



MINISTER OF EUROPEAN UNION AFFAIRS
HUNGARY

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Věra Jourová
Vice-President
Commissioner for Values and Transparency

European Commission

Brussels

Budapest, “ 14 . ” May 2024

Subject: Observations on the Commission’s assessment of 6 May 2024 concerning the Article 7(1) TEU procedure against Poland

Dear Vice-President,

I am approaching you with reference to your letter dated 6 May 2024 [Ref. Ares(2024)3287537] by which you informed the Council that the Commission concluded that there is no longer a clear risk of a serious breach of the rule of law in Poland within the meaning of Article 7(1) TEU, and as a consequence, the Commission intends to withdraw its reasoned proposal issued on 20 December 2017 (hereinafter referred to as the ‘reasoned proposal’) by which it launched the Article 7(1) TEU procedure (hereinafter referred to as the ‘Article 7 procedure’) against Poland.

As it is referred to in your letter, the Commission invited the Council to make any observations it deems appropriate. You also indicated that the Commission’s information note annexed to your letter (hereinafter referred to as the ‘information note’), which contains the evaluation that led the Commission to its above-referred decision, will be presented at the next meeting of the General Affairs Council (on 21 May 2024) under the relevant agenda item.

In preparation for the discussion to be held at the next GAC on this important issue, I hereby share with you the main questions and observations that I plan to raise also at the GAC meeting. I kindly ask you to present the Commission’s position and explanation, if possible already at the GAC meeting, and also in writing in your response.

Hungary believes that the Commission’s current position represented in the Article 7 procedure against Poland and its reasoning for the envisaged closure of that procedure are highly relevant and creates an important precedent for the future as the ‘nuclear option’ for the protection of rule

of law was used by the Commission for the first time by launching this proceeding almost six and a half years ago. We also believe that a clear understanding of the Commission's position is required not only for the Council to be able to make its observations at the next GAC but also for the general public.

As it is reflected in the information note, the new analysis to determine whether a clear risk of a serious breach of the rule of law in Poland still exists was carried out by the Commission based on Poland's Action Plan on the Rule of Law (hereinafter referred to as the 'Action Plan') that was presented on 20 February 2024 at the GAC. The Commission argues that the commitments on the future implementation of the comprehensive set of measures envisaged in the Action Plan, and the fact that *'the first concrete steps have been taken to implement the Action Plan, are all directly relevant'*.

I must note that this approach seems to be in clear contradiction with the Commission's earlier position as previously the Commission required to address all problems identified by it with regard to the Polish justice system by adequate legislative or other measures.¹ Now the Commission assessed positively and conclusively all political commitments made in the Action Plan (without any deadlines), thus political promises are stated to be adequate solutions for the closure of the Article 7 procedure, regardless of their eventual future implementation. The Commission took note in its information note that the implementation of the envisaged actions may take longer time. This change in the Commission's approach requires explanation, which has not been given so far.

As a matter of fact, legally speaking it is clear from the information note that only one piece of legislation was adopted and entered into force in Poland since the adoption of the Act of 9 June 2022, namely the Order of the Minister of Justice of February 2024. Hungary is of the view, that even this piece of legislation raises serious questions to be answered for the following reasons.

On the one hand, the Commission remains silent about the fact that under that Ministerial Order it is the Minister of Justice who has the right to appoint the ad-hoc disciplinary commissioners (whose appointment excludes the participation of any other commissioner in the disciplinary case in question) as it only states that it sets out *'the framework for the appointment of ad-hoc disciplinary commissioners, which allows to discontinue unjustified disciplinary proceedings'*. Probably that is why the Commission remains silent on also providing any justification why it believes that this solution ensures that the principle of separation of powers is respected, given that the executive is still interfering in the administration of justice, which, in general terms, was the main driving force when the Commission decided to launch the Article 7 procedure.

