



Brussels, 27.7.2016  
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**COMMISSION RECOMMENDATION**

**of 27.7.2016**

**regarding the rule of law in Poland**

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### regarding the rule of law in Poland

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) The European Union is founded on a common set of values enshrined in Article 2 of the Treaty on European Union, which include 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.
- (2) 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 clear indications of 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.
- (3) 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.
- (4) 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.
- (5) 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 European Commission for Democracy through Law ("*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 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

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

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.

- (6) 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 situations when national "rule of law safeguards" do not seem capable of effectively addressing those threats.
- (7) The Rule of Law Framework has three stages. In a first stage ("*Commission assessment*") 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, as a result of this preliminary assessment, 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 and giving the Member State concerned the possibility to respond. The opinion could be the result of an exchange of correspondence and meetings with the relevant authorities and be followed by further exchanges. In a second stage ("*Commission Recommendation*"), if the matter has not been satisfactorily resolved, the Commission can issue a "rule of law recommendation" addressed to the Member State. In such a case, the Commission indicates the reasons for its concerns and recommends that the Member State solves the problems identified within a fixed time limit, and informs the Commission of the steps taken to that effect. In a third stage ("*Follow-up to the Commission Recommendation*"), the Commission monitors the follow-up given by the Member State to the recommendation. The entire process is based on a continuous dialogue between the Commission and the Member State concerned. If there is no satisfactory follow-up within the time limit set, resort can be had to the 'Article 7 TEU Procedure'; the procedure can be triggered by a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission.
- (8) In November 2015, the Commission became aware of an ongoing dispute in Poland concerning in particular 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 this matter, on 3 and 9 December 2015.
- (9) On 22 December 2015, the *Sejm* adopted 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>.

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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.

<sup>6</sup> Law adopted on 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.

- (10) 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 adopted on 22 December 2015 on the Constitutional Tribunal, the Commission stated it 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 to the Polish authorities to work closely with the Council of Europe's Venice Commission.
- (11) On 23 December 2015, the Polish Government asked for an opinion of the Venice Commission on the law adopted on 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.
- (12) On 30 December 2015, the Commission wrote to the Polish Government<sup>8</sup> to seek additional information about the proposed reforms to the governance of Poland's Public State Broadcasters. 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. On 7 January 2016, the Commission received a response from the Polish Government<sup>9</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>10</sup>. These responses did not remove existing concerns.
- (13) 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. On the same day, the Commission wrote to the Polish Government<sup>11</sup> informing the Government that it was 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. On 19 January 2016 the Commission wrote to the Polish Government<sup>12</sup> offering to contribute expertise and discuss matters related to the new media law.
- (14) On 19 January 2016, the Polish Government wrote to the Commission<sup>13</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. The Polish Government set out a number of positive effects considered to result from the amendment to the Act on the Constitutional Tribunal.

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

<sup>9</sup> Letter of 7 January 2016 from Undersecretary of State Mr Stepkowski to First Vice-President Timmermans.

<sup>10</sup> Letter of 11 January 2016 from Minister of Justice Mr Ziobro to First Vice-President Timmermans.

<sup>11</sup> Letter of 13 January 2016 from First Vice-President Timmermans to Minister of Justice Mr Ziobro.

<sup>12</sup> Letter of 19 January 2016 from Commissioner Oettinger to Minister of Justice Mr Ziobro.

<sup>13</sup> Letter of 19 January 2016 from Minister of Justice Mr Ziobro to First Vice-President Timmermans.

- (15) On the same day the European Parliament held a plenary debate on the situation in Poland.
- (16) On 1 February 2016, the Commission wrote to the Polish Government<sup>14</sup> noting that the judgements of the Constitutional Tribunal on the appointment of judges had still not been implemented. The letter also underlined the need to further examine the amendment to the Act on the Constitutional Tribunal, in particular the "combined effect" of the various changes made, requesting more detailed explanations. The letter also requested information about other laws which had 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 Office, and about legislative reforms which were being envisaged, notably further reforms of the media legislation.
- (17) On 29 February 2016, the Polish Government wrote to the Commission<sup>15</sup> providing further clarifications on the mandate of the President of the Constitutional Tribunal. The letter clarified 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 had been pronounced unconstitutional and lost their legal effect. As a result, the current President of the Tribunal would continue to exercise his mandate pursuant to the old legislative provisions until his mandate expired on 19 December 2016. The letter also stated that the mandate of the next President would be 3 years long. The letter furthermore requested clarifications as to what the Commission meant by insisting that the binding and final judgments of the Constitutional Tribunal had 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 ran counter to the Tribunal's subsequent judgement.
- (18) On 3 March 2016, the Commission wrote to the Polish Government<sup>16</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 noted that according to a preliminary assessment, certain amendments, both individually and taken together, made more difficult the conditions under which the Constitutional Tribunal could review the constitutionality of newly passed laws and requested more detailed explanations on this. The letter also asked for information about other laws which had been adopted recently and further legislative reforms which were being envisaged.
- (19) On 9 March 2016, the Constitutional Tribunal ruled that the law adopted on 22 December 2015 was unconstitutional. That judgment has so far not been published by the Government in the Official Journal, with the consequence that it does not have legal effect.
- (20) On 11 March 2016, the Venice Commission adopted its opinion "on amendments to the Act of 25 June 2015 on the Constitutional Tribunal"<sup>17</sup>. As regards the appointment of judges, the opinion called on the Polish Parliament to find a solution on the basis of the rule of law, respecting the judgments of the Tribunal. It also

