The Jokes Have Ended

Why the European Commission Has Lost Patience with Poland's Ruling Party

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In recent weeks, the European Commission ('EC') has clearly shown that it has lost its patience with unruly Poland. The EU justice commissioner, quoted in the *Financial Times*, said: "I must say that we are at the end of the so-called dialogue on this with Poland. We have tried to engage in a real dialogue with some letters and some documents, then before the Court". The EC has asked the EU Court of Justice to impose financial sanctions on Poland for failing to comply with the CJEU's interim measure of 14 July 2021 (in order to increase the effectiveness of the interim measures) and has initiated a procedure to also impose a fine for failing to implement the CJEU judgment of 15 July 2021. Reynders added the penalties should be as high as one million Euros a day.

EC Vice-President Valdis Dombrovskis and Economic Affairs Commissioner Paolo Gentiloni also announced that the EC cannot approve the Polish National Recovery Plan, which is a necessary condition for activating European money for Poland under the post-Covid Reconstruction Fund. They referred to Poland's failure to observe the rule of law, and in particular to Poland questioning the principle of supremacy of EU law, and possible consequences of this for the Polish reconstruction plan. Likewise, Commissioner Reynders confirmed that the document cannot be approved because Poland is not implementing judgments of the CJEU.

The Battle over Judicial Independence

After several years of battles at European level over the independence of the Polish judiciary, a number of important and even key issues have come to an end in terms of setting the standard to which the Polish authorities must conform. In previous years, we had judgments in well-known cases before the Luxembourg court, in particular the case regarding the provisions reducing the retirement age of judges of the Supreme Court ('SC') (C-619/18), the preliminary ruling in the *A.K.* case regarding the independence of the new National Council of the Judiciary ('neo-NCJ') and the Disciplinary Chamber ('DC') (C-585/18, C-624/18 and C-625/18), as well as the case decided this year regarding the appointment of the so-called neo-judges to the SC (C-824/18). As a result of these proceedings and based on these judgments, first, the judges who had been removed from the SC and the Supreme Administrative Court ('SAC'), returned to adjudication. Second, the SC and the SAC, but also ordinary courts, issued very important judgments, including the famous resolution of the combined Chambers of the SC of 23 January 2020 confirming the lack of independence of the neo-NCJ and the defectiveness of judicial appointments, as well as six judgments of the SAC in July this year which overturned resolutions of the neo-NCJ presenting candidates for judicial posts in the Supreme Court to the president (including Małgorzata Manowska, currently acting as First President of the SC, and Kamil Zaradkiewicz, a formerpresidential commissioner acting as First President of the SC), and held that there was no need to refer the case for re-examination to the neo-NCJ as this body is not independent from the legislative and executive authorities. This substantial body of CJEU judgments has already developed this standard in a clear and consistent manner. Applying those standards to the Polish situation leaves no doubt that the current government's changes of the Polish judiciary are in drastic breach of the European legal order.

The European Court of Human Rights ('ECHR') joined the CJEU's decisions on the Polish rule of law by issuing an extremely important judgment on the status of the so-called 'stand-in judges' (namely people appointed to judicial positions in place of those that were already occupied) in the Polish Constitutional Tribunal ('CT') in the *Xero Flor* case on 7 May this year.

In July of this year, the European courts in Luxembourg and Strasbourg issued further key rulings regarding rule of law breaches in the Polish justice system after 2017. It was the failure to implement these rulings and the clear anti-EU rhetoric of the Polish authorities, supported by its motions to its subordinated, dummy CT, questioning the primacy of EU law over domestic law, that gave rise to the decisive toughening of the EC's position mentioned above. It essentially appears as if the jokes have ended and the Commission, as the guardian of the treaties, has realised that it cannot continue to be deceived by the Polish government and that it needs to react for the good of the whole of the EU.

After the above series of judgments, it is clear that the matter of restoring the rule of law is quite complex and requires more than to simply "undo" one or several elements of the deformation of the judiciary. What is needed, is an overall reconstruction of the independent judiciary.

