COMMISSIONER FOR HUMAN RIGHTS

Adam Bodnar

Warsaw, 15-05-2020

VII.070.5.2020.MAW

Mr.
Juan Fernando López Aguilar
Chair
Committee on Civil Liberties, Justice and Home Affairs

Written Responses

to the Members of the European Parliament's questions stated during the meeting of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) on April 23, 2020, 10:00 -12:00

Dear Mr. Chairman,

please accept the assurances of most distinguished consideration to you and all Members of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament. I would also like to take this opportunity to express my high appreciation for the efforts of the Committee regarding the observance of the rule of law in Poland.

I am addressing you in my capacity of the National Human Rights Institution, the Commissioner for Human Rights in Poland, in relation to questions addressed to my institution during the LIBE Committee meeting on April 23, 2020, 10:00 -12:00.

Office of the Commissioner for Human Rights
of the Republic of Poland
al. Solidarności 77
00-090 Warsaw

Phone (+48 22) 55 17 700
Helpline 800 676 676
biurorzecznika@brpo.gov.pl
www.rpo.gov.pl

1. **Questions of the Coordinator of the EPP Group in the LIBE Committee, Mrs. Roberta Metsola**

a. **How the so-called muzzle law (the Act amending the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other acts) is being enforced and what consequences it brings in term of Article 11 of European Convention on Human Rights and Article 12 of the Charter of Fundamental Rights (freedom of associations)?**

In line with its long-standing position on the issue, the Commissioner holds the opinion that the introduced so-called "muzzle law" (the Act amending the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other acts) bars Polish judges from ensuring observance of the right to a fair trial and from guaranteeing rights deriving from the EU Treaties, including effective judicial protection. The adopted Act provides for an obligation of the judges of ordinary courts, administrative courts, military courts, Supreme Court justices, and prosecutors to submit declarations of their membership in associations and foundations. These declarations are public and subject to publication in the Public Information Bulletin, a platform of public information.

The obligation to submit declarations of membership in NGOs and making them public may have a chilling effect, which can violate freedom of association of judges and prosecutors, as guaranteed in Article 11 ECHR. Such a situation is unprecedented on a European scale. The statutory solutions adopted do not meet the proportionality test and cannot be considered as necessary in a democratic state. Therefore, in my opinion this regulation is primarily aimed at discouraging judges and prosecutors from social and public activity, and thus limiting their freedom of association.

Due to the serious doubts regarding the legality of the enacted obligation to submit the declaration of membership, several judges (including, *inter alia*, 5 judges of the Court of Appeal in the city of Łódź) refused to submit an above-mentioned declaration. The above position is supported by the IUSTITIA Association of Polish Judges. Thus, some judges submitted to court presidents a document stating that they do not belong to any political party, trade union, and do not conduct activities incompatible with the principles of the

independence of the courts and the independence of judges. However, judges did not provide a list of organizations, associations, or foundations to which they belong. Their documents stated that they had refused to provide such an information due to the right to protect private and family life, freedom of religion, assembly and association.

b. How the so-called muzzle law (the Act amending the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other acts) is being enforced?

The provisions of the 'muzzle law' were applied for the first time in the case of judge Igor Tuleya. The National Prosecutor applied to the Disciplinary Chamber of the Supreme Court for a permission to bring judge Igor Tuleya to criminal liability. The prosecutor claims that judge Tuleya had exceeded his powers, allowing a public hearing in a case regarding a politically significant issue (validity of votes conducted in an excessive mode in the Sejm of the Republic of Poland 2016). The Commissioner for Human Rights expressed his concerns in the letter to the Prosecution Office and monitors the proceedings. In response, the Prosecutor's Office indicated that: "the basis for submitting the application was an extensive, thoroughly collected and properly assessed evidence, which left no doubt as to the fact that the judge committed a criminal act. (…) [T]he key issue in relation to the criminal act that the judge was supposed to commit is public disclosure of information from pre-trial proceedings - including the content of witnesses' testimonies - without the consent of the prosecutor". Moreover, the Prosecutor's Office highlighted that despite the CJEU judgment "there are no grounds to question the competence of the Disciplinary Chamber of the Supreme Court to rule on the examination of the application.