On the other hand, in light of the fact that this order has been the only legislative development relating to the disciplinary regime for judges since the adoption of Act of 9 June 2022, an even more crucial question emerges. The Commission recalls in its information note that two judgments of the Court of Justice following infringement procedures launched by the Commission in cases C-791/19 and C-204/21 further confirmed the existence of deficiencies in the disciplinary regime for judges. During the hearing and state of plays held after the adoption of the Act of 9 June 2022 until the presentation of the Action Plan, the Commission has never expressed such an opinion that the Act of 9 June 2022 would adequately remedy the deficiencies identified by the Court of

¹ In paragraph (186) of the reasoned proposal the Commission stated that it *'is ready (...) to reconsider the present reasoned proposal should the Polish authorities implement the recommended actions set out in that Recommendation'* (within the time prescribed therein). This position was in essence reaffirmed on behalf of the Commission until the end of 2023 at all hearings and state of plays held in the Article 7 proceeding against Poland.

Justice, but instead, it indicated that in its opinion the judgments are not fully complied with. Having also in mind that Poland did not commit to take any further steps in its Action Plan with regard to the disciplinary regime for judges (the Polish Government just committed in relation to the Supreme Court to address the concerns relating to the Chamber of Extraordinary Control and Public Affairs which was already subject to the judgment of the Court of Justice and also of the European Court of Human Rights² which are not reflected in the information note), and the Commission did not indicate any concern in its information note, it is not clear whether it assessed and if so to what extent the pending implementation of the judgements of the Court of Justice. It is all the more outstanding, given that in the case concerned the vice-president of the Court of Justice found the situation so crucial that even ordered penalty payment as interim measure, taking an unprecedented step by the Court of Justice. Furthermore, although confirming later on at the request of Poland the development by reducing its amount, the Court of Justice maintained the penalty payment even after the adoption of the Act of 9 June 2022. I also note that Poland brought two actions for annulment before the General Court in which it argues that, with the entry into force of Act 9 June 2022, it fully complied with the orders of the Vice-President of the Court of Justice of 14 July 2021 and 15 July 2022 in which the penalty payment (and later on the reduced sum of that) was imposed on Poland.³ These relevant court proceedings are still on-going, but are omitted from the information note. Without any further justification from the Commission, one can conclude that the concerns on the basis of which this penalty payment was ordered and later maintained have not been fully remedied so far, and the only reason why it is not due any more is the fact that the final judgement establishing the infringement has been delivered in the meantime. However, to our best knowledge, the Commission has not initiated any further procedure to enforce compliance and ensure the *effet utile* of the rulings of the Court of Justice in that case. The Commission's answer is thus crucial also for understanding its approach to whether the eventual non-implementation of a ruling of the Court of Justice might or cannot be considered in itself a rule of law related issue.

As it is apparent from the information note, the other political commitments made by the Polish Government in its Action Plan are not yet implemented.

However, the Commission has already positively assessed all those steps which were taken in Poland with a view to the implementation of the political commitments concerned. In this regard, Hungary believes that the below issues require further explanation from the Commission.

As regards the Constitutional Tribunal, the Commission emphasized its opinion in the reasoned proposal that *'as the independence and legitimacy of the Constitutional Tribunal are seriously undermined, the constitutionality of Polish laws can no longer be effectively guaranteed'* and that

² The Court of Justice stressed in its judgment (in case C-487/19) with regard to Chamber of Extraordinary Control and Public Affairs (hereinafter referred to as the 'Chamber') that the appointment of the judges of that chamber may give rise to legitimate doubts, and in such a case, its order should be declared to be null and void. Furthermore, the Court of Justice in its judgment in case C-204/21, although did not expressly state that the Chamber was not independent and impartial, declared that by adopting and maintaining in force in relation to the Chamber to examine complaints and questions of law concerning the lack of independence of a court or a judge, Poland had breached the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, Article 267 TFEU and the principle of primacy of EU law. In this regard, the European Court of Human Rights concluded in its judgment (*Dolińska-Ficek and Ozimek v. Poland, Applications nos. 49868/19 and 57511/19*) that the appointment of the judges of the Chamber has been unduly influenced by the legislative and executive powers, and thus it does not fulfil the requirements of the right to an independent and impartial tribunal established by law under Article 6(1) of the European Convention on Human Rights.

³ Cases T-830/22, Poland v European Commission and T-156/23, Poland v European Commission.

