



## Commission Recommendation regarding the Rule of Law in Poland: Questions & Answers

Brussels, 21 December 2016

**This Recommendation complements the Recommendation of 27 July 2016, taking into account the latest developments in Poland after a discussion in the college and due to recent developments, the College approved today the Recommendation in principle and empowered the First Vice President to update the Recommendation in the light of the appointment of a new Constitutional Tribunal President on 21 December.**

### **Why is the Commission adopting a complementary Recommendation regarding the Rule of Law in Poland?**

The present Recommendation complements the Recommendation of 27 July 2016. It examines which of the concerns raised in that recommendation have been addressed, sets out the remaining concerns and lists a number of new concerns of the Commission with regard to the rule of law in Poland which have arisen since then. On this basis, it makes recommendations to the Polish authorities on how to address these concerns. These concerns relate to the following issues:

- a) the appointment of judges of the Constitutional Tribunal and the lack of implementation of the judgments of the Constitutional Tribunal of 3 and 9 December 2015 and of 11 August 2016 relating to these matters;
- b) the lack of publication and of implementation of a number of judgments of the Constitutional Tribunal since March 2016, including the judgments of 9 March and 11 August relating to legislative acts on the Constitutional Tribunal;
- c) the effective functioning of the Constitutional Tribunal and the effectiveness of Constitutional review of new legislation, in particular in view of newly adopted legislation concerning the Constitutional Tribunal, in particular the Law on the status of judges, the Law on organisation and proceedings and the Implementing Law;
- d) the rules applicable to the selection of candidates for the post of President and Vice-President of the Constitutional Tribunal and to the appointment of an acting President of the Constitutional Tribunal in the Law on organisation and proceedings and the Implementing Law.

### **What action is the Commission recommending that the Polish authorities should take?**

The Commission considers it necessary that Poland's Constitutional Tribunal is able to fully ensure an effective constitutional review of legislative acts. In particular the Commission recommends that the Polish authorities take the following actions already requested in its Recommendation of 27 July 2016:

- a) implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which requires that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up the post of judge without being validly elected; for this reason, the President of the Republic is required to urgently take the oath of the three judges elected by the previous legislature;
- b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016 and the judgment of 11 August 2016 concerning the Law of 22 July 2016 on the Constitutional Tribunal and other judgments rendered after that date and future judgments;
- c) ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, takes the Opinions of the Venice Commission fully into account and ensures that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined;

d) refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal.

In addition to these actions, the Commission recommends that the Polish authorities:

e) ensure that the Constitutional Tribunal can as a matter of urgency effectively review the constitutionality of the Law on the status of judges, the Law on organisation and proceedings and the Implementing Law, and that the judgments concerned are published without delay and implemented fully;

f) ensure that no appointment of the new President of the Constitutional Tribunal take place as long as the judgments by the Constitutional Tribunal on the constitutionality of the new laws have not been published and implemented fully, and as long as the three judges that were lawfully nominated in October 2015 by the 7th term of the Sejm have not taken up their judicial functions in the Tribunal;

g) ensure that as long as a new President of the Constitutional Tribunal has not been lawfully appointed, he is replaced by the Vice-President of the Tribunal and not by an acting President, or by the person appointed as President of the Tribunal on 21 December 2016.

Finally, the Commission underlines that the loyal cooperation which is required amongst the different state institutions in rule of law related matters is essential in order to find a solution in the present situation. The Commission invites the Polish Government to solve the problems identified in this Rule of Law Recommendation as a matter of urgency, within 2 months, and to inform the Commission of the steps taken to that effect.

### **What are the new concerns after the Commission issued its Recommendation of 27 July 2016?**

On 1 December 2016, the Senate adopted the Law on the legal status of judges of the Constitutional Tribunal ('Law on the status of judges'). On 2 December 2016, the Senate adopted the Law on organisation and proceedings before the Constitutional Tribunal ('Law on organisation and proceedings'). On 15 December 2016, the Senate adopted the Law implementing the Law on organisation and proceedings and the Law on the status of judges ('Implementing Law'). These new laws replace the Law of 22 July 2016 on the Constitutional Tribunal. On 19 December 2016 these laws were signed by the President of the Republic and published in the Official Journal.

