



IUSTITIA

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Mr. Frans Timmermans

Vice - President of the European Commission

Dear Mr President

I would like to inform you of the current situation of judges in Poland and appeal to you to undertake adequate actions.

As you well know, the changes within the Polish legal system are aimed at depriving the courts of their independence, undermining the very foundations of the democratic legal state. By changes I mean those concerning the Law on Common Courts, the National Council of Judiciary as well as the Constitutional Court and the Prosecutors' Office.

Independent disciplinary courts are one of the guarantees of the independence of courts in Europe, including Poland.

In the recent judgment of the Court of Justice of the European Union (further: CJEU) (the Great Chamber) of 25th July 2018 in the case C-216/18 PPU, LM, ECLI:EU:C:2018:586, the Court stated (point 67):

“The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defense, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies’

decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.”

At the moment the repressive system of disciplinary proceedings has been put into action. It's a system where a politician from the ruling party, being at the same time the Minister of Justice - Prosecutor General, has direct or indirect influence over the choice of: disciplinary officer who act as prosecutors and the judges of disciplinary courts of first instance. On the other hand the forming of the Disciplinary Chamber in the Supreme Court which is the disciplinary court of second instance, stands in contradiction with Article 175 section 1 and Article 183 of the Polish Constitution. This chamber has also been brought into life contrary to Article 175 section 2 of the Polish Constitution, according to which a special or extemporary court can be established only during wartime.¹ The autonomy of this Chamber cannot allow for acceptance that it is a Chamber of the Supreme Court, it is in fact a special court not provided for in the Constitution. Persons sitting in this Chamber in my opinion have not been effectively nominated as Supreme Court judges². According to common opinion of constitutional law experts, the competition for the positions of Supreme Court judges has been announced without the necessary signature of the Prime Minister, therefore it is void on the basis of Article 144 section 2 of the Polish Constitution.³ This competition, abusing the dignity of any court (the hearings of the candidates lasted about fifteen minutes each) was conducted by the National Council of Judiciary that was also formed in an unconstitutional process and without any consultation with the judiciary. NCJ proceeded against the law and sent the motions for nominations to the President regardless the fact, that the competition was still ongoing⁴. The National Council of Judiciary has become a tool used by politicians to introduce changes in the judicial system that will submit the courts to politicians on a permanent basis.

These reservations were shared by the Supreme Administrative Court that withheld the appeal proceedings in the competition for the positions of Supreme Court judges and then sent a preliminary question to the Court of Justice of the European Union.

¹ *W. Wróbel*, see https://web.facebook.com/karne24/posts/dr-hab-w%C5%82odzimierz-wr%C3%B3bel-prof-uj-o-nowej-izbie-dyscyplinarnej-sn-kontrola-spraw/547917265638256/?_rdc=1&_rdr, <https://www.iustitia.pl/81-uchwaly/2679-uchwala-zarzadu-stowarzyszenia-sedziow-polskich-iustitia-w-sprawie-wstrzymania-postepowan-dyscyplinarnych>

² Statement of the board of SSP „Iustitia”, available at: <https://iustitia.pl/79-informacje/2650-stanowisko-zarzadu-ssp-iustitia-z-dnia-16-11-2018-r-dotyczace-konsekwencji-konkursu-na-stanowiska-sedziow-sadu-najwyzszego>

³ Opinions of *M. Florczak-Wątor*, *T. Zalański*, available at: <https://iustitia.pl/nowa-krs-nowy-sn/2497-konkurs-bez-kontrasygnaty-jest-niewazny-opinia-prawna>; *S. Patyra*, available at: <https://iustitia.pl/nowa-krs-nowy-sn/2587-brak-kontrasygnaty-premiera-oznacza-niewaznosc-konkursu-do-sadu-najwyzszego-opinia-prof-dr-hab-slawomira-patry-2>; *A. Rakowska-Trela*, available at: <https://iustitia.pl/nowa-krs-nowy-sn/2591-konkurs-do-sadu-najwyzszego-jest-niewazny-opinia-prawna-2>; *J. Ciapala*, available at: <https://iustitia.pl/nowa-krs-nowy-sn/2598-delikt-konstytucyjny-prezydenta-opinia-prawna-dr-hab-gerzego-ciapaly>

⁴ Opinion of *J. Zimmernann*, available at: <https://iustitia.pl/dzialalnosc/opinie-i-raporty/2496-prezydent-zlamie-prawo-powolujac-sedziow-sn-przed-terminem-opinia-prawna-prof-zw-dr-hab-jan-zimmermann>

I am convinced that proceeding with disciplinary cases against judges in such a system infringes their right to court (Article 6 of the European Convention of Human Rights), the rule of law and is a threat to proper court protection (Article 2 and 19 of the Treaty on the Functioning of the European Union of 7th February 1992) as well as is contrary to Article 47 and 48 of the Charter of Fundamental Rights of the European Union, comprising the requirements of a fair trial.

