

28 March 2021

Ursula von der Leyen

President of the European Commission

Věra Jourová

Vice-President of the European Commission

Didier Reynders

Member of the European Commission

Dear President,

Dear Vice-President,

Dear Commissioner,

Further to the letter of December 2020, endorsed by more than 5,000 judges and prosecutors of the Member States, we, the representatives of Polish civil society organisations and European scholars specialising in EU law and human rights, are writing to you once again in connection with the worsening rule of law crisis in Poland. We have now reached a stage where independent judges seeking to apply EU law and the Court of Justice's judgments are threatened with abusive criminal charges and coercive measures. We urge you therefore to urgently adopt concrete legal measures to prevent the further destruction of the rule of law in Poland.

In particular, we would like to ask you to immediately refer Poland to the Court of Justice regarding the "Muzzle Law" and the functioning of the Disciplinary Chamber,¹ and to simultaneously submit a comprehensive application for interim measures – with the aim of having them granted as soon as possible. The content of such a request and its grounds are set out later in this letter.

The deadline set by the Commission in its additional reasoned opinion addressed to the Polish government regarding the "Muzzle Law" and the suspended Disciplinary Chamber passed at the end of February 2021. Even so, the Polish authorities have not stopped systematically breaching EU law and ignoring the Court of Justice's rulings.

¹ INFR(2020)2182.

At the same time, Polish authorities have significantly and deliberately increased their activities intended to produce irreversible legal effects and to organise a permanent breach of EU requirements of judicial independence before the pending action in Case C-791/19 and the Commission's expected action in the mentioned case are decided by the Court of Justice.

Notwithstanding Poland's requirement to suspend the operation of the Disciplinary Chamber in disciplinary cases regarding judges,² this body – which is not a “court” within the meaning of EU and Polish law – is still unlawfully suspending Polish judges in their official duties and authorising the prosecution of national judges on criminal charges.³ Apart from the well-known decisions of the Disciplinary Chamber to suspend Judges Paweł Juszczyszyn, Beata Morawiec and Igor Tuleya, this body is planning further actions in the immediate future. On 21 April 2021, the Disciplinary Chamber is planning to decide on the detention and the use of coercive measures against Judge Igor Tuleya in order to press criminal charges against him for the content of his ruling. On the following day, this body will be dealing with the matter of lifting the immunity of Judge Józef Iwulski, who is the President of the Labour and Social Security Chamber of the Supreme Court, with the aim of preventing the Court of Justice to decide on requests for preliminary ruling referred by this chamber.

Simultaneously, the Public Prosecutor's Office, under the total control of the Minister of Justice, has requested the Disciplinary Chamber to authorise criminal prosecution and to suspend a number of judges of the Criminal Chamber of the Supreme Court. These include Judge Włodzimierz Wróbel, who received overwhelming support in the recent elections of the First President of the Supreme Court, although the Polish President decided to appoint another person, who was nominated to the Supreme Court by the National Council of the Judiciary in its current unlawful membership.

Other judges of the Criminal Chamber, including its President, Judge Michał Laskowski, as well as the former First President of the Supreme Court, Judge Małgorzata Gersdorf, are also targeted by the Public Prosecutor's Office. As reported in the media,⁴ the prosecution authorities intend to press criminal charges against judges who decided to transfer disciplinary cases of advocates to the Criminal Chamber rather than allowing their examination by the

² Order of the Court of 8 April 2020, *Commission v Poland (disciplinary regime for judges)*, C-791/19 R, EU:C:2020:277.

³ Even though, in accordance with the Court's case-law, measures which can lead to any dismissal of national judges form part of the disciplinary regime (see judgments of the Court: of 24 June 2019, *Commission v. Poland (independence of the Supreme Court)*, C-619/18, EU:C:2019:531, para 77; of 5 November 2019, *Commission v Poland (independence of ordinary courts)*, C-192/18, EU:C:2019:924, para 144).

⁴ M. Jałoszewski, *Prokuratura Krajowa szykuje nalot na SN. Zarzuty grożą Małgorzacie Gersdorf i sędziom Izby Karnej* [Public Prosecutor's Office to raid the Supreme Court: judges of the Criminal Chamber and Judge Małgorzata Gersdorf to face criminal charges], OKO.press, 20 March 2021, <https://oko.press/prokuratura-krajowa-szykuje-nalot-na-sn-zarzuty-groza-malgorzacie-gersdorf-i-sedziom-izby-karnej/>.

suspended Disciplinary Chamber. It should be borne in mind that, having suspended the functioning of this body, the Court of Justice also required Poland to refrain from referring all cases to the Disciplinary Chamber before a panel whose membership does not satisfy the requirements of independence.⁵ These requirements are manifestly not met by any formations of this body.

