



31.3.2022

## MISSION REPORT

following the joint LIBE-AFCO fact-finding mission to Warsaw, Poland 21 - 23 February 2022

Committee on Civil Liberties, Justice and Home Affairs

### Members of the mission:

#### *LIBE Members (in protocol order)*

Juan Fernando López Aguilar	(S&D) (Leader of the mission) (LIBE Chair)
Konstantinos Arvanitis	(The Left)
Lukas Mandl	(PPE)
Róża Thun und Hohenstein	(Renew)
Beata Kempa	(ECR)

#### *AFCO Members (in protocol order)*

Othmar Karas	(PPE) (EP Vice-President)
Gabriele Bischoff	(S&D) (AFCO Vice-Chair) (
Gerolf Annemans	(ID)
Daniel Freund	(Verts/ALE)

## *Introduction*

The LIBE and AFCO Coordinators have requested authorisation in autumn 2021 to send a mission to Poland to take stock of the developments in the country concerning the situation of democracy, the rule of law and protection of fundamental rights in the same spirit of continued fact-based monitoring of the developments since the adoption of the reasoned proposal triggering the Article 7(1) TEU procedure, and moreover to exchange views on the future of the European Union. The mission was authorised for the period 21-23 February 2022, provided that the sanitary conditions would allow such a mission to take place in Warsaw.

In its resolution of 16 January 2020 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary, the European Parliament underlined that the hearings held under the Article 7(1) TEU procedure have not yet resulted in any significant progress by Poland with regard to redressing clear risks of a serious breach of the values referred to in Article 2 of the TEU. The same resolution noted with concern that reports and statements from the Commission and international bodies, such as the UN, OSCE and the Council of Europe, also indicate that the situation as regards the rule of law and the protection of fundamental rights in Poland has deteriorated since the triggering of Article 7(1) TEU in December 2017.

The European Parliament adopted on 17 September 2020 an interim report under the Article 7(1) TEU procedure. Since then, several exchanges of views were organised by the LIBE Committee on the situation of the rule of law and protection of fundamental rights in Poland and the state-of-play as regards the Article 7(1) TEU procedure in the Council. In all these exchanges of views, the Members of the Committee denounced the worrying developments in Poland and in particular as regards the independence of judiciary, media freedom, the shrinking space for civil society, the protection of minority rights and the fight against discrimination.

The rule of law situation in Poland continued to raise concerns also during the pandemic, as also highlighted in the resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights.

Members of the AFCO Committee, which is closely involved in monitoring the discussions being held in the context of the Conference on the Future of Europe, saw the need to raise with Polish stakeholders on the spot institutional questions relating to the evolution of the Union and evolution of the situation in Poland with regard to respect for the rule of law and other constitutional principles underpinning European integration. In particular, the consequences of the recent decision of the Polish Constitutional Tribunal proclaiming the primacy of national constitutional law over the Treaties are of paramount interest to the AFCO Members, as well as the impact of this ruling for Poland in the context of European integration and for the constitutional integrity of the European Union.

## *Summary account of meetings*

### **WARSAW**

**Monday, 21 February 2022**

#### **14:00 – 15:00 Meeting with NGOs active in the field of the protection of the rule of law and fundamental rights + former Commissioner for Human Rights**

During the meeting with representatives of two NGOs and the former Ombudsman/Commissioner for Human Rights, the following points, among others, were raised:

- The NGOs and the former Ombudsman raised the issue of alleged illegal use of the Pegasus surveillance software against Senator Krzysztof Brejza (head of the 2019 election campaign of the Civic Coalition) and his collaborators; Roman Giertych - attorney and plenipotentiary of Donald Tusk - the main opposition party leader; as well as Ewa Wrzosek, prosecutor engaged in investigative proceedings related to the governing party politics. The following problems were raised: lack of control by independent bodies over the use of surveillance software - only the Sejm Committee on Special Services has an oversight of it. The courts give permission on the use of surveillance means by enforcement bodies, based on documents confirming the necessity of such measures. However, the NGOs do not have access to these procedures, and hence cannot verify how this works in practice. In addition, the rights of the victims are not protected; there are no remedies available to appeal to the surveillance activities and they cannot seek appropriate compensation. Generally, targeting of the above-mentioned persons by the Pegasus software puts in question all three conditions for the justified use of surveillance measures: necessity, proportionality and legality. In conclusion, it was recommended that the purchase and use of surveillance software should be regulated at EU level and that its illegal use should be covered by the Article 7(1) TEU procedure in relation to Poland. In effect, those responsible for any illegal spying activities should be held accountable and the victims thereof should receive compensation.
- The NGOs mentioned the following obstacles to the functioning of civil society organisations in Poland: limited access to funding (example of the recent Government's decision to withdraw co-funding of one of the country-wide free helplines for children - victims of physical, psychical and sexual abuse, managed by the *Foundation Dajemy Dzieciom Siłę - FDDS*); outdated provisions of the law on lobbying and no law on access to public documents, which jeopardises transparency of public actions including spending of public funds, and which makes it hard for civil society organisations to track corruption cases. Also, the so-called 'Lex-Czarnek'<sup>1</sup>, a bill on educational law reform [for now vetoed by the President], would introduce a list of ca 200 NGOs, which are banned from conducting educational activities in public schools (among others, Amnesty International).
- The speakers raised the issue of the undermining of the independence of the judiciary

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<sup>1</sup> Government bill of 8 December 2021 amending the Education Act and certain other acts.

in Poland, which originates among others from the merger of the posts of the Minister of Justice and the Prosecutor General, creating a serious risk of politicisation of prosecutions and legal impunity of any wrongdoings. This problem is also exacerbated by the irregular composition of the Constitutional Tribunal and the National Council of Judiciary (NCJ), and is manifested among others by suspending judges who apply EU judgments from their functions based on a decision of the Minister of Justice.

- The NGOs and the former Ombudsman discussed the situation at the Polish-Belarusian border, where, following the introduction of the state of emergency, access was denied for medical services, journalists, civil society organisations, Members of the Parliament as well as the Commissioner for Human Rights.

### **15:00 – 16:00 Meeting with NGOs active in the field of justice**

During the meeting with representatives of NGOs active in the field of justice the following points, among others, were raised:

- The NGOs referred to the ‘Agreement for the Rule of Law’, a document that was developed in cooperation with judicial organisations and that outlines ten points to implement the 20 judgments of the CJEU and ECtHR and to restore the rule of law in Poland, and that was signed by ten political parties and several civil society groups. Some of the most urgent issues mentioned in the ‘Agreement’ include the dismantling of the Disciplinary Chamber of the Supreme Court, the de-politicisation of the Constitutional Tribunal and the Supreme Court, reform of the prosecution system and reform of the National Council of the Judiciary.
- The NGOs maintained that the irregularly composed ‘neo NCJ’ is the backbone of the system of political capture of the judiciary, since this body is responsible for the nominations and promotions of the 10000 judges’ strong judiciary. While it should be the guardian of the independence of the judiciary, it has irregularly appointed 1700 ‘neo judges’, who every day issue hundreds of verdicts that are invalid - citizens can go to the ECtHR to challenge their verdicts. The NGOs dismissed the comparison with the Spanish system of nominating judges to the Judicial Council: although in Spain the final decision regarding the appointment of members of the Council is made by a qualified majority of 3/5 of the highly pluralistic parliament (which is exceptional in the EU), judicial candidates are to be nominated only by the judiciary.
- According to the NGOs, the disciplinary system for judges is entirely subordinated to the Minister of Justice, who is since 2016 the Prosecutor-General. All judges suspended by the Disciplinary Chamber should be reinstated immediately, without any further procedure, since the procedures against them were invalid. Under the ‘muzzle law’<sup>2</sup>, Polish judges can be repressed for voicing concern about the capture of the judiciary or for implementing European judgments related to the process of appointing judges. There is no effective judicial review of these decisions, which have a chilling effect as regards the application of judgments of the European Courts.
- The NGOs argued that the draft laws tabled in the parliament and prepared by the ruling

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<sup>2</sup> Act of 20 December 2019 amending the Act on the System of Common Courts, the Act on the Supreme Court and certain other acts.

parties and the President are not fulfilling the requirements laid down in the judgments of the European courts, and would push judges irregularly nominated in the Disciplinary Chamber, mostly prosecutors, into the classic chambers of the Supreme Court. The draft law prepared by NGOs, associations of judges and opposition parties would make for a full implementation of all those judgments.

