When Will the EU Commission Act?

An Open Letter

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Brussels, 28 April 2020

Věra Jourová

Vice-President of the European Commission for Values and Transparency

Didier Reynders

European Commissioner for Justice

Dear Honourable Members of the European Commission,

We are writing to you in respect of the worsening breakdown of the rule of law in Poland, as well as specifically in regard to actions that must be taken ahead of the upcoming presidential election and election of the First President of the Supreme Court.

Rather than further detailing the main aspects of the persistent deterioration of the rule of law situation in Poland ever since the European Commission activated the Rule of Law Framework in January 2016, which have been comprehensively detailed in your own Article 7(1) reasoned proposal of December 2017 and most recently by the Parliamentary Assembly of the Council of Europe in January 2020, we are writing to ask you to please answer the following questions:

(1) When can we expect the European Commission to launch an infringement action against the "muzzle law" which entered into force on 14 February 2020, which organised an unprecedented structural violation of judicial independence standards laid down in EU law as well as unprecedented system of punishment for judges who dare enforcing EU judicial independence standards?

(2) When will the European Commission act to sanction Polish authorities' refusal to comply with the Court of Justice's A. K. preliminary ruling of 19 November 2019?

(3) When will the European Commission apply for financial sanctions following Polish authorities' public refusal to immediately and fully comply with the Court of Justice's interim relief order of 8 April 2020 in respect of the so-called "disciplinary chamber", and the violation of this order committed directly by the same "disciplinary chamber" when it referred the Court of Justice's interim relief order to the captured "Constitutional Tribunal", which, according to your own Article 7(1) TEU diagnosis, can no longer be considered a court due to its illegal composition and the unlawful appointment of its current "President"?

(4) When will the European Commission launch an infringement action in respect of the unlawful actions of the so-called "Constitutional Tribunal", the latest examples of which are its two "judgments" which essentially nullify, in obvious violation of both Polish and EU law, the resolution of the Supreme Court of 23 January 2020 which aimed to guarantee the effectiveness of EU law and in particular compliance with EU judicial independence standards following the Court of Justice's A. K. preliminary ruling of 19 November 2019? In these two "decisions", *farcically relying in part on the EU Treaties to absurdly justify blatant violations of the said Treaties*, the "Constitutional Tribunal" not only defiantly violated its obligation to refer the matter to the ECJ, it *blatantly violated the most fundamental principles and mechanisms underlying the whole EU legal order* by deliberately ignoring relevant ECJ rulings; denying the ECJ any authority to review Polish measures violating judicial independence; and prohibiting national courts from setting aside and/or referring questions to the ECJ regarding bodies and/or national measures which patently violate the principle of effective legal protection. This amounts to Polexit from the EU legal order in all but name and total anar-

chy is bound to follow if no decisive action is taken against a body which the Commission itself has *already* found to be illegally composed.

(5) When will the European Commission also launch an infringement action against another body masquerading as a court known as the Extraordinary Control and Public Affairs Chamber (ECPA)? In this context, we would like to know whether the Commission intends to take any action in relation to the preliminary cases C-487/19 (concerning judge Waldemar Żurek), C-508/19 (concerning judge Monika Frąckowiak), and C-824/18 (raising i.a. questions about the composition of the ECNJ-suspended – soon to be expelled – National Council of the Judiciary)? A common feature of the abovementioned cases is that all of them relate to the legal status of individuals appointed to the ECPA chamber which is as blatantly defective as the "disciplinary chamber", which was already found not to constitute a court within the meaning of Polish and EU Law;

(6) When will the European Commission likewise launch an infringement action against the ENCJ-suspended – and soon to be expelled – National Council for the Judiciary in light of its active role when it comes to the deliberate violation of EU judicial independence standards?

We are sorry to have to write to you in such an urgent manner, but time is of the essence. As some of the most renowned professors of EU law specialising in rule of law matters wrote to you on 9 March 2020,

> *Waiting to bring infringement actions and to fail to simultaneously seek interim measures when the rule of law in a Member State is so obviously and blatantly deteriorating on an industrial scale only means that the Commission faces a far more serious and intractable problem to deal with later. The problem does not disappear by ignoring it. This is an urgent moment for action. […] This is not merely a clear and present danger as far as the Polish legal order is concerned but represents an existential threat to the functioning of the EU's interconnected legal system as a whole. […] If the Commission does not act, then Member States (and other) judiciaries will have to act to defend themselves by withdrawing judicial cooperation with the Polish judiciary and ultimately, failing to recognise and enforce the decisions of Polish courts. To prevent further unravelling of the EU's core legal system, it is imperative for the Commission to act without delay.*

Poland's ruling party is about to capture the whole Supreme Court while an unfair and not free presidential election is due to take place at the peak of the COVID-19 pandemic in a broader context where, in the first time of the history of the EU legal order, a ruling and an interim relief order of the European Court of Justice are openly ignored and judges punished for seeking to apply the Court of Justice's case law.