Simultaneously, the Polish parliament is considering further amendments to the Law on the Supreme Court, which are important from the point of view of its independence.⁶ A number of its provisions are to come into force within 14 days of the publication of this law in the official journal, including those which allow the Polish President to arbitrarily appoint interim presidents of the Supreme Court's chambers, without the need to hold an election procedure in each chamber. This measure is similar to the new provisions on the election of the First President of the Supreme Court of 2020, which the Commission rightly raised in Poland's chapter of its Rule of Law Report of September 2020.⁷ The legislative process for this law is expected to be completed in the coming days, which means that this act will be waiting for the President's signature and publication in the official journal.

Additionally, the members of the Disciplinary Chamber, as well as the current unlawfully appointed First President of the Supreme Court,⁸ have consistently demanded that the said President of the Labour and Social Security Chamber transfer the files of the cases in which that chamber requested the Court of Justice to give preliminary rulings on the status of individuals appointed to the Supreme Court in gross breach of the law following the nomination procedure before the National Council of the Judiciary in its current membership.⁹ We would like to reiterate that the current First President of the Supreme Court is also in this group.

Furthermore, on 28 April 2021, the Constitutional Tribunal – which is a body that lacks independence according to the Commission's own assessment – is to consider a question of law referred to it by the Disciplinary Chamber the day after it was suspended by the Court of Justice. The unlawfully composed Constitutional Tribunal will pretend to have the

⁵ Including the requirements set out in the judgment of the Court of 19 November 2019, *A.K. and Others (independence of the Disciplinary Chamber of the Supreme Court)*, joined cases C-585/18, C-624/18 and C-625/18, EU:C:2019:928.

⁶ See Law of 25 February 2021 amending the Law on the Supreme Court (Senate form no. 330, 10th term), <https://www.senat.gov.pl/prace/druki/record,11304.html>.

⁷ European Commission, *2020 Rule of Law Report: Country Chapter on the rule of law situation in Poland*, SWD(2020) 320 final, p. 6.

⁸ M. Krajewski, M. Ziółkowski, *Can an Unlawful Judge be the First President of the Supreme Court?*, VerfBlog, 26 May 2020, <https://verfassungsblog.de/can-an-unlawful-judge-be-the-first-president-of-the-supreme-court/>.

⁹ Cases: C-487/19, *W.Ż. (Extraordinary Appeals and Public Affairs Chamber of the Supreme Court – Nomination)*; C-508/19, *Prokurator Generalny (Disciplinary Chamber of the Supreme Court – Nomination)*; joined cases: from C-491/20 to C-496/20, C-506/20, C-509/20; and C-511/20, *Sąd Najwyższy and Others*.

jurisdiction to examine the constitutionality of Article 4(3) TEU and Article 279 TFEU, insofar as they require a Member State to comply with interim measures concerning the system and the functioning of the national judiciary¹⁰.

These circumstances relate directly to the Commission's recent infringement procedure mentioned above. The continued functioning of the Disciplinary Chamber and the unlawful appointment of its members, and other individuals appointed to the Supreme Court at the request of the National Council of the Judiciary in its current unlawful membership, severely threatens the independence of Polish courts and will produce irreversible legal effects resulting in a permanent breach of EU law and the requirements of the rule of law.

The expected decision of the Disciplinary Chamber to allow for detention against Judge Igor Tuleya may mark the first time in the European Union when force is used against a national judge for the content of his ruling. The intention to press criminal charges against judges, with the complicity of a body which patently does not constitute a "court", would exacerbate the "chilling effect" experienced by the members of Poland's judiciary and seriously undermine the effective and uniform application of EU law by the Polish courts. Faced with the prospect of arbitrary criminal or disciplinary sanctions, judges will be reluctant to apply EU law, in particular the requirements related to effective judicial protection.

Decisions of the Disciplinary Chamber to waive immunity and to suspend numerous judges of the Criminal Chamber and the Labour and Social Security Chamber of the Supreme Court, including their presidents, will have equally irreparable consequences and will mark the beginning of the end of mutual trust in respect of Poland. In this situation, the current unlawfully appointed First President of the Supreme Court will be able to decide, on her own, to transfer the files of pending cases to two new chambers. This will mean that several preliminary references to the Court of Justice of key importance to the entire EU legal order will be neutralised and no longer relevant. We are convinced that the main purpose of the actions of the prosecutor's office against these judges is indeed to prevent both the Court of Justice from dealing with those essential preliminary ruling questions and the Supreme Court from applying already decided preliminary ruling cases. This risk will be further increased by the outgoing amendments to the Law on the Supreme Court, which allow the Polish President to appoint interim presidents of the Supreme Court's chambers.