- According to the NGOs, the capture by the executive of the judiciary was prepared in Government circles by launching a negative narrative concerning the community of judges, including accusations on billboards that judges are dishonest and responsible for criminal acts.

### **16:30 - 17:15 Meeting with NGOs active in the field of women's rights**

During the meeting with representatives of NGOs active in the field of women's rights, the following points, among others, were raised:

- The NGOs drew the attention to the situation of reproductive rights of women in Poland, which deteriorated further after the ruling of the Constitutional Tribunal of 22 October 2020, which found that one of the three grounds laid down in Polish law for the admissibility of abortion, namely severe and irreversible foetal abnormalities, was unconstitutional. Before the ruling, access to abortion was already very restricted, with only around 1100 abortions that were conducted yearly, 98% of which were based on the criterion of foetal disorder. The number of abortions conducted out of the system every year is estimated by the NGOs to be around 100 000 abortions. After the ruling, there were three cases of deaths of pregnant women who were refused an abortion and there are many calls from women who were forced to carry their pregnancies to the end and were refused an abortion. Over 1000 women launched complaints to the ECtHR on the violation of their reproductive rights. Three landmark rulings of the ECtHR concerning access to abortion have not been implemented for three years now. According to the NGOs active in the field of women's rights, the right to abortion constitutes a litmus test for the state as regards the rule of law. The following other problems were also raised: lack of law on sexual and reproductive rights, risk of Poland's withdrawing from the Istanbul Convention; limited access to contraception; no sexual education in public schools; limited state support for women giving birth to children requiring special care, whereby the burden of providing assistance to women in need is borne by the NGOs.
- Furthermore, the NGOs raised problems faced by civil society organisations active in the area of women's rights. Members heard a testimony of an activist engaged in a civic movement defending women's rights but also LGBTI rights, human rights and the rule of law, who reported facing 89 judicial trials, one assassination attempt, a hate campaign in public TV and receiving 100 offensive messages a day; and having to move flats following a death threat. In the view of this activist, the source of the problem is the current Government's policy, in particular the undermining of the rule of law and limitation of the independence of the judiciary, including capture of the Constitutional Tribunal and sponsoring of fundamentalist groups from the state budget. The solution to the problems mentioned would be the adoption by the Polish parliament of the bill prepared by the Polish Judges Association Iustitia and supported by the parliamentary opposition, which implements all relevant rulings of the CJEU as well as the ECtHR

with regard to the rule of law in Poland.

### **17:15 - 18:00 Meeting with NGOs active in the field of migration/situation at the border with Belarus**

During the meeting with representatives of NGOs active in the field of migration, the following concerns were raised regarding the situation at the Polish-Belarusian border:

- The NGOs recalled that, following the migration crisis caused by the Belarusian regime, the Polish authorities introduced the state of emergency in the areas near the border and denied access to medical staff, journalists and civil society organisations, which, according to the NGOs, is against the Polish Constitution, and moreover militarized the process of migration. There was no clear limitation where the exclusion zones started, therefore the enforcement services were deciding on it on the spot. Migrants who managed to cross the green border were denied the right to apply for asylum, which violates Poland's international obligations, and were returned to Belarus. People returned back to Poland nine times on average (some even 400 times). Those who managed to cross the green border without being noticed by the border guard, were squatting in forests in the cold without food, where they would often encounter other enforcement services or the paramilitary territorial defence forces - WOT. There is a number of migrants who were and are still detained in detention camps, where they have been attributed numbers. Some of the detentions facilities do not meet key detention standards, with one collecting more than 400 men in barracks on a military terrain with active explosives. Despite the over-restrictive measures, approximately 12 000 migrants crossed the Polish border and fled to Western Europe, which in the opinion of the representatives of the NGOs was a failure not only in terms of security but also in humanitarian terms.

### **18:30 - 19:15 Meeting with NGOs active in the field of LGBTI rights**

During the meeting with representatives of NGOs and activists active in the field of LGBTI rights, the following points, among others, were raised:

- A flagship case of obstruction of the justice system was described, when around 50 LGBTI participants of a protest against the detention of LGBTI activist 'Margot' in 2020 were arrested and thus denied a right of assembly. They were then subjected to degrading treatment by the police, which was almost inhumane in some cases, according to the Commissioner for Human Rights. In subsequent judicial proceedings, the district court did not recognize the police's conduct as discriminatory.
- Other expressions of discriminating actions against the LGBTI community were cited by the speakers, such as the so-called 'LGBT free zones' resolutions with an executive effect adopted by a number of regional governments, despite their lack of competences in bringing about changes to the legal system; a bill being prepared in the Sejm<sup>3</sup>, which forbids gathering events promoting non-hetero sexual behaviour and puts at risk the freedom of expression and assembly. Another example discussed concerned the Minister of Justice's and Prosecutor General's interference in judicial proceedings against an LGBTI activist for putting up images of the Virgin Mary with a rainbow halo.

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<sup>3</sup> Citizens' bill amending the Act of 24 July 2015 on Assemblies and certain other acts.

Whilst the activist had been acquitted twice, the prosecutors intend to appeal the judgement and, if rejected, use the extraordinary appeal to the Supreme Court. Other cases were discussed, such as public hate speech against the LGBTI community by Catholic bishops, who called them ‘perverts’ during Easter masses, while the Polish Church covered up for paedophile priests who abused children; no official acknowledgement of civil same sex unions, which limits the rights of the children and surviving partner in case something happens to one of the parents (limited right to inheritance); no recognition of same sex partnerships registered abroad, which puts in question the free movement of people within the EU; no protection from hate speech against LGBTI people - hate speech is unpunished as long as people targeted are not called by their names.

- According to the speakers, those Government’s policies have significantly contributed to the deterioration of the situation of the LGBTI community. They cited findings of the *6<sup>th</sup> Report on the social situation of LGBTI people in Poland in the years 2019-2020*, conducted by the Centre for Research on Prejudice at the University of Warsaw, which show that every second LGBTI person in Poland is experiencing serious symptoms of depression, 12% of LGBTI people currently living in Poland intend to move abroad, and 60% of the LGBTI youth experienced violence. In conclusion, the LGBTI activists assured the Members about their readiness to fight for their rights in the Polish and European courts and suggested that the solution to the problems is respecting EU legislation in Poland.

#### **19:15 - 20:00                      Meeting in relation to the Pegasus surveillance**

During the meeting, the delegation heard the testimonies of the victims of the Pegasus surveillance case and spoke to an NGO active in the field of protection of fundamental rights and freedoms in the context of the surveillance society. The following points, among others, were raised:

- One victim of allegedly illegal Pegasus surveillance, an opposition politician and chief of the election campaign in 2019, explained that his phone had been monitored 33 times during a six months period, coinciding with the 2019 election campaign. Manipulated material from his phone was used on TV in that period. On 23 December 2021, Citizens Lab confirmed the surveillance activities. In addition, the devices of his assistant and father have been hacked. The politician filed a motion in court, but saw his allegations dismissed. The Deputy PM and leader of the governing Law and Justice party (PiS) later confirmed the hacking, stating that the politician had been involved in illegal activities, without specifying which.
- Another victim of allegedly illegal Pegasus surveillance, a prosecutor, explained that by being active in a prosecutors’ organisation the person was informed by Apple in November 2021 that the phone had been hacked by means of Pegasus software, especially during August 2021 (data by Citizens Lab). A Polish prosecutor refused to initiate a procedure; the victim is now waiting for a court decision. The speaker maintained that the purchase of the Pegasus software was illegal, since the Central Anti-Corruption Bureau (CBA) used money from the Justice Fund for it, which was later covered up by a change in the financial plan of the Justice Fund, approved in 2017 by the parliamentary Public Finance Committee. The speaker maintained that this did not

solve the illegality of the purchase, since the CBA can only be financed directly from the state's budget. The use of the Pegasus software is therefore illegal since there is no legal basis for it, nor a known accusation of criminal activities in relation to the victims, nor supervision by the courts.