'the judgements rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review', which *'is a matter of particular concern as regards respect of the rule of law'*.⁴ Accordingly, the Commission's first recommendation included in its proposal for a Council decision within its reasoned proposal relates to the Constitutional Tribunal. The Commission has consistently reaffirmed its concerns about the functioning of the Constitutional Tribunal at the hearings and state of plays held until the end of 2023. The Commission has also brought an action to the Court of Justice against Poland on 17 July 2023 (case C-448/23) in relation to the judgment of the Tribunal of 7 October 2021 (K 3/21), in which the Commission asked the Court of Justice, inter alia, to declare that the Constitutional Tribunal *'does not satisfy the requirements of an independent and impartial tribunal previously established by law'*, and thus Poland *'has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU'*. I must add that in its judgment the European Court of Human Rights (hereinafter referred to as the 'ECtHR') concluded that there was a violation of the right to a tribunal established by law pursuant to Article 6 of the European Convention on Human Rights in relation to the Constitutional Tribunal⁵, which was emphasized by the Commission also at the hearing held on 22 June 2021. Especially in the light of the on-going infringement procedure and the judgment of the ECtHR, as well as bearing in mind the detailed concerns set out in the reasoned proposal, the question arises on which basis the Commission came to the conclusion to lift all its related concerns in the context of the Article 7 procedure. The sole reference to a non-binding resolution adopted by the Sejm⁶ and a draft legislation that was tabled to the Sejm, without providing any assessment of its content, as well as the fact Poland changed its position in the case pending before the Court of Justice do not seem to suffice to the level of standards, which the Commission would normally require for compliance based on its established practice in similar procedures or based on past expectations imposed in the same procedures.

As regards the National Council for the Judiciary (hereinafter referred to as the 'NJC'), the Commission points out in the information note that the Sejm adopted on 20 December 2023 a resolution on the NJC, stating that it has been composed in violation of the Polish constitution and thus deprived of the capacity to carry out its constitutional functions and tasks. The Commission also emphasizes that there is an on-going legislative procedure which aims at restoring the independence of the NJC. The draft act was adopted by the Sejm on 12 April 2024, but has not yet been adopted by the Senate. The Commission pointed out that according to that draft law, judges, instead of the Sejm, would be empowered to select and appoint the 15 judges-members of the NJC and that the mandates of the current judges-members of the NJC (elected by the Sejm in 2022), would expire on the day on which the results of the election for the new judges-members are announced. The Commission is of the view, that as a consequence, these new judges-members would be appointed by their peers from all levels of the judiciary *'in accordance with European standards'*. It seems that the Commission has positively assessed this draft act as it has not expressed any concern. In this regard Hungary believes that the draft provisions on the commencement of the mandates of the new members of the NJC would require further assessment in view of the European standards on rule of law since it would result in the *ex lege* termination of the mandates of the current judges-members of the NJC. The lack of the Commission's assessment in this regard is deeply concerning, especially in light of the Commission's firm opinion stated in the reasoned proposal with regard to the previous premature termination of the

⁴ See paragraphs (57), (109), (112), (113), (175) and (180) of the reasoned proposal.

⁵ Case of Xero Flor w Polsce sp. z o.o. v. Poland, European Court of Human Rights, ECtHR, Application no. 4907/18

⁶ As it is summarized in the information note, the Sejm underlined the unconstitutional character of the appointment of the three judges of the Constitutional Tribunal and recalled the unlawful appointment of its current President and called for the reinstatement of the Constitutional Tribunal.

mandate of the judges-members of the NJC⁷. Moreover, generally speaking, the lack of assessment of the content of at least the draft provisions should be also remedied, especially in light of the relevant case-law of the Court of Justice⁸, and bearing in mind that the Commission referred to the relevant judgment questioning the independence of the NJC during the hearings of Poland held on 22 June 2021 and it was repeatedly stressed at the hearing held on 30 May 2023 that the independence of the NJC remained a central issue in the Article 7 procedure against Poland.