This is why we feel we have no choice but to write to you and urge you to take immediate actions as regards each of the critical issues listed above before it is too late.

In annex, you will find additional information and suggestions regarding the "Muzzle Law" and the importance of preliminary cases C-387/19, C-508/19 and C-824/18.

We remain at your disposal should you need any additional information and we thank you for your time.

Yours truly,

The Open Dialogue Foundation (ODF, Poland/Belgium)

with:

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ANNEX: Two suggested key steps

Step one: Launch of infringement action against the so-called "Muzzle Law"

On February 14, 2020, the so-called "Muzzle Law" – a comprehensive legal act amending, among others, the act on the organization of common courts, the act on the Supreme Court, and the act on the National Council of the Judiciary entered into force. This act is the crowning achievement of the 4-year long violations of the Constitution as well as the basic legal obligations deriving from membership of both the EU and the Council of Europe, aimed at total political subordination of the judiciary and the change of the model of the state system from the rule of law to authoritarian. The most important changes introduced by the "Muzzle Law" include:

– introduction of a new type of disciplinary torts of judges, according to which a judge's question for a preliminary ruling to the CJEU regarding the status of judges appointed with the participation of the neo NCJ is a serious disciplinary tort threatened with the penalty of expulsion from profession,

– depriving the judicial self-government bodies of any importance (e.g. they lost the right to give opinions on candidates for judges and candidates for senior judicial positions, as well as the right to issue critical opinions on changes in the organization of justice),

– politicizing the new mode of disciplinary proceedings against judges to an even greater extent than before (e.g. the decision to waive the judge's immunity and arrest of a judge was transferred to the exclusive competence of the Disciplinary Chamber of the Supreme Court which is contrary to the Constitution with the Disciplinary Chamber itself found not to constitute a court by application of the ECJ preliminary ruling of 19 November 2019),

– imposing an obligation on judges to disclose information on membership of judicial associations, which will be publicly available on the Internet,

– granting, in a manner contrary to the constitution, to the President of the Republic of Poland the right to correct – by handing a judge's nomination – the defectiveness of the procedure for appointing a judge,

– facilitating the ruling camp's political subordination of the future First President of the Supreme Court, after the term of office of the current President – prof. Małgorzata Gersdorf will expire in April 2020, e.g. by granting each judge of the Supreme Court the right to nominate a candidate, reducing the quorum sufficient for election during the Assembly of Judges, or authorizing the President of the Republic of Poland to elect an interim president of the Supreme Court for election (it is significant that all these solutions were applied earlier, during the political takeover of the position of the President of the Constitutional Tribunal),

– granting to the Extraordinary Control and Public Affairs Chamber of the Supreme Court, appointed in full *ab initio* by the neo National Council of the Judiciary, exclusive competence to assess the correctness of judicial appointments,

Most of the changes listed above are in conflict with both the Polish Constitution and the standards of ECHR and EU law. On the one hand, the "Muzzle Law"

is a very serious threat to maintaining the independence of the Polish judiciary (since it incapacitates the judicial self-government and enables the political subordination of the future First President of the Supreme Court), and on the other hand, it prevents judges of common courts and the Supreme Court from implementing the judgment of the CJEU of November 19, 2019 (since questioning the status of judges appointed with the participation of the neo NCJ has become a disciplinary tort, and only the Extraordinary Control and Public Affairs Chamber, which all "judges" were appointed with the participation of the neo NCJ, is entitled to examine their status).

Finally, the "Muzzle Law", which is a reaction of the Polish government to the ruling of the CJEU of 19 November 2019, has, among others, the effect of preventing Polish courts from submitting requests for a preliminary ruling to the CJEU, which violates the principles of loyal cooperation, direct effect and primacy of EU law in addition of course to violating Article 267 TFEU itself.

Step two: Prioritise the examination of cases C-487/19, C-508/19, and C-824/18 by all possible procedural means

A common feature of the abovementioned cases is that all of them relate to the legal status of judges of the Extraordinary Control and Public Affairs Chamber of the Supreme Court. It should be added that all judges of this Chamber, like the judges of the Disciplinary Chamber of the Supreme Court, were appointed with the participation of the neo NCJ, whose 15 members-judges were elected by the Parliament in violation of Art. 187 of the Constitution.