- An NGO expert on fundamental rights in the context of surveillance explained that Poland's police and special services illegally monitor the activities of journalists and activists, citizens, in violation of both EU law and the Polish Constitution. It is technically very difficult to find out whether one is being hacked with Pegasus. There is no oversight on the special services, which can use surveillance to protect those in power. Only the special services can clarify what has happened, but have no interest to do so.
- All participants in the meeting expressed the hope that the EU/European Commission could tackle this problem, and insisted on the need to set up an inquiry committee on Pegasus in the European Parliament. It was suggested that the latter should summon the Polish special services, cooperate with the victims and also examine the conditions under which the NSO Group sold the Pegasus software to governments, which data are being kept and who has access to them. An extraordinary committee on illegal surveillance has been set up in the Senate, however without inquiry powers; there is no political majority in the Sejm to set up a fully-fledged inquiry committee on the matter.

## **Tuesday 22 February 2022**

### **10:00 - 12:00 Meetings with the Political Leaders/Members in the Sejm (lower chamber of the National Parliament) of the Republic of Poland**

Following the lack of reply of the Marshal of the Sejm to the official request addressed by the Chairs of the LIBE and AFCE Committees, well in advance before the start of the Mission, to meet and to facilitate meetings with the Committee on European Union Affairs and the Standing Committee on the Conference on the Future of Europe of the Sejm, the Chairs of the Delegation addressed this invitation directly to the Chairs of all parliamentary groups represented in Sejm. During the meeting, conveyed at a very short notice, the biggest parliamentary groups of the opposition in the Sejm were represented, but no group from the governing coalition wished to participate. The following points, among others, were raised:

- The MPs representing several parliamentary groups belonging to the opposition in the Sejm explained that the rule of law situation in Poland has seriously deteriorated since the governing parties took over power in 2015, with the main milestones being the politicisation of the Constitutional Tribunal, the National Judiciary Council and Supreme Court, the politicisation of the prosecution due to the merger of the posts of the Minister of Justice and the Prosecutor General, the creation of the Disciplinary Chamber in the Supreme Court, composed mainly by judges appointed by the ruling parties, which conducts disciplinary proceedings against judges who question the reforms of the judicial system. The politicisation of the judiciary, especially of the Constitutional Tribunal, caused an imbalance of state powers and resulted in a lack of constitutional review over the Government and the Parliament. In addition, the majority of the Sejm composed of the members of the governing parties is not effectively holding the Government accountable, while the Senate, where the opposition has a majority over



the governing parties, has no real role in amending draft legislation. The President of the Republic can only put a veto on draft bills (which he does occasionally) or send them to the Constitutional Tribunal. The still politically independent Supreme Audit Office (NIK), which performs audits over the state and local governmental bodies, reports directly to the Sejm and in case of detection of irregularities can notify to the politicised prosecution, which however do not follow-up on the NIK's reports. Therefore, the only real control is executed at the EU level, in particular the CJEU, the Commission and the Parliament, with the suspension of EU funds being the only effective tool of pressure in the rule of law toolbox.

- The MPs stated that, under the majority rule of the governing parties, it is difficult for the opposition parties to function in the Sejm, with legislative procedures on the most important bills (like the one on the reform of the Supreme Court) being adopted under an urgency procedure and without allowing for proper debate. Repetition of voting to obtain a favourable outcome is used often, hence bending the rules of procedure of the Sejm, which allow for such repetition only if there is an important reason and if 30 % of MPs file a motion for resumption. In this context, three cases of repetition of voting in Sejm were mentioned (on 11 August 2021, 17 December 2020 and 22 November 2019), when there was no majority in favour of the ruling party position (among others on the nomination of judges to the National Council for Judiciary); as well as one case (on 16 December 2016) of proceeding to the vote with an alleged lack of quorum. In case a bill cannot win the majority in Sejm, the Government on several occasions has referred legislation to the Constitutional Tribunal, which helps to carry out the desired changes in the law (such as the tightening of the abortion law).
- The MPs commented on the content of the four alternative bills concerning the dissolution of the Disciplinary Chamber in the Supreme Court that were tabled recently in view of addressing the Commission's conditions to release the funds from the Resilience and Recovery Fund, by the following authors: 1/ the President; 2/ the governing party - PiS; 3/ the Solidarna Polska party (the government coalition partner) and 4/ by the Polish Judges Association *Iustitia*, supported by ten NGOs and the parliamentary opposition. Despite the fact that all bills assume liquidation of the Disciplinary Chamber as it is now, the first three bills provide for retaining its judges in the Supreme Court as well as retaining the chamber in one way or another, for example by granting it powers of examination of disciplinary cases of other legal professions or setting up another chamber for professional liability. These bills lack proposals for comprehensive changes in the judiciary, and thus are not acceptable either by the majority of the opposition parties nor by the associations of judges. One MP declared that the Presidential bill could provide the basis for the political dialogue to re-establish the rule of law, however it does not solve the root problems. Only the fourth bill foresees total abolishment of the Disciplinary Chamber, retirement of all its members and discontinuation of all cases. In effect, it aims to restore the state in the Supreme Court before the changes introduced by the ruling parties. It also implements all conditions provided for in the judgements of the CJEU and thus eliminates political dependence of the judiciary. All representatives of the parliamentary clubs in the Sejm present at the meeting declared the will to support the fourth bill and expressed hope that it could win a majority in the Sejm.
- Finally, the prospects of Poland's continued membership in the EU were discussed,

which are being jeopardised by the negative narrative of the governing parties and public media about the EU institutions, with even mentioning of a possible Polexit by extreme-right politicians, as well as the Government's continuing clashes with the EU institutions on rule of law issues. Even though the majority of citizens (around 80%) are in favour of Poland's membership of the EU, one cannot take it for granted and there is an urgent need to actively oppose further attempts to capture state institutions by the ruling party as well as revert all reforms taken in this direction so far.

#### **13:45 - 14:30 Meeting with representatives of the National Council of the Judiciary (NCJ/KRS)**

During the meeting with representatives of the National Council of the Judiciary, the following points, among others, were raised:

- The NCJ representatives offered their availability to provide the EP with written explanations on the rule of law situation in Poland and on the justice system. They expressed regret that the EU so far had not enquired about their position on the matter.
- It was maintained that the NCJ is not a political body and is free from political influence. When it comes to the legal challenges as to their legitimacy, the CJEU rulings do not contain statements to the effect that the NCJ is incompatible with EU law. In the ruling of 15 July 2021, the NCJ representatives stated that it is mentioned that having the council composed by judges appointed by the executive is not sufficient to influence the independence of the judiciary.
- According to the representatives of the NCJ, the pressure on Polish judges does not come from the political domain, but from activists and associations of judges that question the work of their colleagues. To become a member of the NCJ, written support by 25 judges is required; four years ago, that support could not be made public for fear of prosecution and harassment. One of the judges associations published a resolution at the time saying that giving support to judge Styrna means being complicit to a constitutional *coup d'état*.
- The current NCJ nominated almost 2000 judges. Representatives believe they are being stigmatised, politicised and accused of being complicit with the Government, while they are only adjudicating in simple civil law cases.
- As regards the Disciplinary Chamber, it was maintained that given the attacks on the chamber since its creation (calling the judges 'neo judges' or 'judges in disguise'), it couldn't have functioned well; that the associations of judges do not understand the CJEU ruling correctly, since in no way did the CJEU question the legality of the nomination of judges by the NCJ and appointment by the President; that the CJEU wanted the functioning of the Disciplinary Chamber to be suspended, but that it is not clear how the Government could implement that, as it is limited by the law and the Constitution.
- As regards the Constitutional Tribunal, the NCJ sees no major controversies in the light of international and European law. It is rather a political problem whether the Constitutional Tribunal can review EU law; according to the Constitution, it has full powers to do so, as also confirmed in the past by judge Marek Safjan, former President

of the Constitutional Tribunal and currently judge at the CJEU. The political choice laid down in the Constitution has been that EU law takes precedence over Polish law, but not over the Polish Constitution; this is not a legal problem.