The expected outcome of these developments will be to block any possibility of taking advantage of any mechanisms provided in EU law to examine the status of individuals unlawfully appointed to the Supreme Court in gross breach of the Polish Constitution and EU law. This will seriously exacerbate Poland's rule of law breakdown which has resulted, among

¹⁰ Case P 7/20.

other things, in the lack of respect for the effective judicial protection and the requirements of the rule of law in proceedings before Poland's top court.

At the same time, the continued operation of the remaining solutions that are challenged by the Commission in its infringement procedure undermine EU law. The mere prospect of disciplinary and criminal sanctions for the content of judicial decisions will exacerbate the "chilling effect" which we have already mentioned. The exclusive jurisdiction of the Extraordinary Appeals and Public Affairs Chamber – a body which suffers from the same legal flaws as the Disciplinary Chamber – in cases regarding the status of individuals appointed to Polish courts at the request of the National Council of the Judiciary in its current membership, in parallel with the requirement to discontinue such proceedings, is resulting in tens of thousands of decision existing in the Polish legal system which are issued by bodies which flagrantly violate the EU criteria for effective judicial protection. The new provisions requiring judges to disclose specific information about their non-professional activities, in particular their membership in judicial associations, also aim to create the "chilling effect" by stigmatising judges and restricting their ability to exercise their fundamental rights. As currently drafted, these provisions are disproportionate and incompatible with the right to respect for private life, freedom of association, and the right to the protection of personal data as guaranteed by the Charter and the General Data Protection Regulation.

For all these reasons, we urge you to refer the case to the Court of Justice without more delay and to apply for a broad set of interim measures, even before the Polish government submits its observations, pursuant to Article 160(7) of the Rules of Procedure – to avoid the usual dilatory tactics of the Polish authorities. Only in this way will it be possible to stop the imminent threat to the rule of law and to contain the crisis.

In this respect, it is essential that the proposed application for interim measures covers as broad a set of issues as possible. Accordingly, we would like to ask you to consider submitting a request to require the Republic of Poland, immediately and pending the final judgment:

- 1) to suspend the application of the provisions of Article 110 § 1(1)(b) and (2) and Article 110 § 2a and 2b of the Law on the organisation of the ordinary courts of 27 July 2001, as well as Article 3(5), Article 27 and Article 73 § 1 of the Law on the Supreme Court of 8 December 2017 – which form the basis for the jurisdiction of the Disciplinary Chamber in cases concerning judges;
- 2) to suspend the application of the provisions of Article 42a § 1 and 2 and Article 107 § 1(2) and (3) of the Law on the organisation of the ordinary courts of 27 July 2001, as well as Article 29 § 2 and 3 and Article 72 § 1(2) and (3) of the Law on the Supreme Court of 8 December 2017 – which prohibit the courts from examining the authority of

other judges or courts to adjudicate and provide for disciplinary sanctions for judges for undertaking such an examination;

- 3) to take all necessary measures to ensure that the pending disciplinary and criminal proceedings against judges, as well as investigations before the initiation of disciplinary proceedings, regarding both the violation of Article 107 § 1(1)(2) and (3) of the Law on the organisation of the ordinary courts of 27 July 2001 or Article 72 § 1(2) and (3) of the Law on the Supreme Court of 8 December 2017, as well as those related to the content of judicial decisions – conducted before competent authorities or courts – are suspended;
- 4) to refrain from allowing individuals appointed to the Supreme Court – including the Disciplinary Chamber and the Extraordinary Appeals and Public Affairs Chamber – on the motion of the National Council of the Judiciary formed in accordance with the procedure established by the provisions of the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other acts to refer and examine cases;
- 5) to take all necessary measures to ensure that the judges with respect to whom the Disciplinary Chamber has authorised criminal prosecution or detention have the opportunity to have these decisions examined by the Supreme Court composed of judges other than those referred to in point 4, and in proceedings which satisfy the requirements of effective judicial protection;
- 6) to take all necessary measures to ensure that information contained in the declarations submitted by judges, as referred to in Article 88a § 1 of the Law on the organisation of the ordinary courts of 27 July 2001, are not publicly available;
- 7) to inform the European Commission, no later than one month after being notified of the order regarding the interim measures, and then regularly – every month – thereafter, of all the measures it has adopted or plans to adopt in order to fully comply with that order.

For obvious reasons, we do not have access to the documents from the pending infringement procedure. Nevertheless, we are convinced that this will be one of the most important cases ever brought before the Court of Justice in the history of the European Union. We are also aware of the Commission's long-standing policy of referring only those cases where the Commission is certain of winning to the Court of Justice. But we also know that, in its recent case-law, the Court of Justice confirmed the extended scope of the second subparagraph of Article 19(1) TEU, which now covers a remarkably wide range of measures and practices of the Member States that might jeopardise effective judicial protection and the rule of law. Instead of always waiting for the Court of Justice to lead the way, the Commission must fulfil its role as Guardian of the Treaties, must stop acting in a too little too late fashion, and finally

face the reality that Poland has become the country which has dismantled democracy and the rule of law *the most in the world* since 2015.¹¹

The requested application for interim measures must reflect this reality and the existential threat to the functioning and future of the EU legal order. We do hope that the Commission's legal service is aware of the extreme gravity of the situation in Poland and stands ready to argue accordingly. In any case, we remain at your disposal should you require additional information on the points outlined above. We once again urge you to act promptly and meaningfully.

