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Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

The honouring of membership obligations to the Council of Europe by Poland

Information note by the co-rapporteurs on their fact-finding visit to Warsaw (13 to 15 March 2023)

Co-rapporteurs: Ms Azadeh Rojhan, Sweden, Socialists, Democrats and Greens Group and Mr Pieter Omtzigt, Netherlands, Group of the European People's Party

¹ Document declassified by the Monitoring Committee at its meeting on 30 May 2023.

1. Introduction

1. This was the first monitoring visit to Poland since the Assembly decided to open a full monitoring procedure in respect of Poland on 28 January 2020. This was largely the result of the impact of the global Covid-19 pandemic, followed by elections and important domestic developments in the home countries of the rapporteurs. Nevertheless, even in the absence of possibilities for physical fact-finding visits to the country we have continued our monitoring activities. In this context a number of online exchanges of views were held, inter alia with civil society organisations, the then Polish Ombudsperson Adam Bodnar and his staff as well as with the Polish Delegation to the Assembly.
2. The main aim of this visit was to observe the current political climate and study the developments in the country with regard to its honouring of membership obligations, in particular in the field of the rule of law. As a result of domestic developments and engagements, Ms Azadeh Rojhan had to cancel her participation in the visit at the last moment. The visit was therefore exceptionally conducted by a single rapporteur and with a slightly reduced number of subjects. In addition to the political and rule of law situation, the visit also looked at the media environment as well as the developments in Poland with regard to the reported abuse of the Pegasus surveillance software. The reported abuse of the Pegasus surveillance software in several Council of Europe member States is the subject of a separate report in the Committee on Legal Affairs and Human Rights of which one of the rapporteurs for Poland, Mr Omtzigt, is also the rapporteur. In order to avoid duplication of efforts, this information note will only look at the rule of law aspects in the Polish context, while a detailed analysis of the abuse of the Pegasus surveillance software will be reserved for the report by the Committee on Legal Affairs and Human Rights.
3. During our visit we met, inter alia with: the Marshal of the Polish Senate, the Secretary of State of Justice, the First President of the Supreme Court and Presidents, or their deputies, of all Supreme Court Chambers, the Commissioner for Human Rights and his Deputy, the Chairpersons and members of the Senate Committees on Legislative Affairs and of the Committee to clarify cases of illegal surveillance, their impact on the electoral process in the Republic of Poland and the reform of the secret services, the Vice-Chairperson and members of the Sejm Committee on Culture and Media, the Constitutional Tribunal, the Chairperson and members of the National Council of the Judiciary, the Disciplinary Officer for Ordinary Court Judges, the Presidium of the Polish Delegation to PACE, the Chairperson and members of the National Broadcasting Council, the Vice Chairperson of the Polish Bar Association, the Judges Associations Artemis and Iusticia, representatives of the OSCE/ODIHR as well as a wide range of representatives from civil society. The programme of our visit is attached to this note in Appendix 1.
4. We would like to thank the Polish delegation for the organisation of the programme and hospitality provided, and the Head of the Council of Europe Office in Warsaw for the support given to our delegation during our visit. The statement issued at the end of our visit is attached in Appendix 2.
5. During and after our visit several interlocutors, including the First President of the Supreme Court and the Marshal of the Polish Senate, have provided us with elaborate and detailed background information regarding the items we discussed during our visit. We would like to express our sincere appreciation for this and, while a detailed analysis of these papers would be beyond the scope of this information note, they provide us with invaluable background information for the preparation of our report to the Assembly.

2. Recent political developments and political climate

6. The political environment we encountered during our visit continued to be characterised by a deep polarisation between opposition and ruling majority which has permeated into many levels of the Polish society. This is compounded by the fact that there will be parliamentary elections in Poland latest on 11 November 2023, for which the campaign has already unofficially started. Another development which has affected all parts of Polish society, and on which opposition and ruling majority have formed a rare but strong united front, has been the invasion of Ukraine by the Russian Federation. Poland has played a key role in rallying support for Ukraine and has welcomed more than 1.5 million Ukrainian refugees (of the more than 8 million Ukrainian refugees that have passed through its borders), which understandably is putting a considerable strain on the country's social infrastructure. The support and solidarity of the Polish State and its citizens with Ukraine cannot be but strongly lauded. In this context, it is hoped that the recent decision by Poland to ban imports of cereals, dairy products as well as fruits, vegetables, and meats, is not a signal of a change in its position².

² Poland later allowed the transit of these products through its territory to other EU countries.

7. To recall, during the 2019 elections the incumbent authorities retained their ruling majority in the Sejm but narrowly lost control over the Senate. This has resulted into a stalemate between these two important parliamentary bodies, that affects the system of checks and balances and overall functioning of the democratic institutions in the country, in turn deepening the political polarisation. Amendments adopted by the Senate to legislation proposed by the Sejm are habitually overturned by the latter, while we were informed by the Senate that legislative initiatives from their side often are not placed on the agenda of the Sejm. While the Senate over legislation in most cases can be overturned by simple majority in the Sejm, for a number of specific issues, such as the appointment of the Ombudsperson, agreement of both Senate and Sejm is necessary, leading to a difficult and protracted negotiation process.

8. In addition to the polarisation between ruling majority and opposition, also tensions within the ruling majority have come to the surface, especially between the Law and Justice party (PiS) and its hard-line coalition partner United Poland party of Justice Minister Zbigniew Ziobro. This intra-coalition dynamic is hindering the possibilities to find a solution to the rule of law crisis, with Minister Ziobro, openly criticising the efforts of Prime Minister Mateusz Morawiecki to find common ground with the European Commission in the standoff over the rule of law situation in Poland, and opposing the legislative reforms proposed by PiS to that effect (see below).

9. In June 2021, the ruling coalition formally lost its majority when 3 MPs left the coalition, reportedly over differences over the government's economic and energy policy. The ruling coalition maintained its parliamentary support to govern mainly due to the votes of the Kukiz '15 faction, which signed an agreement to support the ruling coalition without joining the government. However, this situation further reduced the political space to manoeuvre of PiS and increased the dependency of the government on the United Poland Party to survive.