The law entered into force on February 14, 2020, and on that day the National Prosecutor's Office sent a letter to the Disciplinary Chamber of the Supreme Court - despite the fact that the alleged crime of judge Igor Tuleya took place on December 18, 2017. The opinion of the Commissioner for Human Rights on the said Act was presented in the Senate. Please find enclosed the translation of this document.

c. Can presidential elections be supervised by the politicized Extraordinary Council and Public Affair Chamber within the Supreme Court, and if that happened can they really be free and independent as we to expect in Member States?

i. Postal voting procedure

The new draft law on the Presidential Election The Republic of Poland 2020 established postal voting as the one and only procedure for all eligible citizens and introduced the new power of the Speaker of the Sejm to change the date of the election (even day before the voting).

The introduced changes have raised the Commissioner's deep concerns since they could have wide-ranging consequences for Poland's democratic system. In the opinion of the Commissioner, it is not possible to carry out the elections of the President of the Republic of Poland ordered on May 10, 2020, due to the risks associated with COVID-19.

The state of emergency has not been introduced in Poland, although the restrictions imposed prove that it has been implemented in practice. The Constitution provides that, during the state of emergency, the Constitution, electoral law for the Sejm, Senate, and local government, and the Act on the election of the President of the Republic of Poland, may not be changed. This means that parliamentary work on the Act on special rules for conducting elections for the President of the Republic of Poland in 2020 is being carried out in violation of this standard. Moreover, it is also forbidden to hold elections alone during the state of emergency (Article 228 (7) of the Constitution).

I would like to draw your attention to following implications of the draft law, which are:

- Compliance with international standards of the new power of the Speaker of the Sejm to change the date of the election (even a day before the voting) – the election calendar indicates precisely the dates of each election procedure and specifies the election date for May 10, 2020. An arbitrary decision of the Marshal of the Sejm to change the date of the election will affect the course of the election campaign, especially in the context of the principle of equal opportunities of candidates.

- Compliance with international standards of a fundamental change in the voting procedure, by introducing only the correspondence method of casting votes – there is no guarantee that correspondence voting will comply with the principle of the universality of voting. Since many voters are registered for permanent residence in a different place than they reside on the day of voting, electoral law provides mechanisms enabling the voter to correct such a situation. In the context of only postal voting, it is a matter of great importance to ensure that electoral packages reach every eligible voter. Meanwhile, the draft law indicates that the procedure of adding to the electoral register takes place at the request of the voter submitted to the municipal office no later than on the date of entry into force of the Act. The voter will, therefore, have very little time for such correction. Therefore, it is possible that the electoral packages intended for thousands of voters will not reach the addressees, because they will not be transferred to where they are staying. The enormous challenge will also be the effective forwarding of electoral packages by postal offices within the expected time limit. What is more the electoral package received has to be confirmed personally by the voter with his signature – this endangers the risk of spreading COVID-19 vastly.
- The ability to conduct the election campaign in the current conditions, i.e. due to limitations on public gatherings, and its compliance with international standards, such as equal opportunities for candidates, transparency of and access to media.
- The ability to ensure the secrecy and equality of the introduced postal voting on a large scale so close to the election day. Its compliance with international standards in light of potential procedural and organizational difficulties.
- The ability to secure an adequate level of election observation by the international actors and civil society in Poland.
- The ability to maintain the needed balance between the executive power and electoral management bodies, during the organization and administration of democratic elections, in the light of the new competencies of the Minister of State Assets

Overall, in the opinion of the Commissioner, the electoral mechanisms provided for in these exceptional, specific circumstances do not guarantee that the election will be

universal and in accordance with international standards in the matter. The election campaign is not carried out in compliance with the principle of equal opportunities for candidates, and citizens are not provided with knowledge about elections to a minimum, satisfactory degree.

Statutory solutions do not provide sufficient guarantees that elections will be conducted following the principle of universal suffrage (Article 127 (1) of the Constitution) and are not able to ensure the full exercise of citizens' active voting right/suffrage (Article 62 (1) of the Constitution). Large groups of voters may be excluded from the possibility of voting due to the inadequacy and ineffectiveness of the (exclusive) correspondence voting procedure introduced in the provided formula, in such a short time before the election, without extensive information campaign. The solutions provided for in the Act also do not guarantee compliance with the principle of equal opportunities for candidates, which also affects the implementation of passive suffrage.