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<sup>14</sup> Letter of 1 February 2016 from First Vice-President Timmermans to Minister of Justice Mr Ziobro.

<sup>15</sup> Letter of 29 February 2016 from Minister of Foreign Affairs Mr Waszczykowski to First Vice-President Timmermans.

<sup>16</sup> Letter of 3 March 2016 from First Vice-President Timmermans to Minister of Foreign Affairs Mr Waszczykowski.

<sup>17</sup> Opinion no. 833/2015, CDL-AD(2016)001.

considered, inter alia, that a high attendance quorum, the requirement of two thirds majority for adopting judgements and a strict rule making it impossible to deal with urgent cases, especially in their combined effect, would have made the Tribunal ineffective. Finally, it considered that a refusal to publish the judgement of 9 March 2016 would further deepen the constitutional crisis in Poland.

- (21) On 21 March 2016, the Polish Government wrote to the Commission inviting First Vice-President Timmermans 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.
- (22) On 31 March 2016, the Polish Government wrote to the Commission with recent information and legal assessments regarding the dispute around the Constitutional Tribunal in Poland. On 5 April 2016, meetings took place in Warsaw between First Vice-President Timmermans and the Minister of Foreign Affairs of Poland, the Minister of Justice, the Deputy Prime Minister, as well as with the President and the Vice-President of the Constitutional Tribunal. Following these meetings, several meetings also took place between the Polish Government, represented by the Ministry of Justice, and the Commission.
- (23) Following the judgment of 9 March 2016, the Constitutional Tribunal resumed the adjudication of 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>18</sup>.
- (24) On 13 April 2016, the European Parliament adopted a Resolution on the situation in Poland, inter alia urging the Polish Government to respect, publish and fully implement without further delay the Constitutional Tribunal's judgment of 9 March 2016 and to implement the judgments of 3 and 9 December 2015, and calling on the Polish Government to fully implement the recommendations of the Venice Commission.
- (25) 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 the situation in Poland.
- (26) 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.
- (27) 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 contained 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 included the requirement of a two-thirds majority for adopting decisions for "abstract" constitutional review of newly adopted laws. In the course of April an expert group was composed in the *Sejm* to help prepare a new law on the Constitutional Tribunal.
- (28) On 24 May 2016, First Vice-President Timmermans had meetings in Warsaw with the Prime Minister of Poland, with the President and the Vice-President of the Constitutional Tribunal, with the Ombudsman, with the Mayor of the City of

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<sup>18</sup> Since 9 March 2016 twenty judgments rendered by the Constitutional Tribunal have not been published.

Warsaw and with members of the opposition parties in the *Sejm*. On 26 May 2016, First Vice-President Timmermans had a meeting in Brussels with the Deputy Prime Minister of Poland. Subsequently, further exchanges and meetings took place between the Commission and the Polish government.

- (29) 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. On 1 June 2016, the Commission adopted an Opinion concerning the rule of law in Poland. Following the dialogue that had been ongoing with the Polish authorities since 13 January, the Commission deemed it necessary to formalise its assessment of the current situation in that Opinion. The Opinion set out the concerns of the Commission and served to focus the ongoing dialogue with the Polish authorities towards finding a solution.
- (30) On 24 June 2016, the Polish Government wrote to the Commission acknowledging receipt of the Commission's Rule of Law Opinion of 1 June<sup>19</sup>. The letter informed the Commission about the state of play of Parliamentary work in Poland including on a new Law on the Constitutional Tribunal, and expressed the conviction that the work undertaken at the Parliament was the right way to reach a constructive solution. Subsequently, the dialogue between the Commission and the Polish Government continued.
- (31) On 22 July 2016, the *Sejm* adopted a new law on the Constitutional Tribunal replacing the Law of 25 June 2015 on the Constitutional Tribunal. A first reading took place on 10 June 2016, a second reading started on 5 July 2016 and a third reading was concluded on 7 July. The Senate adopted amendments on 21 July 2016. The *Sejm* adopted the law as amended by the Senate on 22 July 2016. Before the law can take effect it must be signed by the President of the Republic and published in the Official Journal. The Commission provided comments and discussed the content of the draft law with the Polish authorities at various stages of the legislative process.