- According to another NCJ representative, member of the Sejm, the CJEU and ECtHR rulings have catastrophic effects in the Polish legal system, as they undermine the nomination of judges and the legality of judgments. At the basis of this is a lack of uniform model across Europe for the nomination, promotion and disciplining of judges. The rulings of the European courts are cases of judicial activism, not based on law. It could be considered to introduce a uniform model of nominating judges throughout the Union.

### **15:00 - 16:30 Meeting with the Senate of the Republic of Poland**

The delegation met with the Marshal of the Senate and representatives of the Foreign and European Affairs Committee and of the Extraordinary Committee on Illegal Surveillance. While the delegation had expressed the wish to have the widest possible spectrum of political parties represented at the meeting, Members were informed that members of the ruling parties did not wish to participate in the meeting. During the meeting, the following points, among others, were raised:

- The Marshal of the Senate explained that politicians are preoccupied by the situation in Ukraine and the underlying clash of civilisations, wondering where the new borders of the free world will be drawn. He said that rule of law issues come up all the time and that the Pegasus case is of serious concern. He expressed gratitude for the visit by the EP, which he perceived as an expression of solidarity and care for our common destiny. The Marshal met the day before with three US Senators who wrote a letter in defence of the rule of law in Poland when the Constitutional Tribunal was captured in 2016. Six years later, the Constitutional Tribunal, the Supreme Court and the National Council of the Judiciary have been destroyed; prosecutors have been submitted to the executive.
- A representative of the Committee on Foreign and EU Affairs recalled that ‘rule of law’ was one of the slogans on the Solidarity banners during the fight against the communist regime. In 2015, the process of destruction of what the Solidarity movement had brought has started. Poland is not a Member State because of the money, but for the values we share: every citizen has the right to an impartial tribunal; the same rules apply equally throughout the Union. This common architecture has been broken by the decisions of the so-called Constitutional Tribunal. The EU should act much more swiftly and with determination, using the Article 7(1) TEU procedure, infringement procedures and the conditionality mechanism.
- A representative of the Extraordinary Committee on Illegal Surveillance informed about the activities of the committee, which include taking testimonies of the victims of illegal surveillance, hearing the President of the Supreme Audit Office, and going through classified information. The Senator stated that the Pegasus software was bought in a secretive way, to avoid that the relevant committee of the Sejm would discover it; the purchase, which is likely to be illegal, was then revealed by the Supreme Audit Office. The Senator maintained that, would the Supreme Court have known about Pegasus in the 2019, it would not have declared the elections valid. The OSCE did declare the 2019

elections free but not fair because of the biased media landscape - which has been manipulated by content coming from Pegasus. It is important that the EP inquiry committee be established.

#### **16:45 - 17:45 Meeting with professional associations of judges/prosecutors/lawyers**

During the meeting with representatives of Polish professional organisations of judges, prosecutors and lawyers, the following points, among others, were raised:

- The representative of one of the largest judges associations described personal suspension the week prior to the meeting with the delegation, for reason of excluding, in application of the CJEU and ECtHR rulings, in November 2021 from a panel of judges a judge nominated by the NCJ in September 2021 and therefore distrusted by the accused. In February, the speaker was informed that the files of the particular case had been sent to Warsaw; the decision on the initiation of disciplinary proceedings came two days later. The decision on the suspension was delivered while the speaker was performing judicial duties in a courtroom. The decision on the duration of the suspension, which could be indefinite until the end of disciplinary proceedings, will be taken by the Disciplinary Chamber. The speaker received a lot of expressions of support and vulgar hate speech after publishing a statement on the judges association's Facebook page, the latter mostly from anonymous profiles
- A representative of a Polish prosecutors association shared with the delegation the dramatic changes in professional life since 2016, when the new law on the prosecutor's office entered into force. The speaker and 123 other prosecutors received a letter containing one sentence from the Minister of Justice, degrading them to lower instance levels of the prosecutor's office. There was no justification, nor right of appeal. The Minister of Justice did not reply to three requests for justification of the decision. Some years ago, the speaker filed a lawsuit before the Labour Court; up until now, the case has not been heard. In January last year, the speaker and six other prosecutors were seconded without their consent 300 km away from where they lived; for the speaker this was accompanied by a further degrading to the lowest level of the prosecutor's office. Again there was no justification, nor a right to appeal. On this decision, hearings are taking place before the Labour Court. Last year, an extraordinary measure, crime against the national prosecution, was applied to the speaker, who was ordered to pay an amount evaluated by the speaker to equal nearly 600 000 EUR in compensation for violating the assets of the prosecution office. Since the speaker does not have this amount, this would be tantamount to consumer bankruptcy. Finally, a criminal case is pending against the speaker and another representative of the prosecutors association, which the speaker assesses as a professional crime by the prosecutor initiating the case, i.e. abuse of power. Other members of the association also face large numbers of disciplinary, explanatory and criminal proceedings.
- The speaker continued explaining that a system of benefits has been created to incentivise prosecutors, in order for them to become loyal and subordinate. The ruling party can influence any preparatory procedure, since there are no rules for (re)allocation of cases, also between far away offices.
- A representative of a lawyers' association explained not having experienced any

harassment or prosecution from the Minister of Justice/General Prosecutor or Disciplinary Chamber. However, the speaker heard reports from barristers experiencing difficulties in the exercise of their professional duties, for instance an attorney defending a client can be punished for filing a complaint, or barred by the police from entering the court room of the Disciplinary Chamber. Several attorneys defend judges in disciplinary proceedings without remuneration out of their belief in the separation of powers; they face online hate speech.

#### **17:45 - 18:30            Meeting with media representatives I**

During the meeting with media representatives, the following points, among others, were raised:

- According to one speaker, since 2015-2016, the Government has shown a drive to gain financial control over the public media. Since 2017, media concentration can be witnessed, including public attacks by politicians against media (e.g. during the 2020 presidential elections). In December 2020, Polska Press has been taken over by a state-owned oil refiner. The advertisement budgets of state-owned companies allow for selling political propaganda as an important source of income for only those media uncritical for the Government's policies. The Government delays the granting of licenses for more than a year and a half, while this is supposed to be a purely administrative process without room for interpretation; this is creating a lot of insecurity for the media concerned and their employees.
- Another media representative denounced the unfounded accusations by the Government that the media outlet is run by the opposition. While public TV was not perfect before PiS came in power, it has never been so politicized and has never been a tool for spreading hatred as it is now, including against critical journalists, who are called opponents. Leaked internal emails revealed that the Prime Minister instructed TVP to blacken journalists. The speaker complained of financial harassment by the State against private outlets, by halting subscriptions and initiating SLAPP cases: the media outlet concerned has faced almost 100 court cases since 2015. While the outlet has won almost 95% of the cases, it is losing resources over it. The speaker maintained that the newest Government approach is to use police violence against journalists, in the form of tear gas, detention, house searches and confiscation of personal computers, so-called because of accusations of death threats against local PiS politicians, which are unfounded. The Government is also using phishing with fake messages of existing media brands as decor to infect phones with Pegasus software, hence undermining the credibility of the media.
- The last speaker said that one could have the impression of media pluralism in Poland, but warned that this impression is deceptive: public TV has been captured by the Government, including by means of the new National Media Council; money is taken from private media and given via a special fund to media delivering a 'public mission'; the National Broadcasting Council rejects all claims of media concentration made by the public; the granting of licenses is being delayed; the project called 'bill of freedom of speech'<sup>4</sup> by the Minister of Justice proposes the establishment of a Council on

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<sup>4</sup> Draft act on the protection of freedom of speech on social networking websites of September 28, 2021

Freedom of Speech, which will have the right to punish social media that want to cancel posts found to be offensive or dangerous to the public interest.

