

Bergen, Norway, 11.08.21

Mr Didier Reynders, Commissioner for Justice, European Commission

Ms Vera Jourova, Vice-President and Commissioner for Values and Transparency. European Commission

Open appeal for resolute response to any failure to comply with rulings of the European Court of Justice by the Polish government

On 14 and 15 July, the Court of Justice of the European Union (CJEU) ruled on some of the components of the comprehensive system of political control of the judiciary in Poland, declaring the Disciplinary Chamber of the Polish Supreme Court to be established and operating in violation of EU law. The Rafto Foundation appeals for the European Commission to implement the strongest sanctions available to them to ensure respect for the EU Treaty.

The [CJEU order of 14 July](#) and [judgment of 15 July](#) are as clear and comprehensive as one could hope for. The Disciplinary Chamber is not a tribunal established by law, a ruling which is now [also corroborated by the European Court of Human Rights on 22 July](#). The Disciplinary Chamber is not independent and impartial. The activities of the Chamber subject other judges in Poland to politically motivated punishment for their exercise of freedom of expression, for the content of judgments passed, and for presenting questions to the CJEU. Thus, one cannot trust that any judges in Poland are independent and impartial, and especially not in cases where the government's ideological or economic interests are at stake.

The politicized Polish Constitutional Court, which [also may not qualify as a court in view of the decision of the European Court of Human Rights 7 May](#), declared on [14 July that Poland is not obliged to comply with CJEU interim injunctions regarding the organization of Polish courts](#). In other words, the Polish government does not accept to be judged by independent and impartial courts, whether in Poland or in Europe. Poland thereby violates Article 19 TEU, which requires recognition to the CJEU as the supreme authority interpreting EU law. Poland has opted out of the European legal order. The authority of the CJEU is at stake if these rulings are not respected.

The European Commission has set 16 August as deadline for the Polish government to explain how it will implement the rulings of the CJEU. We are eager to do what we can to ensure that these important verdicts have the desired effects. Factors which we consider causes for concern are:

1. We fear the unrealistic expectation may have been created that the Polish government can be punished by withholding funds from EU budgets if it does not comply with the Rule of Law regulation and the CJEU. As far as we can judge the matter, the procedure for establishing the required majority for a decision to withhold funds is so demanding that it is questionable that sanctions will be imposed. More fundamentally, however, we warn against the detrimental effect for the authority of the CJEU if the consequences of a treaty infringement as ruled by the CJEU are made the subject of political negotiations among member states.
2. We fear that an insincere response by [Poland's real head of state, Deputy Prime Minister Jarosław Kaczyński](#), who has vaguely indicated that something will be done with the construction of the Disciplinary Chamber in September, will derail a proper response to the rulings of the CJEU. [Justice Minister Zbigniew Ziobro](#) has refused to abandon his hardline

position and stated that the rulings of the CJEU are illegal. He controls a critical part of the already insecure parliamentary support for the government. The [partial suspension of the activity of the Disciplinary Chamber by the Supreme Court of Poland](#) is far from satisfactory compliance with the CJEU rulings.

In our opinion, it would be dangerous to expect a reform of the disciplinary system in good faith by the current government in Poland. Its responses to the controversy over the Constitutional Court, the CJEU ruling against the retirement of Supreme Court judges, and the Article 7 proceedings, betray a systematic and consistent effort to subvert the spirit and, when possible, also the letter of EU law. The design of the Disciplinary Chamber is not an accident, but part of a [comprehensive system](#) including the dangerous parallel construction of an Extraordinary Control and Public Affairs Chamber, and many other laws and bodies deliberately created to subdue the courts. Cases addressing other parts of this system are pending before the CJEU and the European Court of Human Rights. Poland will undoubtedly be convicted in several of them.

If Polish authorities manage to prevent the rulings of 14 and 15 July from having concrete consequences, then the authority of the CJEU and its ability to make a difference will be significantly weakened. We also fear, as stated above, the more general effect on the authority of the CJEU if the accommodation of a member state to its rulings becomes a matter of political negotiations between the EU institutions and the convicted party.

3. Finally, there is the danger that the CJEU might impose fines for non-compliance with its rulings which are insufficient to deter the Polish government from future violations of the Treaty. If Poland also receives financial support from the Multiannual Financial Framework or the Next Generation EU recovery funds, we are in the perverse situation that the EU makes it easier for the Polish authorities to free up resources from the state budget to pay fines imposed on them.

No case has hitherto represented a systemic threat to the rights of citizens in a member state, or to the integrity of the European legal system, comparable to the one we now face. We therefore appeal for the Commission to secure the strongest possible incentives for the Polish authorities to ensure the dismantling of the whole system established to control the courts. In other contexts, the distribution of expenditure or contributions for EU member states is calculated based on their GDP. **The Rafto Foundation supports the [proposal of the European Stability Initiative that fines be set at 1% of Poland's GDP, which would amount to approximately EUR 5,2 billion per year](#), starting no later than 16 August if the Polish response at that date is not satisfactory.**

In so far as the [EEA agreement](#) and [Regulation on the implementation of the Norwegian Financial Mechanism 2014-2021](#) presupposes that all parties to this agreement respect the fundamental principles of rule of law and the authority of the CJEU, the Rafto Foundation will also recommend that the Norwegian government freeze all grants to be provided under this agreement for partners which in some way are selected by, or dependent on the Polish government.

The Rafto Foundation works closely with the former Ombudsman for Human Rights in Poland, with other civil society activists, and with judges' associations in Poland and Europe. [More than 4000 Polish judges had signed an appeal for implementation of the rulings of the CJEU rulings by the end of July.](#)

Yours sincerely,

Jostein Hole Kobbeltvedt
Executive Director Rafto Foundation for Human Rights