10. According to constitutional requirements, the next parliamentary elections in Poland, for both Sejm and Senate will have to take place on or before 11 November 2023. Current opinion polls indicate that, if elections were to take place today, the results for opposition and ruling majority could be very close. This affects the dynamics both between and within the opposition and ruling majority, with the election campaign unofficially, but clearly, having started.

11. Both Sejm and Senate need to agree on the candidate that will be appointed as Ombudsperson. The term of the previous Ombudsperson, Adam Bodnar, expired in September 2020. Initially the Sejm and Senate were in a stalemate about his succession as they could not agree upon a mutually acceptable candidate. In line with legal requirements and past practice, Mr Bodnar remained in function until a new Ombudsperson could be appointed. Following a petition by several members of the ruling majority, who felt that the stalemate between Senate and Sejm on the appointment of a successor to Mr Bodnar was favouring the opposition, the Constitutional Tribunal of Poland (CT) ruled, on 15 April 2021, that the continuation in office of Mr Bodnar, after his term had ended, was in violation of the Constitution and ordered that his functions would terminate three months after the CT judgment. However, the Tribunal did not specify who should fulfil the tasks of the Ombudsperson after his functions were terminated, leading to widespread expectations that the Sejm would adopt legislation allowing it to appoint an interim Ombudsperson without the agreement of the Senate. The CT verdict and its argumentation were widely criticised - especially in the context of questions regarding the independence of the Constitutional Tribunal - as an attempt by the ruling majority to get rid of a critical Ombudsperson³. However, in a positive development, on 8 July 2021, the opposition and ruling majority reached an agreement and appointed Professor Marcin Wiacek as the new Ombudsperson. During our visit most interlocutors expressed a positive view about the new Ombudsperson which they regarded, until then, generally as nonpartisan.

12. The agreement regarding the appointment of the Ombudsperson is a positive feat and shows that cooperation and agreement between opposition and ruling majority is possible on politically sensitive but urgent issues if parties can overcome narrow party-political interest. We hope this can set an example that can be replicated in other occasions including with regard to resolving the institutional rule of law crisis that is undermining the country's democratic development.

3. Rule of Law

13. The situation with regard to the respect for the rule of law in Poland continues to dominate the domestic agenda and the country's relations with international partners, in particular the European Union and Council of

³ The relation between Mr Bodnar and ruling majority had become increasingly acrimonious and his decisions and actions both more political as well, possibly unavoidable, politicised.

Europe. Regrettably the situation has continued to deteriorate considerably since the adoption of [Resolution 2316 \(2020\)](#) on the Functioning of Democratic institutions in Poland, on 28 January 2020, which resulted in the opening of a full monitoring procedure in respect of Poland.

14. As we will outline below, no progress has been made with regard to addressing the central tenets of our report, namely the challenges to the independence of the judiciary as well as the attempts to bring the justice system under the political control of the ruling majority. In addition, the concerns expressed in our report about the legality and legitimacy of key judicial institutions and their decisions as a result of the manner in which these bodies are composed, have unfortunately come true. This has been compounded by the controversial disciplinary proceedings against several judges for their critical positions on judicial reforms. As a result, the polarisation in the judiciary between so-called “old” and “new”⁴ judges has deteriorated to the point that it mirrors the one in the political environment and is undermining the efficient functioning of key judicial institutions. Regrettably, the term “new” and “old” judges is used by both sides in a stigmatising and derogatory manner with implied questions about the integrity of an individual judge instead of strictly referring to the manner in which the judge was appointed. The increasing polarisation and animosity inside the judiciary was clearly evident during the meetings with several judicial institutions in the framework of our visit.

15. Arguably, the main developments with regard to the rule of law in Poland since our report have been the judgments of the ECtHR that have brought into question the legitimacy of key judicial bodies in Poland, as well as the ongoing infringement procedures, and CJEU judgments in that respect, that were started by the European Commission against Poland. We will outline these developments – in summary – below. A common thread in the judgments of the ECtHR and CJEU has been the questionable legitimacy and independence of key judicial institutions in Poland, including the Disciplinary Chamber of the Supreme Court. The latter plays an important role in the continuing trend of using, or better abusing, disciplinary procedures against judges that have reportedly been critical of the judicial reforms or who have ruled against the interest of the ruling majority and government in cases before them.

3.1. European Court of Human Rights

16. In recent years the ECtHR has made a series of judgments that question the legitimacy and the independence of key judicial institutions in Poland, namely the Constitutional Tribunal as well as the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs of the Supreme Court which, in the judgment of the Court, gave rise to violations of article 6 (right to a fair trial) of the Convention.

17. The key judgments in this respect are *Xero Flor w Polsce sp. Z o.o. vs Poland* (4907/18); *Reczkovicz vs Poland* (43447/19) and *Dolińska-Ficek and Ozimek v. Poland* (49868/19 and 57511/19).

18. On 7 May 2021, in the case [Xero Flor w Polsce sp. Z o.o. vs Poland](#) (4907/18)⁵ the ECtHR adjudicated that *“the actions of the authorities in appointing one of the judges who had been on the bench in the applicant company’s case and the ignoring of the Constitutional Court’s judgments in that connection had meant that the panel that had tried the case had not been a “tribunal established by law”*. In effect this means that any bench of Constitutional Court judges that contains a judge that had been appointed in 2015 in violation of the Constitutional Tribunal own ruling⁶ on this matter, cannot be considered a tribunal established by law, and that therefore the decisions of such have no legitimacy. This confirmed a main concern expressed by the Assembly in [Resolution 2316 \(2020\)](#) on the functioning of democratic institutions in Poland.

19. On 22 July 2021, the ECtHR announced its judgment in the case [Reczkovicz vs Poland \(43447/19\)](#)⁷ in which it ruled unanimously that *“in the disciplinary proceeding against the complainant there had been a violation of art 6 §1 of the convention as the procedure for appointing judges [on the disciplinary chamber] had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Disciplinary Chamber of the Supreme Court,*

⁴ The term “new” and “old” judges is widely used in Poland to differentiate between the judges who have been appointed by the National Council of the Judiciary, or bodies appointed by it, before it was reformed and lost its independent status (the so-called old judges), and those appointed by, or by bodies appointed by, the new National Council of the Judiciary after its reform.