The Commission considers that whereas some of the issues addressed in its recommendation of 27 July 2016 have been addressed, important issues remain unresolved, and new concerns have arisen in the meantime. In particular

a) As regards the composition of the Constitutional Tribunal, the three new laws require that the three judges nominated by the 8th term of the *Sejm* without a valid legal basis take up their judicial functions.

b) As regards the publication of judgments, the Law on the organisation and proceedings contains a provision which gives the power to the President of the Tribunal to order publication of the judgments. However, the Implementing Law still precludes the publication of certain judgments rendered by the Tribunal, including the judgments of 9 March 2016 and 11 August 2016 concerning previous Laws on the Constitutional Tribunal, including the Law of 22 July 2016, and all other judgments rendered after that date.

c) As regards the effectiveness of the constitutional review, the Commission considers that even if certain improvements can be noted as compared to the Law of 22 July 2016, the three new laws adopted in December 2016 contain a number of provisions which do not respect earlier judgments of the Constitutional Tribunal and added new concerns as compared to those identified in the Recommendation of 27 July 2016. These new concerns relate in particular to the disciplinary proceedings, the possibility of early retirement, the new requirements for judges of the Tribunal, the significant changes to the internal organisation of the Tribunal, the selection procedure for candidates to the post of President and Vice-President of the Tribunal, the role of the Vice-President of the Tribunal and the appointment of an acting President of the Tribunal.

d) The Commission considers in particular that the combined effect of the provisions on the appointment of an acting President of the Tribunal, the selection procedure for the candidates to the post of President and the refusal to swear in the judges elected by the 7th *Sejm* while providing for the taking up of office of the three judges nominated by the 8th term of the *Sejm* without a valid legal basis, seriously threaten the legitimacy of the Constitutional Tribunal and consequently the effectiveness of the constitutional review. In addition, as long as the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* cannot take up their judicial functions in the Constitutional Tribunal, the Commission considers that the selection process of the new President of the Tribunal remains fundamentally flawed.

e) The Commission also notes that the timing of the adoption of these three laws and the lack of an appropriate *vacatio legis* for a number of key provisions denies the possibility to the Constitutional Tribunal to review their constitutionality before their entry into force.

f) In addition, actions and public statements by the Polish authorities undermining the legitimacy and efficiency of the Constitutional Tribunal continue to occur, including the launching of a criminal investigation against the President of the Constitutional Tribunal.

## **What are the developments in Poland that the College is concerned about?**

### **1. The appointment of judges to the Constitutional Tribunal**

Ahead of the general elections for the Sejm (lower chamber of the Polish Parliament) of 25 October 2015, on 8 October the outgoing legislature nominated five persons to be 'appointed' as judges 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.

On 19 November, 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. On 25 November the new legislature annulled the five nominations by the previous legislature and on 2 December nominated five new judges.

On 3 December, the Constitutional Tribunal ruled that the previous legislature was entitled to nominate three judges for seats vacated during its mandate, but was not entitled to make the two nominations for seats vacated during the term of the new legislature. The Constitutional Tribunal also clarified that the President was obliged to take the oath of the three validly elected judges without delay. On 9 December, the Tribunal ruled that the new legislature was not entitled to annul the nominations for the three appointments under the previous legislature, but that it was entitled to appoint the two judges whose mandate began under the incoming legislature.

The consequence of the judgements is that the President of the Republic is obliged to "appoint" (i.e. take the oath of) the three judges nominated by the previous legislature. However, the President of the Republic has in the meantime taken the oath of all five judges nominated by the new legislature. The judgments of the Constitutional Tribunal have thus not been implemented, raising concerns as regards the rule of law, and the correct composition of the Tribunal remains disputed between the institutions of the State.

The law adopted on 22 July 2016 on the Constitutional Tribunal does not remove these concerns and is incompatible with the judgments of 3 and 9 December as well as the opinion of the Venice Commission. The law requires the President of the Constitutional Tribunal to assign cases to all judges who have taken the oath before the President of the Republic but have not yet taken up their duties as judges. These provisions would enable the three judges which were unlawfully nominated by the new legislature of the *Sejm* in December 2015 to take up their function while using the vacancies for which the previous legislature of the *Sejm* had already lawfully nominated three judges.

In its judgment of 11 August 2016 the Constitutional Tribunal found the relevant provision of the Law of 22 July 2016 unconstitutional and the Venice Commission in its opinion of 14 October 2016, confirmed that that provision is not a solution in line with the principle of the rule of law. However, the Polish Government continues to refuse to recognise the validity of the judgment of 11 August 2016 and to publish it in the Official Journal.

