

Warsaw, 19 May 2021

European Commission

In the name of the Justice Defense Committee¹, an umbrella organization of 13 NGOs, we would like to draw your attention to the specific legal issues and suggest possible solutions in relation to the draft of the Polish National Recovery and Resilience Plan (NRRP).

It is with great regret and disappointment that we have to state that this document, submitted by Polish authorities, which is so important to all EU citizens after the Covid pandemic and unlike the Slovak respective version is missing the reference to the fundamental issue of the destruction of the rule of law in Poland. Therefore, it does not fulfill the obligations placed on Poland regarding the reversal of the obvious and illegal politicization of the judiciary.

As arises from Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility the National Recovery and Resilience Plans contain “an explanation of how the plan contributes to effectively address challenges identified in the relevant country-specific recommendations ”under the European Semester”². According to the Commission’s guidelines, “Member States should look at the full set of country-specific recommendations”, while “reforms linked to (...) the effectiveness of justice systems, and in a broader sense respect of the Rule of Law are essential elements of the Member States’ overall recovery strategy”.

According to the 2020 CSR Poland should “Enhance the investment climate, in particular by safeguarding judicial independence” as regarding the rule of law “recent developments raise further

¹ <https://komitetobronysprawiedliwosci.pl>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0241>

concerns, putting at risk the functioning of the Polish and the Union's legal order"³. Since then the state of the rule of law has only aggravated.

Poland has lost a number of cases before the Court of Justice and the European Court of Human Rights regarding the reform of its judiciary. More cases are to be addressed by those courts in the coming months. The list of those cases is attached to this statement. All the verdicts issued to date oblige Poland to reintroduce the independence of the judiciary institutions and the judges themselves.

While the NRRP refers to the judiciary in three places; the severe impediments on its independence and measures to address them not even mentioned⁴. Therefore, the Commission should require Poland to precisely specify how Poland is to implement all the interim measures and verdicts issued by the Court of Justice and the European Court of Human Rights, and define how and when those verdicts will be executed. More specifically, the NRRP should address the following questions:

- How is Poland to reinforce the independence of the National Council of the Judiciary so that it can be a full member of the ENCJ again?
- How is Poland to replace the illegal disciplinary system with one that is compliant with the Polish Constitution and the Treaty, especially with regards to the illegal Disciplinary Chamber in the Supreme Court as well as so called "muzzle law"?
- How is Poland to reverse the judicial appointments to the Supreme Court and other courts which were made in conflict with the Polish Constitution and the Treaty?
- How is Poland to reform Constitutional Tribunal, the membership of which is currently illegal?
- How is Poland to reform its prosecution system by depoliticisation of the prosecutors as well involvement of Poland in the European Public Prosecutor's Office (the EPPO).

Polish NRRP might be compared with Slovakian NRRP. Slovakia even though it does not suffer from such severe rule of law crisis, defines its reformatory plans as regards judiciary on 30 pages⁵. Polish NRRP is completely silent not only about necessary reversal of the destructive reforms, but any necessary changes and improvements in the judiciary system.

³ <https://eur-lex.europa.eu/legal-content/EN/TEXT/?qid=1591720698631&uri=CELEX%3A52020DC0521>

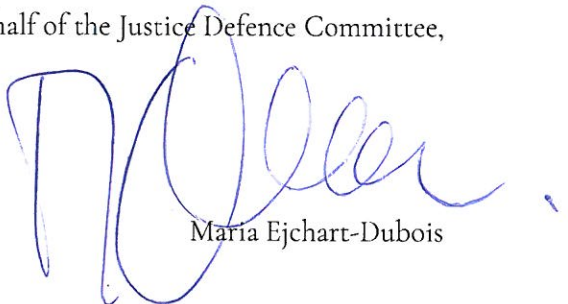
⁴ A) Page 14 – Section 3 "Investment climate and level of private investment" only refers to the poor quality of the legislative process in Poland, B) Page 62 – the section referring to the fulfillment of the Country Specific Recommendation 4 – "improvement of the investment climate, in particular via protection of the independence of the judiciary" says nothing about any issues related to the rule of law crisis in Poland, C) Page 485 the section regarding the Prevention of abuse if the Recovery Fund refers to control of the judiciary, which – as arises from the Commission's own recommendations and various Court of Justice interim measures and verdicts will not be secured in Poland unless the politicization of the judiciary is reversed and the verdicts are executed.

⁵ https://www.planobnovy.sk/files/dokumenty/cely_plan_obnovy.pdf

Currently Poland is not fulfilling its obligations as an EU Member State bound by the Treaty, in particular Article 4 and Article 19. Furthermore, Poland openly intends not to execute those obligations given that the Constitutional Tribunal (the same which was considered to be in breach of Article 6 of the Convention on Human Rights) is to address two complaints by a member of the politically elected Disciplinary Chamber and Prime Minister Mateusz Morawiecki himself about the authority of the Court of Justice and questioning the superiority of the *acquis* in general (cases P 7/20 and K 3/21). *De iure*, the objective of those motions is to exclude Poland from the common legal space of the European Union.