⁵ [Full text of judgment.](#)

⁶ Please see § 23-44 of [Doc. 15025](#) on the functioning of democratic institutions for a description of the of problematic appointment procedure the ECtHR refers to.

⁷ [Full text of judgment.](#)

which had examined the applicant's case. The Disciplinary Chamber was not therefore a "tribunal established by law" within the meaning of the European Convention".

20. In its judgment, on 8 November 2021, in the cases [Dolińska-Ficek and Ozimek v. Poland \(49868/19 and 57511/19\)](#)⁸, the ECtHR found that the procedure for appointing judges to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court had been unduly influenced by the legislative and executive powers. Therefore, the Chamber of Extraordinary Review and Public Affairs was not an "*independent and impartial tribunal established by law*" within the meaning of the European Convention. In addition, the Court found that "*in blatant defiance of the rule of law, the President of Poland had carried out judicial appointments to this Chamber despite a final court order staying the implementation of the NCJ's resolution recommending judges to the Chamber of Extraordinary Review and Public Affairs.*"

21. It is important to note that the above-mentioned cases are the leading cases. At least 57 other cases have already been communicated to the Polish authorities by the ECtHR, that concern the independence of the judiciary. In total, the number of pending applications cases to the ECtHR dealing in one or more aspects with the reform of the judiciary was 195 in October 2022. In addition, there have been several additional applications to the Court regarding the independence and legality of the Constitutional Tribunal of which at least one case has been communicated to the Polish authorities (Botor v. Poland (50991/21)). This underscores the scale of the legitimacy problem. In [Resolution 2316 \(2020\)](#), the Assembly expressed its concern that the judicial reforms in Poland and their violation of European rule of law norms and standards, would undermine the legitimacy of the Polish judicial system itself and could lead to an influx of complaints with the ECtHR, substantially increasing its workload. Unfortunately, these concerns have borne out to be correct.

22. The effects of the above-mentioned judgments of the ECtHR on the justice system should not be underestimated. Combined these judgments have declared three key judicial institutions - namely the Constitutional Court in certain benches, as well as the Extraordinary Review and Public Affairs Chamber and Disciplinary Chamber of the Supreme Court - as not established by law.

23. Equally important, with regard to the two Chambers of the Supreme Court, the judgments are based on, in the words of the ECtHR, *manifest breaches in the appointment of judges* to these newly established chambers, as a result of the fact that these judges are proposed by the KRS which following its reform is no longer considered a body that is independent from the legislative or executive powers⁹. This is a key aspect of the ruling. Although the judgments concretely deal with the recently established chambers of the Supreme Court, it is clear that this reasoning also hold for other chambers when new judges will be appointed to them in sufficient numbers, and indeed for all judicial benches that will contain judges appointed by the reformed National Council of the Judiciary (KRS). As a result, if not addressed as a matter of priority, this could bring into questions the legality of numerous judgments, ultimately leading to a further increase in applications to the ECtHR.

24. Secondly, it is therefore clear that it will be difficult, if not nigh impossible, to satisfactorily implement these judgments without reforming the appointment procedure for the KRS¹⁰. In this context it should be noted, and it is worrisome, that in none of the proposals of the Polish authorities to address international, and in particular EU concerns about the rule of law in Poland, the reform of the KRS and the procedure of appointment of its members are even mentioned.

25. Regrettably, the authorities have indicated¹¹ that they have no intention of complying with these judgments contrary to Poland's obligations under the Convention. In reaction to the Xero Flor vs Poland judgment, the Minister of Justice of Poland requested, on 29 July 2021, the Polish Constitutional Tribunal to examine the constitutionality, under the Polish Constitution, of article 6 of the ECHR. On 24 November 2021, the Polish Constitutional Tribunal

⁸ [Full text of the judgment.](#)

⁹ The KRS, according to the Polish Constitution, is the "autonomous self-governing body of the judiciary established to safeguard the independence of the judiciary". Following its reform all the members of the KRS are now appointed by the Sejm, which can also nominate the candidates for KRS positions. As a result of these reforms the KRS consists of political appointees and can no longer be considered as an independent judicial institution. The reform of the Supreme Court established two new chambers: the disciplinary chamber and the extraordinary appeals chamber. The members of these two chambers are nominated by the KRS and appointed by the President of Poland. Given the lack of independence of the KRS the independence of these two chambers is widely questioned. This was confirmed in the judgments of both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights.

¹⁰ [Doc. 15025](#) on the functioning of democratic institutions in Poland" § 59-71.

¹¹ This was also confirmed to us in various meetings during our visit.

ruled that Article 6 (1) of the European Convention on Human Rights (the right to a fair trial by an independent tribunal) is not compatible with the Polish Constitution if applied to the Constitutional Tribunal or used to give the Court in Strasbourg the right to assess the legality of the process of electing judges to the Constitutional Tribunal.

26. In similar fashion, following the *Reczkovicz vs Poland* (43447/19) judgment, the Minister of Justice asked the Constitutional Tribunal to examine the compatibility with the Polish Constitution of the first sentence of Article 6(1) of the ECHR. Expectedly, on 10 March 2022, the Constitutional Tribunal of Poland ruled that Article 6(1) of the convention was incompatible with the Polish Constitution insofar as it extended civil rights and obligations to the right of a judge to hold an administrative function in the organisational structure of the judiciary in Poland; or if it permitted the ECtHR in the determination whether a tribunal is established by law to: ignore provisions of the constitution, statutes and judgments of the Polish Constitutional Tribunal; review statutes regarding the court system and competences of the courts, as well as the statute of the National Council of the Judiciary; or create independent norms pertaining to the procedure for judicial appointments.

27. These Constitutional Tribunal decisions have escalated the confrontation between the Polish authorities and international community and are above all an unacceptable challenge to the supremacy of the Convention. These decisions run counter to the obligation of all member States to fully implement the Convention and judgments of the European Court of Human Rights. Regrettably these decisions are also indicative of the increasing lack of independence¹² of the Polish Constitutional Tribunal and the weaponization of this important institution in the standoff with the European Institutions over the Rule of Law in Poland.

