

To: Antonio Tajani, President of the European Parliament

Klaus Welle, Secretary-General of the European Parliament, Rue Wiertz 60, 1047 Bruxelles, Belgium

Cc: The Authority for European Political Parties and European Political Foundations
Rue Wiertz 60, 1047 Brussels (Office PHS 6 C 95)

Chair of the Committee of independent eminent persons

From: Alberto Alemanno, Jean Monnet Professor of European Union Law, HEC Paris
Laurent Pech, Jean Monnet Professor of European Union Law, Middlesex University London
both acting on behalf of The Good Lobby

Re: Reasoned request to the European Parliament for verification of Alliance of Conservatives and Reformists in Europe's continuing compliance with Article 2 TEU under Article 10(3) of Regulation (EU, EURATOM) No 1141/2014 on the Statute and Funding of European Political Parties and European Political Foundations as amended by Regulation 2018/673

Legal basis: Article 10(3) of Regulation (EU, EURATOM) No 1141/2014 on the Statute and Funding of European Political Parties and European Political Foundations as amended by Regulation 2018/673

London/Paris, 20 September 2018

Dear European Parliament, dear Mr Welle,

We are writing to ask you to lodge with the Authority for European Political Parties and European Political Foundations a request for verification of compliance by the Alliance of Conservatives and Reformists in Europe (hereinafter: ACRE) with the conditions laid down in point (c) of Article 3(1) of Regulation (EU, EURATOM) No 1141/2014 on the Statute and Funding of European Political Parties and European Political Foundations as amended by Regulation 2018/673 (hereinafter: The Regulation).

Under Article 11 of the Regulation, the Authority shall ask the committee of independent eminent persons established by Article 11 for an opinion on the subject.

It is indeed our submission that there is ample evidence that the ACRE (along with the parliamentary group known as the ECR group with which ACRE is affiliated) has failed to continuously comply with the conditions for registration laid down in Article 3, and in particular Article 3(1)(c), at the very least since the activation of the so-called pre-Article 7 procedure by the European Commission in January 2016. Since then, it is our submission that the ACRE has deliberately and persistently refused to take any concrete action against one of its member parties, the Law and Justice party, Poland's ruling party since October 2015, notwithstanding its systemic and persistent undermining of Article 2 TEU values.

I – Poland's ruling party's systemic undermining of the rule of law

As you would know, the Commission's activation of the pre-article 7 procedure *for the very first time* was justified inter alia by the unprecedented failure by a national government of an EU country – in this case Poland – to respect the "binding rulings" of the national constitutional court. Since then, the situation has seriously worsened, which gave the European Commission no choice but to activate, *for again the very*

first time, Article 7(1) TEU last December. As noted then by Frans Timmermans, the First Vice-President of the Commission in charge inter alia of the rule of law, “over a period of two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland ... The common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch”.

Since the activation of Article 7(1) TEU, Polish authorities have continued to show their open disregard for the most elementary understanding of their constitutional and EU obligations. Having previously openly ignored the rulings of Poland’s Constitutional Tribunal which were not to their liking, they are now openly refusing to comply with the rulings of Poland’s Supreme Court in relation to the legislation purging it, or to use the Polish government’s phrasing, the “reform” of the Supreme Court. As you would know, this legislation is also subject to an ongoing infringement action by the European Commission as the measures contained in this legislation would not be compatible with the principle of judicial independence, including the irremovability of judges. For the Commission, therefore, Poland has failed to fulfil its obligations under Article 19(1) of the Treaty on European Union read in connection with Article 47 of the Charter of Fundamental Rights of the European Union.

As observed by Professor Scheppele and one of the present authors of this letter, writing in March 2018:

While Polish authorities like to repeatedly claim that criticisms are all due to misunderstandings, the European Commission’s lack of expertise on Polish legal affairs or “biased political assessments”, the Commission’s concerns have been repeatedly shared by multiple national and international actors. In addition to the repeated warnings issued by the European Parliament, one may mention the repeated critiques originating from key bodies of the Council of Europe such as the Venice Commission, the Commissioner for Human Rights, and the Parliamentary Assembly. Beyond the EU and the COE, criticism has also been expressed by the United Nations Human Rights Committee, the OSCE Office for Democratic Institutions and Human Rights as well as representatives of the judiciary across Europe, including the Network of Presidents of the Supreme Judicial Courts of the European Union and the European Network of Councils for the Judiciary. Numerous civil society organisations such as Amnesty International and Human Rights Watch have also expressed concerns. The First President of the Supreme Court of Poland last December issued a shocking warning that there is an ongoing coup d’Etat against the judiciary by a government intent on destroying the constitutional structures of the state.

