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**COMMISSION OPINION**

**of 1.6.2016**

**regarding the Rule of Law in Poland**

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### 1) Introduction

1. This opinion sets out the concerns of the European Commission in regard of the rule of law in Poland and provides an opportunity for the Republic of Poland to respond to these concerns.
2. The European Union is founded on a common set of values enshrined in Article 2 of the Treaty on European Union, which include in particular 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.
3. For this reason the Commission, taking account of its responsibilities under the Treaties, adopted on 11 March 2014 a Communication "*A new EU Framework to Strengthen the Rule of Law*"<sup>1</sup> This Rule of Law Framework sets out how the Commission will react should 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.
4. The Commission considers after a careful assessment of the facts, that the following issues in Poland raise serious concerns in regard of these principles.

### Rule of Law Framework

5. The Rule of Law Framework provides guidance for a dialogue between the Commission and the Member State concerned to prevent the escalation of systemic threats to the rule of law.
6. The purpose of this dialogue is to enable the Commission to find a solution with the Member State concerned in order to prevent the emergence of a systemic threat to the rule of law that could develop into a "clear risk of a serious breach" which would potentially trigger the use of the 'Article 7 TEU Procedure'. 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.
7. 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 Venice Commission, provides a non-exhaustive list of these principles and hence defines the core meaning of the rule of law as a common value of the

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<sup>1</sup> COM(2014) 158 final, hereinafter "the Communication".

Union in accordance with Article 2 of the Treaty on European Union (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 law<sup>2</sup>. In addition to upholding those principles and values, State institutions also have the duty of loyal cooperation.

8. The Framework is to be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law<sup>3</sup>. The purpose is to address threats to the rule of law which are of a systemic nature<sup>4</sup>. The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened<sup>5</sup>. The Framework is to be activated in particular in situations when national "rule of law safeguards" do not seem capable of effectively addressing those threats.
9. The Rule of Law Framework has three stages:
  - *Commission assessment*: in this stage the Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law. If, on this evidence, the Commission believes that there is a systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending a "rule of law opinion", substantiating its concerns. The opinion could be the result of an exchange of correspondence and meetings with the relevant authorities and be followed by further exchanges.
  - *Commission Recommendation*: in a second stage, if the matter has not been satisfactorily resolved, the Commission can issue a "rule of law recommendation" addressed to the Member State. In this case, the Commission would recommend that the Member State solves the problems identified within a fixed time limit, and inform the Commission of the steps taken to that effect. The Commission will make public its recommendation.
  - *Follow-up to the Commission Recommendation*: in a third stage, the Commission will monitor the follow-up given by the Member State to the recommendation. If there is no satisfactory follow-up within the time limit set, the Commission can resort to the 'Article 7 Procedure'.

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

### Factual context

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<sup>2</sup> See COM(2014) 158 final, section 2, Annex I.

<sup>3</sup> See para 4.1 of the Communication.

<sup>4</sup> See para 4.1 of the Communication.

<sup>5</sup> See para 4.1 of the Communication.

10. In November 2015, the Commission became aware of an ongoing dispute in Poland concerning the composition of the Constitutional Tribunal, as well as the shortening of the mandates of its current President and Vice-President. The Constitutional Tribunal rendered two judgments on these matters, on 3 and 9 December 2015.
11. In addition, the Commission noted that the *Sejm* adopted on 22 December 2015 a law amending the law on the Constitutional Tribunal, which concerns the functioning of the Tribunal as well as the independence of its judges<sup>6</sup>.
12. In a letter of 23 December 2015 to the Polish Government<sup>7</sup>, the Commission asked to be informed about the constitutional situation in Poland, including the steps envisaged by the Polish authorities with respect to the above-mentioned two judgements of the Constitutional Tribunal. As regards the amendments contained in the Law of 22 December 2015 on the Constitutional Tribunal, First Vice President Timmermans stated he would expect that this law is not finally adopted or at least not put into force until all questions regarding the impact of this law on the independence and the functioning of the Constitutional Tribunal have been fully and properly assessed. The Commission also recommended the Polish authorities to work closely with the Council of Europe's Venice Commission<sup>8</sup>.
13. On 23 December 2015 the Polish Government asked for an opinion of the Venice Commission on the Law of 22 December 2015. However, the Polish Parliament did not await this opinion before taking further steps, and the Law was published in the Official Journal and entered into force on 28 December 2015.
14. On 30 December 2015 the Commission wrote to the Polish Government<sup>9</sup> to seek additional information about the proposed reforms to the governance of Poland's Public State Broadcasters. First Vice President Timmermans asked the Polish Government how relevant EU law and the need to promote media pluralism were taken into account in the preparation of the new "small media law".
15. On 31 December 2015, the Polish Senate adopted the "small media law" concerning the management and supervisory boards of the Polish public television broadcaster and public radio broadcaster. The new law modifies the rules for the appointment of the Management and Supervisory Boards of the public service broadcasters, putting them under the control of the Treasury Minister, rather than an independent body. The new law also provided for the immediate dismissal of the existing Supervisory and Management Boards.