28. In response to these judgments by the Constitutional Tribunal, the Secretary General of the Council of Europe, availing herself of her competencies under article 52 of the ECHR, requested explanations of the Polish authorities *“in which manner the Polish law ensures the effective implementation of articles 6 and 32 of the convention following the judgment of the Constitutional Tribunal of 21 November 2021 in the case of Xero Flor vs Poland”*. Subsequently, on 16 March 2022, the Secretary General made a similar request following the Constitutional Tribunal decision of 10 March 2022 in relation to the *Reczkovicz vs Poland* (43447/19) judgment. The replies to her enquiries were received on respectively 8 March 2022 and 23 June 2022.

29. In their reply to the Secretary General, the Polish authorities argued, inter alia, that the Constitutional Tribunal could not be seen as a tribunal within the meaning of article 6; that the monopoly of appointing judges by the legislator could not be subject to external control; and that the Constitution of Poland has supremacy over international law and the Convention, and that the ECtHR had in effect created new constitutional norms.¹³

30. On 9 November 2022, the Secretary General presented her report under article 52 of the ECHR to the Committee of Ministers, in which she provided a legal analysis of the replies by the Polish authorities. Her report and its conclusions were fully endorsed by the Committee of Ministers and form the basis for the discussions between the Committee of Ministers and Polish authorities on the implementation of the above-mentioned ECtHR judgments.

31. In her report the Secretary General underscored that it is a fundamental principle of international law that treaties are binding on their signatories, who are obliged to implement them in good faith. In addition, the Convention clearly states that the high contracting parties are obliged to secure the rights outlined in the Convention, including article 6, to everyone in their jurisdiction. Moreover, the Court is established with the express purpose of ensuring observance with the engagements undertaken and therefore the Court can examine and decide on the way State parties ensure the rights and freedoms provided in the Convention within their jurisdiction. As already stated by the Venice Commission, the State parties expressly accept the competence of the ECtHR to interpret and not only apply the Convention. As a result, *“[ECtHR] is vested with the jurisdiction to establish the*

¹² Reportedly both decisions by the Constitutional Tribunal were taken by benches that contained judges that were considered to be illegally appointed by the ECtHR in their judgment on *Xero Flor vs Poland*.

¹³ The Polish authorities have provided the Secretary General with a comprehensive reply outlining in detail the grounds for the decisions by the Constitutional Tribunal. It is beyond the scope of this note to reproduce the full reply of the authorities, or their rebuttal by the Secretary General of the Council of Europe. We have only outlined them in summary in this note. Please see the [SG/Inf \(2022\) 39](#) Report by the Secretary General under Article 52 of the European Convention on Human Rights on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland for the full text of the replies by the Polish authorities, as well as their analysis and rebuttal by the Secretary General of the Council of Europe.

scope of the binding obligations assumed by State parties under the Convention and its protocols” and the “High Contracting parties are [further] obliged to execute the final judgments of the European Court “¹⁴.

32. In relation to the specific arguments of the Polish authorities the Secretary General notes that according to established case law, constitutional disputes may come before the ECtHR and that *“where this is the case, the guarantees contained in Article 6, paragraph 1 of the Convention, including the guarantee of judicial independence, apply to a constitutional court”*. The applicability of the same guarantees to the rights of judges holding administrative positions and to the judicial appointment-process is also well-grounded in the European Court’s jurisprudence. The Secretary General therefore concluded that it only results from the explanations of the authorities *“that Poland’s internal law allowed for explicitly declining to apply the European Court’s interpretation of the Convention and is thus not in conformity with Article 32 of the Convention. This in turn implies a failure by Poland to respect its obligation under Article 1 of the Convention to guarantee the right to a fair trial for everyone within its jurisdiction.”*¹⁵

33. Concluding, the Secretary General emphasised that Poland, as is the case for all other signatories of the European Convention of Human Rights, is obliged to implement the Convention and abide by the judgments of the European Court, even if in extreme cases that would require amending the Constitution.

34. The execution of Court Judgments is supervised by the Committee of Ministers. However, as mentioned it is clear that in order to address the deficiencies noted in the judgment it will be necessary to re-establish the independence of the National Council of the Judiciary and change the manner in which its members are appointed. No attempts to address this issue have been made till now and most interlocutors consider it unlikely that this will be done before the next elections, given the political sensitivity of the subject. Nevertheless, we urge the authorities to address this issue without any undue delays. In this respect we welcome that the first President of the Supreme Court, who is widely seen as close to the authorities, has said in various interviews that *“the current model [for appointment of KRS members] is not my model”*¹⁶ and that she would be open for other mechanisms to appoint the members of the National Council of the Judiciary¹⁷.

35. The judgments of the ECtHR have raised questions regarding the legitimacy of all benches composed of judges that are appointed by the new National Council of the Judiciary. In order not to risk invalidating their judgments, several judges have refused to adjudicate on benches composed with new judges and have questioned the legitimacy of these judges’ appointments and decisions. In response, the authorities have adopted the controversial so-called muzzle-laws which we outlined in the addendum to our report to the Assembly¹⁸. These laws, inter alia, prohibit the questioning, by another domestic court or judge, of the legitimacy of any judge appointed by the President of the Republic and provide for severe disciplinary punishment in cases of transgression of this interdiction. The disciplinary proceedings started by the authorities on these grounds have formed an important part of the complaints against disciplinary decisions brought before the ECtHR and CJEU.

36. The Polish authorities have argued that, if implemented, the ECtHR judgments would mean that the legitimacy of any judicial decision in Poland could be questioned, which would violate the principle of judicial certainty. However, this was rejected by several members of the Supreme Court Presidium, who underscored that the Supreme Court had adopted an elaborate set of criteria to test whether a particular bench and its decisions could be considered illegitimate, and that in most cases Courts would avoid appointing benches that would not pass that test. Nevertheless, the potential impact of the ECtHR judgments is clear, and evident from the increasing number of applications to the ECtHR questioning the legitimacy of the courts under art 6 of the convention. This should be addressed by the authorities in line with international standards and norms as a matter of urgency.

37. A key issue of concern in this respect is the adjudication of election related complaints which could have an important and potentially detrimental impact on upcoming elections. According to Polish legislation the Extraordinary Review and Public Affairs chamber has jurisdiction over *“...electoral disputes and challenges concerning the validity of national or constitutional referendums, and determination of the validity of elections and referendums...”*¹⁹. The case law of the ECtHR is clear that electoral disputes cannot be examined under Article 6

¹⁴ Report by the Secretary General under Article 52 of the European Convention on Human Rights on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland, § 22.

