

# Commission action on the Rule of Law in Poland: Questions & Answers

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## **What is the legal basis for the Commission's actions to defend the Rule of Law in Member States?**

The rule of law is one of the fundamental values upon which the European Union is founded. 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 fundamental values of the Union.

On 11 March 2014, the European Commission adopted [a new Framework for addressing systemic threats to the Rule of Law](#) in any of the EU's 28 Member States. The Framework establishes a tool allowing the Commission to enter into a dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law.

The purpose of the Framework 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 Procedure'.

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

The Procedure foreseen under Article 7 of the Treaty on European Union (TEU) aims at ensuring that all EU Member States respect the common values of the EU, including the Rule of Law. It foresees two legal possibilities in such a situation: a preventive mechanism in case of a "clear risk of a serious breach of the [Union's] values" (Article 7(1) TEU) and a sanctioning mechanism in the case of "the existence of a serious and persistent breach" of the Union's value, including the Rule of Law (Article 7(2) and Article 7(3) TEU). Article 7 TEU has until today not been used.

## **Why did the Commission launch a Rule of Law dialogue on 13 January 2016 on the situation in Poland?**

Events in Poland, in particular the political and legal dispute concerning the composition of the Constitutional Tribunal, and a new law relating to the functioning of the Constitutional Tribunal, gave rise to first concerns regarding the respect of the rule of law.

Following a debate in the College of Commissioners on 13 January 2016 about the developments in Poland, the Commission launched a dialogue and requested

information from the Polish authorities on the situation.

### **What has happened in the two years since the Commission launched the Rule of Law dialogue with Poland?**

A comprehensive explanation of the developments of the past two years, and the Commission's attempts to engage in constructive dialogue with the Polish authorities can be found in the [Reasoned Proposal](#) for a Council Decision adopted today (LINK). The Commission has made an extensive use of the possibilities provided by the Rule of Law Framework for a constructive dialogue with the Polish authorities. Throughout this process the Commission has always substantiated its concerns in an objective and thorough manner. The Commission has issued a Rule of Law Opinion and three Rule of Law Recommendations. It has exchanged more than 25 letters with the Polish authorities on this matter. A number of meetings and contacts between the Commission and the Polish authorities also took place, both in Warsaw and in Brussels, and the Commission has always made clear that it stood ready to pursue a constructive dialogue and has repeatedly invited the Polish authorities for further meetings to that end. Key steps include:

#### **2016**

- On 13 January 2016, the Commission **launched a dialogue** with the Polish authorities in order to seek solutions to its concerns regarding the Constitutional Tribunal.
- Between February 2016 and July 2016 the Commission and the Polish Government exchanged a number of letters and met on several occasions.
- On 13 April 2016, the European Parliament voted for a Resolution urging the Polish Government to respect, publish and fully implement the judgments of the Constitutional Tribunal.
- On 1 June 2016, in the absence of solutions from the Polish authorities, the Commission formalised its concerns by sending a **Rule of Law Opinion** to the Polish Government.
- On 27 July 2016, after further exchanges were unable to resolve the Commission's concerns, the Commission adopted a **Rule of Law Recommendation**, finding that there was a systemic threat to the rule of law in Poland. The Commission invited the Polish authorities to address its concerns within three months, but the Polish Government informed the Commission that it disagreed on all the points raised.
- By 21 December 2016, important issues remained unresolved, and the Commission adopted a **second Rule of Law Recommendation**, concluding that there continued to be a systemic threat to the rule of law in Poland. The Polish authorities again disagreed with the Commission's assessment.

#### **2017**

- On 20 January 2017, the Polish Government announced a comprehensive reform of the judiciary in Poland.
- On 16 May 2017, the Commission informed the Council on the situation in Poland, and there was broad support among Member States for the Commission's role and efforts to address the issue. Member States called upon Poland to resume the dialogue with the Commission.

