



College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers

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Why is the Commission holding a debate on the situation in Poland and the Rule of Law Framework?

The rule of law is one of the fundamental values upon which the European Union is founded. The Commission, beyond its task to ensure the respect of EU law, is also responsible, together with the European Parliament, the Member States and the Council, for guaranteeing the fundamental values of the Union. Recent events in Poland, in particular the political and legal dispute concerning the composition of the Constitutional Tribunal, have given rise to concerns regarding the respect of the rule of law. The Commission has therefore requested information on the situation concerning the Constitutional Tribunal and on the changes in the law on the Public Service Broadcasters. Today the College held a first debate on these recent developments in Poland, following a presentation of the matter by First Vice-President Timmermans (responsible for the rule of law framework), as well as Commissioner Oettinger (responsible for media policy) and Commissioner Jourova (responsible for justice).

What is the rule of law?

The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 of the Treaty on European Union (TEU).

Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.

Both the Court of Justice and the European Court of Human Rights confirmed that these principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights. The rule of law is therefore a constitutional principle with both formal and substantive components.

This means that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law, and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process.

Within the EU, the rule of law is of particular importance. Compliance with the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law. The confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU as "an area of freedom, security and justice without internal frontiers". Today, a judgment in civil and commercial matters of a national court must be automatically recognised and enforced in another Member State and a European Arrest Warrant against an alleged criminal issued in one Member State must be executed as such in another Member State. Those are clear examples of why all Member States need to be concerned if the rule of law principle is not fully respected in one Member State. This is why the EU has a strong interest in safeguarding and strengthening the rule of law across the Union.

What are the developments in Poland that the College discussed?

1. Concerning 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. The amendment also shortened the terms of office of the President and Vice-President of the Tribunal from nine to three years, with the current terms coming to an automatic end within three months of the amendment's adoption. On 25 November the new legislature annulled the five nominations by the previous legislature and on 2 December nominated five new judges.

The Constitutional Tribunal was seized concerning the decisions of both the previous legislature and the incoming legislature. The Tribunal delivered two judgements, on 3 and 9 December 2015.

On 3 December, the Court 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.

On 9 December, the Court 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 Constitutional Tribunal also declared invalid the shortening of the terms of office of the current President and Vice-President of the Tribunal.

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, and the correct composition of the Tribunal remains disputed between the institutions of the State.

Moreover, the legislature adopted on 28 December new rules on the functioning of the Constitutional Tribunal, which, among other things, render more difficult the conditions under which the Tribunal may review the constitutionality of newly passed laws, i.a. by increasing the number of judges hearing cases, and by raising the majorities needed in the Tribunal to hand down judgements (in full configuration, judgements shall be adopted by a majority of two-thirds of the votes, instead of by simple majority as under the former rules).

2. Concerning the governance of the Public Service Broadcasters

On 31 December, the Polish Senate adopted the "small media law" concerning the management and supervisory boards of the Polish public television broadcaster (TVP) and public radio broadcaster (PR). The new law appears to modify the rules for the appointment of the Management and Supervisory Boards of the public service broadcasters, putting them under the control of the Treasury Minister, rather than an independent body. The new law also provided for the immediate dismissal of the existing Supervisory and Management Boards.

What has the Commission done so far to address this issue?

Under the current Commission, First Vice-President Timmermans has been entrusted by President Juncker with the responsibility for the EU's Rule of Law Mechanism (see below) and with upholding the respect for the rule of law. The Commission's intention is to clarify the facts, in consultation with the Polish Government.

In light of the current situation regarding the **Constitutional Tribunal**, First Vice-President Timmermans wrote to the Polish Government on 23 December 2015 to request further information about the state of play. The letter requests that the Polish Government explain the measures they envisage to take with respect to the different Constitutional Tribunal judgements.