¹⁵ Ibid § 26.

¹⁶ Gazeta Prawna 1 czerwca 2020 r.

¹⁷ Rzeczpospolita 3 czerwca 2022 r.

¹⁸ [Doc. 15025 Add.](#)

¹⁹ Article 26 of the Law on the Supreme Court of Poland.

of the Convention. At the same time, the independence and impartiality, and perception thereof, of the body adjudicating on elections disputes and challenges to the validity of elections is essential for the democratic nature and legitimacy of elections and recognised by the ECtHR in relation to Protocol 1 article 3. Therefore, the questioning of the ECtHR in its recent judgments of the legitimacy and independence from political control of this Chamber and its decisions, means that it cannot muster the required trust as an impartial and objective arbiter by a large segment of the electoral stakeholders, which could lead to appeals to the ECtHR under Protocol 1, Article 3, (Right to Free Elections²⁰) of the Convention. The potential risk was recognised in our meeting with the Presidium of the Supreme Court, and we were informed that the Supreme Court is looking into how to address this issue within its own mandate. However, it is not clear to us if it is possible to address this risk without legislative efforts. We call therefore upon all political parties and forces to address this issue in a mutually satisfactory matter before the next elections are called to ensure that their democratic legitimacy cannot be questioned. If, in the context of close election results, electoral stakeholders would appeal to the Strasbourg Court due to the lack of trust in the impartiality of the Extraordinary Appeals and Public Affairs Chamber, this could considerably increase political uncertainty about the outcome of the elections. The notion that an election would be challenged before the ECtHR could lead to increase political uncertainty and affect the perception of the legitimacy of an election which would be highly undesirable for any sovereign State. Both ruling majority and opposition have a responsibility to avoid such a situation.

3.2. EU Infringement procedures

38. The European Commission has started a number of infringement procedures against Poland. It is beyond the scope of this information note to outline these procedures. However, several of these procedures are closely intertwined with the appeals launched before the ECtHR and its judgments in these cases (see previous section). Given the apparent priority given by the Polish authorities to resolve its stand-off with the European Commission over the rule of law in Poland it is important to ensure that any solutions will also address, or at least not impede, the proper execution of the ECtHR judgments. This interrelationship was underscored by many of the interlocutors we met, who all stressed the need for close coordination between the European Commission and Council of Europe in resolving the Polish rule of law crisis.

39. The European Commission has initiated a number of cases against Poland before the European Court of Justice (CJEU) for violating European rules and principles with regard to the rule of law and independence of the judiciary. On 20 December 2017, the Commission triggered an Article 7(1) TEU procedure against Poland. On 3 April 2019, the European Commission launched an infringement procedure against Poland on the grounds that *“the new disciplinary regime for judges undermines the judicial independence of Polish judges and does not ensure the necessary guarantees to protect judges from political control, as required by the Court of Justice of the EU”*²⁰. On 15 July 2021, the CJEU reached its judgment in the infringement proceedings brought by the European Commission in case 791/19 and found that the disciplinary regime for judges in Poland is not compatible with EU law and does not protect judges from political control. Faced with considerable financial sanctions, the Polish authorities announced on 7 August 2021 that they would disband the Disciplinary Chamber but did at that time not follow through. On 7 September 2021, the Commission requested the CJEU to impose penalties on Poland to ensure compliance with the interim measures demanded by the Court. On 27 October 2021, the CJEU imposed a 1 million euro daily fine until Poland has fully complied with the interim measures. The latter is still not the case, and the fine is accumulating.

40. On 6 October 2021, in a ruling case C-487/19, the CJEU found that *“transfers without consent of a judge to another court, or, as is the case in the main proceedings, the transfer without consent of a judge between two divisions of the same court are [...] potentially capable of undermining the principles of the irremovability of judges and judicial independence”*. In addition, it ruled that the appointment of the judge on the Disciplinary Chamber that had dismissed the appeal against the transfer had taken *“place in clear disregard of the fundamental procedural rules for the appointment of judges to the Supreme Court”* and that the conditions in which the Supreme Court judge was appointed had created questions as to *“the imperviousness of that judge to external factors and as to his neutrality”*. According to the Polish Prime Minister this ruling was *“an attempt to hit at the very heart of the social and legal system”*, that could affect *“hundreds of thousands”* of judgments by Polish courts and appealed the constitutionality of the TEU with the Polish Constitution. Similar to what happened with the ECtHR judgments, on

²⁰ Rule of Law: [Commission](#) launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal.

14 July 2021 and 7 October 2021, in a direct challenge to the supremacy of the TEU, the Constitutional Court of Poland ruled that certain provisions of the TEU were inconsistent with the Polish Constitution. On 22 December 2021, the European Commission decided to launch another infringement procedure against Poland because of serious concerns with regard to its rulings on the TEU and the questions about its independence and impartiality.²¹ On 15 February 2023, the European Commission decided to refer Poland to the CJEU for violations of EU law by its Constitutional Court.²²

41. Despite the announcement of the authorities that the Disciplinary Chamber of the Supreme Court would be disbanded, the latter continued to decide on disciplinary cases against judges and on requests to lift their immunity from prosecution. As a result of the concerns about the state of Rule of Law in Poland and the non-compliance with CJEU decisions the EU has been withholding its payments under the EU recovery Fund for Poland, with dire consequences for the Polish budgetary situation. In order to break the impasse, President Duda proposed to replace the Disciplinary Chamber of the Supreme Court with a Supreme Court Chamber of Professional Liability. On 9 June 2022, the Sejm adopted the necessary legislation to change the disciplinary regime which was signed into Law on the same day.

42. However, the composition of the new Chamber of Professional Liability is equally problematic. It is composed of 11 judges selected by President Duda from a list of 33 judges randomly selected from the sitting judges of the Supreme Court. However, due to the fact that many Supreme Court judges have been nominated by the new KRS, the procedure still allows for the new Chamber to be dominated by the so-called new judges²³, challenging its independence. As a result, the ECtHR in Strasbourg has ordered several interim measures to prevent disciplinary cases against judges from being heard by this new Chamber. As the new Chamber did not address the concerns of the European Commission, the latter decided not to allow the disbursement of the money under the recovery fund.