What is at stake in this case is the independence of the whole of the judiciary in Poland. More statements, dialogue and reports are not going to contain, let alone solve Poland's rule of law crisis. It is indeed no longer a crisis that Poland is facing but a total breakdown in the rule of law which, in turn, represents a threat to the interconnected legal order that underpins the European Union.

Yours faithfully,

Justice Defence Committee (KOS):

Amnesty International

Association of Judges "THEMIS"

Association pro memoriam prof. Zbigniew Hołda

Civil Development Forum (FOR Foundation)

Free Courts

Helsinki Foundation for Human Rights

Institute of Law and Society INPRIS

"Lex Super Omnia" Association of Prosecutors

Polish Judges' Association "Iustitia"

Polish Association of Judges of Administrative Courts

Presidium of the Judges Cooperation Forum

Wiktor Osiatyński Archive

¹¹ V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021, <https://www.v-dem.net/files/25/DR%202021.pdf>, p. 19.

and

Cracow Institute of Criminal Law Foundation

"Defensor Iuris" Association of Attorneys-at-Law

Dr Vigjilence Abazi, Maastricht University

Professor Joana Covelo de Abreu, University of Minho

Professor Alberto Alemanno, HEC Paris

Professor Matej Avbelj, New University

Professor Aslı Ü. Bâli, UCLA School of Law

Professor Petra Bárd, Eötvös Loránd University, Central European University

Professor Samo Bardutzky, University of Ljubljana

Professor Gavin Barrett, University College Dublin

Dr Uladzislau Belavusau, T.M.C. Asser Institute

Professor Paul Blokker, University of Bologna

Professor Bojan Bugarić, University of Sheffield

Professor Antoine Buyse, Utrecht University

Dr Matthieu Burnay, Queen Mary University of London

Professor Başak Çalı, Hertie School in Berlin

Professor Ramona Coman, Université Libre de Bruxelles

Dr John Cotter, Keele University

Dr Kati Cseres, University of Amsterdam

Dr Eglė Dagilytė, Anglia Ruskin University

Dr Tom Gerald Daly, Melbourne School of Government

Professor Giacomo Di Federico, University of Bologna

Professor Peter Van Elsuwege, Ghent University

Dr Cassandra Emmons, Harvard University

Professor Iris Goldner Lang, University of Zagreb

Dr Barbara Grabowska-Moroz, University of Groningen

Dr Joelle Grogan, Middlesex University London

Professor Xavier Groussot, Lund University
Professor Michaela Hailbronner, University of Gießen
Professor Gabor Halmai, European University Institute
Dr Daniel Hegedüs, The German Marshall Fund of the United States
Professor Christophe Hillion, University of Oslo
Professor Hristo Hristev, Sofia University
Professor R Daniel Kelemen, Rutgers University
Professor Jeff King, University College London
Professor Dimitry Kochenov, CEU Democracy Institute
Dr Constantinos Kombos, University of Cyprus
Professor Tomasz Tadeusz Koncewicz, University of Gdańsk
Dr Kriszta Kovács, WZB Berlin Social Science Center
Jaka Kukavica, European University Institute
Dr Dilek Kurban, Hertie School
Professor Rui Lanceiro, University of Lisbon
Professor Rick Lawson, Leiden University
Professor Ronan McCrea, University College London
Professor Christoph Möllers, Humboldt University
Professor John Morijn, University of Groningen
Professor Jan-Werner Müller, Princeton University
Professor Tommaso Pavone, University of Oslo
Professor Laurent Pech, Middlesex University London
Professor Vlad Perju, Boston College Law School
Professor Thomas Perroud, Panthéon-Assas University (Paris II)
Professor Roman Petrov, National University Kyiv-Mohyla Academy
Professor Sébastien Platon, University of Bordeaux
Professor Jiří Přibáň, Cardiff University
Professor Daniel Sarmiento, Complutense University of Madrid
Julian Scholtes, European University Institute

Professor Wojciech Sadurski, University of Sydney, University of Warsaw

Professor Kim Lane Scheppele, Princeton University

Professor Alessandra Silveira, University of Minho

Dr Rui Tavares, New York University

Dr Radosveta Vassileva, University College London

Professor Marlene Wind, University of Copenhagen

Professor Jan Wouters, KU Leuven

Professor Mirosław Wyrzykowski, University of Warsaw

Professor Lorenzo Zucca, King's College London