#### HAS ADOPTED THIS RECOMMENDATION:

1. Poland should duly take into account the Commission's analysis set out hereafter and take the measures figuring in section 6 of this Recommendation so that the problems identified are solved within the time limit set.

#### **1. SCOPE OF THE RECOMMENDATION**

2. The present recommendation sets out the concerns of the Commission with regard to the rule of law in Poland and makes recommendations to the Polish authorities on how to address these concerns. These concerns relate to the following issues:
  - (1) 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 relating to these matters;
  - (2) the lack of publication in the Official Journal and of implementation of the judgment of 9 March 2016 and of the judgments rendered by the Constitutional Tribunal since 9 March 2016;

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<sup>19</sup> Letter of 24 June 2016 from Minister of Foreign Affairs Mr Waszczykowski to First Vice-President Timmermans.

- (3) the effective functioning of the Constitutional Tribunal and the effectiveness of Constitutional review of new legislation, in particular in view of the law on the Constitutional Tribunal adopted by the *Sejm* on 22 July 2016.

## 2. APPOINTMENT OF JUDGES OF THE CONSTITUTIONAL TRIBUNAL

3. 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.
4. On 19 November 2015, the *Sejm*, 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 2015, the *Sejm* passed a motion annulling the five nominations by the previous legislature and on 2 December nominated five new judges.
5. The Constitutional Tribunal was seised concerning the decisions of both the previous legislature and the incoming legislature. The Tribunal consequently delivered two judgements, on 3 and 9 December 2015.
6. In its judgment of 3 December<sup>20</sup>, the Constitutional Tribunal ruled *inter alia* that the previous legislature of the *Sejm* had been 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 two 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*.
7. On 9 December<sup>21</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.
8. Despite these judgments, the three judges 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.
9. The two judges elected by the new legislature replacing the two judges outgoing in December 2015 have in the meantime taken up their function of judge in the Constitutional Tribunal.
10. On 28 April 2016, the President of the Republic took the oath of a new judge in the Constitutional Tribunal, nominated by the *Sejm* to fill a vacancy created earlier that month to replace a judge whose term in the Constitutional Tribunal had ended.
11. On 22 July 2016, the *Sejm* adopted a new Law on the Constitutional Tribunal. Article 90 of this Law states that "With effect from this Act's entry into force, the President of the Tribunal shall include on panels ruling on cases, and assign cases to,

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<sup>20</sup> K 34/15.

<sup>21</sup> K 35/15.



judges of the Tribunal who have taken the oath before the President of the Republic but, by the date of this Act's entry into force, had yet to take up their duties as judges." Article 6(7) of the new Law stipulates that "After taking the oath, judges shall present themselves at the Tribunal to take up their duties, and the President of the Tribunal shall assign them cases and create conditions enabling them to perform their duties".

12. The Commission considers that the binding and final judgments of the Constitutional Tribunal of 3 and 9 December 2015 have still not been implemented as far as the appointment of judges is concerned. 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 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 court judgments is an essential requirement inherent in the rule of law.
13. In one of its letters the Polish Government has 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>22</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 has not recognized.
14. 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.
15. The Commission furthermore 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>23</sup>.
16. Finally, as regards the law adopted on 22 July 2016 on the Constitutional Tribunal the Commission observes that this law is not compatible with the judgments of 3 and 9 December. Article 90 and Article 6(7) require 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. This provision seems targeted at the situation of the three judges which were unlawfully nominated by the new legislature of the *Sejm* in December 2015. It would enable these judges to take up their function while using the vacancies for which the previous legislature of the *Sejm* had already lawfully nominated three judges. These provisions are therefore

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<sup>22</sup> Opinion, para 112.

<sup>23</sup> Opinion, para 136.

contrary to the judgments of the Constitutional Tribunal of 3 and 9 December 2015 and the opinion of the Venice Commission.

17. 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 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. The relevant provisions of the law adopted on 22 July 2016 on the Constitutional Tribunal are contrary to the judgments of the Constitutional Tribunal of 3 and 9 December 2015 and to the opinion of the Venice Commission and raise serious concerns in respect of the rule of law.