#### **19:00 - 19:45 Meeting with representatives of academia and think tanks I**

During the meeting with representatives of academia and think tanks, the following points, among others, were raised:

- According to a think tank, there will be a rise in anti-EU sentiments because of very strong anti-EU propaganda on public TV and in public spaces. The speaker pleaded that the pro-EU majority needs to see the support of EU institutions like the EP, which is even more crucial than the annual rule of law cycle. A new institution has been created in 2016, the National Institute of Freedom, to distribute government and EU funds to NGOs. Some newly set up GONGOs without track record are being supported at the expense of well-established organisations defending values not in line with the Government. The Justice Fund in the Ministry of Justice is also being abused to fund government-friendly organisations, instead of for support of victims of judicial mistakes and institutions supporting the rule of law. This is not a cultural divide that needs to be bridged, but an authoritarian-democratic divide. The key is restoring the rule of law in the country; the rest can be solved taking it from there.
- An academic explained that a points system for assessing the performance of professors has been introduced, which changes all the time; it is being used to promote candidates from conservative organisations like Ordo Iuris. The Government adopted the so-called ‘Academic Freedom Package’<sup>5</sup>, the law allowing anyone to present their ideology at university under the guise of academic freedom. While calling LGBTI rights ‘an ideology’ is denounced by the courts, one can propagate the view that LGBTI rights are an ideology and further one’s career in universities. Students writing satirical poems of the PiS leader can be expelled from university; it then becomes a lottery whether the court will stand up for the student’s freedom of speech or serve the Government’s interests. At the instigation of organisations like Ordo Iuris, religion is likely to become a mandatory class in schools
- Another academic denounced that the Government does not fight anti-Semitism, to the contrary. The speaker was sued on political request by organisations on the basis of the 2018 amendment to the Act on the Institute of National Remembrance for “publicly and contrary to the facts attributing to the Polish Nation or to the Polish State responsibility or co-responsibility for Nazi crimes”. While all accusations were rejected by the appeal court, the Minister of Justice called the ruling ‘scandalous’. An extraordinary appeal against the judgment is expected. The speaker deplored that such SLAPP cases may discourage young scholars to engage in Holocaust research. The speaker also denounced that the International Auschwitz Council, which issued critical statements on the law, was taken down by the Government some years ago; the Council has not been reappointed since. The knowledgeable previous director of the Museum of the History of Polish Jews who won the competition for the next mandate was not prolonged; the Jewish Historical Institute has been captured by the Government. Finally, it was leaked on public TV that the speaker would meet with the delegation and would spread

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<sup>5</sup> The Act of 17 November 2021 amending the Act - Law on Higher Education and Science and certain other acts

propaganda that Poland was responsible for the Holocaust.

**19:45 - 20:30 Meeting with representatives of academia and think tanks II**

During this meeting with a legal think tank, the following points, among others, were raised:

- The speaker argued that there is no single definition of the rule of law; the latter depends on the cultural and historical context of a given state. Within the debate on the rule of law, the nomination of judges is a controversial issue. The same problem arose in Malta; the CJEU's advocate general indicated that the executive can play a certain role in the nomination of judges. Art. 19 TEU and some paragraphs of the Charter admit that the involvement of the executive does not necessarily entail a danger to impartiality if there is no pressure on judges during the process. The Polish Constitutional Tribunal criticizes the CJEU decision for having ruled in matters where it has no competence. The same is true for the CJEU judgement on the conditionality mechanism.
- The representative of the organisation explained that the organisation gets its money from donors, 90% of which are national donors; among those living abroad, the majority are Poles. The organisation maintains that it did not receive any government subsidies or grants from foreign entities or other NGOs. Asked whether the aim of the organisation is to establish a religious state, the representative insisted they are a legal think tank, not a religious organisation. It is only natural for this representative that the organisation has lobbyist status with the EU. Poland should be part of the EU; the role of a think tank is to attempt to influence law-making.
- No further information was given by the organisation regarding its Court case initiated against a speaker during a hearing in the European Parliament.

**Wednesday 23 February 2022**

**8:15 - 9:00 Meeting with the OSCE's Office for Democratic Institutions and Human Rights (ODIHR)**

During the meeting with representatives of ODIHR, the following points, among others, were raised:

- Since 2017, five legal opinions have been issued on the rule of law situation in Poland, including on the Supreme Court, the National Council of the Judiciary and disproportionate limitations on the freedom of expression of judges. The ODIHR can only do so on request of the authorities, such as the Supreme Court or the Ombudsman. It is clear that cumulative changes to the judicial system have increased together the politicisation of the judiciary. The ODIHR is observing cases of judges who are being suspended and prosecutors being transferred, especially when vocal about the changes to the judicial system. The ODIHR has observed that expedited legislative procedures without meaningful consultations have been used, including for adapting the elections legislation. It recently also issued two urgent opinions on the situation at the border with Belarus.
- In general, the ODIHR observes that the extent to which its recommendations are followed, albeit that they are of an advisory nature only, is unsatisfactory. The ODIHR

wants to see participating states as partners and be a partner in a dialogue among all actors in society ; it is therefore very unfortunate that the Minister of Justice and the Foreign Affairs Minister have not yet accepted to meet. The opinions were however presented in the Senate and also served the public discussion, since Poland has a strong and active civil society.

- Poland's biggest challenge is how to remedy the deficiencies in its judicial system identified by international bodies and courts, which together show a high increase in political influence over the judiciary. The question was raised how the Constitutional Tribunal will be able to decide on electoral disputes. The balance of state powers is broken. It is hard to say to what extent the drafts submitted to Parliament by the Government would address the problems identified; it seems that additional work will be needed.
- The ODIHR stands ready to exchange more deeply on the quality of the electoral process in Poland.

#### **9:00 - 9:45                      Meeting with Ombudsman Office**

During the meeting with several representatives of the Polish Ombudsman Office/Office of the Commissioner of Human Rights, the following points, among others, were raised:

- According to the Ombudsman Office, there is no contradiction between EU law and the Polish Constitution of 1997, which was adopted with the idea that Poland would become a member of the EU. According to the Constitution, in case of conflict, EU law has primacy over Polish law. This conflict is not a legal conflict, because in light of the constitutional and legal doctrine, there is no contradiction between the two. Art. 44(1) of the Constitution guarantees the right to impartial and independent trial; there is no discrepancy with EU law and Art. 6(1) ECHR.
- The Ombudsman Office uses its mandate to participate in many proceedings before the CJEU and the ECtHR to present its positions on the independence of the judiciary in Poland. It also took part in the Constitutional Tribunal's proceedings, maintaining that the Constitutional Tribunal does not have the power to question the rulings of the CJEU and the ECtHR; its recent decision is problematic.
- As regards freedom of speech, the Polish Ombudsman has presented legal opinions in the 'Lex TVN'<sup>6</sup> case, and has sent questions to the National Broadcasting Council; the bill was not adopted in the end. As regards public media, since December 2016, the decision of the Constitutional Tribunal ruling that the existence of bodies like the National Media Council bypasses the role of the Constitutional role of the National Broadcasting Council has not been implemented. The Ombudsman expressed a positive opinion on the Senate proposal, which was however not implemented. The studies by the Ombudsman's office show that during the presidential electoral campaign of 2020, candidates supported by the majority were definitely favoured in the public media narrative, both in content and time.
- The Human Rights Commissioner does important work on equal treatment and believes

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<sup>6</sup> The Act of August 11, 2021 Amending the Broadcasting Act.



the law in place does not provide effective protection against discrimination. While the Constitutional clause is fine, the Act of 2021 and the Labour Code only provide for non-discrimination protection within the area of labour relations. As regards judicial protection of LGBTI rights, Poland ranks last in the ranking. Resolutions against so-called 'LGBT ideology' covered one third of the Polish territory; some have been lifted after action by the Ombudsman. Poland lacks programmes and awareness raising activities that would complement non-discrimination legislation.

