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From: General Secretariat of the Council
On: 9 July 2021
To: Delegations

Subject: Rule of Law in Poland - Article 7(1) TEU Reasoned Proposal - Report on the hearing held by the Council on 22 June 2021

As provided for in 10641/2/19 REV2 (paragraph 23 of the Annex), delegations will find in the Annex the formal report on the hearing of Poland, held on 22 June 2021, in accordance with Article 7(1) TEU.

On 22 June 2021, the Council heard Poland in accordance with Article 7(1) TEU. The hearing was conducted during the meeting of the General Affairs Council and lasted approximately two hours.

In line with the standard modalities for hearings referred to in Article 7(1) TEU (10641/2/19 REV2), the substantive scope of the issues to be covered by the hearing was agreed by Coreper on 9 June 2021 (9294/21). The hearing covered all the topics included in the Commission's reasoned proposal of 20 December 2017.

At the start of the hearing, the Presidency reminded participants that the hearing would be conducted in accordance with the standard modalities (10641/2/19 REV2). The Presidency also indicated that, due to the COVID-19 situation and the specific social distancing measures, the number of persons present in the Council meeting room needed to be limited.

The Commission was then given the floor so that it could update the Council on the issues covered by the hearing. The Commission focused on: the independence of the Constitutional Tribunal; the independence and activities of the Disciplinary Chamber of the Supreme Court; the National Council for the Judiciary; the reform of the Supreme Court; the extraordinary appeal procedure; and the Law on the Judiciary of 20 December 2019, introducing new disciplinary offences for judges.

The Polish delegation was then given the floor so that it could present its initial views on the topics of the hearing and reply to the remarks made by the Commission.

Afterwards, 10 delegations intervened to put questions to Poland: AT, FI, ES, DK, DE (also speaking on behalf of FR), LU, NL, IE, EL and SE.

Those questions concerned:

- the disciplinary regime for judges, which could limit the independence of the judiciary and have a chilling effect on the referral of preliminary questions to the CJEU; the impact that this may already have had on the decline in public confidence in the judiciary, as registered by the Justice Scoreboard;
- the continued activities of the Disciplinary Chamber of the Supreme Court, despite the order of the Court of Justice of the European Union of 8 April 2020 in Case C-791/19 R;
- the role of the Minister for Justice as Prosecutor-General and its impact on the independence of prosecutors;
- the application of the principle of primacy of EU law and the lack of implementation by Poland of Court of Justice of the European Union rulings;
- the lack of independence of the Constitutional Tribunal;
- the lack of independence of the National Council for the Judiciary.

The Polish delegation was given the opportunity to provide detailed answers after each question by delegations.

In particular, the Polish delegation stated that no judges were held responsible for referring preliminary questions to the Court of Justice of the European Union and that the right to a fair trial and to an independent judge was guaranteed to members of the judiciary as well. The delegation further stated that trust in the judiciary had been low in Poland for many years, and that this had been one of the reasons which had prompted the reforms initiated in 2016.

The Polish delegation stated that the Government had no control over the courts and that the internal organisation of the Supreme Court was managed by its First President: in line with the Court of Justice of the European Union order of 8 April 2020 in Case C-791/19 R, she had decided to suspend the disciplinary activities of the Disciplinary Chamber, which continued to adjudicate only in cases concerning the immunity of judges in criminal proceedings. The delegation also stated that the nomination of judges was a constitutional prerogative of the President of the Republic of Poland, which could not be subject to legal review.

The Polish delegation stated that the role and prerogatives of the Minister for Justice had remained the same since Poland's accession to the EU, while criticism had been raised only since 2016. The delegation expressed the view that this seemed to be an example of applying double standards to Poland, as compared to other Member States.

The Polish delegation stated that, while primacy could be accorded to international and EU law in certain areas in accordance with the principle of conferral, the Polish Constitution remained the highest source of law, and general legislative competence lay with the Member States. The delegation further stated that Poland had no issues with implementing Court of Justice of the European Union rulings.

The Polish delegation stated that all judges sitting on the Constitutional Tribunal had been lawfully appointed and that it was a constitutional prerogative of the Prime Minister - which could not be limited by EU law - to refer questions to the Tribunal.

The Polish delegation stated that the system for the appointment of the members of the National Council for the Judiciary was similar to those used by other Member States and that it ensured the independence of those members and the absence of any political influence on them.

The Commission presented its final remarks, stating that the principle of judicial independence was paramount, while there were several means of achieving it. The Commission further stated that recent Court of Justice of the European Union case-law would prompt further action by the Commission in order to protect the values of the Union.

After questions and answers, the Polish delegation presented its closing comments.

The Presidency concluded that the General Affairs Council would remain seized of this matter.