**3. LACK OF PUBLICATION AND IMPLEMENTATION OF THE CONSTITUTIONAL TRIBUNAL JUDGMENT OF 9 MARCH 2016 AND OF THE JUDGMENTS RENDERED SINCE 9 MARCH 2016**

18. On 22 December 2015, following an accelerated procedure, the *Sejm* amended the Law on the Constitutional Tribunal<sup>24</sup>. The amendments are set out in more detail below in section 4.1. In its judgment of 9 March 2016, the Constitutional Tribunal declared unconstitutional the law adopted on 22 December 2015 in its entirety as well as specific provisions thereof. 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 adopted on 22 December 2015. The same position is taken by the Government towards the judgments rendered by the Tribunal after 9 March 2016.
19. The Commission considers that the judgment of 9 March 2016 is binding and must be respected. The Constitutional Tribunal was correct not to apply the procedure foreseen by the law adopted on 22 December 2015. In that respect the Commission agrees with the Venice Commission, which states on this point that "a simple legislative 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>25</sup> The Commission furthermore underlines that as the law adopted on 22 December 2015 required a quorum of 13 judges for judgments by the full bench and as the Constitutional Tribunal was 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.

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<sup>24</sup> Law of 25 June 2015 on the Constitutional Tribunal, published in Official Journal on 30 July 2015, item 1064, as amended. The law adopted on 22 December 2015 was published in the Official Journal on 28 December; item 2217.

<sup>25</sup> Opinion, para 41.

20. The refusal of the Government to publish the judgment of the Constitutional Tribunal of 9 March 2016 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 automatic legal and operational effect of a binding and final judgment, and breaches the principles of legality and separation of powers.
21. The refusal to publish the judgment of 9 March creates a level of uncertainty and controversy which will adversely affect 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 will undermine the proper functioning of constitutional justice in Poland. This risk is already a reality as the Tribunal has to date rendered 20 rulings since its ruling of 9 March 2016, and none of these rulings have been published in the Official Journal.
22. The Commission observes that the new law adopted on 22 July 2016 on the Constitutional Tribunal does not remove the above concerns. Article 80 (4) of the Law requires an "*application*" for publication of judgments from the President of the Constitutional Tribunal to the Prime Minister. This seems to indicate that publication of judgments would be dependent on a decision of the Prime Minister. It therefore raises significant concerns regarding the independence of the Tribunal.
23. In addition, Article 89 stipulates that "In a period of 30 days from the entry into force of [this] Act the rulings of the Tribunal handed down before 20 July 2016 in a manner contrary to the Constitutional Tribunal Act of 25 June 2015 shall be published except for the rulings regarding normative acts that were repealed". This provision gives rise to concern as the publication of the judgments should not depend on a decision of the legislator. In addition, the indication that the judgments have been rendered illegally is contrary to the principle of the separation of powers as it is not for the *Sejm* to determine compatibility with the Constitution. Moreover, the provision is incompatible with the judgment of 9 March 2016 and the findings of the Venice Commission.
24. In conclusion, the fact that the Polish Government has so far refused to publish the judgment of 9 March 2016 of the Constitutional Tribunal, as well as all subsequent judgments, in the Official Journal creates uncertainty on the legal basis on which the Tribunal must act and on the legal effects of its judgments. This uncertainty undermines the effectiveness of constitutional review and raises serious concerns in respect of the rule of law. The law adopted on 22 July 2016 does not remove these concerns.

#### **4. REVIEW OF THE LAW ON THE CONSTITUTIONAL TRIBUNAL AND EFFECTIVENESS OF CONSTITUTIONAL REVIEW OF NEW LEGISLATION**

25. The Commission notes that on 22 July 2016 the *Sejm* adopted a new law relating to the functioning of the Constitutional Tribunal, repealing the Law of 25 June 2015 on the Constitutional Tribunal. This law follows the law adopted on 22 December 2015 which was declared unconstitutional by the Constitutional Tribunal. It must therefore be assessed whether this law is compatible with the rule of law, taking into account

its impact on the effectiveness of the constitutional review, including of recently adopted acts and therefore constitutes appropriate action to redress the rule of law concerns identified in the Commission's Rule of Law Opinion of 1 June. The legislation concerned and its impact is considered in more detail below, taking into account the effect of the provisions both individually and collectively, as well as the previous case law of the Constitutional Tribunal and the Opinion of the Venice Commission.

#### **4.1. Amendment of 22 December 2015 to the Law on the Constitutional Tribunal**

26. 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 by the full bench<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.
27. In its judgment of 9 March 2016, the Constitutional Tribunal declared unconstitutional the law adopted on 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 (see section 3 above).
28. As set out already in its Opinion of 1 June 2016, the Commission took 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, undermined the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution. This conclusion is shared by the Venice Commission. As these findings are relevant for the assessment of the law adopted on 22 July 2016, the main conclusions are recalled hereunder.

