

Ms Věra Jourová, Vice-President, Values and Transparency

Mr Didier Reynders, Commissioner for Justice

Ms Helena Dalli, Commissioner for Equality

1 December 2020

Re: Concerns regarding the rule of law and human rights in Poland and next steps under the Article 7(1) TEU procedure

Dear Vice-President Jourová, Commissioner Reynders and Commissioner Dalli,

We are writing to raise our longstanding and grave concerns concerning the deterioration of the rule of law and fundamental rights in Poland. In light of recent developments and continued and persistent attacks against the rule of law and human rights in Poland, we believe it is critical for the European Commission to issue an update to its Reasoned Proposal under Article 7(1) of the Treaty on European Union (TEU) expanding the scope of the ongoing procedure to include violations of EU values as set out in Article 2 TEU.

As you are aware, on 22 October 2020 the Polish Constitutional Tribunal issued a decision on constitutional claims filed by members of the Polish Sejm and formally supported by the Prosecutor General regarding the Act of 7 January 1993 on Family Planning, Human Embryo Protection, and Conditions of Legal Pregnancy Termination (the “Act”). In its decision, the Tribunal upheld those claims and found that certain provisions of the Act that provide for the legality of women’s access to reproductive health care are unconstitutional.

In particular, the Constitutional Tribunal held that Art. 4a sec. 1 point 2 of the Act, which allows the termination of pregnancy in situations of “severe and irreversible fetal defect or incurable illness that threatens the fetus’ life” is inconsistent with Art. 38 in conjunction with Art. 30 and in conjunction with Art. 31 sec. 3 of the Constitution of the Republic of Poland.¹

The decision has not been published by the Polish Government, and therefore has not yet taken binding legal effect, although as a result of the decision, we have received reports that some hospitals are already cancelling procedures or refusing to provide legal abortion care. When the decision does take effect, it will lead to violations of rights protected under international human rights law, including the rights to freedom from torture or cruel, inhuman or degrading treatment

¹ See Ref. No. K 1/20, <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy>.

or punishment, to the highest attainable standards of health, to privacy, and to non-discrimination. Such a change in the legal status quo is also incompatible with the international principle of non-retrogression as it removes without justification previous legal protections for women's human rights.

As a result, this decision also will undermine adherence to the EU values of the rule of law, equality, human rights and dignity enshrined in Article 2 TEU. In the starkest terms, the Constitutional Tribunal is now being used to deprive women of their fundamental rights. Under international human rights law Poland is obliged to ensure women's legal access to abortion care at a minimum when their life or health is at risk, when the pregnancy involves a severe or fatal fetal impairment or results from sexual assault.² It has been repeatedly established that a failure to do so will give rise to multiple human rights violations under international treaties that Poland has ratified, including of the right to freedom from torture or cruel, inhuman or degrading treatment or punishment. By removing a long-established legal ground for access to abortion from Polish law, the Tribunal's decision therefore paves the way for violations of international human rights law.³

Further, because of the serious questions over the legitimacy of the current Constitutional Tribunal, its decision should not be considered a decision of a "tribunal previously established by law" - in contravention of Article 47(2) of the Charter of Fundamental Rights of the European Union. Indeed, between July 2016 and December 2017, the European Commission adopted four Rule of Law Recommendations concerning Poland under its Rule of Law Framework and concluded that, in light of legislation impacting the functioning and independence of the Constitutional Tribunal, there was a clear risk of a breach of the rule of law as outlined in Article 2 TEU. The European Commission expressed serious concerns regarding the independence and legitimacy of the Constitutional Tribunal, noting that, "*the constitutionality of Polish laws can no longer be effectively guaranteed. The judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review.*" The European Commission reiterated these unresolved concerns in its Reasoned Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.⁴

As the Constitutional Tribunal decision of 22 October 2020 demonstrates, these fears have now been realized and underline the extremely grave consequences that the rule of law deficit is now having on adherence to EU values. The continuing lack of an independent and legitimate constitutional review process is now threatening fundamental human rights enshrined in international law and the EU values enshrined in Article 2 TEU. The Tribunal, which is no longer

² See e.g. Human Rights Committee (HRC) (2019), General Comment No. 36, para. 8; *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016); *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017); *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (2005); Concluding Observations: Ireland, para. 9, CCPR/C/IRL/CO/4 (2014); Committee on the Elimination of Discrimination Against Women (CEDAW), *L.C. v. Peru*; CEDAW/C/50/D/22/2009 (2011); Committee on Economic, Social and Cultural Rights (CESCR) (2016), General Comment No. 22; Joint Statement of UN Special Procedures, International Safe Abortion Day, 28 September 2016.