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<sup>6</sup> Law of 22 December 2015 amending the Law of 25 June 2015 on the Constitutional Tribunal. The amending Law was published in the Official Journal on 28 December; item 2217.

<sup>7</sup> Letter of 23 December 2015 from First Vice President Timmermans to Minister of Foreign Affairs Mr Waszczykowski and Minister of Justice Mr Ziobro.

<sup>8</sup> European Commission for Democracy through Law (Venice Commission)

<sup>9</sup> Letter of 30 December 2015 from First Vice President Timmermans to Minister of Foreign Affairs Mr Waszczykowski and Minister of Justice Mr Ziobro.

16. On 7 January 2016, the Commission received a response from the Polish Government<sup>10</sup> on the letter on the media law denying any adverse impact on media pluralism. On 11 January, the Commission received a response from the Polish Government on the Constitutional Tribunal reform<sup>11</sup>. These responses did not remove existing concerns.
17. On 13 January 2016, the College of Commissioners held a first orientation debate in order to assess the situation in Poland. The Commission decided to examine the situation under the Rule of Law Framework and mandated First Vice President Timmermans to enter into a dialogue with the institutions of the Republic of Poland in order to clarify the issues at hand and identify possible solutions.
18. On the same day, First Vice-President Timmermans wrote to the Polish Government<sup>12</sup> informing the Government that the Commission is examining the situation under the Rule of Law Framework and wished to enter into a dialogue with the institutions of the Republic of Poland in order to clarify the issues at hand and identify possible solutions.
19. On 19 January 2016 the Commission wrote to the Polish Government<sup>13</sup> offering to contribute expertise and discuss matters related to the new media law.
20. On 19 January 2016 the Polish Government wrote to the Commission<sup>14</sup> setting out its views on the dispute concerning the appointment of judges, referring inter alia to a constitutional custom relating to the appointment of judges. Regarding the amendment to the Act on the Constitutional Tribunal this letter sets out its positive effects.
21. On 1 February 2016 the Commission wrote to the Polish Government<sup>15</sup> noting that the judgements of the Constitutional Tribunal on the appointment of judges have still not been implemented. The letter also underlines the need to further examine the amendment to the Act on the Constitutional Tribunal, in particular the "combined effect", requesting more detailed explanations. The letter also requests information about other laws which have been adopted recently, in particular the new Civil Service Act, the Act amending the law on the Police and certain other laws, as well as the Law on the Public Prosecution Service, and about legislative reforms which are being envisaged, notably further reforms of the media legislation.
22. On 29 February 2016 the Polish Government wrote to the Commission<sup>16</sup> providing further clarifications on the mandate of the President of the Constitutional Tribunal. The letter clarifies that the Tribunal's judgment of 9 December 2015 states that the interim provisions of the amending law that provided for ending the mandate of the President

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<sup>10</sup> letter of 7 January 2016 from Undersecretary of State Mr Stepkowski to First Vice President Timmermans

<sup>11</sup> letter of 11 January 2016 from Minister of Justice Mr Ziobro to First Vice President Timmermans

<sup>12</sup> Letter of 13 January 2016 from First Vice President Timmermans to Minister of Justice Mr Ziobro.

<sup>13</sup> Letter of 19 January 2016 from Commissioner Oettinger to Minister of Justice Mr Ziobro.

<sup>14</sup> Letter of 19 January 2016 from Minister of Justice Mr Ziobro to First Vice President Timmermans.

<sup>15</sup> Letter of 1 February 2016 from First Vice President Timmermans to Minister of Justice Mr Ziobro.

<sup>16</sup> Letter of 29 February 2016 from Minister of Foreign Affairs Mr Waszczykowski to First Vice President Timmermans.

were pronounced unconstitutional and lost their legal effect. As a result, the current President of the Tribunal will continue to exercise his mandate pursuant to the old legislative provisions until his mandate expires on 19 December 2016. The letter also states that the mandate of the next President will be 3 years long. The letter furthermore requests clarifications as to what the Commission means by insisting that the binding and final judgments of the Constitutional Tribunal have still not been implemented as well as clarifications why according to the Commission the resolutions electing three judges of the Constitutional Tribunal on 2 December 2015 run counter to the Tribunal's subsequent judgement.