In addition, the new Law on the status of judges reintroduces a provision similar to the one of the Law of 22 July 2016 which was declared unconstitutional in the judgment of 11 August 2016. Likewise, provisions aiming at deploying a similar effect can be found in the Law on organisation and proceedings and in the Implementing Law.

In conclusion, 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 were nominated by the 7th term of the Sejm can take up their judicial functions in the Constitutional Tribunal, and that the three judges nominated by the 8th term of the Sejm without a valid legal basis do not take up their judicial functions. The relevant provisions of the Law of 22 July 2016 on the Constitutional Tribunal raise serious concerns in respect of the rule of law and have been found unconstitutional by the judgment of 11 August 2016 of the Constitutional Tribunal. Also this judgment should be respected, published and implemented by the Polish authorities. In addition, provisions aiming at producing a similar result included in the Law on the status of judges, the Law on organisation and proceedings and in the Implementing Law are also inconsistent with these judgments and must not be applied.

### **2. The Lack of publication and implementation of the Constitutional Tribunal judgment of 9**

## **March 2016 and of the judgments rendered since 9 March 2016**

On 22 December 2015, following an accelerated procedure, a law amending the law on the Constitutional Tribunal, which concerns the functioning of the Tribunal as well as the independence of its judges, was passed by the Polish Parliament. In a letter of 23 December 2015 to the Polish Government, the Commission asked to be informed about the constitutional situation in Poland. 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.

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. On 11 March, the Venice Commission issued an opinion in which it found the amendments of 22 December to be incompatible with the rule of law. 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 judgments rendered by the Constitutional Tribunal since 9 March 2016 have so far not been published by the Government in the Official Journal.

The refusal to publish the judgment of 9 March creates a level of uncertainty and controversy which adversely affects not only that judgment, but all subsequent and future judgments of the Tribunal. Since these judgments are, following the judgment of 9 March 2016, rendered in accordance with the rules applicable before 22 December 2015, the risk of a continuous controversy about every future judgment undermines the proper functioning of constitutional justice in Poland. The law adopted on 22 July on the Constitutional Tribunal does not remove these concerns.

On 16 August 2016, the Polish Government, on the basis of the Law of 22 July 2016, published 21 judgments of the Constitutional Tribunal rendered in a period from 6 April 2016 to 19 July 2016. However, the two judgments of 9 March and 11 August 2016 have still not been published by the Polish Government, contrary to what had been requested in the Commission's Recommendation. Furthermore, none of the 16 judgments of the Constitutional Tribunal rendered after 11 August 2016 have so far been published.

The provision of the Law of 22 July 2016 concerning the publication of judgments of the Tribunal was declared unconstitutional by the Constitutional Tribunal in its judgment of 11 August 2016 because of its inconsistency with the principles of the separation and balance of powers and the independence of courts and tribunals from other branches of power.

The new Implementing Law provides that judgments of the Tribunal and decisions of the Tribunal adopted in breach of the Constitutional Tribunal Act of 25 June 2015 or the Constitutional Tribunal Act of 22 July 2016 and issued prior to the date of entry into force of the new Law on organisation and proceedings shall be published in the relevant official gazettes after their publication has been ordered by the acting President of the Tribunal, unless they concern regulatory instruments that have ceased to apply. A similar provision was already held unconstitutional by the Tribunal in its judgment of 11 August 2016. The Commission's Recommendation underlined that the indication that judgments have been rendered illegally is contrary to the principle of the separation of powers as it is not for the *Sejm* to determine the lawfulness of judgments. Also the Venice Commission confirmed this position in its two opinions. In addition, the exclusion from publication of judgments relating to normative acts which ceased to be applicable, as provided in the Implementing Law, excludes in particular the judgments of 9 March and 11 August 2016. There is no guarantee that the Law on organisation and procedure will ensure that the future President of the Tribunal publishes all the judgments which have been adopted prior to his term of office.

