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## European Commission's complaint to the Court of Justice of the EU about the Law on the Ordinary Courts Organisation in the "infringement procedure" and the issue of the rule of law in Poland

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With regard to the rule of law in Poland, ongoing proceedings under Article 7 of the Treaty on European Union ("TEU") by the European Commission ("EC") to declare the existence of a clear risk of a serious breach by Poland of the values referred to in Article 2 of the TEU are in the main spotlight. Meanwhile, proceedings are pending before the Court of Justice of the European Union ("CJEU") on the Polish Law on the Ordinary Courts Organisation.

**While these proceedings attract less interest, they are of extreme importance and significance to all the efforts to restore the rule of law in Poland.**

The EC filed a complaint against Poland with the CJEU in March 2018 on the basis of the "infringement procedure" under Article 258 of the Treaty on the Functioning of the European Union ("TFEU") with respect to the Law on the Ordinary Courts Organisation. The allegations of the breaches of the TEU applied to two issues:

- 1) The differentiation in the retirement age of female judges (60) and male judges (65) and, therefore, sex discrimination. According to the EC, this is in conflict with Article 157 TFEU and Directive 2006/54 on gender equality in employment;
- 2) The discretionary power of the Minister of Justice (simultaneously also holding the position of Prosecutor General with the rights to prosecute in all

proceedings) to decide on whether a judge can continue his/her career after reaching retirement age (60/65 years). The discretionary power of the Minister of Justice is incompatible with Article 19 (1) TEU (which gives concrete expression to the value of the rule of law stated in Article 2 TEU and entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals) in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union (“CFR”), and breaches the independence of the Polish courts and access to an independent and impartial court for citizens.

The Act amending the Law on the Ordinary Courts Organisation of 12 April 2018, which was passed by the Polish Parliament, changed the previous principles (which are the subject of the complaint described above) such that (1) the retirement age of women and men was equated at 65, and (2) the decision to extend a judge’s office after reaching the retirement age of 65 years will be made by the National Council of the Judiciary (“NCJ”) instead of the Minister of Justice (“MoJ”).

These changes eliminate the issue of sex discrimination. However, the matter of the decision to extend the office of judges aged over 65 remains under political influence. This is because positions in the NCJ have been filled by political appointees representing the parliamentary majority according to the rules specified in the Act on the NCJ, as amended on 8 December 2017, in gross breach of the Constitution. It should be emphasized that, according to the Polish constitutional model, the NCJ is supposed to be an independent body guarding the independence of the courts and the sovereignty of judges (Article 186 of the Constitution). In accordance with the Constitution (Article 187 in conjunction with Articles 173 and 10), the majority of its members (15 judges of the 25 members of the Council) should be elected by the judiciary. This is in line with European standards, including the criteria set out by the European Networks of Councils for the Judiciary (“ENCJ”), according to which the mechanism of appointing Council members elected from among judges must “exclude any executive or legislative interference and the election of judges should be solely by their peers and be on the basis of a wide representation of the relevant sectors of the judiciary” (Recommendation of the ENCJ, Rome 2011).

Meanwhile, the judges of the Polish NCJ were all elected by the parliament. Furthermore, the candidates elected to the NCJ have extensive connections with the executive, because some of them were so-called judges seconded to the Ministry of Justice, being directly and officially subordinated to it. Some of these judges were appointed presidents of courts by the MoJ between August 2017 and February 2018.

**The decision to extend the tenure of a judge aged over 65 will depend on a fully politically-dependent NCJ. This enables influence to undermine the independence of the judges and undermines the principle of the irremovability of judges, which is enshrined, among others, in Article 180 of the Constitution.**

The politically-dependent system of election of the NCJ is one of the fundamental elements of a breach of the rule of law in Poland, which was specified by the EC in the recommendations issued in connection with the procedure under Article 7 TEU. A Member State's judicial system must remain independent of executive and legislative powers (including the procedure for election to the Judicial Council, which must have the attributes of independence to be able to protect the independence of the courts), to ensure consistency and uniformity of the interpretation of EU law that is applied by the national courts.

It should also be remembered that the CJEU decides on whether EU law is breached by the national regulations as at the date of passage of the deadline set in the justified opinion of the EC (i.e. 12 October 2017). Therefore, the CJEU should not be deprived of the opportunity to rule on the compatibility of the Law on the Ordinary Courts Organisation with EU law according to the status of the law from before the cosmetic changes made to it on 12 April 2018.

**Conclusion: the European Commission's complaint to the Court of Justice of the EU about the Law on the Ordinary Courts Organisation in the "infringement procedure" should not be withdrawn.**

Within the proceedings, given the change in the Polish regulations, the CJEU can examine whether the current NCJ, after its formation in conflict with the Polish Constitution, can be an independent body deciding on the extension of the careers of judges. The withdrawal of the complaint would be of highly negative significance to the whole process of restoring the rule of law. The withdrawal would be a bad precedent, which the authorities in Poland will certainly perceive as permission for further anti-constitutional moves.

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