The Disciplinary Chamber in the Focus of European Courts

Let us take a brief look at what the courts have recently ruled with regard to Poland's notorious DC. On 14 July this year, the CJEU issued an interim measure in a case regarding the so-called Muzzle Act. The Act prohibited judges to directly apply EU law, to ask preliminary ruling questions, and to examine the status of neo-judges defectively appointed and promoted by the new NCJ, and therefore to perform one of the fundamental tasks of any court, namely to examine whether the membership of the bench was correct. The interim measure ordered by the CJEU required the Polish authorities to immediately freeze all activities of the DC (also in those proceedings in which judges are stripped of their immunity), suspend the operation of the Muzzle Act, and repeal the effects of decisions made to date by the DC (e.g. on lifting the immunity of judges Tuleya and Juszczyszyn). For the record, on the same day, Julia Przyłębska's dummy tribunal 'ruled' that Poland did not have to comply with the measures issued by Luxembourg. Martial law prosecutor Stanisław Piotrowicz, who was a member of this Court (as the presiding judge), explained in the justification that such interim measures of the CJEU with respect to the Polish judiciary are *ultra vires* (namely by overstepping competence) and in breach of the Polish Constitution. A so-called stand-in judge was taking part in issuing this 'ruling' and therefore, by definition, it is a defective judgment, without any legal significance.

Meanwhile, on 15 July this year, the CJEU issued its judgment in an anti-infringement procedure initiated by the EC two years ago on the whole new disciplinary regime for judges. This is a very comprehensive scope of subjects. In it, the CJEU held that this new system, with the Minister of Justice and an illegal DC holding dominant roles, is significantly breaching EU rule of law standards because it makes it effectively possible for the authorities to repress independent judges and therefore prevents the operation of the European principle of effective judicial protection guaranteeing every citizen and all players in legal transactions the right to a trial by an independent, impartial court.

In turn, the ECHR ruled on 22 July of this year in the case of a Polish attorney-at-law, Joanna Reczkowicz (*Reczkowicz v. Poland*), who had previously appeared before the DC and subsequently filed a complaint in Strasbourg contesting that body's right to adjudicate. She won, because the ECHR ruled that the DC was not a court in the meaning of the standards of Article 6 of the Convention.

The DC takes centre stage in all these judgments. In each of them, this body was judged as one that does not satisfy the criteria of European law by any means, and therefore cannot function in the common EU legal space and within the area of applicability of the Convention. What the Luxembourg Court has already

stated several times and what the Polish SC sanctioned in its resolution of the joint chambers in January 2020 has been confirmed once again.

The Neo-NCJ as the Heart of the Problem

However, this is not the only thing to which the judgments and measures of July apply. In fact, they strike at the heart of the problem of the Polish justice system which was 'reformed' by the current government. This original sin is, in fact, the neo-NCJ. This is a key body in our country's constitutional system, which, in accordance with Article 186 of the Constitution, is responsible for safeguarding the independence of the judiciary, as well as for nominating and promoting all judges in Poland. And there are around 10,000 of them. The CJEU and ECHR have unequivocally stated that the neo-NCJ, in which 23 out of 25 members are chosen by the executive and legislative authorities, and which has clearly, even ostentatiously, taken sides with the current government in recent years by censuring independent judges, who were disobedient to the authorities and by rewarding those mentally close to the ruling camp with appointments (frequently choosing poor candidates instead of excellent, experienced professionals in recruitments, promoting their own candidates, who have tragic judicial statistics, instead of excellent judges deserving promotion), is not an independent body that can fulfil its constitutional mission. Such a dummy of a true NCJ cannot participate in the legal process of selecting and promoting judges. What conclusion and legal consequences arise from this? Everyone nominated and promoted by the neo-NCJ (and there are already over 1,000 of them) was appointed defectively by the President. They have neither the status of legitimate judges nor enjoy constitutional protection against irremovability (as provided for in Article 180, para. 1). In order to make the system healthy and restore the citizen's confidence in the judiciary, the only solution is to immediately dissolve the current neo-NCJ and appoint a legal one with the appropriate constitutional procedure (namely with the participation of the judiciary, which should elect 15 of its members), as provided for in Article 187 of the Constitution in connection with Articles 10, 173 and 186. Consequently, all nominees of the neo-NCJ should lose their positions, while the judges they promoted should return to their previous positions. This applies to absolutely everyone who went through the nomination procedure before this body, beginning with people appointed to judicial positions in ordinary courts, administrative courts, and the Supreme Administrative Court, and ending with the entire fifty or so neo-judges of the Supreme Court, headed by Ms. Manowska. Only such a move can fix the system, ensure legal certainty, and prevent the chaos from growing any further. Otherwise, the problem will continue to grow and, for the next few decades, will generate hundreds of thousands of cancellations of court judgments, etc. In the event of losing before a bench with a so-called neo-judge, every professional attorney *ad litem* will (at least for reasons of professional diligence) raise this objection and many cases will end up before the ECHR and an award of damages by the Polish government. This will be the consequence of the judgments in *Ástráðsson v Iceland* and *Reczkowicz v Poland*.

