Open Letter to the President of the European Commission

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Open Letter to the President of the European Commission regarding Poland's disciplinary regime for judges and the urgent need for interim measures in Commission v Poland (C-791/19)

Ever since the European Commission initiated a third infringement procedure in respect to the recurrent attacks on the rule of law by Polish authorities last April, the situation has continued to seriously deteriorate. We have now reached the unprecedented and frightening stage where Polish judges are being subject to harassment tactics in the form of multiple arbitrary disciplinary investigations, formal disciplinary proceedings and/or sanctions for applying EU law as interpreted by the ECJ or 'daring' to refer questions for a preliminary ruling to the Court of Justice.

In addition, Polish authorities are now openly challenging the authority of the rulings recently adopted by the ECJ and the not-yet-captured Labour and Social Security Chamber of the Supreme Court. These judgments concern both the Disciplinary Chamber of Poland's Supreme Court, whose legality is being challenged in the pending infringement procedure previously mentioned, and the new National Council of the Judiciary, whose lack of independence had previously led to its suspension from the European Network of Councils for the Judiciary (ENCJ).

As representatives of non-governmental organisations and scholars specialising in matters relating to the rule of law and the protection of human rights, we write this open letter so as to urge you to take immediate steps to stop the rapidly increasing legal chaos in Poland.

As you yourself keep repeating, "there can be no compromise when it comes to respecting the rule of law". This is why we are asking you to promptly submit to the European Court of Justice an application for interim measures in the infringement case C-791/19 *Commission v Poland* now pending before the Court of Justice. Without interim measures in place, Polish authorities evidently feel free to openly persecute judges who seek to apply and enforce EU law via the two institutions they de facto control: the Disciplinary Chamber and the National Council of the Judiciary.

The time has come to accept we are facing a situation in which EU law has broken down. Interim measures are called for before the situation gets worse and irreparable damage is done.

The prior Commission asked for interim measures in the case in which the government of Poland sought to capture the Supreme Court by retroactively lowering the retirement age of its judges (C-619/18 R). The Court of Justice agreed to grant the Commission's request and Poland was ordered to maintain the status quo until the Court could rule in the matter.

Given that Polish authorities are now openly challenging the authority of ECJ case law and actively seeking to prevent Polish judges from applying EU law, while an infringement action that challenges their attempts to fatally undermine the independence of Polish judges through a new disciplinary regime is pending, fresh action is required. It is imperative to prevent the Commission from losing its ability to enforce any favourable ruling that it may eventually receive. Interim measures are therefore essential because, if Polish authorities succeed in intimidating and/or removing the judges who are most keen to apply EU law and to defend the rule of law more generally, it will be too late for the Commission's pending infringement action to have any impact by the time the ECJ finds Poland to have violated – for the third time in a row – the principle of judicial independence.

This is why the Commission, in the context of interim proceedings, must request the Court to order Poland to immediately adopt the following interim measures:

– refrain from all activities, including preliminary disciplinary investigations or formal disciplinary proceedings with respect to judges on account of the content of their judicial decisions or requests for preliminary rulings;

– ensure both that the Disciplinary Chamber suspends all of its activities in light of the ECJ preliminary ruling (Joined cases C-585/18, C-624/18 and C-625/18) and the Supreme Court ruling finding it not to constitute a "court" within the meaning of EU and Polish law and that other authorities, including disciplinary officers and prosecutors, refrain from bringing actions to this chamber;

– ensure both that the President of the Disciplinary Chamber (or any person acting on behalf of the President) is no longer able to establish, on an ad-hoc basis and with an almost unfettered discretion, disciplinary courts of first instance to cases brought against ordinary court judges and that the disciplinary courts already established in this way refrain from considering cases and issuing judgments;

– ensure that the people appointed to the Disciplinary Chamber do not participate in the Supreme Court's bodies – including the General Assembly of the Supreme Court Judges – in procedures intended to fill the office of the First President of the Supreme Court, which will be vacant in April 2020, or the presidents of the Supreme Court heading particular chambers;

– ensure that the National Council of the Judiciary refrains from nominating any new individual to be appointed as a judge, including to the Disciplinary Chamber, and – more generally – abstains from any action or statement which undermine the judicial independence of Polish judges.

We wish this open letter were not necessary. Sadly, it is well established that Polish authorities have deliberately ignored the Commission's multiple recommendations ever since the Commission's rule of law framework was activated in respect of Poland in January 2016. Rather than taking the rule of law dialogue as a warning and an invitation to return to the rule of law, the Polish authorities have instead intensified the repression of independent judges and prosecutors.

The Rubicon has now been crossed with Polish authorities actively and purposely organising non-compliance with the ruling of the Court of Justice of 19 November 2019 and the judgment of the Supreme Court of 5 December by claiming that neither the ruling of the Court of Justice nor the judgment of the Supreme Court are of any legal significance when it comes to the continuing functioning of the Disciplinary Chamber and the National Council of the Judiciary.

Poland's ruling party's strategy is clear: create *faits accomplis* and hide behind a veneer of legality if and when required by relying on the captured Constitutional Tribunal, the so-called Disciplinary or Extraordinary Control and Public Affairs Chambers, or the ENCJ-suspended Polish National Council of the Judiciary to in effect nullify the effect of EU law in Poland whenever convenient for the ruling party.

The attacks on judicial independence we are witnessing in Poland are unprecedented in the history of the EU and legal chaos is bound to ensue and spread because Polish authorities are openly and purposefully ignoring their duties and obligations as a matter of Polish as well as EU law. If not promptly addressed through interim measures, we have no doubt this will mark the beginning of the end of the EU's common and interconnected legal order.

"A Europe that protects must also stand up for justice and for values. Threats to the rule of law challenge the legal, political and economic basis of our Union. The rule of law is central to President von der Leyen's vision for a Union of equality, tolerance and social fairness," says the European Commission's website.

Time has come to put words into action by urgently applying for interim measures so as to preserve what is left of the rule of law in Poland while there is still time to prevent its complete abolition.

Yours faithfully,

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