Moreover, in the light of the justification of the Supreme Court's judgment of December 5, 2019, reference number act III PO 7/18, and resolution of the Supreme Court of January 23, 2020 reference number BSA I-4110-1 / 20, which were issued on the basis of the indications contained in the CJEU judgment of 19 November 2019 (in joined cases C-585/18, C-624/18, and C-625/19), the current National Council of the Judiciary does not provide sufficient guarantees of independence from legislative and executive authorities, and thus does not meet the requirements arising for such an authority under EU law.

In addition, the procedure for appointing new Supreme Court judges was also defective because the presidential announcement of the competition for their positions was made without the countersignature of the Prime Minister which is required by the Constitution, and the persons participating in the competition were deprived of the possibility of effective judicial review of the NCJ resolutions on the selection of candidates. This causes an obvious and fundamental defect in the appointment of the judges of the Extraordinary Control and Public Affairs Chamber, who – until the doubts related to the procedure for their appointment are resolved – should be removed from adjudication, as well as from participation in the collegial bodies of the Supreme Court, including in the assembly, which will elect the future First President of the Supreme Court.

It should be emphasized that the suspension of 20 judges of the Extraordinary Control and Public Affairs Chamber is a very urgent issue, because otherwise, together with the other judges of the Supreme Court elected by the neo KRS (of which 10 sit in the Disciplinary Chamber, and 7 in the Civil Chamber) they will be able to appoint one of 5 candidates for the position of First President of the Supreme Court, as the successor of Professor Gersdorf. In this case, President Duda will certainly indicate the very candidate who will guarantee strict political subordination to the ruling camp. As the example of the Polish Constitutional Tribunal indicates, filling most judicial positions and the position of First President will be sufficient to subject the highest Polish judicial body to strict political control. This situation will be tantamount to the fall of the Supreme Court as the last symbol of judicial independence in Poland, and in addition, the bodies of the European Union will be deprived of a partner who ensures proper and uniform interpretation of European Union law in Poland (the best example of which is the resolution of the combined chambers of the Supreme Court of 23 January 2020).

Secondly, a situation in which incorrectly elected judges of the Extraordinary Control and Public Affairs

Chamber have the right to adjudicate, it is not possible to comply properly with the judgment of the CJEU of 19 November 2019 (in joined cases C-585/18, C-624/18, and C-625/19). This is due to the fact that, according to the "Muzzle Law" referred to at the beginning of this appeal, only the Extraordinary Control and Public Affairs Chamber is authorized to examine the correctness of judicial appointments, including those made with the participation of the neo NCJ. Considering that all judges of the Extraordinary Control and Public Affairs Chamber were elected with the participation of the neo NCJ, they obviously have a personal interest in legalizing the status of judges appointed with its participation. Pursuant to the principle of "*nemo iudex in causa sua*" in force since Roman law, none of the judges of this chamber should rule on the status of judges elected with the participation of the neo NCJ, which, however, was not prevented by 7 judges from this chamber on 8 January 2020 (and so even before the entry into force of the "Muzzle Law") of the resolution on case number I NOZP 3/19, in which by granting the decisive significance of the ceremony of handing the judge's nomination by the President, they *de facto* decided in their favour the legality of their status as judges of the Supreme Court.

Moreover, the withdrawal from the possibility of adjudicating and participating in the collegial bodies of the Supreme Court of the judges of the Extraordinary Control and Public Affairs Chamber will also prevent the possibility of defective election of judges of this chamber to assess the validity of presidential elections, which the executive power seeks to unlawfully conduct in May 2020. Under the Act on the Supreme Court, which entered into force in 2018, it is the newly established Extraordinary Control and Public Affairs Chamber that has exclusive competence to assess the validity and legality of nationwide elections and referendums, including presidential elections.