Polish authorities have since been engaged in a patently unconstitutional attempt to dismiss the First President of the Supreme Court and might just well succeed in doing so before the European Court of Justice will be able to issue a ruling on this matter. Be that as it may, and as noted by the European Commission in a contribution submitted to the Council on 20 June 2018 prior to Poland’s first formal Article 7 hearing which took place on 26 June 2018:

27 current judges of the Supreme Court, including the First President, are at risk of forced retirement on 3 July 2018. This would constitute an irreversible violation of the rule of law.¹

At the actual hearing, the Commission reiterated that Polish authorities are continuing to offer misleading information while failing to offer cogent answers to its serious concerns,² concerns which are unanimously

¹ Council document no 10351/18.

² Council document no 10906/18.

and strongly supported by all organisations working on rule of law issues.³ Among the pressing and/or recurrent issues mentioned by the Commission one may refer to:

- the situation of the Supreme Court, because a number of its judges are now subject to an unconstitutional removal process;
- the setting up of a new Polish National Council of the Judiciary which does not comply with standards requiring that judge-members be elected by their peers;
- the forced retirement and the 'reformed' regime for extending the mandates of ordinary courts judges;
- the dismissal of 70 presidents of courts by the Minister for Justice without any possibility of judicial review;
- the failure to remove the so-called extraordinary appeal procedure;
- the failure to implement a single one of the recommended actions regarding the Constitutional Tribunal. In particular, three judges continue to be prevented from taking up their duties despite two judgments from 2015 confirming their lawful appointment. And while all relevant judgments previously unpublished have been published, some contained a disclaimer on their legality!

The rule of law situation in Poland is so out of control that Polish authorities are now openly threatening the European Court of Justice in the same way they have previously sought to bully the Polish Constitutional Tribunal and subsequently the Polish Supreme Court into submission:

"There is, of course, no way Poland would hand in a decision on the court reforms to the Court of Justice. This is our internal competence guaranteed by EU law" Jaroslaw Kaczynski, the head of the ruling Law and Justice (PiS) party and the country's de facto ruler, 26 January 2018⁴

"I am convinced that the Court of Justice of the European Union is neither competent nor proper and thus may not make statements on the judiciary reform in Poland, or any other E.U. country for that matter" Zbigniew Ziobro, Poland's justice minister and a member of PiS, 6 July 2018⁵

The Polish government "will probably have no choice but to ... ignore the ruling of the ECJ as contrary to the Treaty of Lisbon and the whole spirit of European integration" Jaroslaw Gowin, deputy prime minister and a member of PiS, 26 August 2018⁶

Most recently and further evidence if any was needed of Poland's full blown descent into authoritarianism, Poland's revamped aka unconstitutionally established judiciary disciplinary bodies – whose compatibility with EU law is subject to several pending preliminary ruling requests before the ECJ – have "started proceedings against three judges who publicly spoke out against the government's sweeping" attacks on

³ See recently the letter by the International Commission of Jurists on the "Forced retirement of 27 Supreme Court Justices", 11 July 2018: <https://www.icj.org/poland-icj-sitting-and-former-judges-call-for-immediate-reinstatement-of-supreme-court-justices>; ENCJ Board proposes to suspend National Judicial Council (KRS) of Poland: <https://www.ency.eu/node/492>. See also the resolution by the Presidents of the Associations of Judges of Denmark, Finland, Iceland, Norway, Sweden, Estonia and Latvia, 31 August 2018: <https://www.iaj-uim.org/news/resolution-on-the-political-interference-into-the-polish-judiciary/>

⁴ <https://uk.reuters.com/article/uk-poland-judiciary-kaczynski/poland-will-not-yield-to-eu-over-court-reforms-kaczynski-idUKKBN1FF13X?il=0>

⁵ <https://nyti.ms/2IWWb9a>

⁶ <https://www.politico.eu/article/poland-warsaw-ignore-ecj-ruling-on-justice-reform/>

Poland's judicial branch.⁷ Further confirming the accuracy of this diagnosis, the general assembly of the European Network of Council for the Judiciary decided yesterday to suspend the Polish National Judicial Council on the ground that it is no longer independent of the executive and legislature and in compliance with relevant European minimum standards.