- The Ombudsman Office is visiting on a regular basis the secluded zone at the Polish-Belarusian border and indicated serious breaches of law to the authorities, including the chief commanders of the detention centres, the heads of the border guards and the head of the office for foreigners. The Ombudsman Office is trying to intervene in individual cases of the 400 children being kept in deplorable conditions in detention centres. 600 men detained in a detention centre in Western Poland on military training ground have been moved to other centres after our intervention. It questions pushbacks, which are a violation of the ECHR. The Act on Foreigners<sup>7</sup> and its implementing acts are not compliant with EU law and the case law of the CJEU; this was repeatedly raised with the authorities.
- It is essential that the institution remains independent in accordance with the Constitution. The Ombudsman Office is not slandering Poland; Poland is part of the EU and considers the European Parliament to be also the parliament of Polish citizens.

#### **10:45 - 11:00 Meeting with judges and prosecutors affected by disciplinary/criminal proceedings for applying EU law**

During the meeting with two judges and one prosecutor affected by disciplinary/criminal proceedings for applying EU law, the following points, among others, were raised:

- One judge explained refusing to voluntarily appear before the Disciplinary Chamber, since this would mean to accept the legality of this body, which would contradict the European courts' rulings. It has still not been decided whether they will bring the speaker by force before the Chamber. The judge is also facing criminal proceedings for executing his duties. Since 18 November 2020, the speaker is suspended as a judge, facing a lowering of his salary of 25% (others face 50% decreases). While the judge cannot perform the duties as a judge, it is also not allowed to practice any other legal profession or exercise any other professional activity, since the president of the court formally objected to this, according to the judge without legal basis. The judge is therefore teaching at university and is engaged in publications on the undermining of judicial independence; a case is pending before the labour court because the judge accused the president of the court of harassment.
- Another judge was a member of the NCJ during two terms of its office, and was also its spokesman during the last of those two terms. The judge's NCJ mandate was illegally interrupted, as confirmed by the CJEU and the ECtHR. The speaker faces 17 disciplinary procedures all over the country, none of which, according to the speaker, relate to the quality of his work; they mostly relate to statements made in relation to rulings. According to the judge, 25 attorneys are working on the cases initiated against

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<sup>7</sup> The Act of 17 December 2021 amending the Act on foreigners and certain other acts,

the person, in an attempt to defend the rule of law. The judge denounced the intensity of the actions taken by disciplinary prosecutors, including against the judge's family: the couple was surveilled for 16 months; the judge was checked for debts in financial institutions even if already paid, their building permit was examined, there was a smear campaign in state-owned media. The judge is still working, but the combination with the proceedings is tiring. The judge maintains to have been illegally transferred overnight to another court, and to be the only judge without assistant in that court; the judge got hundreds of files, just to break the person. The judge stated to have met judges who will not implement the CJEU rulings because they are afraid, have a mortgage, kids. The levels of fear of communist times are coming back.

- The prosecutor stated that the scope of politicisation of the prosecutor's office is beyond imagination: prosecutors face proceedings for the slightest criticism, are banned from exercising their duties and sometimes moved hundreds of kilometres away for work. The Rome Charter of European Prosecutors states that prosecutors can voice their opinion on any matters pertaining to the independence prosecution office. In reality, criticism means repression in Poland. The speaker is facing a dozen disciplinary proceedings and one criminal charge and was displaced 350 km from home while given 48 hours to move, having to leave the family behind for six months. The decision could not be appealed. The judge also found out to have been put under Pegasus surveillance.
- The prosecutor reiterated furthermore that Poland is not part of the EPPO, which in the opinion of the speaker is due to political reasons. The EPPO revealed 23 investigations about Poland; the Polish prosecutor's office refuses to cooperate. The prosecutor's office initiated proceedings for alleged corruption against the Polish ECJ judge, for the purpose of undermining the credibility of the court; this is another example of political instrumentalisation of the prosecutor's office. The prosecutor alleged that there is a serious risk that the control on the use of EU funds by Poland will not happen properly; also the funds of the Recovery and Resilience Facility would be at risk. The situation is becoming legally perilous for EU citizens having economic interests in Poland.

### **11:00 - 11:45 Meeting with former and current judges of the Supreme Court**

During the meeting with former and current judges of the Supreme Court, the following points, among others, were raised:

- The former first president and a judge of the Supreme Court stated that the rule of law is even more important to have against the background of a war. Since 2016, they have been warning for the threat of Poland becoming an authoritarian state; this was not taken seriously.
- The former first president recalled that proceedings of the Disciplinary Chamber of the Supreme Court continue; more and more judges are being suspended for trivial reasons; the judge classified this as breaches of the Constitution and the CJEU ruling. The adjudicating panels within the Supreme Court are being tampered with; 'neo judges' with a personal interest in the ruling are added to panels. The judge pointed to the upcoming ruling in the Wrobel case as being of extreme importance.
- The speaker further recalled that a draft bill by the President and three more drafts to implement the CJEU judgments have been tabled. The judge maintained that while the

abolition of the Disciplinary Chamber is important, the Government drafts fall absolutely short: the defects will spill over when moving 'neo judges' from the Disciplinary Chamber to other chambers of the Supreme Court.

- Another Supreme Court judge recalled that the term of the previous NCJ was interrupted and that 'neo judges' were appointed in flagrant violation of the Constitution; the NCJ is now a body formed by one political force and its disposal. The judge could not recall one case in which the NCJ really defended the independence of the judiciary.
- According to the judge; since June 2020, the General Assembly of Judges of the Supreme Court has not been convened, theoretically because of the pandemic. The judge fears that the draft bills by the Government would simply create a 'neo Disciplinary Chamber', and would legalise the 'neo judges'. All judges (50% lawfully appointed, 50% 'neo judges') would be eliminated from the Supreme Court and reappointed, allowing for a further purge. Several current vacancies in the traditional chambers of the Supreme Court cannot be filled; according to the judge, this is because experienced lawyers do not want to become members of the Supreme Court in the current circumstances.
- Asked how the damage to the judicial system in terms of so many thousands of verdicts delivered by unlawfully appointed judges can be undone, the judge suggested the creation of a mechanism allowing those who want to have their case reviewed on the basis of a list of requirements to get such possibility.

#### **12:30 - 13:15                      Meeting with former judges of the Constitutional Tribunal**

During the meeting with former members of the Constitutional Tribunal, the following points, among others, were raised:

- According to the former judges of the Constitutional Tribunal, the last presidential and parliamentary elections were flawed given the uncontrolled use of Pegasus software by special services and inequality of treatment of candidates by the public media. The Supreme Court confirmed the validity of the elections on the basis of the election report presented by the National Electoral Commission and opinions issued as a result of examining election protests. However, the Supreme Court does not have competences to rule on the fairness of the whole electoral campaign. It can only order verification of votes or even repetition of voting following a justified electoral complaint. Now since the Supreme Court itself is flawed, there are even more doubts about the fairness of future election campaigns.
- The former judges stated that the rule of law situation in Poland started deteriorating with the President's refusal to receive an oath from three judges correctly appointed to the Constitutional Tribunal by the Sejm of the VII<sup>th</sup> parliamentary term on 8 October 2015 and nomination of other judges appointed by the Sejm of the VIII<sup>th</sup> parliamentary term on 2 December 2015. This raised doubts about the validity of the composition of the Constitutional Tribunal as well as its legitimacy. Changes in the Constitutional Tribunal were followed by the unconstitutional shortening of the term of office of the National Judiciary Council (NCJ) and the nomination of a 'neo NCJ'; as well as further reforms of the judiciary, including the creation of the Disciplinary Chamber in the

Supreme Court. All these changes have put into question the predictability of public authorities and the fundamental trust in public institutions, which is the core of the *Rechtsstaat*. The problems of illegally appointed judges cause further problems of the validity of their judgements.