In conclusion, the fact that the Polish Government has so far refused to publish in the Official Journal the judgments of 9 March 2016 and 11 August 2016 relating to legislative acts on the Constitutional Tribunal, and all other judgments rendered by the Constitutional Tribunal since 11 August 2016, creates uncertainty as to the legal basis for the Tribunal's judicial activity and as to the legal effects of its decisions. This uncertainty undermines the effectiveness of constitutional review and raises serious concerns in respect of the rule of law. Compliance with final judgments is an essential requirement inherent in the rule of law. The refusal to publish a binding and final judgment denies the latter's automatic legal and operational effect and breaches the principles of legality and separation of powers.

### **3. Review of the law on the Constitutional Tribunal and effectiveness of constitutional review of new legislation**

The present Recommendation sets out the Commission's concerns regarding the impact of recent legislation on the Constitutional Tribunal on the effectiveness of constitutional review.

The Commission notes that the new Law on organisation and proceedings no longer contains a number of provisions of the Law of 22 July 2016 identified as a concern in its Recommendation of 27 July 2016,

in particular provisions on the referral of cases to the full bench, on the handling of cases in chronological order, on the postponement of deliberations, on the possibility of the Public Prosecutor-General to prevent the examination of cases and on the transitional provisions for pending cases.

Despite these improvements, the Commission notes nevertheless that certain concerns remain. In particular, the number of judges required to participate in a full bench remains at eleven while it was set at nine in the 1997 Act on the Constitutional Tribunal and in the Law of 25 June 2015. As pointed out in the Recommendation this represents a constraint on the decision-making process of the Constitutional Tribunal, in particular in the current circumstances where the Constitutional Tribunal has only 12 judges (since the three judges that were lawfully nominated in October 2015 by the 7th term of the Sejm have not taken up their judicial functions). The risk identified in the Recommendation that the attendance quorum for a full bench might on occasion not be reached has already materialised.

Moreover, the new Law on the organisation and proceeding, the Law on the status of judges and the Implementing Law contain other provisions which have aggravated certain concerns identified in the Recommendation, or have introduced new concerns (see above) relating to the situation of judges and to the appointment of the President, the Vice-President and the acting President of the Tribunal.

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 the compliance of legislative acts with fundamental rights. This raises serious concerns in respect 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, such as, in particular, a media law, a law amending the law on the Police and certain other laws, a new Civil Service Act, a law on the National Council of Media and a new anti-terrorism law.

#### **4. The appointment of the President, Vice-President and acting President of the Constitutional Tribunal**

##### Appointment of the President of the Tribunal

The Implementing Law and the Law on organisation and proceedings contain new rules on the procedure for submitting candidates for the post of President and Vice-President of the Tribunal. The new procedure for the selection of candidates for President of the Tribunal requires the three "December judges" unlawfully nominated by the new legislature of the *Sejm* to participate in the process. The Commission considers that such requirement renders the entire selection process unconstitutional. Similarly, the fact that the lawfully elected "October judges" cannot participate in the process can equally have an impact on the outcome, and therefore vitiates the process.

In addition, the new procedure does not ensure that only candidates are proposed to the President of the Republic which have the support of the majority of the General Assembly of the Tribunal. According to the judgment of the Tribunal of 7 November 2016, the constitution must be understood as providing that the President of the Tribunal shall be appointed by the President of the Republic from amongst candidates which have obtained a majority vote in the General Assembly of the Tribunal. This renders the new procedure incompatible with the judgment of the Constitutional Tribunal of 7 November 2016. In its opinion of 14 October 2016, the Venice Commission also underlined the importance that the selection process ensures that only candidates with substantial support in the Tribunal can be elected as candidate to be proposed to the President of the Republic.

The same concerns relate to the procedure for submitting candidates for the post of Vice-President of the Tribunal; this procedure is identical to the procedure for submitting candidates for the post of President as provided in the Law on organisation and proceedings.

##### Role of the Vice-President of the Tribunal

The Commission also notes that the Implementing Law and the Law on organisation and proceedings contain a number of provisions which negate the function of the Vice-President of the Constitutional Tribunal. The combined effect of these provisions denies the specific position of the Vice-President as the deputy of the President of the Constitutional Tribunal. The position of Vice-President of the Tribunal is recognized in the constitution.

##### Appointment of an acting President of the Tribunal

The Implementing Law provides that if it is necessary to implement the procedure for submitting candidates for the post of President of the Tribunal, for the period between the day after the date on which this Act is published and the appointment of the President of the Tribunal, the Tribunal shall be headed by the judge of the Tribunal whom the President of the Republic, by way of a decision, has tasked with performing the duties of the President of the Tribunal. The acting President of the Tribunal is given a wide range of powers as long as there is no new President of the Tribunal.