23. On 3 March 2016 the Commission wrote to the Polish Government<sup>17</sup>, providing clarifications concerning the issue of the appointment of judges as requested by the Polish Government in the letter of 29 February 2016. Regarding the amendment to the Act on the Constitutional Tribunal the letter notes that according to a preliminary assessment certain amendments, both individually and taken together, make more difficult the conditions under which the Constitutional Tribunal may review the constitutionality of newly passed laws and requests more detailed explanations on this. The letter also asks for information about other laws which have been adopted recently and further legislative reforms which are being envisaged.
24. On 9 March 2016 the Constitutional Tribunal ruled that the Law of 22 December 2015 is unconstitutional. That judgment has so far not been published in the Official Journal.
25. On 11 March 2016 the Venice Commission adopted its opinion "*on amendments to the Act of 25 June 2015 on the Constitutional Tribunal*"<sup>18</sup>.
26. On 21 March 2016, Minister of Foreign Affairs of Poland Mr Waszczykowski wrote to First Vice President Timmermans inviting him to a meeting in Poland to assess the dialogue carried out so far between the Polish Government and the Commission and to determine how to continue it in an impartial, evidence-based and cooperative way.
27. On 31 March 2016 Secretary of State for European Affairs Mr Szymanski wrote to FVP Timmermans with recent information and legal assessments regarding the dispute around the Constitutional Tribunal in Poland. A note was included from Undersecretary of State Mr Stępkowski "*Polish Constitutional Tribunal and the current controversy around it*".
28. On 5 April 2016, meetings took place in Warsaw between First Vice-President Timmermans and Minister of Foreign Affairs Mr Waszczykowski, Minister of Justice Mr Ziobro, Deputy Prime Minister Mr Morawiecki, as well as with the President and the Vice-President of the Constitutional Tribunal, Mr Rzepliński and Mr Biernat.

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<sup>17</sup> Letter of 3 March 2016 from First Vice President Timmermans to Minister of Foreign Affairs Mr Waszczykowski.

<sup>18</sup> Opinion no. 833/2015, CDL-AD(2016)001.

29. Following these meetings, several meetings took place between the Polish Government, represented by the Ministry of Justice, and the Commission.
30. Following the judgment of 9 March 2016, the Constitutional Tribunal started again adjudicating cases. The Polish Government did not participate in these proceedings and the judgements rendered by the Constitutional Tribunal since 9 March 2016 have so far not been published by the Government in the Official Journal<sup>19</sup>.
31. On 6 April 2016 the President of the Constitutional Tribunal informed the public that he had received a letter from Minister of Justice Mr Ziobro, dated 5 April 2016, stating *inter alia* that the Tribunal is legally required to proceed in accordance with the provisions of the Law of 22 December 2015, that any attempts by the Tribunal to act outside the framework of the Constitution and the Law of 22 December 2015 will not be granted legitimacy by any form of participation therein from the Minister of Justice in his capacity as Prosecutor-General, and that the Prosecutor-General's role is to monitor the lawfulness of such attempts.
32. On 20 April 2016 a meeting took place between the Commission and representatives of the Network of Presidents of Supreme Judicial Courts of the EU and of the Conference of European Constitutional Courts to discuss about the situation in Poland. The President of the Network of Presidents, Chief Justice Denham, contributed in writing to this meeting.
33. On 26 April 2016, the General Assembly of the Supreme Court of Poland adopted a resolution attesting that the rulings of the Constitutional Tribunal are valid, even if the Polish Government refuses to publish them in the Official Journal.
34. On 28-29 April 2016, a delegation of the Venice Commission visited Warsaw to discuss the recent amendments to the Law on the Police and certain other laws<sup>20</sup>, in view of delivering an opinion on 10-11 June 2016.
35. An expert group was composed in the *Sejm* to help prepare a new law on the Constitutional Tribunal. On 29 April 2016 a group of members of the *Sejm* submitted to the *Sejm* a legislative proposal for a new Constitutional Tribunal Act with a view to replacing the current Act. The proposal contains several provisions which were already criticised by the Venice Commission in its opinion of 11 March 2016 and declared unconstitutional by the Tribunal in its ruling of 9 March 2016. This includes the requirement of a two-thirds majority for adopting decisions for "abstract" constitutional review of newly adopted laws.
36. On 5 May 2016 the President of the Constitutional Tribunal Mr Rzepliński informed the public that he had received a letter from the Minister of Finance of Poland Mr Szałamacha, dated 2 May 2016, calling for restraint in making public statements on the current

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<sup>19</sup> Since 9 March 2016 nine judgments have been rendered by the Constitutional Tribunal which have not been published.

<sup>20</sup> Law of 15 January 2016 amending the Law on Police and other laws, published in Official Journal on 4 February 2016, item 147.

situation around the Tribunal until 13 May 2016 as on that date a credit rating agency would take a decision on its rating for Poland.

37. On 24 May 2016, First Vice-President Timmermans had meetings in Warsaw with Prime Minister Ms Szydło, with the President and the Vice President of the Polish Constitutional Tribunal Mr Rzepliński and Mr Biernat, with the Ombudsman Mr Bodnar, with the Mayor of the City of Warsaw Ms Gronkiewicz-Waltz and with members of the opposition parties in the *Sejm*. On 26 May 2016 First Vice-President Timmermans had a meeting in Brussels with Deputy Prime Minister Mr Morawiecki. Subsequently, further exchanges and meetings took place between the Commission and the Polish government.

38. However, despite the detailed and constructive nature of the exchanges between the Commission and the Polish Government, they were not able to resolve the concerns of the Commission.