43. In order to release these funds, the Polish authorities subsequently proposed further amendments that would move the disciplinary proceedings out of the Supreme Court to the Supreme Administrative Court, which was seen as more independent. In addition, the amendments would also allow the questioning of the status of judges by other judges and remove the possibility of disciplinary proceedings against judges for doing so.

44. The ruling coalition is split on this issue, with the Minister of Justice and his party opposing the latest amendments. Nevertheless, they were adopted by the Sejm on 13 January 2023 with 203 votes against 52 and 189 abstentions. The Senate²⁴ proposed 14 amendments on this law, but these were all rejected by the Sejm which adopted the law in final reading on 7 February 2023. However, on 14 February 2023, President Duda, who reportedly opposes the notion that the legitimacy of judges appointed by him can be challenged by another judge, did not sign the law, and used his constitutional right to refer the bill to the Constitutional Tribunal. Given the divisions in the ruling coalition, there is no indication in which direction the Constitutional Tribunal will lean or when it will be able to hear the appeal given its recent internal tribulations (see below).

45. A point of concern is that none of the proposals by the European Commission and Polish authorities to resolve the rule of law crisis in Poland, have addressed the issue of the lack of independence of the National Council of the Judiciary. As we have outlined above, it will not be possible to resolve the rule of law crisis in Poland without addressing this issue. Several interlocutors expressed their fear that the European Union would be willing to accept compromise solutions that would not address the root causes of the rule of law crisis and undermine the execution of the ECtHR judgments. We therefore urge the European Commission and Council of Europe to closely co-operate and synchronise their efforts, with a view to ensuring that any solution accepted indeed addresses and resolves the root causes of the rule of law crisis and not only some of its effects.

3.3. *Disciplinary Proceedings against judges*

46. The controversial disciplinary proceedings against judges who have been critical of the reforms and/or who have questioned certain aspects of the reforms in their adjudication of cases, have regrettably continued to take

²¹ Rule of Law: [Commission](#) launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal.

²² The [European Commission](#) decides to refer POLAND to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal.

²³ The current chamber is composed of 6 “new judges” and 5 “old judges”.

²⁴ The Senate originally had announced they would ask for a Venice Commission opinion, but this was not possible within the timeframe for adoption of these amendments.

place. In addition to questionable disciplinary proceedings, there have been several reports of decisions of early termination of terms and the transfer of judges to other positions against their will. Many of these cases have been challenged before the CJEU and ECtHR. This has resulted in the Court in Strasbourg giving priority status to all applications that relate to the reform of the judiciary in Poland. In addition, the Court has increasingly been ordering interim measures, which ask the authorities to ensure that these cases will be heard in compliance with the requirements of article 6 of the Convention, including with regard to an independent and impartial tribunal established by law.

47. In a development that underscores our concerns about the excessive centralisation of judicial powers and functions in the person of the Minister of Justice, we were informed that in at least two cases the Minister of Justice has filed an extraordinary appeal against a rejection by a lower court of a disciplinary case against a judge. In its response to the complaints filed with it against these appeals the ECtHR has noted the controversial nature of these appeals and has asked the parties to provide the Court with its reflections on whether if this would warrant a pilot judgment procedure as a result of potential systemic or structural dysfunctioning of this procedure.

48. We do not wish to comment on the merits of any individual cases, however we note that the abuse of disciplinary proceedings against judges, as proven by the ECtHR and CJEU judgments, has become one of the issues at the heart of the ongoing rule of law crisis which the authorities should address as a priority.

3.4. Constitutional Tribunal

49. A new controversy has emerged in relation to the Constitutional Tribunal. On 5 January 2023, 6 of the 15 members²⁵ of the Constitutional Tribunal, called upon the President of the Tribunal, Julia Przylebska²⁶, to step down, as according to their interpretation, her 6-year term ended in December 2022. However, Ms Przylebska has argued that the legal provisions that limit the term of office for the Constitutional Tribunal President to 6 years came into force after her nomination and are therefore not applicable to her. Therefore, in her view, she should be allowed to continue to fulfil her functions as President until the end of her 9-year mandate^{27 28} as per the previous legislation until December 2024. On 1 March 2023, the Assembly of the Constitutional Tribunal sided with its President and agreed that in its opinion there were no legal grounds for selecting candidates for the position of President of the Constitutional Tribunal. There are concerns that this split in the Constitutional Tribunal could affect the work and efficiency of the Constitutional Tribunal, including in respect to the above-mentioned amendments that could unlock the EU funds. That this is not a hypothetical questions became clear on 5 April 2023, when the 6 judges wrote to the President of the Tribunal that they oppose, and therewith effectively scuttle²⁹, the holding of a hearing on the amendments that could lead to the unblocking of EU funds.

4. Media

50. Poland has a pluralist, well developed, but also highly polarised media environment at both national and regional level. The media landscape encompasses a wide range of printed press as well as radio and television outlets. Private media is reportedly mostly controlled by foreign investors and international media conglomerates. This has been a thorn in the eye of the authorities which have called for the “re-polonisation” of the media sector in an attempt to bring it under its control. As a large part of the private media are in the hands of German conglomerates these efforts have been accompanied by a pronounced anti-foreign, and especially anti-German, rhetoric which is of concern and regrettable.

51. In august 2020 Polish State oil company³⁰, PKN Orlen, bought Polska Press Group³¹ from its German owners, raising concerns among a number of interlocutors, including the Ombudsperson at that time, about increased government control over the regional media landscape. These concerns were compounded by reports that PKN Orlen dismissed a number of editors and journalists, which raised fears about editorial control and

²⁵ It is important to note that several of the 6 judges are considered to be close to Justice Minister Ziobro, and that therefore this development cannot be dismissed as a simple standoff between “old” and “new” Constitutional Tribunal judges.

²⁶ Ms Przylebska is a close friend of Mr Jarosław Kaczyński.

²⁷ The Polish Constitution limits the term in office of a Constitutional Tribunal judge to a single, non-renewable 9-year term.