- On 13 July 2017, the Commission wrote to the Polish authorities expressing its concerns about the pending legislative proposals on the reform of the judiciary, underlining the importance of refraining from adopting the proposals as they were drafted at that time, and calling for a meaningful dialogue. The Commission explicitly invited the Polish Foreign Minister and Polish Justice Minister to meet at their earliest convenience. These invitations were ignored.
- By 26 July 2017, the Polish Parliament had adopted **four judicial reform laws**; two of the laws had been signed into force by the President, and two of the laws were vetoed by the President and subject to further legislative discussions. The Commission adopted a **third Rule of Law Recommendation**, reiterating its existing concerns about the Constitutional Tribunal and setting out in addition its grave concerns about the judicial reforms. The Commission's Recommendation set out a list of proposed remedies, and urged the Polish authorities in particular not to take any measure to dismiss or force the retirement of Supreme Court judges.
- On 25 September the Commission again informed the Council of the situation in Poland, and there was again broad agreement on the need for Poland to engage in a dialogue with the Commission.
- On 26 September 2017, the President of the Republic transmitted to the Sejm two new draft laws on the Supreme Court and on the National Council for the Judiciary. On 15 November 2017, the European Parliament adopted a Resolution expressing support for the Recommendations issued by the Commission, and considering that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU.
- On 8 December 2017, the two new draft laws proposed by the President of the Republic were adopted by the Sejm, the lower house of the Polish Parliament, after further legislative work. On the same day, the Venice Commission of the Council of Europe adopted two opinions on the judicial reforms in Poland, concluding that they enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to judicial independence.
- On 15 December 2017, the two laws were approved by the Polish Senate, the upper house of the Polish parliament.

In summary, within a period of two years more than 13 consecutive laws have been adopted affecting the entire structure of the justice system in Poland; the Constitutional Tribunal, the Supreme Court, the ordinary courts, the national Council for the Judiciary, the prosecution service and the National School of Judiciary. The common pattern of all these legislative changes is that the executive or legislative powers have been systematically enabled to interfere significantly with the composition, powers, administration and functioning of these bodies.

**What are the main issues that the Commission is concerned about?**

The **independence and legitimacy of the Constitutional Tribunal** in Poland have been seriously undermined and it is no longer able to provide an effective

constitutional review, in light of a number of developments over the past two years. In particular, these developments have led to a complete recomposition of the Tribunal outside the normal constitutional process for the appointment of judges. Three judges that were lawfully nominated to the Tribunal have not been able to take office, and three judges with no legal mandate are sitting on the Tribunal. In addition, the President of the Tribunal was unlawfully appointed, and certain judgments of the Tribunal have not been published by the Government.

As a consequence, the **constitutionality of national legislation can no longer be guaranteed**. There are a number of sensitive laws which have been adopted, the most recent being a new electoral law, for which no independent constitutional review is possible. Laws on the media, on public demonstrations, on public services, on NGOs are other recent examples which deserve an independent constitutional review

As a consequence of further judicial reforms, **almost 40% of the current Supreme Court judges will be subject to forced retirement**. The President of the Republic will have the discretionary power to prolong the mandate of Supreme Court judges, and all new Supreme Court judges will be appointed by the President on the recommendation of the newly composed National Council for the Judiciary, which will be largely dominated by political appointees. In other words **the independence of the highest Court in Poland is undermined**. Given the wide scope of competences of the Supreme Court, this could impact on a wide range of areas directly concerning the life of Polish and European citizens, such as social security rights or the validation of election results. One concrete example is the fine recently imposed by the Polish media regulator on a commercial broadcaster for its broadcasting of protests against the Government. Such a decision should normally be reviewed by independent courts, including the Supreme Court.

The ordinary courts are also directly affected, as a number of **judges are forced to retire following a lowering of the retirement age of judges**. These mandates can be prolonged at the discretion of the Minister of Justice. The **Minister of Justice also has the discretionary power to appoint and dismiss all presidents of courts without concrete criteria**, no obligation to state reasons and no judicial review. According to available information until now, **24 court presidents have already been dismissed** and 32 have been appointed under this new discretionary regime.

There has been a total reset of the National Council for the Judiciary, which is the institution tasked by the Constitution with safeguarding judicial independence. The mandate of the current judges-members of the Council will be prematurely terminated and new judges-members will be reappointed by the Polish Parliament, instead of by other judges as required by European standards. This will have an impact on the careers of judges, in terms of their appointments, promotions, mobility and disciplinary proceeding.

