution. This could even justify, for example, the repeal of final judgments by Polish courts applying EU law as interpreted by the case-law of the Court of Justice of the EU.

²³ Opinion CDL-AD(2017)031, paras 58, 63 and 130.

6. Court Presidents: situation of the court presidents affected by the transitional six-month dismissal and appointment regime.

(i) Commission Recommendation of 20 December 2017

In its fourth Recommendation, the Commission recommends that the law on Ordinary Courts Organisation is amended so as to remedy decisions on dismissal of court presidents already taken under the six-month transitional regime which ended on 12 February 2018²⁴.

(ii) Update of the state of play

In the period between 12 August 2017 and 12 February 2018, over 70 presidents (and 70 vice-presidents) of courts have been dismissed under the six-month transitional regime which gave the Minister of Justice the power to arbitrarily dismiss them without any specific criteria, without justification and without judicial review²⁵. The laws adopted in April and May 2018 do not address the above issues.

(iii) Assessment

As stated by the Commission in the General Affairs Council of 14 May 2018 and in the European Parliament on 13 June 2018, the new laws are not sufficient to remove the concerns. In particular, no remedy has been provided for judges who have been dismissed as court presidents.

²⁴ For the motivation, see paragraph 47(f) of the fourth Recommendation and paragraphs 151-162 of the Reasoned Proposal.

²⁵ Data provided by the Ministry of Justice as per statement BM-II-082-219/18 of 19 April 2018.

7. Constitutional Tribunal: publication of the 2016 judgments and the recomposition of the Tribunal, including the procedure to appoint a new president.

(i) Commission Recommendation of 20 December 2017

In its fourth Recommendation of 20 December 2017, the Commission recommends that Polish Authorities publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016²⁶.

The Commission also recommends that the Polish authorities 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 elected²⁷.

(ii) Update of the state of play

An amendment has been introduced by the law of 12 April 2018 amending the law concerning the Constitutional Tribunal²⁸. The amendment provides for publication of '*findings delivered in breach of law*'. On 5 June 2018 the Polish government published the three 2016 judgements with this disclaimer.

No steps have been taken in order to restore the independence and legitimacy of the Constitutional Tribunal.

²⁶ For the motivation, see paragraph 47(e) of the fourth Recommendation and paragraphs 97-101 of the Reasoned Proposal.

²⁷ For the motivation, see paragraph 47(d) of the fourth Recommendation and paragraphs 91-96 and 102-113 of the Reasoned Proposal.

²⁸ Articles 1 and 2 of the law of 12 April 2018 amending the law laying down implementing provisions for the law on the Constitutional Tribunal (Organisation and Proceedings) and for the law on the Status of Constitutional Tribunal Judges.

(iii) Assessment

As stated by the Commission in the General Affairs Council of 14 May 2018 and in the European Parliament on 13 June 2018, the new laws are not sufficient to remove the concerns.

The three 2016 judgements have not been published as a 'judgement' but as "*findings delivered in breach of law*".

The Polish Authorities still have not taken any steps to restore the independence and legitimacy of the Constitutional Tribunal. In fact, none of the recommended actions set out by the Commission have been implemented:

- (1) The three judges that were lawfully nominated in October 2015 by the previous legislature have still not been able to take up their function of judge in the Constitutional Tribunal. By contrast, the three judges nominated by the 8th term of the *Sejm* without a valid legal basis were admitted to take up their function by the acting President of the Tribunal;
- (2) Three important judgements of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016 have still not been published as such, without any additional qualifications about their legality;
- (3) After the end of the mandate of the former President of the Constitutional Tribunal, a new President has still not been lawfully appointed. The former President was not replaced by the Vice-President of the Tribunal but by an acting President and, subsequently, by the person appointed as President of the Tribunal on 21 December 2016. The appointment of the new President of the Constitutional Tribunal took place before an effective review of the law on the status of judges, the law on Organisation and Proceedings and the Implementing law could occur.

II. LIST OF TOPICS FOR THE HEARING

1. **Supreme Court:** retirement regime of current Supreme Court judges, including the First President, and regime for prolongation of judicial mandates.
 2. **National Council for the Judiciary:** election regime of the judges-members of the National Council, premature termination of the mandates of the former judges-members.
 3. **Ordinary Court Judges:** retirement regime of current Ordinary Court judges, regime for prolongation of judicial mandate and situation of Ordinary Court judges already affected by the new retirement regime.
 4. **Disciplinary regime,** including the new autonomous disciplinary chamber in the Supreme Court.
 5. **Extraordinary appeal procedure.**
 6. **Court Presidents:** situations of Court Presidents already affected by the dismissal and appointment regime.
 7. **Constitutional Tribunal:** publication of the 2016 judgments and the recomposition of the Tribunal, including the procedure to appoint a new president
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