²⁸ Her term as Constitutional Tribunal judge ends in December 2024.

²⁹ Under the procedure used by President Duda to send this law to the Constitutional Tribunal, the Tribunal is required to hear the case with a full bench consisting of 11 Judges. Given that 6 of the 15 judges oppose the hearing the Tribunal does not have the required quorum to hear and adjudicate on this case.

³⁰ The Polish State has a controlling 27.5 stake in PKN Orlen.

³¹ Polska Press Group consists of around 20 regional newspapers, 120 weekly magazines, and 500 online portals.

reduced pluralism. For their side the Polish authorities assert that it would be impossible to exert any editorial control over Polska Press news outlets through a state-owned company, even if they had wanted to.

52. Polish Law forbids entities based outside the EU from owning more than a 49% stake in a media company. One of the main independent private broadcasters is TVN24. TVN24 is owned by Discovery Europe, a Dutch based company which is wholly owned by the US based and owned Discovery channel. On 8 November 2021, the Sejm passed legislation that would in effect make the ownership construction as used by NTV24 illegal. While promoted as a bill to prevent the foreign ((non-EU) control over Polish Media, it was widely seen as an attempt to silence NTV24, which is often critical of the authorities. The Senate subsequently vetoed this bill but was overruled by the Sejm. The adoption of this law brought Poland into direct confrontation with the US authorities who had expressed strong reservations about it. The bill was finally vetoed by President Duda, citing his concern about the damage this bill could do to US-Polish relations, as well as his belief that foreign control should be addressed through the markets and not legislation. No attempts were made by the Sejm to override President Duda's veto and the legislation has been taken off the agenda.

53. The independence and impartiality of the Polish media regulator, the National Media Council (NMC), which is considered to be fully under control of the authorities, is a point of concern. The NMC has the powers to investigate, and possibly sanction, media outlets on the basis of the content of their broadcasts. From our meeting with the media regulator, it was clear that the grounds for starting such investigations are widely defined – if not overbroad – while in this respect too much discretionary power is granted to the Chairman of the authority. This was underscored by controversial decisions of the NMC to start legal proceedings against, inter alia NTV24 over a broadcast³² that had challenged the official government version of the Smolensk tragedy, as well as a broadcast which raised questions about the handling by Cardinal Karol Józef Wojtyła, before he was elected Pope John-Paul II, of allegations of abuse of children by priests under his ultimate authority as Cardinal. While these are arguably sensitive political and social topics in Poland, it would undermine pluralism and the freedom of the press if critical reporting over such issues were to be prevented by overzealous use by the NMC of its powers to investigate and sanction broadcasters. A free and pluralist media landscape is essential for any democracy, and we therefore intend to follow this issue closely and return to it in more detail in the context of a next visit to the country.

5. Pegasus

54. As mentioned, the detailed findings with regard to the abuse of the Pegasus surveillance software will be discussed in the context of the report on this issue that is being prepared in the Committee on Legal Affairs and Human Rights. However, in the context of the ongoing monitoring procedure in respect of the honouring by Poland of its membership obligations, it will be important to make few observations.

55. We were informed that the number of (secret) services and law enforcement agencies that are legally allowed to conduct covert surveillance has proliferated in Poland after independence. As a result, the judicial and parliamentary oversight is similarly fragmented and clearly no longer adequate. Moreover, there are some questions about how well the oversight mechanisms are adapted to Poland's increasingly polarised political and social environment. We would like to recommend that the authorities consider reforming the covert surveillance functions of the different secret services and law enforcement agencies with a view of creating a single agency with the technical capacity and mandate to execute such surveillance and with the necessary mechanisms to ensure proper judicial and bi-partisan parliamentary control over its operations.

56. As highlighted in the conclusions by the Senate Committee "to clarify cases of illegal surveillance, their impact on the electoral process in the Republic of Poland and the reform of the secret services", several of the persons whose telephones had been hacked using the Pegasus software, were politicians with important roles in their parties and the election campaigns that were taking place at the moment of surveillance. Such surveillance can undermine, and was reportedly used to undermine, a level playing field for election contestants, and therefore the democratic nature of an election. This underscores the need for a well-developed and bipartisan parliamentary oversight mechanism over covert-surveillance operations. Moreover, it raises questions with regard to the violation of the immunity of elected representatives. It is clear that for the reasons outlined here, no covert surveillance of an elected member of parliament should take place without explicit agreement from a specialised bipartisan body of the chamber to which this person belongs.

³² Called "The Power of Lies": [International Press Institute](https://www.internationalpressinstitute.org/) (10.01.2023).

57. Regrettably a proper investigation into the allegations made regarding the abuse of the Pegasus software has been a victim of the political polarisation and is stonewalled by the authorities and ruling party. While the Senate has established a special Committee “to clarify cases of illegal surveillance, their impact on the electoral process in the Republic of Poland and the reform of the secret services”, no attempts have been made by the Sejm to investigate the allegations of illegal surveillance, including of prominent political personalities. Given the impact this issue can have on the trust in the political system by its major stakeholders we urge all political forces to agree on a genuinely independent, or at least bipartisan investigation into the allegations that are made in this respect, and to address any shortcomings and misdeeds uncovered.

Appendix 1

Programme of the fact-finding visit to Warsaw (13 to 15 March 2023)
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Co-rapporteurs: **Ms Azadeh Rojhan**, Sweden, Socialists, Democrats and Greens Group
(absent during the visit)
Mr Pieter Omtzigt, Netherlands, Group of the European People's Party

Secretariat: **Mr Bas Klein**, Deputy Head of Secretariat, Monitoring Committee of the Parliamentary Assembly of the Council of Europe

Principal focus points of this visit:

- Rule of Law, ECtHR decisions
- Independence of the Judiciary, Judicial reforms, Disciplinary measures against members of the judiciary
- Media Freedom, Respect for Privacy

Sunday, 12 March 2023

20:30 (approx.) Delegation meeting

Monday, 13 March 2023

09:00 Meeting with Themis Judges Association

09:45 Civil Society Roundtable on Rule of Law and Independence of the Judiciary (*)

11:15 Expert Briefing on the Media environment (*)

12:15 Expert Briefing on the Human Rights situation in Poland (Lunch meeting) (*)