These provisions which allow the President of the Republic to directly appoint an acting President raise

serious concerns as regards the principles of the separation of powers and the independence of the judiciary as protected by the Polish constitution. In particular, the constitution does not provide for the function of acting President of the Tribunal. Moreover, the power given to the President of the Republic to appoint an acting President of the Tribunal appears to be contrary to the constitution which provides that the President and Vice-President of the Tribunal shall be appointed by the President of the Republic "from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal", while the procedure in the Implementing Law denies any such role to the General Assembly. Furthermore, the criteria to be used by the President of the Republic to choose the acting President appear arbitrary. These provisions also disregard any prior steps in the selection process taken by the Tribunal before the entry into force of the new law.

The appointment of a President of the Tribunal on 21 December 2016

1. On 19 December 2016, the President of the Republic appointed judge Julia Przyłębska, to the position of acting President of the Constitutional Tribunal. On 20 December 2016, judge Julia Przyłębska admitted the three judges nominated by the 8th term of the Sejm without a valid legal basis to take up their function in the Tribunal and convened a meeting of the General Assembly for the same day. In view of the short notice, one judge was unable to participate and requested to postpone the meeting for the next day. Judge Julia Przyłębska refused and seven other judges also did not participate in the meeting. Only six judges, including the three judges unlawfully nominated, took part in the meeting and elected two candidates, Julia Przyłębska and Mariusz Muszyński, who were presented as candidate to the President of the Republic. On 21 December 2016, the President of the Republic appointed judge Julia Przyłębska to the post of President of the Constitutional Tribunal.
2. The Commission considers that this procedure which led to the appointment of a new President of the Tribunal is fundamentally flawed as regards the rule of law. As explained above, the procedure was led by an acting President whose appointment raises serious concerns as regards the principles of the separation of powers and the independence of the judiciary as protected by the Polish constitution. Furthermore, the fact that the procedure allowed the three "December judges" unlawfully nominated by the new legislature of the Sejm to participate in the process rendered the entire selection process unconstitutional (see section 2 below). Similarly, the fact that the lawfully elected "October judges" could not participate in the process equally had an impact on the outcome, and therefore vitiated the process. Moreover, the very short notice for the convocation of the General Assembly and the refusal to postpone the meeting raise serious concerns. Finally, the election of candidates by six judges only is incompatible with the judgment of the Tribunal of 7 November 2016 according to which Article 194(2) of the constitution must be understood as providing that the President of the Tribunal shall be appointed by the President of the Republic from amongst candidates which have obtained a majority vote in the General Assembly of the Tribunal.
3. For these reasons, the Commission considers that these provisions on the appointment of an acting President of the Tribunal and of an President of the Tribunal, and their implementation on 19, 20 and 21 December 2016 seriously threaten the legitimacy of the Constitutional Tribunal and consequently the effectiveness of the constitutional review.

### **What has the Commission done following the adoption of its Recommendation of 27 July 2016?**

After the adoption of its Recommendation of 27 July 2016 the Commission continued to follow closely the developments in Poland. On 13 September and 14 December 2016, the Commission took part in Plenary debates of the European Parliament on the situation in Poland and explained what has happened since the adoption of its Recommendation of July 2016, and how the Commission sees the situation. More in particular during the plenary debate on 14 December 2016 the Commission urgently called on the Polish authorities not to put into force the new laws before the Constitutional Tribunal has had the occasion to examine their constitutionality. The Commission also called on the President of the Republic to urgently swear in the three judges elected by the previous Sejm, and called on the Polish Government to publish, and fully respect, all the previous judgments of the Constitutional Tribunal.

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

On 11 March 2014, the 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'. 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 informs 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, resort can be had to the 'Article 7 Procedure'. This procedure can be triggered by a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission.

The entire process is based on a continuous dialogue between the Commission and the Member State concerned. The Commission will keep the European Parliament and Council regularly and closely informed.

### **What are the next steps?**

The Commission invites the Polish Government to solve the problems identified in this Rule of Law Recommendation as a matter of urgency, within 2 months, and to inform the Commission of the steps taken to that effect. If there is no satisfactory follow-up to the Recommendation within the time limit set, Article 7 of the Treaty on European Union (TEU) may be activated by a reasoned proposal of one third of the Member States, the European Parliament or the Commission. There is however no automaticity when it comes to Article 7 TEU under this stage in case of the concerns not having been resolved.