We hereby emphasise that judicial independence is the precondition for all other civic and business rights, as well as the prevention of corruption with regard to EU funds. The current state of the rule of law in Poland poses a risk for the EU budget in light of the Regulation on a general regime of conditionality for the protection of the Union budget⁶. It is of utmost importance to reflect this in the process of acceptance of the Polish NRRP. We remain at your disposal for future questions if needed.

On behalf of the Justice Defence Committee,



Maria Ejchart-Dubois

Partners of the Justice Defence Committee:

Professor Zbigniew Hołda Association

Polish Judges' Association "Iustitia"

Association of Judges "THEMIS"

Lex Super Omnia" Association of Prosecutors

Free Courts Initiative

Helsinki Foundation for Human Rights

Institute for Law and Society INPRIS

Wiktor Osiatyński Archive

Amnesty International Poland

Civil Development Forum (FOR)

Polish National Association of Judges of Administrative Courts

Presidium of the Judges' Cooperation Forum

Bar Association „Defensor Iuris”

⁶ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32020R2092>

Attachment

List of finalised and pending cases against Poland with regard to the destruction of the rule of law and the politicisation of the judiciary system

- C-192/18 – Commission vs. Poland (independence of common courts) – verdict issued against Poland⁷
- C-619/18 - Commission vs. Poland (independence of the Supreme Court) – interim measure and verdict issued against Poland⁸
- C-585/18, C-624/18, C-625/18 - A.K; preliminary questions (independence of the National Judiciary Council and Disciplinary Chamber) – judgement issued against Poland⁹
- C-824/18 - A.B.; preliminary questions (independence of the National Judiciary Council in the process of appointing the new Supreme Court judges) – judgement issued against Poland¹⁰
- C-487/19 - W.Ż.; preliminary question as to the independence of the newly formed Public Law Chamber of the Supreme Court – pending, Advocate General's opinion issued ¹¹
- C-508/19 – M.F.; preliminary question as to independence of the newly formed Disciplinary Chamber of the Supreme Court – pending, Advocate General's opinion issued¹²
- C-791/19 – Commission vs. Poland (illegality of the new system of disciplinary prosecution of judges), interim measure issued, case pending, Advocate General's opinion issued¹³
- C-204/21 - Commission vs. Poland (“muzzle act” disciplining judges) – pending, motion for an interim measure¹⁴
- C-491/19 – W.Ż.; preliminary question as to the judicial status of the newly selected Supreme Court judges - pending
- C-492/19 – W.Ż.; preliminary question as to the judicial status of the newly selected Supreme Court judges - pending
- C-493/19 – P.J.; preliminary question as to the judicial status of the newly selected Supreme Court judges - pending
- C-494/19 – K.M.; preliminary question as to the judicial status of the newly selected Supreme Court judges - pending

⁷ <https://curia.europa.eu/juris/liste.jsf?num=C-192/18>

⁸ <https://curia.europa.eu/juris/liste.jsf?num=C-619/18>

⁹ <https://curia.europa.eu/juris/liste.jsf?num=C-585/18>

¹⁰ <https://curia.europa.eu/juris/liste.jsf?num=C-824/18>

¹¹ <https://curia.europa.eu/juris/liste.jsf?num=C-487/19>

¹² <https://curia.europa.eu/juris/liste.jsf?num=C-508/19>

¹³ <https://curia.europa.eu/juris/liste.jsf?num=C-791/19>

¹⁴ <https://curia.europa.eu/juris/liste.jsf?num=C-204/21>

- C-495/19 – T.M.; preliminary question as to the judicial status of the newly selected Supreme Court judges - pending
- C-496/19 – M.F.; preliminary question as to the judicial status of the newly selected Supreme Court judges - pending
- C-506/19 – T.B.; preliminary question as to the judicial status of the newly selected Supreme Court judges - pending
- C-509/19 – M.F.; preliminary question as to the judicial status of the newly selected Supreme Court judges - pending
- C-511/19 – B.S.; preliminary question as to the judicial status of the newly selected Supreme Court judges – pending
- Case of Grzęda v. Poland, 43572/18 - pending
- Case of Żurek v. Poland, 39650/18 - pending
- Case of Xero Flor v. Poland, 4907/18 - judgment issued against Poland¹⁵
- Case of Broda v. Poland, 26691/18 and Bojara v. Poland, 27367/18 - pending
- Case of Sobczyńska and others v. Poland, 62765/14, 62769/14 and 11708/18 - pending
- Case of Reczkowicz and others v. Poland, 43447/19, 49868/19 and 57511/19 - pending
- Case of Tuleya v. Poland, 21181/19 - pending
- Case of Brodowiak and Dżus v. Poland, 28122/20 and 48599/20 - pending
- Case of Biliński v. Poland, 13278/20 - pending
- Case of Pionka v. Poland, 26004/20 - pending
- Case of Juszczyzyn v. Poland, 35599/20 - pending

¹⁵ <http://hudoc.echr.coe.int/eng?i=001-210065>