##### *4.1.1. Attendance quorum*

29. The amended Article 44(3) stated 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) the Constitutional Tribunal shall rule by the full bench, unless otherwise specified by law. This applied in particular to what are described as "abstract cases" of constitutional review of newly adopted laws. The amended Article 44(1) also provided 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).

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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 adopted on 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).

30. The Commission considered that the attendance quorum of 13 out of 15 judges for the full bench (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 noted, 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.

#### 4.1.2. *Voting majority*

31. According to the amended Article 99(1), judgments of the Constitutional Tribunal sitting as a full bench (for "abstract cases") required a majority of two-thirds of the judges sitting. With a view to the new (higher) attendance quorum (see above) this meant that a judgment had to be approved by at least nine judges if the Constitutional Tribunal adjudicated as a full bench<sup>33</sup>. Only if the Tribunal adjudicated in a panel of seven or three judges (individual complaints and preliminary requests from ordinary courts), was a simple majority of votes 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).

32. In addition to the increased attendance quorum, a two-third majority for adopting decisions (for "abstract" constitutional review of newly adopted laws) significantly aggravated the constraints on the decision-making process of the Constitutional Tribunal. The Commission noted, 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 required voting by simple majority, and that the requirement of a qualified majority was thus unconstitutional.

#### 4.1.3. *Handling of cases in chronological order*

33. According to amended Article 80(2)<sup>34</sup>, the dates for hearings or proceedings in camera, where applications in abstract constitutional review proceedings were to be considered, "shall be established by order in which the cases are submitted to the Court". There were no exceptions foreseen to this rule and according to the amendment this rule applied to all pending cases for which no date for a hearing had been set yet<sup>35</sup>. The former version of the Law did not include such a rule.

34. The "sequence rule" according to which the Constitutional Tribunal had to hear cases in the sequence in which they were registered negatively affected its capacity to render rapidly decisions on the constitutionality of new laws, in particular in view of the number of pending cases. The impossibility to take into account the nature of a case (notably when involving fundamental rights issues), its importance and the context in which it is presented, could have prevented 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

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<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).

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

sequencing rule could also have discouraged the putting of preliminary ruling questions to the Court of Justice, particularly if a hearing is required after the preliminary ruling has been received.

#### 4.1.4. *Minimum delay for hearings*

35. 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.

36. Finally, this issue had 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) risked slowing down proceedings. 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.

#### 4.1.5. *Disciplinary proceedings*

37. 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 amended 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.” Such an action of the General Assembly could have been initiated by an application by the President of the Republic or the Minister of Justice pursuant to the amended Article 31a(2), although the Constitutional Tribunal remained free to decide. The final decision would have been 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.

38. The Commission noted with concern the fact that certain amendments increased 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 were given the power to initiate disciplinary proceedings against a Constitutional Tribunal judge<sup>39</sup> and, in particularly serious cases, the *Sejm* was given the power to take the final decision on the dismissal of a judge following a request to that effect by the Constitutional Tribunal<sup>40</sup>.

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

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

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

<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.

39. The Commission considered 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 the independence of the judiciary, as the Parliament (as a political body) could be expected to decide on the basis of political considerations. Similarly it was 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 required approval by the Tribunal or its President, already the fact that they could have been initiated by political institutions could have had an impact on the independence of the Tribunal. This raised 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*.

#### **4.2. Law adopted on 22 July 2016 on the Constitutional Tribunal**

40. In addition to provisions on the appointment of judges of the Tribunal and the publication of its judgments (see sections 2 and 3), the law adopted on 22 July 2016 contains other provisions on the functioning of the Tribunal. The law is inspired by the Law on the Constitutional Tribunal of 1 August 1997 but adds new provisions inter alia on the attendance quorum of judges for hearing cases, the majorities needed in the Constitutional Tribunal to hand down judgments by the full bench, the handling of cases in chronological order, the minimum delay for hearings, the role of the Public Prosecutor-General, the postponement of deliberations, transitional provisions for pending cases and *vacatio legis*.

41. The Commission considers that even if certain improvements can be noted as compared to the amending Act adopted on 22 December 2015, and certain concerns have been addressed as set out hereunder, a number of concerns raised already regarding the law adopted on 22 December 2015 remain and a number of new provisions raising concern have been introduced. Overall, the effects of certain provisions of the law adopted on 22 July 2016, taken separately or in combination, raise concern regarding the effectiveness of constitutional review and the rule of law.