The law which introduced postal voting was passed, however the presidential election did not take place as scheduled on May 10, 2020. Election was not officially cancelled although polling stations stayed closed. Currently, the Parliament is working on the new changes in the electoral procedure.

ii. Supervision of the election by the Extraordinary Council and Public Affair Chamber within the Supreme Court

As to the supervision of the election procedure by the Extraordinary Control and Public Affairs Chamber of the Supreme Court it should be noted that this body was established on the basis of new Law on Supreme Court. It consists exclusively of new judges-members who were chosen by reorganized and politicized National Council of the Judiciary and lay judges who were elected by upper house of Parliament (Senat). Its scope of competences covers, inter alia, deciding upon validity of election (parliamentary, Presidential, to European Parliament) and referendum (general and Constitutional), as well as examining the election protests.

At the end of the protest examination process, the Chamber issues a resolution on either validity or invalidity of the elections, in a given part or as a whole. After announcing

invalidity, the Extraordinary Control and Public Affairs Chamber addresses the National Electoral Commission to initiate further steps, which may lead to repeating of elections in given constituencies. According to the electoral code, by adopting a resolution regarding invalidity of elections or invalidity of election of a representative or a senator, the Supreme Court announces termination of mandates in question and decides on holding another election, or on undertaking some electoral steps, specifying the stage from which the election procedure should be repeated.

It should be highlighted that judges of the Extraordinary Control and Public Affairs Chamber were selected by the new National Council of Judiciary similarly to the judges of the Disciplinary Chamber of the Supreme Court. Following the CJEU judgment of 19 November, 2019, the Supreme Court concluded that the Disciplinary Chamber did not meet requirements of an independent and impartial tribunal. Therefore, the question of the legitimacy of the Extraordinary Control and Public Affairs Chamber remains.

However, the new Act, so-called muzzle law (the Act amending the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other acts) declares that any person appointed by the President of the Republic is a lawful judge, and it is prohibited to question his/her legitimacy. New Article 42a prohibits courts (except the Extraordinary Chamber) from questioning (a) the powers of courts, constitutional state bodies and law enforcement and control bodies, and (b) the jurisdiction of a judge dealing with a case. Doing so is a disciplinary offence punishable, potentially, with dismissal and only the Extraordinary Chamber can decide whether a judge is independent and impartial. In order to guarantee that no judge in Poland questions the validity of an appointment made by the new NCJ, amended Article 107 § 1 of the Acts on the Common Courts (on disciplinary offences) prohibits "actions questioning … the effectiveness of the appointment of a judge or the constitutional mandate of an organ of the Republic of Poland".

Moreover, the resolution of the combined chambers of the Supreme Court of January 23, 2020 imposed on the judges of the Supreme Court - appointed on the recommendation of the new National Court Register - an absolute obligation to refrain from adjudicating. This resolution was respected by the judges of the Extraordinary Chamber for 3 months and meetings in the Chamber were adjourned or forwarded to the Criminal Chamber of the

Supreme Court. Relying on the provisions of the muzzle law, the Extraordinary form April 6, 2020, began to rule again, but only in electoral matters.

It should also be emphasized that the last Constitutional Tribunal's judgment of April 20, 2020, in the case U 2/20 aimed at eliminating from the legal order the resolutions of the three combined chambers of the Supreme Court will not significantly affect the activities of common courts, which should examine the validity of the appointment of judges since even a Constitutional Tribunal judgment cannot block the implementation of the CJEU judgment of the 19th November 2019.

Currently, to the CJEU has been submitted two questions for a preliminary ruling regarding the status of the Disciplinary Chamber of the Supreme Court and the Chamber of Extraordinary Control and Public Affairs (C-487/19 and C-508/19). In the opinion of the Commissioner, due to the competence of the Extraordinary Chamber, these judgements will be crucial in order to secure the legality of presidential elections.

d. What measure has been taken to ensure that votes will remain secret?

State's obligations to guarantee the secrecy of voting, in the case of voting only by correspondence, should be considered significantly broader and more extensive than in relation to the current model of correspondence voting regulated in the Election Code.