As regards all those other political commitments made in the Action Plan, the implementation of which has not yet even started, including the envisaged elimination of the extraordinary appeal procedure and certain concerns related to the Polish prosecution service, I would like to recall that the Commission has consistently urged Poland to adequately address these issues within the Article 7 procedure at the hearings and state of plays, based on its reasoned proposal. As regards the prosecution service, it seems that the Commission particularly welcomes the Minister of Justice's (who is the Prosecutor General) letter of 15 January 2024, in which he called on the prosecutors to act independently. In this regard, further explanation would be useful from the Commission whether, in light of the reasoned proposal⁹, its opinion has changed in any way since the launch of the Article 7 procedure, taking into account that the Minister of Justice of Poland is currently still holding the position of the Prosecutor General. We note that the fact that Poland has joined the enhanced cooperation on the establishment of the European Public Prosecutors Office does not have direct relevance in this regard, as it falls outside the scope of the Article 7 procedure.

Lastly, I would like to recall that in the course of the endorsement of Poland's first payment request under the Recovery and Resilience Fund, the Commission stated that the implementation of the Action Plan would not be monitored primarily within the framework of the two related 'supermilestones' but within the framework of the Article 7 procedure. I would like to point out that even though since the Commission's relevant decision of 29 February 2024¹⁰ no further legislative act has been adopted in Poland in order to implement the numerous political commitments set out in the Action Plan, the Commission decided on 6 May 2024 that there is no need to monitor the implementation of all these political commitments within the Article 7 procedure but it will be appropriate to monitor the eventual developments in particular under the

⁷ See paragraph (140) of the reasoned proposal (*'According to Article 6 of the law on the National Council for the Judiciary the mandates of all the current judges-members of the National Council for the Judiciary will be terminated prematurely. This termination decided by the legislative powers raises concerns for the independence of the Council and the separation of powers. (...) The premature termination also raises constitutionality concerns, as underlined in the opinion of the National Council for the Judiciary, of the Supreme Court and of the Ombudsman.'*) and paragraph (145) of the reasoned proposal (*'The political appointment of judges-members and the premature termination of mandates of the current judges-members of the Council therefore violates the principles of separation of powers and judicial independence.'*)

⁸ Judgment in joined Cases C-585/18, C-624/18 and C-625/18 A. K., CP, DO v Krajowa Rada Sądownictwa and Sąd Najwyższy of 19 November 2019, ECLI:EU:C:2019:982

⁹ See paragraph (170) of the reasoned proposal: *'(170) As underlined by the Venice Commission 138, while recognising that the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts, taken together, the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary pursuant to the law on the Organisation of Ordinary Courts and the weak position of checks to these powers, result in the accumulation of too many powers for one person. This has direct negative consequences for the independence of the prosecutorial system from political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland.'*

¹⁰ Positive preliminary assessment of the satisfactory fulfilment of milestones and targets related to the first payment request submitted by Poland on 15 December 2023 of 29 February 2024, available at: [52bd45c7-da37-4ba0-b623-95da8cdad7f9_en \(europa.eu\)](https://ec.europa.eu/eu-justice/press/newsroom/press_corner/press_corner.cfm?id=52bd45c7-da37-4ba0-b623-95da8cdad7f9_en)

Commission's annual Rule of Law Reports. As the Commission did not provide any justification for why it decided to change its position, as expressed in March 2024¹¹, Hungary believes that this should also be explained by the Commission.

Having regard to the above, I am of the opinion that without a well-founded explanation on the above crucial issues further to the current assessment provided by the Commission in the information note, the Commission faces the risk that its decision of 6 May 2024 and its envisaged decision to withdraw the reasoned proposal will be considered as decisions taken purely on political grounds.

Hungary believes that the Commission's decision to be taken in relation to the Article 7 procedure against Poland will be highly relevant to all rule of law related EU mechanisms and (political) debates for the future, including the new EU institutional cycle.

I would highly appreciate to receive your replies to my observations in writing as soon as possible and I hope that you will be able to reflect on them also at the meeting of the General Affairs Council on 21 May 2024.

Yours sincerely,


János BÓKA



¹¹ See the letter of the Economic Policy Committee of 20 March 2024 concerning the preparation of the Economic and Financial Committee's (EFC) draft opinion in relation to, inter alia, the first payment request from Poland [Ref. number: ecfm.cef.cpe.01(2024)2288222]: '*On the payment request made by Poland, (...) The Commission clarified the various points related to the independence of judges and the political commitments made by Poland. The Commission also explained that the implementation of measures will also be monitored in the procedure initiated against Poland under Article 7(1) TEU.*'