## **2) Scope of the opinion**

39. The present opinion sets out the current concerns of the Commission in regard of the rule of law in Poland concerning the following issues:

- the appointment of judges of the Constitutional Tribunal and the implementation of the judgments of the Constitutional Tribunal of 3 and 9 December 2015 relating to these matters<sup>21</sup>;
- the Law of 22 December 2015 amending the Law on the Constitutional Tribunal, the judgment of the Constitutional Tribunal of 9 March 2016 relating to this law, as well as the respect of the judgments rendered by the Constitutional Tribunal since 9 March 2016;
- the effectiveness of Constitutional review of new legislation, in particular the new media law, and certain other laws which have been adopted and enacted in 2016.

## **3) Appointment of judges of the Constitutional Tribunal**

### ***I. The Facts***

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

41. On 19 November 2015, the new legislature, through an accelerated procedure, amended the Law on the Constitutional Tribunal, introducing the possibility to annul the judicial nominations made by the previous legislature and to nominate five new judges. The amendment also shortened the terms of office of the President and Vice-President of the Tribunal from nine to three years, with the current terms coming to an automatic end

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<sup>21</sup> The Commission considers the issue of the shortening of the mandate of the President and the Vice-President of the Constitutional Tribunal as resolved in view of the judgment of the Tribunal of 9 December 2015 and the clarifications received from the Polish Government.

within three months of the amendment's adoption. On 25 November 2015 the new legislature passed a motion annulling the five nominations by the previous legislature and on 2 December nominated five new judges.

42. The Constitutional Tribunal was seized concerning the decisions of both the previous legislature and the incoming legislature. The Tribunal delivered two judgements, on 3 and 9 December 2015.
43. In its judgment of 3 December<sup>22</sup>, the Constitutional Tribunal ruled *inter alia* that the previous legislature of the *Sejm* was entitled to nominate three judges replacing the judges whose terms expired on 6 November 2015. At the same time, the Tribunal clarified that the *Sejm* had not been entitled to elect the judges replacing those whose term expired in December. The judgment also specifically referred to the obligation for the President of the Republic to immediately take the oath from a judge elected by the *Sejm*.
44. On 9 December<sup>23</sup>, the Constitutional Tribunal *inter alia* invalidated the legal basis for the nominations by the new legislature of the *Sejm* of the three judges for the vacancies opened up on 6 November 2015 for which the previous legislature had already lawfully nominated judges. In this judgment the Constitutional Tribunal also considered that a reduction of the duration of the mandate of the President and Vice-President from nine to three years was constitutional only in so far as the reduction applied to future mandates and as long as a renewal of the mandate would not be possible.
45. Despite these judgments, the three judges that have been nominated by the previous legislature have not taken up their function of judge in the Constitutional Tribunal and their oath has not yet been taken by the President of the Republic. Conversely, the oath of the three judges nominated by the new legislature without a valid legal basis has been taken by the President of the Republic.
46. The two judges elected by the new legislature replacing the two judges outgoing in December 2015, Ms Przyłębska and Mr Pszczołkowski, have in the meantime taken up their function of judge in the Constitutional Tribunal.
47. On 28 April 2016 the President of the Republic took the oath of Mr Jędrzejewski who had been nominated by the new legislature earlier that month to replace Mr Granat whose term as judge in the Constitutional Tribunal had ended.

## ***II. Assessment***

### **Appointment of judges of the Constitutional Tribunal**

48. The Commission considers that the binding and final judgments of the Constitutional Tribunal of 3 and 9 December 2015 as far as the appointment of judges is concerned have still not been implemented. These judgments require that the State institutions of Poland cooperate loyally in order to ensure, in accordance with the rule of law, that the three

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<sup>22</sup> K 34/15.

<sup>23</sup> K 35/15.

judges that have been nominated by the previous legislature of the *Sejm* 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 this function. The fact that these judgments have not been implemented raises serious concerns in regard of the rule of law, as compliance with final judgments is an essential requirement inherent in the rule of law.

49. In the exchange of letters the Polish Government referred to the existence of a constitutional custom in Poland regarding the nomination of judges which would justify the position taken by the new legislature of the *Sejm*. The Commission notes however, as did the Venice Commission<sup>24</sup>, that it is for the Constitutional Tribunal to interpret and apply the national constitutional law and custom, and that the Constitutional Tribunal did not refer to such a custom in its judgments. The judgment of 3 December which has validated the legal basis for the nominations of the three judges by the previous *Sejm* for the posts which became vacant on 6 November cannot be overturned by invoking a supposed constitutional custom which the Tribunal did not recognize.
50. Also, limiting the impact of these judgments to a mere obligation for the Government to publish them, as put forward by the Polish authorities, would deny any legal and operational effect of the judgments of 3 and 9 December. In particular, it denies the obligation of the President of the Republic to take the oath of the judges in question, which has been confirmed by the Constitutional Tribunal.
51. Finally, the Commission notes that also the Venice Commission considers that a solution to the current conflict over the composition of the Constitutional Tribunal "*must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal*" and "*therefore calls on all State organs and notably the Sejm to fully respect and implement the judgments*"<sup>25</sup>.