³ See e.g. CESCR: General Comment No. 22, para. 38; General Comment No. 3, para. 9; General Comment No. 14, paras. 32, 48, 50. See also "Maastricht guidelines on violations of economic, social and cultural rights", 1997, Guideline 14(e); "Limburg principles on the implementation of the ICCPR", 1987, Principle 72.

⁴ Reasoned Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final - 2017/0360 (NLE)), paras. 92-113 and 175(1).

an independent and impartial court, has issued a decision that gravely undermines the values of human rights and equality.

The 22 October decision comes amidst persistent attempts to restrict sexual and reproductive rights of women and girls in Poland; the decision of the Polish Government to withdraw from the Istanbul Convention, the constitutionality of which will be examined by the Constitutional Tribunal; hate speech and policies that promote intolerance and discrimination against LGBTI+ people and undermine their rights, including the establishment of so-called ‘LGBTI-free zones’ in numerous municipalities across the country; as well as the continued erosion of judicial independence and other fundamental rights and rule of law principles in Poland. The disproportionate use of force by the authorities in response to the peaceful demonstrations that were sparked across the country following the 22 October decision is of deep concern in light of the rights to freedom of assembly and to peacefully express dissent.

We urge the Commission to promptly and effectively address these concerns by extending its scrutiny of the situation in Poland, so as to include recent developments and their impact on all Article 2 TEU values. The lack of independence, impartiality and legitimacy of the Constitutional Tribunal is now presenting a clear risk of serious breaches of EU values outlined in Article 2 TEU, namely respect for human rights and equality. As stated above, the Constitutional Tribunal is being actively used to deprive women of their fundamental rights and, in its current configuration, threatens to further undermine human rights in Poland.

We commend the European Commission’s efforts to hold the Polish government to account for violations of EU law. Further action, however, is urgently needed, on account of the continued deterioration of the rule of law and fundamental rights in Poland, and repeated failures by the Polish government to comply with the Commission’s Recommendations and with the decisions of the Court of Justice of the European Union (CJEU).

We now respectfully request the European Commission to:

- issue an update to its Reasoned Proposal of December 2017 to extend EU scrutiny to recent developments and all Article 2 TEU violations;
- urge the Council to move forward with the ongoing procedure under Article 7(1) TEU, as requested also by the European Parliament in its September 2020 resolution;⁵
- call on Poland to implement all previous Commission Recommendations and CJEU decisions, and to restore the independence and legitimacy of the Polish judiciary, including the Constitutional Tribunal, without further delay.

We remain at your disposal to provide further information in relation to the requests above.

Yours Sincerely,

⁵ European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017)0835 – 2017/0360R(NLE)), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0225_EN.pdf.

Amnesty International

Center for Reproductive Rights

CIVICUS

Human Rights Watch

International Federation for Human Rights (FIDH)

International Campaign for Women's Right to Safe Abortion

International Planned Parenthood Federation European Network

National Women's Council of Ireland

Women on Waves

Women on Web

Members of the Great Coalition for Equality and Choice (Poland):

ADDP l'Association Défense de la Démocratie en Pologne

ASTRA Network

BABA Lubuskie Stowarzyszenie na Rzecz Kobiet

Berliński Kongres Kobiet

Black Brussels Balloons

Czarny Protest Gliwice

Democracy is OK (DOK)