The Commission also recalls that Recommendations adopted under the Rule of Law Framework do not prevent the mechanisms set out in Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU.

### **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 values, including the Rule of Law (Article 7(2) and Article 7(3) TEU). Article 7 TEU has so far 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.

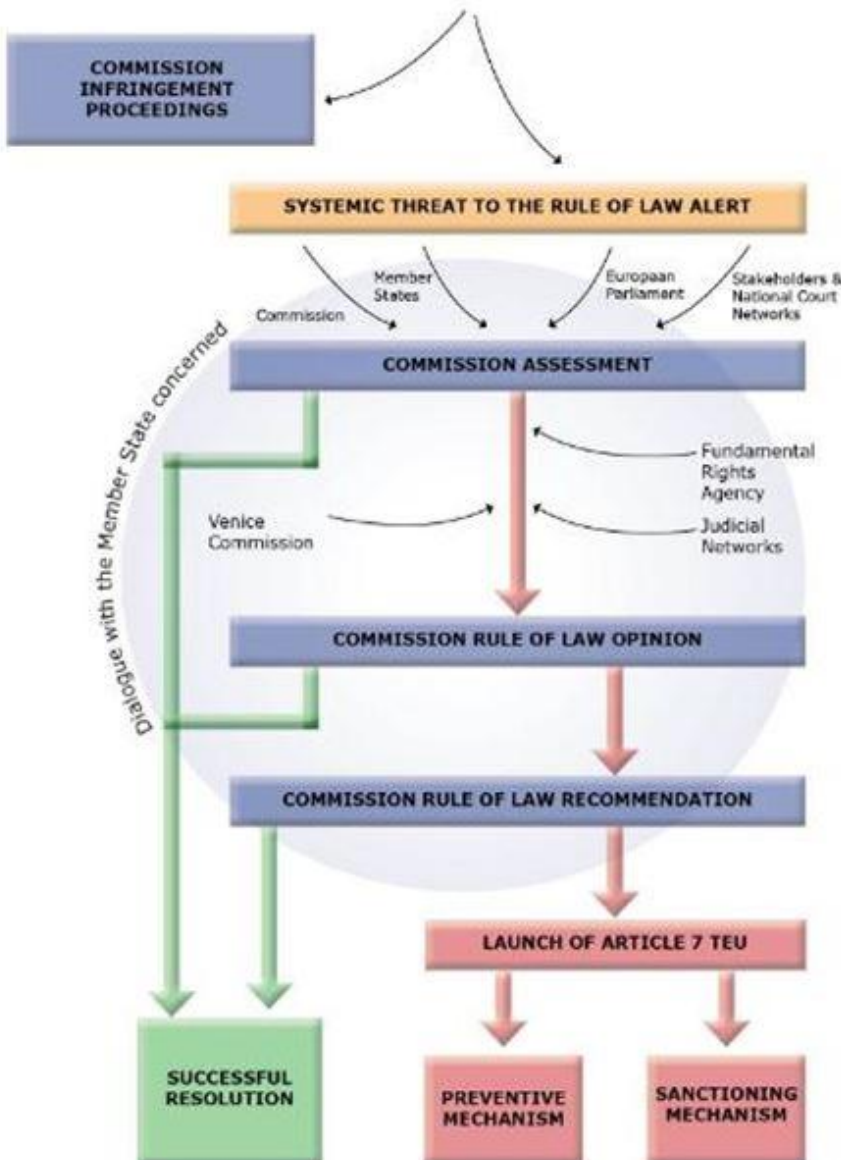
In accordance with Article 354 of the Treaty on the Functioning of the European Union, the Member of the European Council or the Council representing the Member State in question shall not take part in the vote, and the Member State concerned shall not be counted in the calculation of the majorities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

### Has the Article 7 Procedure ever been used?

Since 2009, the European Union has been confronted on several occasions with events in some EU countries, which revealed specific rule of law problems. The Commission has addressed these events by exerting political pressure, as well as by launching infringement proceedings in case of violations of EU law. The preventive and sanctioning mechanisms of Article 7 have so far not been resorted to.

### ANNEX I

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



### For more information:

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MEMO/16/4479

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