## Conclusion

52. In view of the above the Commission considers that the Polish authorities should respect and fully implement the judgments of the Constitutional Tribunal of 3 and 9 December 2015. These judgments require that the State institutions cooperate loyally in order to ensure, in accordance with the rule of law, that the three judges that have been nominated 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.

## **4) Amendment of 22 December 2015 to the Law on the Constitutional Tribunal**

### ***I. The Facts***

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<sup>24</sup> Opinion, para 112.

<sup>25</sup> Opinion, para 136.

53. On 22 December 2015, following an accelerated procedure, the *Sejm* amended the Law on the Constitutional Tribunal<sup>26</sup>. The amendments *inter alia* increased the attendance quorum of judges for hearing cases<sup>27</sup>, raised the majorities needed in the Constitutional Tribunal to hand down judgments in full configuration<sup>28</sup>, required the handling of cases in chronological order<sup>29</sup> and provided a minimum delay for hearings<sup>30</sup>. Certain amendments<sup>31</sup> increased the involvement of other institutions of the State in disciplinary proceedings concerning judges of the Tribunal. These amendments are set out in more detail below.

#### Attendance quorum

54. The amended Article 44(3) states that "*Adjudicating in full bench shall require the participation of at least 13 judges of the Court*".<sup>32</sup> According to the amended Article 44(1) under 1) the Constitutional Tribunal shall rule sitting in its full configuration, unless otherwise specified by law. This applies in particular to what are described as "abstract cases" of constitutional review of newly adopted laws. The amended Article 44(1) under 2) and 3) provides for exceptions, notably for individual complaints or cases submitted by ordinary courts. The former version of the Law required, for a decision by the full bench, the presence of at least *nine* judges (Article 44 (3), item 3 of the Law before the amendment).

#### Voting majority

55. According to the amended Article 99(1), judgments of the Constitutional Tribunal sitting as a full bench (for "abstract cases") require a majority of two-thirds of the judges sitting. With a view to the new (higher) attendance quorum (see above) this means that a judgment must be approved by at least nine judges if the Constitutional Tribunal adjudicates as a full bench<sup>33</sup>. Only if the Tribunal adjudicates in a panel of seven or three judges (individual complaints and preliminary requests from ordinary courts), a simple majority of votes is required. The former version of the Law required, for a decision by the full bench, a simple majority of votes (Article 99(1) of the Law before the amendment).

#### Handling of cases in chronological order

56. According to amended Article 80(2)<sup>34</sup>, the dates for hearings or proceedings in camera, where applications in abstract constitutional review proceedings are considered, "*shall be established by order in which the cases are submitted to the Court*". There are no exceptions foreseen to this rule and according to the amendment this rule applies to all

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<sup>26</sup> Law of 25 June 2015 on the Constitutional Tribunal, published in Official Journal on 30 July 2015, item 1064, as amended. The Law of 22 December 2015 was published in the Official Journal on 28 December; item 2217.

<sup>27</sup> See Article 1(9) new, replacing Article 44(1-3).

<sup>28</sup> See Article 1(14) new, replacing Article 99(1).

<sup>29</sup> See Article 1(10) new, inserting a new Article 80(2).

<sup>30</sup> See Article 1(12) new, replacing Article 87(2).

<sup>31</sup> See Article 1(5) new, inserting a new Article 28a and Article 1(7) new, inserting a new Article 31a.

<sup>32</sup> This new attendance quorum also applies for resolutions of the General Assembly, unless otherwise provided in the Law, see Article 1(3) new, amending Article 10(1).

<sup>33</sup> According to the amendment, the same rules - attendance quorum and a two-third majority of votes - also apply to the General Assembly of the Court.

<sup>34</sup> See Article 1(10) new, inserting a new Article 80(2).

pending cases for which no date for a hearing has been set yet<sup>35</sup>. The former version of the Law did not include such rule.

### Minimum delay for hearings

57. According to amended Article 87(2)<sup>36</sup>, "*[t]he hearing may not take place earlier than after three months from the day the notification on the date of the hearing has been delivered to the participants of the proceedings, and for cases adjudicated in full bench – after six months*". The former version of the Law stated that the hearing cannot be held earlier than after 14 days from the delivery date of the notification of its date to participants of the proceedings.

### Disciplinary proceedings

58. According to amended Article 28a<sup>37</sup>, "*[d]isciplinary proceedings may also be instituted further to an application from the President of the Republic of Poland or the Minister for Justice no later than three weeks after the date of receipt of the application, unless the President of the Court decides that the application is unfounded*." Furthermore, according to the new Article 31a(1) of the Law<sup>38</sup> "*[i]n particularly gross cases, the General Assembly shall apply to the Sejm to depose the judge of the Court*." This action of the General Assembly could be initiated by an application by the President of the Republic or the Minister of Justice pursuant to Article 31a(2) new, although the Constitutional Tribunal remains free to decide. The final decision will be taken by the *Sejm*. According to the former version of the Law the Executive branch was not entitled to institute disciplinary proceedings and the *Sejm* was not granted the power to depose a judge of the Court. The Constitutional Tribunal itself had the power to depose of a judge of the Tribunal.