Electoral law authorities raise a number of allegations against the possibility of holding the presidential election in May 2020, in conditions of a pandemic, even if it would be correspondence elections. The most important are:

– conducting elections in conditions that justify the introduction of a constitutional state of natural disaster (Article 228 (1) of the Constitution), which prevents them from being held until after 90 days after the end of this state,

– provisions introducing correspondence voting procedures for all voters participating in the presidential elections were adopted by the Sejm as a matter of urgency, which violates Art. 123 (1) of the Constitution, and their adoption less than 6 months before the scheduled date of elections is inconsistent with the case-law of the Constitutional Tribunal,

– conducting correspondence elections in the manner set out in the bill submitted by the ruling camp violates the provisions of Art. 127 (1) rules for the universality and secrecy of elections, since voters in foreign circuits and those in quarantine will not be able to participate in practice, and personal data should be attached to the envelope along with the voting card,

– preparing and conducting, within a few days after the eventual entry into force of the relevant provisions, elections in the form of correspondence by a state that has no experience in such form of voting in a way that will not violate democratic standards is simply impossible, especially since the National Electoral Commission has been excluded from its preparation,

– due to restrictions introduced in connection with the pandemic, including regarding the freedom of assembly, the constitutional principle of equality of elections was also violated, as the only candidate who is able to effectively conduct the election campaign is the current president – supported by the ruling camp Andrzej Duda, who is intensively promoted by the state media, which are not even trying to maintain neutrality and objectivity.

The conduct of universal nationwide elections in pandemic conditions was very critically assessed by the head of the OSCE Office, who in her statement of April 7, 2020 stated that preventing the campaign from being conducted during the pandemic in conjunction with the correspondence voting introduced shortly before the elections raises serious concerns for fair

voting and preserving democratic standards. In turn, according to the resolution of the European Parliament adopted on April 17, 2020, the preparations of the Polish government to hold elections during the pandemic are "completely incompatible with European values" and also "may threaten the lives of Polish citizens and undermine the concept of free, equal, direct and secret elections, referred to in the Polish constitution."

It should be emphasized that the Extraordinary Control and Public Affairs Chamber has already proved its political availability to the ruling camp in electoral matters, when in the decision of 6 April 2020 reference number I NSW 11/20 dismissed the complaint of a person who wanted to register in the presidential election, however – as it appears from his complaint – due to the outbreak of the coronavirus, he was not able to collect enough signatures of citizens for his candidacy. Initially, the complaint was upheld by a judge from the Labour Chamber, who ruled on the case because of refraining from adjudicating judges of the Extraordinary Control and Public Affairs Chamber in connection with the content of the resolution of the joint chambers of the Supreme Court of January 23, 2020, however, after reviewing the appeal against this decision, three judges of the Extraordinary Control and Public Affairs Chamber stated that "the introduction of an epidemic state is not the same as the introduction of an emergency state, which is associated with the limitation of electoral rights." This circumstance clearly indicates that the judges of the Extraordinary Control and Public Affairs Chamber do not consider the state of the pandemic to be a significant obstacle in the electoral process, and their possible control of the legality of future elections will not be an audit by an independent and impartial court.

Increasingly, the Polish government's desire to conduct presidential elections at any cost in a pandemic is seen as the next phase of a creeping coup d'état, which began with the President's refusal to swear in three properly selected Constitutional Tribunal judges, and its subsequent manifestations were the establishment of the unconstitutional neo NCJ, an attempt purge in the Supreme Court, as well as a number of changes in the structure of common courts, including the politicization of disciplinary proceedings against judges. As part of the same plan aiming at violating democracy and the rule of law in Poland and introducing the authoritarian system, one should also consider the "Muzzle Law", the introduction of which directly violates the principles of loyalty, direct effectiveness and primacy of European law. The implementation of this plan is tantamount to a gross violation of legal standards arising from European treaties (Article 2 and Article 19 TEU, Articles 11, 47, 48, 49 EUCFR) and a breakdown of the integrity of the European Union. Moreover, the attitude of the Polish government indicates that it does not intend to respect European law and the CJEU rulings, as evidenced by the fact that the Supreme Court Disciplinary Chamber continued to operate, despite the judgment of the Polish Supreme Court of December 5, 2019, and the resolution of the combined chambers of the Supreme Court of 23 January 2020 unequivocally stating that it is not a court both within the meaning of Polish law and European law. The best evidence of this is the unfounded and issued in gross violation of the procedure decision of the Disciplinary Chamber of 4 February 2020 to suspend the performance of the duties of Judge Paweł Juszczyszyn due to his judicial decision, which implemented the guidelines contained in the judgment of the CJEU of November 19, 2019.

The lack of a decisive reaction of the European Union bodies to such an advanced breach of European law standards carries a serious risk of introducing similar pseudo-reforms also in other European countries, especially the countries of the former "Eastern Bloc". Urgent action by the European Commission described in this appeal corresponds to the function of the Commission as a "guardian of the European treaties" and is even necessary to prevent irreversible changes that will de facto exclude Poland from the circle of European legal culture and western democracy.

To co-sign this open letter, please leave a comment with your name and affiliation!

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