- According to the former judges, the activities of the politicised Constitutional Tribunal, including the recent ruling on the primacy of the Polish Constitution over EU law go against key articles of the Treaties and aim at depriving the CJEU of the competences of assessing the legality of the appointment of judges in Poland. The ruling effected in immediate motion of the Minister of Justice and Prosecutor General to the Constitutional Tribunal to declare unconstitutional the judgments of the CJEU and ECtHR. The Constitutional Tribunal is also expected to provide judgment upon the motion from the Prosecutor General on the constitutionality of the provisions of the treaties underpinning the General conditionality system to protect the Union budget<sup>8</sup>. Last but not least, the Constitutional Tribunal has been legitimising unconstitutional acts of the Parliament.
- As regards ways to restore the rule of law in Poland, the former judges pointed at the need to implement all judgments of the CJEU and ECtHR, starting with the restoration of the legal composition of the Constitutional Tribunal, which - according to the ECtHR - is now not a court; dissolution of the ‘neo National Council of the Judiciary’ and liquidation of the Disciplinary Chamber of the Supreme Court. None of the three bills tabled by the representatives of the governing parties provides a solution to the systemic problems of the rule of law in Poland.

### **13:15 - 13:45            Meeting with media representatives II**

Following the lack of reply from the President of the Board of the Public Television to the invitation addressed by the Chairs of the LIBE and AFCO Committees for a meeting with the joint LIBE-AFCO Delegation, Members held a meeting only with the President of the Board of the National Broadcasting Council (managing public media).

During the meeting with the President of the Board of the National Broadcasting Council the following points, among others, regarding the functioning of the media market in Poland were raised:

- The President explained that the role, composition and characteristics of the National Broadcasting Council (NBC), which is a media authority, are enshrined in the Constitution. It is an authority independent of the Government and is intended to uphold the freedom of speech, the right to information and the public interest in broadcasting. This provision is confirmed by the Broadcasting Act of 29 December 1992. According to the NBC President, the model used by the NBC is similar to the French model. The term of office is 6 years and it is practically impossible to shorten or cancel it, unless in the case of dismissal, perhaps as a result of the simultaneous rejection of the annual report by the Sejm, Senate and the President. So far, there has been no such unanimity. NBC members are appointed by the Sejm, the Senate and the President. Among them, there are trade union activists, Solidarity activists, representatives of journalistic

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<sup>8</sup> On February 16, 2022 the hearing on this motion was adjourned indefinitely by the Constitutional Tribunal

associations and journalists. The selection must be approved by the relevant authorities. With the establishment of the National Media Council in 2016, it is this body, and not the National Broadcasting Council, that elects the supervisory boards of public media and their boards.

- Regarding independence of media, the President of the NBC stated that in several instances in the Broadcasting Act there is a guarantee of independence of the media, in the form of a ban on influencing editorial work and the shape of the media coverage. Communist censorship in Poland was abolished by the Broadcasting Act. The National Broadcasting Council can react to broadcasters only *ex post* - it evaluates what has appeared on air. It can impose penalties, but these can be appealed to the courts. Up to 80% of society is reached by public media, while private media do not have such reach. The revenues of public TV and private TV are comparable, because low advertising revenues of public TV are compensated by a radio and TV subscription. Public radio only occupies 15% of the market. The influence of politicians on the media market concerns only the public media, i.e. 1/3 of the TV market and 15% of the radio market.
- Asked about media pluralism, the NBC President explained, in particular as regards information and journalism, that there are 3 TV news channels: TVP Info; TVN 24 (private channel available only in cable and satellite networks - this is the choice of the broadcaster who did not choose terrestrial broadcasting in 2011 as it would have to be made available free of charge); and Polsat news (private channel). All political disputes are concentrated on those news channels that occupy 8% of the media market (TVN24 - 4%, TVP Info - 3.5%, Polsat news - 1.5%). NBC deals with the entire market plus the internet portals market. Research conducted by the Nicolaus Copernicus University in Toruń on the characteristics of the media in terms of ideological attitudes confirmed that TVP Info favors conservative attitudes, TVN 24 favors liberal and oppositional attitudes, and that Polsat News is the most balanced and objective, but its audience is slightly over 1%, which testifies to the polarization of society. To sum up, the public chooses programs that confirm their outlook on life. As for who has access to first-hand information, that is the one who has better contacts with politicians. Opposition politicians do not come to TVP but to TVN and vice versa. The fastest way to distribute government information is via the Internet.
- As regards objectivity of public media, the NBC President stated that this is problematic, although public media should be objective. However, the same principle should apply to commercial media, because they are licensed, and thus obliged to objectivity. Complaints are being submitted to the National Broadcasting Council on all media; last year, about 600 complaints were filed.

### ***Press conference***

The LIBE-AFCO mission was concluded with a press conference by the LIBE Chair, Juan Fernando López Aguilar, the AFCO Vice-Chair, Gabriele Bischoff, and Vice-President of the Parliament, Othmar Karas. The link to the press conference is here below.

[https://multimedia.europarl.europa.eu/en/webstreaming/press-point-by-chairs-libe-and-afco-delegations-to-poland-warsaw\\_20220223-1430-SPECIAL-PRESSER](https://multimedia.europarl.europa.eu/en/webstreaming/press-point-by-chairs-libe-and-afco-delegations-to-poland-warsaw_20220223-1430-SPECIAL-PRESSER)

## *Conclusions*

The fact-finding mission was carried out jointly by the Committee on Civil Liberties, Justice and Home Affairs and the Committee on Constitutional Affairs from 21 to 23 February in Warsaw, Poland. Members of the mission came from all political groups represented in the European Parliament, and the programme was agreed on the basis of inputs and suggestions submitted by all of them. The Delegation had the opportunity to engage with several relevant Polish stakeholders, including Members of the Sejm and the Senate, current and former judges of the Supreme Court and the Constitutional Tribunal, Polish associations of judges, prosecutors and lawyers, and judges and prosecutors facing disciplinary and criminal measures for applying the judgments of the CJEU, representatives of media, academia and think tanks, representatives of NGOs and activists. The interlocutors raised serious concerns regarding the lack of checks and balances with serious detrimental effects on the situation of the rule of law and fundamental rights protection in Poland, including recent developments that are far from reassuring.

After the mission, the majority of the Members of the Delegation<sup>9</sup> has serious concerns about the situation of democracy, the rule of law and fundamental rights in Poland.