### Judgment of 9 March 2016 of the Constitutional Tribunal

59. In its judgment of 9 March 2016, the Constitutional Tribunal declared unconstitutional the Law of 22 December 2015 in its entirety as well as specific provisions thereof, in particular those referred to above. So far the Polish authorities have failed to publish the judgment in the Official Journal. The Polish Government contests the legality of the judgment, as the Constitutional Tribunal did not apply the procedure foreseen by the Law of 22 December 2015. The same position is taken by the Government towards the judgments rendered by the Tribunal after 9 March 2016.

## ***II. Assessment***

60. As set out in more detail below, the Commission takes the view that the effect of the amendments concerning the attendance quorum, the voting majority, the handling of cases in chronological order and the minimum delay for hearings, in particular their combined effect, undermine the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution.

### Attendance quorum

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<sup>35</sup> See Article 2 new.

<sup>36</sup> See Article 1(12) new.

<sup>37</sup> See Article 1(5) new.

<sup>38</sup> See Article 1(7) new.

61. The Commission considers that the attendance quorum of 13 out of 15 Judges for the full configuration of the Constitutional Tribunal (which deals with the "abstract" constitutional review of newly adopted laws) represents a serious constraint on the decision-making process of the Constitutional Tribunal, with the risk of blocking it. The Commission notes, as confirmed by the Venice Commission, that an attendance quorum of 13 out of 15 judges is unusually high compared to requirements in other Member States. It is indeed entirely imaginable that for various reasons, such an attendance quorum might on occasion not be reached, which would then leave the Tribunal at least temporarily unable to adjudicate. In fact, such a situation would be present in the current circumstances, as the Tribunal has only 12 judges at this stage.
62. The impact of this requirement on the functioning of the Constitutional Tribunal must be assessed within the context of other provisions, notably by taking into account its combination effect with other requirements as amended.

#### Voting majority

63. In addition to the increased attendance quorum, a two-third majority for adopting decisions (for "abstract" constitutional review of newly adopted laws) significantly aggravates the constraints on the decision-making process of the Constitutional Tribunal. The Commission notes, as also confirmed by the Venice Commission, that in the vast majority of European legal systems, only a simple voting majority is required. In any event, the Constitutional Tribunal found that the Polish Constitution prescribed voting by simple majority, and that the requirement of a qualified majority was thus unconstitutional.

#### Handling of cases in chronological order

64. The "sequence rule" according to which the Constitutional Tribunal must hear cases in the sequence in which they have been registered negatively affects the capacity to render rapidly decisions on the constitutionality of new laws, in particular in view of the current number of pending cases. The impossibility to take into account the nature of a case (in particular when involving fundamental rights issues), its importance and the context in which it is presented, can prevent the Constitutional Tribunal from meeting the requirements for a reasonable length of proceedings as enshrined in Article 6 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights. As also noted by the Venice Commission, the sequencing rule may also discourage the putting of preliminary ruling questions to the Court of Justice, particularly if a hearing is required after the preliminary ruling has been received.

#### Minimum delay for hearings

65. Finally, this issue is to be seen in combination with the requirement concerning the scheduling of cases, in particular the minimum delay for hearings (participants of the proceedings must be notified of a hearing before the Constitutional Tribunal at least three - and in important cases six - months before the date of the hearing) risks slowing down proceedings unnecessarily. As set out above, the absence of a general provision that would allow the Constitutional Tribunal to reduce these deadlines in urgent cases is incompatible with the requirements for a reasonable length of proceedings under Article 6 of the

European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights.

### Overall findings on procedural issues

66. As an overall conclusion the Commission considers that the combined impact of these provisions on the effectiveness of the constitutional review is a matter of concern in regard of the rule of law, as it prevents the Constitutional Tribunal from fully ensuring an effective constitutional review and fulfilling its function as a safeguard mechanism established at national level to secure the rule of law. This conclusion is shared by the Venice Commission.

### Disciplinary proceedings

67. The Commission also notes with concern the fact that certain amendments increase the involvement of other institutions of the State in disciplinary proceedings concerning judges of the Tribunal. In particular, the President of the Republic or the Minister of Justice have been given the power to initiate disciplinary proceedings against a Constitutional Tribunal judge<sup>39</sup> and, in particularly serious cases, it is for the *Sejm* to take the final decision on the dismissal of a judge following a request to that effect by the Constitutional Tribunal<sup>40</sup>.