In his letter, the First Vice-President also recommended that the Polish Government consult the Venice Commission before enacting the proposed changes to the Law on the Constitutional Tribunal. The Polish Government requested a legal assessment from the Venice Commission on 23 December, but has proceeded with the conclusion of the legislative process before receiving the Venice Commission's opinion.

The Commission wrote to the Polish Government on 30 December 2015 to seek additional information about the proposed reforms to the **governance of Poland's Public State Broadcasters**. First Vice-President Timmermans asked the Polish Government how relevant EU law and the need to promote media pluralism were taken into account in the preparation of the new "small media law".

On 7 January 2016, the Commission received a response from Poland on the letter on the media law denying any adverse impact on media pluralism. On 11 January, the Commission received a response from Poland on the Constitutional Tribunal reform.

On 13 January 2016, the College of Commissioners held a first orientation debate in order to assess the situation in Poland under the Rule of Law Framework adopted in March 2014.

What is the Rule of Law Framework?

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

The purpose of the Framework is to enable the Commission to find a solution with the Member State concerned in order to prevent the emergence of a systemic threat to the rule of law that could develop into a "clear risk of a serious breach" which would potentially trigger the use of the 'Article 7 Procedure'. Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission can launch a 'pre-Article 7 Procedure' by initiating a dialogue with that Member State through the Rule of Law Framework.

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

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

- **Commission assessment:** The Commission will collect and examine all the relevant information and assess whether there are clear indications of a systemic threat to the rule of law. If, on this evidence, the Commission believes that there is a systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending a "rule of law opinion", substantiating its concerns.
- **Commission Recommendation:** In a second stage, if the matter has not been satisfactorily resolved, the Commission can issue a "rule of law recommendation" addressed to the Member State. In this case, the Commission would recommend that the Member State solves the problems identified within a fixed time limit, and inform the Commission of the steps taken to that effect. The Commission will make public its recommendation.
- **Follow-up to the Commission Recommendation:** In a third stage, the Commission will monitor the follow-up given by the Member State to the recommendation. If there is no satisfactory follow-up within the time limit set, the Commission can resort to the 'Article 7 Procedure'. The entire process is based on a continuous dialogue between the Commission and the Member State concerned. The Commission will keep the European Parliament and Council regularly and closely informed.

Is the Commission considering the developments in Poland under the Rule of Law Framework?

The European Commission is considering the developments in Poland under the Rule of Law Framework. The College of Commissioners held a first orientation debate in order to assess the situation in Poland under this mechanism.

What is the Article 7 Procedure?

The Procedure foreseen under Article 7 of the Treaty on European Union (TEU) aims at ensuring that all EU Member States respect the common values of the EU, including the rule of law. It foresees two legal possibilities in such a situation: a preventive mechanism in case of a "clear risk of a serious breach of the [Union's] values" (Article 7(1) TEU) and a sanctioning mechanism in the case of "the existence of a serious and persistent breach" of the Union's value, including the Rule of Law (Article 7(2) and Article 7(3) TEU). Article 7 TEU has 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 TFEU, the Member of the European Council or the Council representing the Member State in question shall not take part in the vote, and the Member State concerned shall not be counted in the calculation of the majorities for these determinations.

Has the Article 7 Procedure 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.

What is next?

A reply to the letter of First Vice-President Timmermans on the media law was received on 7 January and on 11 January on the Constitutional Tribunal reform. On the Constitutional Court reform, the Commission is cooperating with the Council of Europe Venice Commission, which is preparing an Opinion on the matter.

Under the Rule of Law Framework, the Commission enters into a structured and cooperative exchange with the Polish authorities in order to collect and examine all relevant information to assess whether there are clear indications of a systemic threat to the rule of law.

Following today's orientation debate, the College mandated First Vice-President Timmermans to send a letter to the Polish government in order to start the structured dialogue under the Rule of Law Framework. The College agreed to come back to the matter by mid-March, in close cooperation with the Venice Commission.

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Attachments

[ANNEX I.pdf](#)