Those concerns related in particular to the following issues:

- the irregularly composed Constitutional Tribunal, which is delivering rulings on demand of the executive, including issuing a near-total ban on abortion, refuting the primacy of EU law and the validity of CJEU rulings in the area of independence of the judiciary, and stating the incompatibility of Article 6 of the ECHR with the Polish Constitution, thereby excluding Poland further from international agreements and obligations which Poland committed to freely;
- the Supreme Court, which is being increasingly politicized by the executive;
- the Disciplinary Chamber and the Extraordinary review Chamber of the Supreme Court, which continue to function despite their lack of being independent and impartial tribunals as ruled by the CJEU and the ECtHR;
- the 'muzzle law', which is being applied with the intention of silencing judges critical for the changes to the judicial system undertaken since 2015 or for implementing the judgments of the European courts related to the rule of law, with most recently, on 25 February, the suspension of judge Anna Głowacka;
- the 'neo-National Council of the Judiciary', which is at the core of the politicisation of the Polish judiciary as also found by the CJEU and the ECtHR (ruling of 15 March), and which continues to operate while its composition is being renewed under the same compromised terms;
- the unprecedented level of politicization of the public prosecution service, exacerbated by the fact that the Minister of Justice is also the Prosecutor General; this resulted in a

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<sup>9</sup> with the exception of ID Member Gerolf Annemans and ECR Member Beata Kempa, who therefore disagree with these key findings and conclusions.

growing number of politically motivated investigations carried out against those regarded as opponents of the government, and of cases not initiated or discontinued by the public prosecution due to their political dimension;

- Poland's refusal to cooperate with the EPPO, in addition to its decision not to join the EPPO.
- the draft bill that would have allowed the executive to take control of the largest independent TV channel, TVN24, which was ultimately vetoed by the President; the setting up of the National Media Council, which bypasses the Constitutional role of the National Broadcasting Council, which in turn is politicised;
- the further deterioration of women's rights, LGBTI rights and the rights of migrants;
- the Government's alleged illegal use of the 'Pegasus' spyware in relation to people perceived as opponents of the ruling majority, including members of the opposition, a lawyer and a prosecutor;

The Delegation also discussed with the stakeholders the three recent legislative proposals initiated by the Polish President and the ruling parties to address the problems with the Disciplinary Chamber of the Polish Supreme Court. There was near unanimity among the stakeholders that those legislative proposals are ineffective and insufficient, as they do not address the problems identified in the European Courts rulings. Under these proposals, a similar chamber for disciplinary proceedings would be established or the current one revamped with its judges transferred to other chambers of the Supreme Court, hence leaving the problems linked to irregular appointments unanswered. The legislative proposals also do not address the aforementioned other extremely serious problems with regard to the rule of law and fundamental rights situation in Poland identified in the judgements of the CJEU and the ECtHR, which are of equal importance.

The Delegation would like to express its astonishment with regard to the lack of reply from the Marshal of the Sejm to the invitation to meet with the EP delegation in Warsaw. None of the representatives of the ruling coalition participated in the meetings with the EP delegation, although they were invited to do so. In addition, none of the competent Ministers nor the President wished to meet with the delegation. This lack of engagement with the European Parliament, which is also the parliament of the Polish people, is very worrying.

In conclusion, the Delegation is of the view that the EU should continue to insist with the Polish authorities that Poland respects the obligations stemming from the Treaties as regards to respect for democracy, the rule of law and fundamental rights, including the rights of persons belonging to minorities. All relevant instruments of the rule of law toolbox should be used to that effect, including the annual rule of law report, the Article 7(1) TEU procedure, infringement procedures, direct funding possibilities and the Rule of Law Conditionality Regulation.

In particular, the Delegation reiterates the Parliament's call on the Commission to immediately send a written notification under Article 6(1) of the Rule of Law Conditionality Regulation to Poland and to refrain from approval of the Polish national plan under the Recovery and Resilience Facility until all criteria related to compliance with country-specific recommendations in the field of the rule of law and relevant CJEU and ECtHR judgments are

fully fulfilled. Finally, the Commission should ensure recovery of the penalty imposed by the Court of Justice for non-compliance with interim measures (Case C-204/21), and to request a penalty payment in accordance with Article 260(3) for non-compliance with the judgment (Case C-791/19).

The Co-Chairs of the Delegation will present this mission report before the LIBE and AFCO Committees on 31 March 2022.



## Annex I

Committee on Civil Liberties, Justice and Home Affairs (LIBE)

Committee on Constitutional Affairs (AFCO)

Mission to Poland, Warsaw

21 February - 23 February 2022

### Programme

#### Monday 21 February 2022

14:00 - 15:00	Meeting with NGOs I (NGOs active in the field of the protection of Rule of Law and with a general mandate)
15:00 - 16:00	Meeting with NGOs II (NGOs active in the field of justice)
16:00 - 16:30	Coffee break
16:30 - 17:15	Meeting with NGOs III (NGOs active in the field of women's rights)
17:15 - 18:00	Meeting with NGOs IV (NGOs active in the field of migration/situation at the border)
18:00 - 18:30	Coffee break
18:30 - 19:15	Meeting with NGOs V (NGOs active in the field of LGBTI rights)
19:15 - 20:00	Meeting in relation to the Pegasus surveillance

#### Tuesday 22 February 2022

8:15 - 9:15	Sejm of the Republic of Poland ( <i>NB: widest possible spectrum of political parties to be represented</i> ) (tbc) <ul style="list-style-type: none"><li>• meeting with the Marshal of the Sejm (tbc)</li></ul> Separate meetings: <b>LIBE</b> <ul style="list-style-type: none"><li>• meeting with representatives of the EU Affairs Committee (tbc)</li></ul> <b>AFCO</b> <ul style="list-style-type: none"><li>• meeting with representatives of the Standing Subcommittee on the Conference on the Future of Europe (tbc)</li></ul>
9:15 - 9:45	Transport
9:45 - 12:30	Meeting with the President of the Republic of Poland (tbc) Meeting with the Prime Minister of the Republic of Poland (tbc) Meeting with Deputy Prime Minister (tbc) Meeting with Minister of European Affairs (GAC) (tbc) Meeting with Minister of Justice and Prosecutor General (tbc)
12:30 - 12:45	Transport
10:00 - 12:00 (alternative programme)	Meetings with the Political Leaders/Members in the Sejm (National Parliament) of the Republic of Poland ( <i>NB: widest possible spectrum of political parties to be represented</i> ).
12:45 - 13:45	Lunch break
13:45 - 14:30	Meeting with representatives of the National Council of the Judiciary (NCJ/KRS)
14:30 - 15:00	Transport

<b>15:00 - 16:30</b>	<b>Senate of the Republic of Poland</b> ( <i>NB: widest possible spectrum of political parties to be represented</i> ) <b>Joint meeting with:</b> <ul style="list-style-type: none"> <li>• the Marshal of the Senate</li> <li>• representatives of the Foreign and European Union Affairs Committee</li> <li>• representatives of the Extraordinary Committee on Illegal Surveillance</li> </ul>
<b>16:30 - 16:45</b>	Transport
<b>16:45 - 17:45</b>	<b>Meeting with professional associations of judges/prosecutors/lawyers</b>
<b>17:45 - 18:30</b>	<b>Meeting with media representatives I</b>
<b>18:30 - 19:00</b>	<i>Coffee break</i>
<b>19:00 - 19:45</b>	<b>Meeting with representatives of academia and think tanks I</b>
<b>19:45 - 20:30</b>	<b>Meeting with representatives of academia and think tanks II</b>

### Wednesday 23 February 2022

<b>8:15 - 9:00</b>	<b>Meeting with the Organization for Security and Cooperation in Europe's (OSCE) / Office for Democratic Institutions and Human Rights (ODIHR)</b>
<b>9:00 - 9:45</b>	<b>Meeting with the Office of the Polish Ombudsman</b>
<b>9:45 - 10:15</b>	<i>Coffee break</i>
<b>10:15 - 11:00</b>	<b>Meeting with Judges and prosecutors affected by disciplinary/criminal proceedings for applying EU law</b>
<b>11:00 - 11:45</b>	<b>Meeting with former representatives of the Bureau of the Supreme Court</b>
<b>11:45- 12:30</b>	<i>Lunch</i>
<b>12:30 - 13:15</b>	<b>Meeting with former representatives of the Constitutional Tribunal</b>
<b>13:15 - 13:45</b>	<b>Meeting with media representatives II</b>
<b>13:45 - 14:15</b>	<i>Coffee break</i>
<b>14:15 - 15:00</b>	<i>Press Conference by the Chairs of the Delegation</i>