II – ACRE's failure to comply with Article 3 of EU Regulation 1141/2014

Despite the continuing non-compliance with the Commission's recommendations more than eight months following the activation of Article 7(1) TEU by the European Commission, and the worsening of the situation in Poland as evidenced by the organisation of a second formal Article 7 hearing on 18 September 2018, the ACRE and in particular, the European Parliament group it is affiliated with (the ECR Group), have deliberately and persistently refused to take any concrete action against Poland's ruling party, one of its member parties. We would therefore ask you and the Authority to promptly investigate this matter with the view of considering the ACRE's possible de-registration as a European political party.

As you are well aware, Article 3 of EU Regulation 1141/2014 conditions the registration of European political parties and their affiliated European political foundations "to observe, in particular in its programme and in its activities, the values on which the Union is founded, as expressed in Article 2 TEU, namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" (see also recitals 12 and 13 of the Regulation).

While the ACRE is officially dedicated to bringing together parties committed to inter alia individual liberty, parliamentary democracy and the rule of law,⁸ there is no evidence of ACRE taking any action whatsoever against Poland's "Law and Justice" party.⁹ On the contrary, there is a substantial body of evidence – which we would find important to share with the Authority upon your request – of the ACRE and ECR Group leadership refusing to condemn and, at times, positively approving the actions of Poland's ruling party while it is engaged in a systematic dismantlement of all of Poland's checks and balances.

To visualise Poland's descent into authoritarianism, let us reproduce below one table from a recent report by Freedom House,¹⁰ a US-based independent watchdog which earlier this year referred to the "bulldozing of the judiciary in Poland" noting "how few safeguards there are, even in the heart of the European Union, against a determined government that disregards political and constitutional norms".¹¹

⁷ <https://www.bloomberg.com/news/articles/2018-09-11/poland-starts-to-discipline-judges-who-criticized-court-reforms>

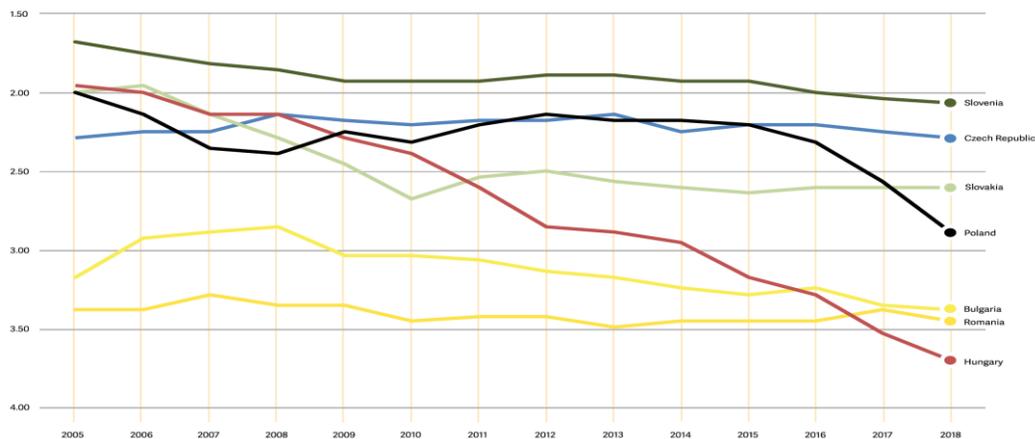
⁸ See the so-called Reykjavik Declaration adopted at the Council meeting of the ACRE on 21 March 2014: <http://www.acreurope.eu/#about>

⁹ See Article 4 of Regulation 1141/2014 which requires from any "political alliance" the observance of EU values not only in its programme but also "in its activities" the values laid down in Article 2 TEU.

¹⁰ Freedom House, Nations in Transit 2018: Confronting Illiberalism.

¹¹ Ibid., p. 1.

DEMOCRACY SCORES IN CENTRAL AND EASTERN EUROPE 2005-2018



As noted by Freedom House, Poland is on its way to no longer being considered a consolidated democracy “having suffered the largest category declines in the history” of their survey.¹²

By this reasoned request and the references therein, we consider the European Parliament as having now been made aware of facts substantiating a possible “manifest and serious breach” of the values laid down in Article 2 TEU by the ACRE. This would consist of its failure to take any sanction against Poland’s ruling party, a member of the ACRE, notwithstanding the activation of the pre-Article 7 procedure in January 2016 and the activation of the Article 7(1) procedure in December 2017.