##### *4.2.1. Attendance quorum*

42. Article 26(2) states that "The examination of a case by the full Tribunal shall require the participation of at least eleven judges of the Tribunal". In addition, Article 26(1)(g) provides that "The Tribunal shall rule (...) in the full Tribunal on (...) cases in which three judges of the Tribunal submit an application to that effect within 14 days of receiving copies of a constitutional complaint or of an application or legal question referred to in Article 38(1)".

43. Article 26(2) increases the number of judges required to participate in a full bench from nine (as under the 1997 Act on the Constitutional Tribunal and the Law of 25 June 2015 prior to its amendment of 22 December 2015) to eleven. This represents a constraint on the decision-making process of the Constitutional Tribunal. The number has been reduced compared to the thirteen which was required by the amending Act of 22 December 2015. However, in particular as the Constitutional Tribunal currently has only 12 judges to handle cases, the attendance quorum might on occasion not be reached, which would then leave the Tribunal at least temporarily unable to judge.

44. In addition, according to Article 26(1)(g) the Tribunal adjudicates as a full bench, inter alia, in cases in which three judges file an application thereto. These judges do

not have to be judges designated to an adjudicating bench in a given case. The Law does not provide that their application needs to be justified or meet any particular conditions. Such a provision permits for an unforeseeable number of cases to be considered by a full bench and could hamper the efficient functioning of the Tribunal and consequently the effectiveness of the constitutional review.

#### 4.2.2. *Voting majority*

45. Article 69 provides: "Rulings shall be adopted by a simple majority of votes." This is an improvement as compared to the amending Act of 22 December 2015 in so far as it no longer contains the unconstitutional requirement of a two-thirds majority for adopting decisions and thus addresses this concern previously raised by the Commission.

#### 4.2.3. *Handling of cases in chronological order*

46. Article 38(3) provides that "The dates of the hearings at which applications are examined shall be set in accordance with the order in which cases arrive at the Tribunal." Article 38(4) lists a limited number of cases in which the order in which an application arrives shall not be relevant. Article 38(5) provides that "The President of the Tribunal may set the date for the hearing setting aside condition foreseen by paragraph 3 [above] in cases where it is justified by protection of the citizen's rights and freedoms, security of state or constitutional order. On an application from 5 judges the President of the Tribunal may consider again his decision to set the date for the hearing."

47. The "sequence rule" according to which the Tribunal must hear cases at which applications are considered in the sequence in which they have been registered was introduced in the amending Act of 22 December 2015 and has already been ruled by the Tribunal to be inconsistent, *inter alia*, with the Constitution, on the grounds that the said provision interferes with the judiciary's independence and its separateness from other branches of government.

48. According to Article 38(3), the sequencing rule applies to "applications" and does not relate to "constitutional complaints". Even if the sequencing rule applies only to applications, it will affect the capacity of the Tribunal to render rapidly decisions on the constitutionality of laws at the request of institutional actors.

49. Article 38(5) does foresee a possibility for the President of the Constitutional Tribunal to derogate from the sequencing rule. However, this possibility is limited to specific cases and may give rise to delays, considering that five judges may file an application to reconsider the decision of the President of the Constitutional Tribunal to set the date for the hearing. Moreover, it is not clear whether the conditions would allow the President of the Tribunal to diverge from the sequencing rule in all cases requiring urgent decision.

50. Therefore, even if the law adopted on 22 July 2016 constitutes an improvement over the law adopted on 22 December 2015, the impact of the sequencing rule on the effectiveness of the Tribunal still may give rise to certain concerns.

#### 4.2.4. *Minimum delay for hearings*

51. Article 61(1) provides that "The hearing may not take place earlier than 30 days after notice of the date of the hearing is served." Article 61(3) provides that "In cases concerning legal questions, constitutional complaints and disputes on jurisdiction between central constitutional authorities of the state, the President of the Tribunal



may order the time-limit laid down in paragraph 1 to be halved, unless the complainant, court referring a legal question or applicant concerned expresses opposition within seven days of service of the President of the Tribunal's order". The fact that the President of the Tribunal may order to halve the period of 30 days is an improvement as compared to the law adopted on 22 December 2015, even if the complainant, the court referring a legal question or the applicant can object to the shortening of the period.

#### 4.2.5. *Disciplinary proceedings*

52. The law adopted on 22 July 2016 does not provide for the involvement of other institutions of the State in disciplinary proceedings concerning judges of the Tribunal. This is an improvement as compared to the law adopted on 22 December 2015 and therefore this matter no longer raises concerns.

#### 4.2.6. *Possibility of Public Prosecutor-General to prevent examination of cases*

53. Article 61(6) provides that "Absence from the hearing of the Public Prosecutor-General, who has been properly notified thereof, or his/her representative shall not prevent examination of the case unless the obligation to participate in the hearing results from the provisions of the Act." Article 30(5) provides that "The Public Prosecutor-General or his/her deputy shall participate in cases examined by the Tribunal sitting in full bench".