15:00 – 16:00 Meeting with **Ms Malgorzata Manowska**, First President of the Supreme Court with the participation of **Dr hab. Aleksander Stępkowski**, Judge of the Supreme Court, Spokesperson of the Supreme Court

16:15 – 17:15 Meeting with **Mr Bartosz Grohman**, Vice-President of the Bar Association

Tuesday, 14 March 2023

09:00 Meeting with National Association for Judges "Iustitia"

10:00 Meeting with OSCE/ODIHR (*)

- Mr Fabrizio Nava, Senior Political Adviser of Director's Office
- Mr Vladimir Misev, Senior Adviser of Election Department
- Ms Carolyn Hammer, Rule of Law Officer
- Mr Konstantine Vardzelashvili, Head of Democratisation Department

11:00 – 12:15 Meeting with Presidents of all Chambers of the Supreme Court
Dr hab. Małgorzata Manowska, First President of the Supreme Court
Prof. dr hab. Joanna Misztal-Konecka, President of the Supreme Court in charge of the Civil Chamber
Dr hab. Piotr Prusinowski, President of the Supreme Court in charge of the Labour and Social Insurance Chamber

Mr Tomasz Artymiuk, Judge of the Supreme Court in place of the President of the Supreme Court in charge of the Criminal Chamber

Dr hab. Oktawian Nawrot, Judge of the Supreme Court in place of the President of the Supreme Court in charge of the Extraordinary Control and Public Affairs Chamber

Mr Wiesław Koziół, President of the Supreme Court directing the work of the Professional Responsibility Chamber

Dr hab. Aleksander Stępkowski, Judge of the Supreme Court, Spokesperson of the Supreme Court

- 12:25 – 13:15 Meeting with **Ms Joanna Lichocka**, Vice-president of the Sejm Committee on Culture and Media and **Ms Dominika Chorościńska**, member of the Committee
- 13:15 – 14:30 Working lunch with Presidium of the Polish Delegation to PACE
Mr Arkadiusz Mularczyk, Chairperson of the Delegation
Mr Aleksander Pociąg, Vice-chairperson of the Delegation
Ms Iwona Arent, Vice-chairperson of the Delegation
Mr Andrzej Szejna, Vice-chairperson of the Delegation
- 14:45 – 15:45 Meeting with Prof **Marcin Wiśniewski**, Commissioner for Human Rights with the participation of **dr hab. Valeri Vachev**, Deputy Commissioner for Human Rights and **dr Janusz Roszkiewicz**, Senior Specialist in the Fundamental Rights and Freedom in the Constitutional, International and European Law Team
- 16:00 – 17:00 Meeting with **Prof Tomasz Grodzki**, Speaker of the Senate with the participation of **Mr Krzysztof Kwiatkowski**, Chairperson of the Legislative Committee

Wednesday, 15 March 2023

- 09:00 – 09:45 Meeting with **Mr Maciej Świrski** (President) and members of the National Broadcasting Council
- 10:00 – 11:00 Meeting with **Mr Sebastian Kaleta**, Secretary of State of Justice
- 12:30 – 13:45 Working lunch with **Mr Marcin Bosacki**, Chairperson of the Senate Committee to clarify cases of illegal surveillance, their impact on the electoral process in the Republic of Poland and the reform of the secret services and **Ms Magdalena Kochan**, member of the Committee
- 14:15 – 14:45 Meeting with **Mr Piotr Schab**, Disciplinary Officer for Ordinary Court Judges (Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych)
- 15:15 – 16:15 Meeting with **Ms Dagmara Pawełczyk-Woicka**, President of the National Council of Justice and members of the NCJ
- 16:30 – 17:30 Meeting with **Mr Jarosław Wyrembak**, member of the Constitutional Tribunal

(*) Meetings organised by the Council of Europe Office in Warsaw.

Appendix 2

Poland: PACE monitor urges all political parties to set aside narrow party interest and address the rule of law crisis

17/03/2023 | [Monitoring](#)

Ending a [three-day visit](#) to Warsaw, one of the two co-rapporteurs of the Parliamentary Assembly of the Council of Europe (PACE) for the monitoring of Poland, Pieter Omtzigt (Netherlands, EPP/CD), has called on all political parties to set aside narrow party political interest in order to overcome the rule of law crisis that is undermining the legal and social stability of the country.

“I continue to be deeply concerned with regard to the rule of law situation and judicial independence in the country,” said Mr Omtzigt. “The situation has continued to deteriorate since our last visit and many of the concerns outlined in PACE’s 2020 [resolution on Poland](#), based on our report, have unfortunately proven to be true.”

“The legitimacy of key courts in the country is widely questioned domestically and internationally, including by both the European Court of Human Rights and the EU Court of Justice, and judicial efficiency is deteriorating. The political divisions and polarisation that prevent a constructive solution to this institutional crisis are overflowing to all levels of society, and this is of concern for Poland’s long-term democratic consolidation,” he added.

Mr Omtzigt underscored his concern that the chamber of the Polish Supreme Court which adjudicates on election complaints is no longer a tribunal established by law in the eyes of the European Court of Human Rights. This could give rise to uncertainty if the final election results are challenged, and could lead to an even deeper crisis. He urged all parties to resolve this issue before the upcoming elections.

The rapporteur called on all political forces and stakeholders to overcome narrow party political interest and to find a systemic solution to the institutional crisis. “Any solution should fully and structurally address the judgments of both the European Court of Human Rights and the EU Court of Justice. This will be impossible to do without addressing the manner in which the members of the National Council of the Judiciary (KRS) are appointed, which undermines their independence. The current legislation that is now before the Constitutional Tribunal does not do this and therefore clearly will not be enough,” he said.

He underscored that the co-rapporteurs will continue to closely follow these developments in the context of the ongoing monitoring procedure in respect of Poland. In their view, he said, it would be impossible to end this procedure without resolving the institutional crisis and ensuring genuine independence of the judiciary at all levels.

PACE opened its [monitoring of Poland](#) on 28 January 2020. Poland is one of eleven Council of Europe member states subject to the full monitoring procedure. The other monitoring co-rapporteur, Azadeh Rojhan (Sweden, SOC), was unable to take part in the visit at the last moment.