68. The Commission considers that the fact that a political body decides on (and hence may refuse to impose) a disciplinary sanction as proposed by the Constitutional Tribunal may pose a problem regarding independence of the judiciary, as the Parliament (as a political body) is likely to also decide on the basis of political considerations. Similarly it is not clear why political institutions such as the President of the Republic and the Minister of Justice should have the power to initiate disciplinary proceedings. Even if such proceedings require approval by the Tribunal or its President, already the fact that they may be initiated by political institutions may have an impact on the independence of the Tribunal. This raises concerns as regards the separation of powers and the independence of the Constitutional Tribunal as the proposal of the Tribunal to dismiss a judge could be rejected by the *Sejm*.

### Lack of implementation of the judgment of 9 March 2016

69. The Constitutional Tribunal ruled in its judgment of 9 March that the amendments of the Law of 22 December 2015 referred to in this section are unconstitutional.

70. The Commission notes that the Polish Government contests the legality of the judgment, as the Constitutional Tribunal did not apply the procedure foreseen by the Law of 22 December 2015. For this reason the Polish authorities have not published the judgment in the Official Journal.

71. The Commission considers that the Constitutional Tribunal was correct not to apply the procedure foreseen by the Law of 22 December 2015. In that respect the Commission agrees with the Venice Commission, which states on this point that "*a simple legislative*

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<sup>39</sup> See Article 1(5) new, inserting a new Article 28a.

<sup>40</sup> See Article 1(7) new, inserting a new Article 31a.

*act, which threatens to disable constitutional control, must itself be evaluated for constitutionality before it can be applied by the Court. [...] The very idea of the supremacy of the Constitution implies that such a law, which allegedly endangers constitutional justice, must be controlled – and if need be, annulled – by the Constitutional Tribunal before it enters into force”.*<sup>41</sup> The Commission furthermore underlines that as the Constitutional Tribunal is currently composed of 12 judges only, it could otherwise not have reviewed the constitutionality of the amendments of 22 December 2015 as requested by the First President of the Supreme Court, the Ombudsman and the National Council of the Judiciary. This would have been contrary to the Polish Constitution which has tasked the Constitutional Tribunal with the role of ensuring constitutional review. Similarly, the Tribunal could not have decided on the constitutionality of the qualified majority requirement while voting in accordance with the very requirement the constitutionality of which it was examining.

72. The refusal of the Government to publish the judgment of the Constitutional Tribunal of 9 March raises serious concerns in regard of the rule of law, as compliance with final judgments is an essential requirement inherent in the rule of law. In particular, where the publication of a judgment is a prerequisite for its taking effect and where such publication is incumbent on a State authority other than the court which has rendered the judgment, an ex post control by that State authority regarding the legality of the judgment is incompatible with the rule of law. The refusal to publish the judgment denies the legal and operational effect of a binding and final judgment, and breaches the principles of legality and separation of powers.
73. The refusal to publish the judgment of 9 March creates a level of uncertainty and controversy which will adversely affect not only the present judgment, but all future judgments of the Tribunal. Since these judgments will, following the judgment of 9 March, be rendered in accordance with the rules applicable before 22 December 2015, the risk of a continuous controversy about every future judgment will undermine the proper functioning of constitutional justice in Poland. This risk has already materialized as the Tribunal has to date rendered nine rulings since its ruling of 9 March 2016, and none of these rulings have been published in the Official Journal.

## Conclusion

74. In view of the above, the Commission takes the view that the effect of the amendments, in particular their combined effect, undermines the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution. The Commission also notes with concern the fact that certain amendments increase the involvement of other institutions of the State in disciplinary proceedings concerning judges of the Tribunal, raising concerns as regards the separation of powers and the independence and integrity of the Constitutional Tribunal.
75. The Commission notes that the amendments have been declared unconstitutional by the Constitutional Tribunal in its judgment of 9 March 2016. However, the fact that the Polish Government has so far refused to publish the judgment of the Constitutional Tribunal in

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<sup>41</sup> Opinion, para 41.

the Official Journal, creates uncertainty about the legal effect of the judgment and hence on the legal basis on which the Tribunal must act. This uncertainty undermines the effectiveness of constitutional review and raises serious concerns in regard of the rule of law.

76. This legal uncertainty has already manifested itself in the fact that the further judgments rendered by the Constitutional Tribunal have not been published, and are not recognised by the Government. This situation of non-recognition of judgments of the Constitutional Tribunal is liable to create profound legal uncertainty in the Polish legal system across a wide range of areas.

77. Refusing to publish and to act upon the judgment of the Constitutional Tribunal of 9 March 2016, as well as all the judgments of the Tribunal rendered subsequently, falls short of the required respect for the Tribunal as the guarantor of the Constitution, and is not compatible with the rule of law.