Demokratyczna Unia Kobiet

Dolnośląskie Forum Kobiet Stowarzyszeń i środowisk Kobiety

Dziewuchy Berlin

Dziewuchy Dziewuchom Francja

Dziewuchy Londyn

Dziewuchy Szczecin

Dziewuchy Szwajcaria

Farsa

Federacja na Rzecz Kobiet i Planowania Rodziny

Federacja Polskie Lobby Kobiet

Femini Berlin Polska
Feministyczne Stowarzyszenie Polonijne Elles sans Frontieres ASBL
Fundacja Klamra
Fundacja Cicha Tęcza
Fundacja Centrum Praw Kobiet
Fundacja Czas Dialogu
Fundacja Droga Kobiet
Fundacja Edukacja - Równość - Aktywność - Dialog Era Dialogu
Fundacja Feminoteka
Fundacja Głosuj na Kobiety
Fundacja im. Izabeli Jarugi-Nowackiej
Fundacja im. Kazimierza Łyszczyńskiego
Fundacja Inicjatywa Kobiet Aktywnych
Fundacja Kobiety Zmieniają Świat
Fundacja na Rzecz Równości i Emancypacji STER
Fundacja Nowoczesnej Edukacji SPUNK
Fundacja Pozytywnych Zmian
Fundacja Prawnikon
Fundacja Przestrzenie Dialogu
Fundacja Rodzić po ludzku
Fundacja Trans-Fuzja
Galeria Inspiracji
Grupa nieformalna Równość.info
Grupa Ponton
Inicjatywa Sto Lat Głosu Kobiet
Koalicja KARAT
Kobiety w Sieci
KOD Kobiety

Konferencja Episkopatu Polek
Kongres Kobiet Północnej Wielkopolski (Stowarzyszenie „Metropolia Wielkopolska”)
Kongres Kobiet w Tomaszowie
Kongres Kobiet Województwa Śląskiego
Kongres Świeckości
Koszalińskie Stowarzyszenie Aktywności Lokalnej Era Kobiet
Lambda Warszawa
Lubelska Koalicja na Rzecz Kobiet
Łódzki Szlak Kobiet
Manifa Bydgoska
Manifa Lublin
Manifa Łódź
Manifa Rzeszów
Manifa Toruńska
Manifest Wolnej Polki
Mapa kościelnej pedofilli
Marsz Godności
Medical Students For Choice Poland
Międzynarodowy Strajk Kobiet
Nic o nas bez nas. Ruch kobiecy Gliwice i Pyskowice
Nieformalna Grupa Czarny Protest
Nieformalna Grupa Inicjatywna z Bydgoszczy
Obywatelskie Stowarzyszenie "Możemy"
Ogólnopolski Strajk Kobiet
OSK Gryfino
OSK Lublin
OSK Puławy
OSK Sanok

Plakaciary
Polskie Towarzystwo Genderowe
Polskie Towarzystwo Prawa Antydyskryminacyjnego
Protest kobiet
Ratujmy Kobiety
Ratujmy Kobiety Tarnów
Różowa skrzyneczka
Stowarzyszenie Aktywne Kobiety
Stowarzyszenie Dolnośląski Kongres Kobiet
Stowarzyszenie im. Stanisława Brzozowskiego - Krytyka Polityczna
Stowarzyszenie Inicjatyw Kobiety
Stowarzyszenie Klucz Stop Społecznym Wykluczeniom
Stowarzyszenie Kobiety Słupsk
Stowarzyszenie Kobieta na PLUS
Stowarzyszenie Kobiety Piaseczno
Stowarzyszenie Kongres Kobiet
Stowarzyszenie Koniński Kongres Kobiet
Stowarzyszenie Łódzkie Dziewuchy Dziewuchom
Stowarzyszenie Nasz Bocian
Stowarzyszenie ON/OFF
Stowarzyszenie Poprawy Spraw Alimentacyjnych – Dla Naszych Dzieci
Stowarzyszenie Pro Femina
Stowarzyszenie Prowincja Równości
Stowarzyszenie Stan Równości
Stowarzyszenie Stop Stereotypom
Stowarzyszenie Szlakiem Kobiet
Stowarzyszenie Wszechnicy Oświeceniowo-Racjonalistycznej
Tęczowy Tarnów

Toruńskie Dziewuchy

Trójmiejska Akcja Kobieta

Warszawski Strajk Kobiet

Warszawskie Dziewuchy

Wielkopolski Kongres Kobiet