The current ruling party and their acolytes in the neo-NCJ and the judiciary obviously have no intention of implementing these rulings of the European courts. Ms. Manowska, herself defectively appointed to the SC and illegally elected as its First President, first declared that the DC is able to operate at full steam as there are no reservations regarding its independence. Then, she partially changed her mind and decided that she would personally intercept new cases received by this non-judicial body and hide them 'in her drawer', thereby breaching all possible rules. She is allowing proceedings pending in the DC to continue. This is an ostentatious failure to implement the July measure and the CJEU judgment supported by the ruling of the ECHR. The Sejm, in which the ruling majority should immediately initiate a legislative process intended to implement the judgments in question, has done nothing. Some representatives of the government have been mentioning some planned changes, including the liquidation of the DC (which is almost certainly to be replaced by another such monstrosity chosen by the neo-NCJ), while others are contesting any value of

European judgments and are brashly attacking the EU, even talking of a hybrid war being waged by Brussels. In turn, a letter is being sent to the EC which contests the right of the CJEU and the ECHR to rule on the independence of the Polish judiciary. The announcement of the future liquidation of the DC is supposed to 'end the problem'.

Playing for Time

The government is obviously playing for time, deceiving and cheating Brussels about the implementation of the decisions of the European courts, only to obtain the European Commission's acceptance of the Reconstruction Plan but also to prevent a motion being filed with the CJEU to impose financial sanctions for failing to implement the measures. Billions of euros are at stake, while only the threat of losing such massive amounts of money can induce our ruling party to make any 'pro-European' moves. This is only because our rulers want to subordinate the judiciary to themselves at all costs, dismantling the last independent system of control over its activities and simultaneously the last effective bastion defending civic rights and freedoms against the temptations of the authorities.

Finally, a positive note. The only ones who are really implementing the July rulings of the CJEU and ECtHR are the independent and brave Polish judges. An example from recent weeks is Judge Adam Synakiewicz from Częstochowa. Directly following the decisions of the CJEU and ECHR in question, as the court adjudicating in appeal proceedings, he issued a judgment setting aside a decision made in the first instance, because a neo-judge appointed on the motion of the neo-NCJ had ruled there. This decision is extremely important and will have significant consequences, because his colleagues throughout Poland are following in his footsteps.

The conglomerate of judgments of the European courts will slowly be implemented in this way. And, no matter how hard they try, no matter how arrogant their words addressed to the EU are, no matter how much repression they use to punish or threaten independent judges, the ruling party will not succeed. And we will see that the whole battle and European efforts were worthwhile, because they will stop the enslavement of the courts and show everyone, by giving them a roadmap, how to fix the rule of law.

Judge Synakiewicz and Judge Gąciarek are already being prosecuted by the disciplinary commissioners, who are conducting an investigation on the basis of the Muzzle Act that was suspended by the CJEU. Furthermore, they have been suspended. Meanwhile, none of the brave judges are afraid of such harassment and repression any longer. They can't impress them any longer.

The four authors are lawyers from the Free Courts initiative.

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