54. In practice, the combination of Articles 61(6) and 30(5) would appear to give a possibility to the Public Prosecutor-General, who is also the Minister of Justice, to delay or even to prevent the examination of certain cases, including cases handled by the full bench, by deciding not to participate at the hearing. This would allow for an undue interference with the functioning of the Tribunal and would violate the independence of the judiciary and the principle of the separation of powers.

#### 4.2.7. *Postponement of deliberation*

55. Article 68(5) provides that "During deliberations of the full Tribunal, at least four judges may object to the proposed settlement if they consider that the matter is particularly important for State organisational reasons or reasons of public order and they do not agree with the tenor of the settlement." Article 68(6) provides that "In the event of an objection under paragraph 5, the deliberations shall be postponed for three months and, at the subsequent deliberations after the end of that period, the judges that made the objection shall present their joint proposed settlement." Article 68(7) stipulates that "If, during the new deliberations referred to in paragraph 6, at least four judges again object, the deliberations shall be postponed by a further three months. At the end of that period, new deliberations and voting shall take place."

56. For cases examined by a full bench, which could imply a large number of cases (see above) the law adopted on 22 July 2016 allows at least four judges of the Tribunal to raise an objection to a draft determination. This could lead to the postponement of deliberations on a case for at least three months and in some instances for six months following the moment the Tribunal reaches the stage of deliberation. The Law does not provide for an exception to deal with urgent cases more rapidly.

57. The impact of these provisions on the effectiveness of the constitutional review is a matter of concern in respect of the rule of law, as it prevents the Constitutional Tribunal from fully ensuring an effective constitutional review, and grant effective and timely judicial redress in all cases.

#### 4.2.8. *Transitional provisions for pending cases*

58. Article 83(1) provides: "The provisions of this Act shall apply to cases begun but not completed before the date of this Act's entry into force." According to Article 83(2) "The Tribunal must settle cases referred to in paragraph 1 within one year of this Act's entry into force. The time-limit of one year shall not apply to the cases specified in Article 84." Article 84(1) states: "In the case of applications filed by the entities referred to in Article 191(1), subparagraphs 1 to 5, of the Constitution pending before the date of this Act's entry into force, the Tribunal shall (...) suspend proceedings for six months and call on the applicants to supplement their applications in accordance with the requirements of Article 33(2) to (5)." Article 84(2) provides: "If an application referred to in paragraph 1 is supplemented in accordance with the requirements of Article 33(2) to (5), the Tribunal shall order the resumption of the suspended proceedings on expiry of the time-limit referred to in paragraph 1. Otherwise the proceedings shall be discontinued. "
59. Article 85(1) states: "If the date of a hearing has been set before this Act's entry into force, the hearing shall be postponed and the competent panel shall be adjusted to this Act." Art. 85(2) provides: "A new date shall be set for the hearing. The hearing shall take place in accordance with this Act." Article 86 provides: "If the date of publication of a ruling has been set before this Act's entry into force, publication shall be postponed and the competent panel and the requirements concerning the ruling shall be adjusted to this Act."
60. On the one hand, Article 83(2) fixes a deadline of one year from the date of entry into force of the Act to deal with pending cases. However, on the other hand, Article 84 provides, by derogation to Article 83(2), that pending applications (i.e. applications by institutional actors for constitutional review of legislation) shall be frozen for a period of six months. The Tribunal would request the applicants to supplement their applications in order to comply with the new procedural requirements, and would be able to resume its work on these applications only after this period of six months has lapsed (even if the applicants have supplemented their application before). The Law does not provide for an exception to handle urgent cases more rapidly.
61. Articles 85 and 86 amount to legislative interference with pending cases, in particular with those which are already at an advanced stage, and could hamper the functioning of the Tribunal.
62. These transitional provisions taken together raise important concerns as they will slow down significantly the work of the Tribunal on applications and prevent the Tribunal from fully ensuring an effective constitutional review. This is particularly relevant in the context of all the sensitive new legislative acts as referred to in the Commission opinion (see below in section 4.3).

#### 4.2.9. *Vacatio legis*

63. Article 92 of the law adopted on 22 July 2016 provides that "This Act shall enter into force 14 days after its publication." Unless recourse is had to a preventive constitutional review of the Act, the period of *vacatio legis* of 14 days is too short for an effective constitutional review of the Law. For reasons of legal certainty it is important that enough time should be provided to allow the Constitutional Tribunal to review the constitutionality of the Law before its entry into force.