**What do the reforms of the Polish judiciary mean for the rest of the European Union?**

The situation in Poland is a matter of common concern for the EU. Respect for

the rule of law is a prerequisite for the protection of all the values under Article 2 of the Treaty on European Union, as well as for the effective application of EU law. This manifests itself in areas as diverse as the functioning of the Single Market, the creation of an investment friendly environment and the mutual trust which is the corner stone of cooperation between Member States in the Justice and Home affairs areas. For example, the judicial cooperation between Member States in criminal or civil cases could be at stake, in cases such as the mutual recognition of a European Arrest Warrant or a child custody decision.

### **How does the Commission propose to resolve the systemic threat to the Rule of Law in Poland?**

The Commission's **4<sup>th</sup> Rule of Law Recommendation**, adopted today, sets out clearly the measures which the Polish authorities should take to address its concerns. The Commission is willing to reconsider its **Reasoned Proposal to the Council** if Poland takes the specified measures.

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 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-Presidents are lawfully elected and by ensuring that all its legitimately delivered judgements are published and fully implemented;
- Refrain from actions and public statements which could further undermine the legitimacy of the judiciary.

### **What is the Rule of Law Framework?**

Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission can launch a 'pre-Article 7 Procedure' by initiating a dialogue with that Member State through the Rule of Law Framework.

The Rule of Law Framework makes transparent how the Commission exercises its role under the Treaties, and aims at reducing the need for recourse to the Article 7 Procedure.

The Rule of Law Framework has three stages (see also graphic in Annex 1):

- **Commission assessment:** The Commission will collect and examine all the relevant information and assess 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.
- **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, the European Parliament or one third of the Member States could resort to the ‘Article 7 Procedure’.

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.

### **What is the Article 7 Procedure?**

The Procedure foreseen under Article 7 of the Treaty on European Union (TEU) aims at ensuring that all EU Member States respect the common values of the EU, including the Rule of Law. It foresees two legal possibilities in such a situation: a **preventive mechanism** in case of a “clear risk of a serious breach of the [Union’s] values” (Article 7(1) TEU) and a **sanctioning mechanism** in the case of “the existence of a serious and persistent breach” of the Union’s value, including the Rule of Law (Article 7(2) and Article 7(3) TEU). Article 7 TEU has until today not been used.

The preventive mechanism allows the Council to give the EU Member State concerned a warning before a serious breach has actually materialised. The sanctioning mechanism allows the Council to act if a serious and persistent breach is deemed to exist. This may include the suspension of certain rights deriving from the application of the treaties to the EU country in question, including the voting rights of that country in the Council. In such a case the ‘serious breach’ must have persisted for some time.

The Article 7 Procedure can be triggered by one third of the Member States, by the European Parliament (in case of the preventive mechanism of Article 7(1) TEU) or by the European Commission.

To determine that there is a clear risk of a serious breach of the rule of law, the Council, after obtaining the consent of the European Parliament, must act with a decision of 4/5 of its members, and must reach the same threshold if it wishes to address recommendations to the Member State concerned. The Council must hear the Member States concerned before adopting such a decision.

To determine the existence of a serious and persistent breach of the rule of law, the European Council must act by unanimity, after obtaining the consent of the European Parliament. The Member State concerned must first be invited to offer its observations.

To sanction a Member State for a serious and persistent breach of the rule of law, the Council must act by qualified majority. To revoke or amend these sanctions the Council must also act by qualified majority.

In accordance with Article 354 TFEU, the Member of the European Council or the Council representing the Member State in question shall not take part in the vote, and the Member State concerned shall not be counted in the calculation of the majorities for these determinations.

### **Has the Article 7 Procedure been used before?**

Since 2009, the European Union has been confronted on several occasions with events in EU countries which revealed specific rule of law problems. The Commission has until now addressed these events by exerting political pressure, as well as by launching infringement proceedings in case of violations of EU law. The use of the Article 7 Procedure has never been used until today.

### **ANNEX I**

**A rule of law framework for the European Union**

