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Statement of the Legal Experts Group of the Stefan Batory Foundation on the Constitutional Tribunal decision on the compatibility of the provisions of the Treaty on European Union with the Polish Constitution

On 7 October, Poland's Constitutional Tribunal (CT) chaired by Julia Przyłębska ruled that Article 1, paragraph 1 and 2 in connection with Article 4(3) of the Treaty on European Union (TEU) is incompatible with the Polish Constitution insofar as the integration of the equal and sovereign states that make up the European Union is reaching a "new stage" in which – according to members of the CT – a) EU organs operate beyond the limits of the competencies transferred by Poland in the treaties, b) the Constitution is not the supreme law of the Republic of Poland with priority of validity and application, c) Poland cannot function as a sovereign and democratic state.

The Tribunal also deemed Article 19(1), paragraph 2 of the TEU unconstitutional insofar as it grants national courts the power to bypass provisions of the Constitution in their rulings and rule on the basis of regulations that do not apply, have been repealed by the lower chamber of parliament, the Sejm, or deemed unconstitutional by the CT. Moreover, according to the adjudicating panel, Article 19(1) paragraph 1 of the TEU is unconstitutional insofar as this provision – together with Article 2 of the TEU – grants national courts the power to: a) check the legality of the procedures for appointing judges, including examining whether the act appointing the judge by the president of Poland is legal, b) check the legality of the National Council of the Judiciary resolution containing the request asking the president to appoint the judge and c) deem the process of appointing a judge flawed and, as a result, refusing to recognise the appointed individual as a judge.

In our view, the CT decision contains a significant legal flaw: three of the people involved in issuing it were selected by the Sejm during its 8th term to judges' posts that had already been filled correctly. These people are Mariusz Muszyński, Justyn Piskorski and Jarosław Wyrembak; people who cannot adjudicate at the CT. This leads to the conclusion that the proceedings in the case were invalid and that a so-called non-existent ruling was issued. The Legal Experts Group described these circumstances in a report on the judiciary in March 2018, among other places. The Group stands by the arguments expressed there completely.

The CT decision directly undermines the principles that Poland committed to when it joined the EU in 2004. **The ruling on the unconstitutionality of the TUE provisions is not only a blatant violation of EU law, but also a violation of the Polish Constitution, based on which Poland respects the international law.**

The CT ruling negates the statutory interpretation of the EU principle of the rule of law, the principle of sincere cooperation and the principle of effective legal protection established by the Court of Justice of the European Union (CJEU), in part in response to prejudicial questions from Polish courts. Joining the EU, Poland committed to abide by the CJEU's jurisprudence.

According to EU law, the CT is not entitled to assess the TEU's constitutionality. The CT ruling could prompt the European Commission to launch proceedings against Poland at the CJEU, which could result in the country being fined for not respecting EU law.

Contrary to the CT's position, by ruling on the current government's judiciary "reform", the CJEU is not overstepping the competencies transferred by Poland in the treaties, including the TEU. The CJEU's settled case law – including the CJEU ruling of 6 October 2021 in the case of judge Waldemar Żurek – shows that while the organisation of the judiciary in member states is among those states' competencies, member states have the duty to uphold the commitments resulting from EU law when enacting those competencies. As the CJEU indicated in the ruling above, this concerns national provisions on the appointment of judges and provisions on appropriate judicial control in the context of these appointment proceedings in particular.

It is not true – as the CT claims in its ruling – that Poland cannot function in the EU as a sovereign and democratic state. It is worth remembering that Poland made the sovereign decision to join the EU in 2004 and to transfer competencies on certain matters to it. Following Poland's EU accession, the CJEU received the power to rule on Polish matters, including carrying out the interpretation of EU law based on which national courts are entitled to control the legality of the procedure for appointing a judge. In recent years, CJEU rulings constituted a barrier against the destructive "reform" of the judiciary.

We see the ruling by the politicised CT, where the overwhelming majority of judges are neither independent nor impartial, on the constitutionality of the provisions of the CJEU as the execution of a political order by the government and the majority in the Sejm. Opposing EU law and the Polish Constitution – within the scope covered by the CT decision – is fundamentally false. We would like to point out that the CT ruling of 2005 on the accession treaty outlined three ways in which Poland could react to incompatibilities between the Polish Constitution and EU law: amending the Constitution, taking steps to introduce changes to the EU regulations, or deciding to leave the EU. **The CT ruling of 7 October 2021 effectively tends towards leading Poland out of the EU.**

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