For several months now the disciplinary officer Piotr Schab and his two deputies Przemysław Radzik and Michał Lasota have initiated and conducted various proceedings against judges. The way of proceeding infringes the basic standards such as the right of defense. The proceedings are usually initiated against judges who are active in the field of defending the rule of law, among others by educational actions, meetings with citizens, international activity. Such proceedings are also initiated against judges who asked preliminary questions concerning the changes within the judicial system. By the way, members of the NJC that became a quasi-disciplinary body as well, publically demand initiation of disciplinary proceedings against judges who asked the preliminary questions.⁵

At this moment disciplinary charges were pressed against judges and disciplinary courts were indicated by the person who has been nominated to the position of judge in the Disciplinary Chamber of the Supreme Court and who effectively rules the chamber. Such proceedings are conducted among others against members of SSP IUSTITIA Monika Frąckowiak (member of the board of European Judges and Prosecutors for Democracy Association - MEDEL and the Vice-President of Wielkopolska Division of SSP IUSTITIA) and Olimpia Barańska – Małuszek (President of Gorzow Wielkopolski Division of SSP IUSTITIA). It is worth mentioning that the disciplinary officer already conducted three disciplinary cases with regard to judge Frąckowiak activities. The first one, based on an anonymous letter, aimed at gathering statistical performance data of the judge, which constituted the basis for further charges against judge. Hereby I must emphasize that the last three years of management of the courts by the Minister of Justice – Prosecutor General, have resulted in significant worsening of the functioning of the courts (also due to significant understaffing) while the consequences are burdened on the judges. I have no doubt that these proceedings are aimed at creating a freezing effect among judges and other legal professions.

Without commenting on the accuracy of the charges, in my opinion any person, including a judge, has the right to fair proceedings. It is every judge's right and even a duty to fight for the rule of law for other citizens and he or she cannot be punished for doing so by way of disciplinary or even criminal proceedings. It is also unacceptable that when the whole judicial system is inefficient, only judges who stood up to the politicians are prosecuted, without reaction to the professional activities of others, for example the members of the politically dependent NCJ. The latter, in the opinion of about 90 percent of judges do not

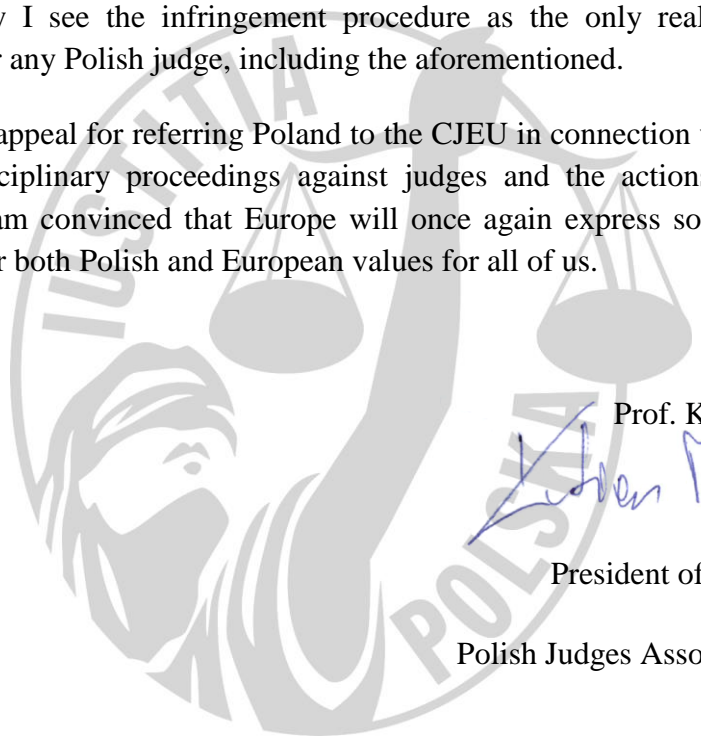
⁵<https://www.rp.pl/Sedziowie-i-sady/308299974-Czlonek-KRS-chcdyscyplinarek-dla-sedziow-za-pytania-do-TSUE.html>).

fulfill their constitutional obligations of safeguarding the independence of the courts and of the judges and should either resign or be dismissed (data based on referendums among judges). Most of judges' meetings in Poland abstain from participation in proceedings related to competitions for the positions of judges organized by the NCJ.

Polish judges – from the Supreme Court, Supreme Administrative Court and the common courts – despite the actions of the National Council of Judiciary and the disciplinary officers or disciplinary courts did not get intimidated and asked the preliminary questions. These questions have not, however, led to legal changes or stopped the actions against the judges conducted or inspired by the Polish political authorities. Only after the motion from the European Commission the Court of Justice of the European Union applied interim measures by which it stopped the Supreme Court judges from retirement⁶.

This is why I see the infringement procedure as the only real chance for a fair disciplinary trial for any Polish judge, including the aforementioned.

Therefore I appeal for referring Poland to the CJEU in connection with the regulations concerning the disciplinary proceedings against judges and the actions of the politically dependent NCJ. I am convinced that Europe will once again express solidarity with Polish judges who fight for both Polish and European values for all of us.



Prof. Krystian Markiewicz

Krystian Markiewicz
President of the National Board

Polish Judges Association 'IUSTITIA'

⁶decision on temporary measures of the Vicepresident of CJEU of 19.10.2018 and the decision of Great Chamber of CJEU of 17.12.2018 - <http://curia.europa.eu/juris/documents.jsf?num=C-619/18>