If anything, the ACRE, and in particular, the leadership of its affiliated parliamentary group, may be said to have encouraged the systemic undermining of judicial independence as well as the broader dismantlement of all checks and balances we have been witnessing in Poland by publicly claiming inter alia the following despite all evidence to the contrary:¹³

“Having spoken to Polish MEPs, Ministers and the Prime Minister today, it is clear that they have no intention of undermining pluralism and the rule of law in Poland” Syed Kamall (co-chairman/co-president of ECR Group and the leading ECR speaker on the situation in Poland since the activation of the pre-Article 7 procedure), 19 January 2016¹⁴

“Emphasises that the reversal of these appointments [to the Constitutional Tribunal] by the new parliament was carried out in the course of the ordinary self-correction procedure, and stresses that there are no grounds to deny a newly elected parliament the right to decide on the correctness of its previous decision in the course of the same procedure” ECR Group Motion, 11 April 2016¹⁵

“when you try to lecture a government, especially one which won a democratic election with a large majority, you lecture not just the governing party, but also the people who voted for that governing party. No wonder people feel more detached than ever from Brussels. The Polish Government needs no lecture from you guys on how to run a democracy; but the Left, they like to give lectures on democracy while the

¹² Ibid., p. 3.

¹³ See the multiple reports by multiple national and international bodies cited in Part I of this letter.

¹⁴ <http://ecrgroup.eu/take-a-step-back-and-look-at-the-facts-on-poland-kamall-urges-meps/>

¹⁵ European Parliament, Motion for a resolution to wind up the debate on the statements by the Council and the Commission pursuant to Rule 123(2) of the Rules of Procedure on the situation in Poland, B8-0465/2016, 11 April 2016, (2015/3031(RSP)), B8-0465/2016.

hypocrisy blinds them to the authoritarian regimes that they have supported in the past” Syed Kamall, 14 December 2016¹⁶

“I do not believe the European Commission has acted fairly in recent months, singling out Poland above other countries in a partisan attack” Helga Stevens MEP (then ECR candidate for European Parliament President), 12 January 2017¹⁷

“5,711,687 Poles voted for the PiS majority government of Poland, giving it a firm mandate to conserve what worked and reform what didn't. ... It has also included reforming an outdated constitution influenced by partisans, and defying Migrant Quotas the Polish people do not want. It is a travesty that people who have no democratic mandate to govern Poland are now seeking to wrest control from those who do. Emmanuel Macron threatening to apply sanctions to Poland, as though it had invaded Ukraine, is an act of spectacular arrogance. The hypocrisy of a foreign politician backing unelected bureaucrats in subverting the freely and fairly elected government of Poland in the name of protecting democracy is staggering. Moreover, Poland is right to defy the migrant quotas, a cheap ploy to make the rest of the EU pay for the mistakes of Berlin and Brussels” ACRE news & commentary, 30 April 2017¹⁸

The “new legislative proposals, such as the proposals for laws on the National Judicial Council and Supreme Court, should not be subject to interference from the EU institutions” ECR Motion, 6 November 2017¹⁹

We remain at your disposal to provide you with further evidence of the ACRE’s failure to comply with its duties under Article 3 of Regulation 1141/2014 and urge you to undertake a verification – as you are required under Article 10 of the Regulation – of the ACRE’s continuing compliance with the values on which the EU is founded.

Should you fail to provide a prompt and satisfactory response to our letter, we will have no other option but to refer this matter to the EU Ombudsman to verify the correct handling of our request.

We would also like to inform you that in accordance with Article 6 of Regulation 1141/2014, as amended by Regulation 2018/673, we have also addressed this letter to the Authority for European Political Parties so as to have it request from the Committee of independent eminent persons an opinion on a possible “manifest and serious breach of the values on which the EU is founded”, as referred to in point (c) of Article 3(1) of the Regulation.

Yours sincerely,



Alberto Alemanno

Laurent Pech

¹⁶ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%20CRE%2020161214%20ITEM-014%20DOC%20XML%20V0%2F%2FPL>

¹⁷ <http://ecrgroup.eu/helga-stevens-on-poland/>

¹⁸ http://www.acreurope.eu/item/euro_federalists_should_lay_off_poland

¹⁹ Motion for a resolution to wind up the debate on the statements by the Council and the Commission pursuant to Rule 123(2) of the Rules of Procedure on the situation as regards the rule of law and democracy in Poland (2017/2931(RSP)), B8-0594/2017.