## **5) Effectiveness of Constitutional review of new legislation - Media law and other laws**

### ***I. The Facts***

78. A number of particularly sensitive new legislative acts have been adopted by the *Sejm*, often through accelerated legislative procedures, such as, in particular, a media law<sup>42</sup>, a new Civil Service Act<sup>43</sup>, a law amending the law on the Police and certain other laws<sup>44</sup> and laws on the Public Prosecution Service<sup>45</sup>, and a new law on the Ombudsman and amending certain other laws<sup>46</sup>. The Commission has asked the Polish Government about the state of play and content of these legislative reforms in its letters of 1 February 2016 and 3 March 2016, but so far this information has not been provided. Furthermore, a number of other sensitive draft legislative acts have been submitted to the *Sejm*, such as drafts for a new media law<sup>47</sup> and a new anti-terrorism law<sup>48</sup>.

### ***II. Assessment***

79. The Commission considers that as long as the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review, there will be no effective scrutiny of compliance with the Constitution, including fundamental rights, of legislative acts such as those referred to above.

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<sup>42</sup> Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016, item 25.

<sup>43</sup> 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.

<sup>44</sup> Law of 15 January 2016 amending the Law on Police and other laws, published in Official Journal on 4 February 2016, item 147.

<sup>45</sup> 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.

<sup>46</sup> 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.

<sup>47</sup> Draft legislation submitted to the *Sejm* on 25 April 2016.

<sup>48</sup> Draft legislation submitted to the *Sejm* on 11 May 2016. The Commission is furthermore aware that a new law amending the Law on the National Judicial Council and certain other laws has been submitted on 5 May 2016 by the Minister of Justice to the National Legislative Centre.

80. The Commission notes for example that new legislation (such as the media law<sup>49</sup>) raises concerns relating to freedom and pluralism of the media. More specifically, the new media law modifies the rules for the appointment of the Management and Supervisory Boards of the public service broadcasters, putting them under the control of the Treasury Minister, rather than an independent body. The new law also provides for the immediate dismissal of the existing Supervisory and Management Boards. In that respect the Commission questions in particular the possibilities of judicial redress for the persons affected by the law.
81. Legislation such as the new Civil Service Act<sup>50</sup> is equally important from the perspective of the rule of law and fundamental rights. In that respect the Commission has asked to Polish Government about the possibilities of judicial redress for the persons affected by the law in its letters of 1 February and 3 March 2016<sup>51</sup>. The Polish Government has so far not replied to the Commission on this point.
82. Also the Law on the Public Prosecution Service<sup>52</sup> is important from the perspective of the rule of law and fundamental rights, and requires a fully effective constitutional review, including in individual cases.
83. The law amending the law on the Police and certain other laws<sup>53</sup> may also raise questions relating to its compliance with fundamental rights, including privacy and data protection. On 28-29 April 2016, a delegation of the Venice Commission visited Warsaw to discuss the amendments to the Law on the Police and certain other laws, with a view to delivering an opinion on 10-11 June 2016.

## Conclusion

84. The Commission considers that as long as the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review, there will be no effective scrutiny of compliance with fundamental rights of legislative acts. This raises serious concerns in regard of the rule of law, notably as a number of particularly sensitive new legislative acts have been adopted recently by the *Sejm* for which constitutional review should be available.

## **6) Conclusion**

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<sup>49</sup>Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016, item 25.

<sup>50</sup> 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.

<sup>51</sup> Letter of 1 February 2016 from First Vice President Timmermans to Minister of Justice Mr Ziobro; Letter of 3 March 2016 from First Vice President Timmermans to Minister of Foreign Affairs Mr Waszczykowski.

<sup>52</sup> 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.

<sup>53</sup> Law of 15 January 2016 amending the Law on Police and other laws, published in Official Journal on 4 February 2016, item 147.

85. For the reasons set out above the Commission is of the opinion that there is a situation of a systemic threat to the rule of law in Poland. The fact that the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review adversely affects its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law established in Poland. Where a constitutional justice system has been established, its effectiveness is a key component of the rule of law.
86. Respect for the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 of the Treaty on European Union. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law, and for establishing mutual trust of all EU citizens and national authorities in the legal systems of all other Member States.
87. The Commission is of the opinion that this threat to the rule of law must be addressed as a matter of urgency. The Polish authorities should respect and fully implement the judgments of the Constitutional Tribunal of 3 and 9 December 2015 concerning the appointment of judges. This means in particular that the President should take the oath of the three judges that have been nominated by the previous legislature.
88. Moreover, it is necessary that the Polish authorities respect and publish the judgment of the Constitutional Tribunal of 9 March 2016 concerning the rules on the functioning of the Constitutional Tribunal. They should also publish and comply with all judgments that have been rendered by the Constitutional Tribunal since 9 March or will be rendered in the future.
89. More generally, 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. This includes that all Polish authorities refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal.
90. The Commission invites the Polish Government to submit its observations on the foregoing within two weeks of receipt of this opinion. On the basis of these observations, the Commission stands ready to pursue the constructive dialogue with the Polish government with a view to finding solutions to the concerns set out in this opinion. If the concerns have not been satisfactorily resolved within a reasonable time, the Commission may issue a recommendation.

Done at Brussels, 1.6.2016

*For the Commission*  
*Frans TIMMERMANS*  
*Member of the Commission*