

Warsaw, 30 May 2022

**To: Ms Ursula von der Leyen
President of the European Commission**

Dear Madam President,

As a coalition of legal and human rights associations operating in the area of the protection of human rights, associating, among others, the most important associations of judges in Poland, we are writing to you about the implementation of the rulings of the EU Court of Justice by the Polish authorities in the context of the negotiations on the approval of the Polish National Recovery Plan (NRP) and the conditions for subsequent disbursements from the Reconstruction Fund.

As the Polish authorities are announcing that the document of the NRP has already been agreed with the European Commission and is to be formally accepted by the EC during your planned visit to Warsaw on 2 June this year, given the fact that the content of this document and the arrangements made in this respect between Poland and the EC are not generally known, we would like to ask whether the document takes into account the clearly and obviously described obligations of the Polish authorities to fulfil their commitments arising from the decision of the CJEU of 14 July 2021 (C-204/21 R) and the CJEU judgment of 15 July 2022 (C-791/19):

- (i) the liquidation of the Disciplinary Chamber, which will result in the removal from the Supreme Court of the so-called neo-judges, who were appointed in conflict with EU law and who are currently members of this Chamber, whose method of appointment and awarded special powers do not give a guarantee of an independent trial and an impartial court to the accused in the meaning of Article 19(1) TEU;
- (ii) the immediate reinstatement (and the right to full compensation) of the judges who were unlawfully suspended by the Disciplinary Chamber (for applying the judgments of the CJEU and the ECtHR or for issuing independent judgments), who are victims of the breaches of the rule of law in Poland by the current authorities and are the true defenders of the functioning of the European legal order in our country, in particular by ruling out the need for them to apply for reinstatement before people who, in accordance with the now well-established case law of the CJEU and the ECtHR, as well as the judgments of the Polish Supreme Court, do not provide a guarantee of an independent and impartial court (before so-called neo-judges);
- (iii) the restoration of the guarantee of independent disciplinary proceedings for Polish judges, in particular by removing provisions from the applicable law that

provide for the possibility of prosecution on disciplinary grounds for contesting the status of incorrectly appointed judges or the legitimacy of a constitutional body of the Republic of Poland, i.e. the provisions of the so-called Muzzle Act that were contested within the framework of the infringement procedure (C-204/21).

We would like to point out that the Act amending the Act on the Supreme Court and Certain Other Acts of 26 May 2022, which was passed by the Polish Sejm in accordance with the presidential bill (which will now be processed by the Polish Senate), contains cosmetic changes to the current provisions and does not satisfy the expectations formulated in October 2021 by the EC (arising from the July CJEU rulings) to the slightest extent. This Act:

- (i) only provides for the ostensible liquidation of the Disciplinary Chamber, because a Chamber of Professional Liability is to be established in its place, the method of establishment and operation of which will create a repetition of the same objections from the point of view of EU law that have already been repeatedly formulated by the European Courts in a number of judgments, including C-204/21 R and C-791/19. The new Chamber will again be staffed by people appointed in a procedure which does not guarantee independence and impartiality (so-called neo-judges) and, furthermore, the Polish President will play a decisive role in their appointment, which constitutes an unauthorised abuse of powers and interference by the executive in the shape of the judiciary, namely a gross breach of the separation of powers and therefore of the fundamental principles specified in Article 2 TEU. Consequently, Polish lawyers, including judges, will continue to be subject to disciplinary proceedings before a body that does not have the features of an independent and impartial court, which, as the practice of recent years has shown, leads, among other things, to the unjustified repression of the independent judiciary;
- (ii) does not provide for the obligation to reinstate judges who have been unlawfully suspended by the Disciplinary Chamber, envisaging a procedure before the newly created Chamber of Professional Liability, which does not guarantee an independent and impartial judgment in the cases of the suspended judges, nor does it provide for a deadline by which these judges are to be reinstated. As a result, the judges who have, by all accounts, demonstrated the most respectable behaviour, risking their careers and exposing themselves to repressions and harassment for defending the principles laid down in Articles 2 and 19 TEU, will now have to undergo a humiliating procedure before a body appointed in the same defective manner, with the added likelihood that members of the current Disciplinary Chamber will participate in their cases;
- (iii) does not provide for an amendment that would realistically restore the functioning of an independent and impartial disciplinary system for judges, preventing the inadmissible influence of the executive on such proceedings, in particular, the so-called Muzzle Act has not been removed from the system (the provision of Article 107 § 1, item 3, by which an act of a judge questioning whether another judge is in office, whether the appointment of a judge is effective or whether a constitutional

body of the Republic of Poland is empowered is considered a disciplinary offence), the exclusions from the list of disciplinary offences include the examination of whether the requirements of independence and impartiality have been satisfied, but the ordinary courts have not been included in this (and so, if a judge of an ordinary court performs such an examination of independence, for instance, as a result of a party's motion to remove a judge, he will be liable for committing a disciplinary offence) and, furthermore, a new disciplinary offence called 'denial of administering justice' has been introduced (meaning that, if a judge refuses to adjudicate with a defectively appointed judge, he may be held liable on disciplinary charges for this).

These are only some of the reservations to the enacted law according to the presidential bill. However, they demonstrate that the changes are cosmetic and ostensible and under no circumstances bring about the implementation of the above CJEU judgments.

Invariably, the source of problems with the functioning of the Polish judiciary is the new National Council of the Judiciary (the so-called neo-NCJ), which was appointed defectively, is deprived of independence and has a decisive role in shaping the executive and legislative powers, which the current ruling party appointed for another 4-year term of office, completely disregarding the European legal order, including the judgments of the CJEU (starting with the judgment in the A.K. case C-585/18, C-624/18 and C-625/18), the ECtHR and the Polish Supreme Court. Therefore, we are repeating our appeal for the earliest possible referral of the complaint in the case of the regulations on the neo-NCJ to the CJEU in the infringement procedure, with a request for security (an interim measure).

Partners of the Justice Defence Committee (KOS):

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"