64. In this respect it is recalled that in its Opinion of 11 March 2016, the Venice Commission stressed that the Constitutional Tribunal must have a possibility of reviewing an ordinary statute that regulates the functioning of the Tribunal before the statute enters into force.

#### **4.3. Consequences of the lack of effectiveness of Constitutional review on new legislation**

65. 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>41</sup>, a new Civil Service Act<sup>42</sup>, a law amending the law on the Police and certain other laws<sup>43</sup> and laws on the Public Prosecution Office<sup>44</sup>, and a new law on the Ombudsman and amending certain other laws<sup>45</sup>. The Commission 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. In addition, a number of other sensitive draft legislative acts have been adopted by the *Sejm*, such as the Law on the National Council of Media<sup>46</sup> and a new anti-terrorism law<sup>47</sup>.

66. 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.

67. The Commission notes for example that new legislation (notably the media legislation<sup>48</sup>) raises concerns relating to freedom and pluralism of the media. More specifically, the new media legislation modifies the rules for the appointment of the Management and Supervisory Boards of the public service broadcasters, putting them under the control of the Government (the Treasury Minister), rather than an independent body. The new legislation 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.

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<sup>41</sup> Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016, item 25.

<sup>42</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>43</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>44</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>45</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>46</sup> Law of 22 June 2016 on the National Council of Media. The law was signed by the President of the Republic on 27 June 2016.

<sup>47</sup> Law of 10 June 2016 on anti-terrorism. The law was signed by the President of the Republic on 22 June 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.

<sup>48</sup> Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016, item 25, and Law of 22 June 2016 on the National Council of Media. The law was signed by the President of the Republic on 27 June 2016.

68. Legislation such as the new Civil Service Act<sup>49</sup> is equally important from the perspective of the rule of law and fundamental rights. In that respect the Commission has asked the 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>50</sup>. The Polish Government has so far not replied to the Commission on this point.
69. The law amending the law on the Police and certain other laws<sup>51</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, and delivered an opinion in its session of 10-11 June 2016<sup>52</sup>. The opinion states, *inter alia*, that the procedural safeguards and material conditions set in the Law are still insufficient to prevent its excessive use and unjustified interference with the privacy of individuals.
70. Furthermore, the new anti-terrorism legislation may raise questions relating to its compliance with fundamental rights<sup>53</sup> and is the subject of constitutional review.
71. In conclusion, 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. These concerns are further increased by the fact that, as set out above, the law adopted on 22 July 2016 foresees that a number of pending cases would be put on hold.

## **5. FINDING OF A SYSTEMIC THREAT TO THE RULE OF LAW**

72. 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 in Poland. Where a constitutional justice system has been established, its effectiveness is a key component of the rule of law.
73. 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 citizens, businesses and national authorities in the legal systems of all other Member States.

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<sup>49</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>50</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>51</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>52</sup> Opinion no. 839/2016.

<sup>53</sup> Law of 10 June 2016 on anti-terrorism. The law was signed by the President of the Republic on 22 June 2016.

## **6. RECOMMENDED ACTION**

74. The Commission recommends that the Polish authorities take appropriate action to address this systemic threat to the rule of law as a matter of urgency. In particular the Commission recommends that the Polish authorities:
- (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;
  - (b) publish and implement fully the judgements of the Constitutional Tribunal of 9 March 2016 and its subsequent judgments and ensure that the publication of future judgements is automatic and does not depend on any decision of the executive or legislative powers;
  - (c) ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, including the judgments of 3 and 9 December 2015 and the judgment of 9 March 2016, and takes the Opinion of the Venice Commission fully into account; ensure that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined by requirements, whether separately or through their combined effect, such as those referred to above relating to the attendance quorum, the handling of cases in chronological order, the possibility for the Public Prosecutor-General to prevent the examination of cases, the postponement of deliberations or transitional measures affecting pending cases and putting cases on hold;
  - (d) ensure that the Constitutional Tribunal can review the compatibility of the new law adopted on 22 July 2016 on the Constitutional Tribunal before its entry into force and publish and implement fully the judgment of the Tribunal in that respect;
  - (e) refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal.
75. 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 also encourages the Polish authorities to seek the views of the Venice Commission on the new law adopted on 22 July 2016 on the Constitutional Tribunal.
76. The Commission invites the Polish Government to solve the problems identified in this recommendation within three months of receipt of this recommendation, and to inform the Commission of the steps taken to that effect.
77. On the basis of this recommendation, the Commission stands ready to pursue a constructive dialogue with the Polish Government.

Done at Brussels, 27.7.2016

*For the Commission*  
*Frans TIMMERMANS*  
*Vice-President*