Until now, correspondence voting was an alternative voting procedure that was used only on the basis of an authorized voter's request, instead of voting at a polling station, or voting by proxy. The voter who votes by correspondence could also, after obtaining the electoral package (e.g. in case of any doubts regarding the secrecy rule), personally deliver a return envelope to the regional electoral commission during voting hours. Meanwhile, in the case of voting exclusively by correspondence regulated by statute, the voter, in order to exercise his right to vote, *de facto* is forced to use the only procedure provided for in the act.

In the context of maintaining the secrecy of elections, a very important issue is the procedure for forwarding an envelope (containing a ballot) to the voter. The act regulates it generally and imprecisely, which makes it difficult to assess the regulations (a number of detailed solutions are yet to be regulated in implementing acts). The Act provides for placing a return envelope in a "specially prepared for this purpose sender mailbox in the district in

which the citizen is registered as a voter". Thus, this solution obliges voter to leave the place of permanent residence or residence within a specified period of time, "not earlier than at 6.00 and not later than 20.00 on the day of voting". It is very difficult to assess in detail this solution, among others in terms of the actual availability of special "mailboxes" for voters especially in non-urbanized areas, as well as in terms of ensuring their health safety. The Act refers, in terms of the requirements, which should be met by the designated operator's mailboxes prepared for placement of a returnable envelope, to the ordinance of the minister competent for state assets issued "with a view to ensuring appropriate security of mailboxes, in particular to guarantee secret voting". The aforementioned "adequate security" of the mailboxes is of cardinal importance for maintaining the principle of secrecy of voting.

The law which introduced postal voting was passed, however the presidential election did not take place as scheduled on May 10, 2020. Election was not officially cancelled but polling stations stayed closed. Currently, the Parliament is working on the new changes in the electoral procedure.

2. **Questions of the Coordinator of the Group of the Progressive Alliance of Socialists and Democrats the LIBE Committee, Mrs. Birgit Sippel, along with the question of the vice-Chair of the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament, Miriam Dalli**

a. **What are the possibilities of exerting influence at the moment to make the free elections possible? (Mrs. Sippel); What the EU institutions should do in this situation? (Mrs. Dalli)**

As mentioned before, the supervision of the election procedure, such as deciding upon validity of election (parliamentary, Presidential, to European Parliament) and referendum (general and Constitutional), as well as examining the election protest, is in the scope of the competences of the Extraordinary Control and Public Affairs Chamber of the Supreme Court. Therefore, taking into account the CJEU's judgement from November 19, 2020, it is essential to establish whether the Extraordinary Chamber meet the criterion of independence and can be regarded as a tribunal for the purposes of either EU law or Polish law, since the

circumstances in which it was formed, the extent of its powers, its composition and the involvement of the NCJ in its constitution are similar to the Disciplinary Chamber.

As mentioned above, the crucial problem to resolve is assuring the full application of CJUE judgements concerning judicial independence and preliminary ruling procedure in Poland. Therefore, the Commission – within the cases regarding the status of the Disciplinary Chamber of the Supreme Court and the Chamber of Extraordinary Control and Public Affairs pending before the CJUE (C-487/19 and C-508/19) – should take all necessary steps to indicate the significance of these cases to the Court and ensure prompt implementation. Any statement issued by the bodies of the European Union leading to raise awareness on these matters will be extremely important for the preservation of the rights of citizens of the Republic of Poland.

b. "LGBTI free zones" resolutions adopted on the local level and its implications

In response to the question regarding the issue of "LGBTI free zones" in Poland, I would like to briefly present my assessment on this matter, followed by an overview of the current situation, from the perspective of the Commissioner for Human Rights.

Unfortunately, the problem of discriminatory resolutions where Polish municipalities, regions, and counties declare themselves to be free from the so-called "LGBT ideology" is ongoing. Despite the essential response of the European Parliament and its adoption of the resolution of 18 December 2019 *on public discrimination and hate speech against LGBTI people, including LGBTI free zones*, **new acts of this kind are still being adopted and the ones adopted earlier have not been revoked yet**. To my best knowledge **the total number** of resolutions which are discussed and reported in the international debate as establishing the so-called "LGBTI free-zones", **has reached 100 to date.**

However, it is important to stress that the above-stated number refers to two different types of resolutions – the ones which directly mention LGBTI matters in their titles or contents, in most cases by declaring "freedom from LGBT ideology" (56 acts of this type), and the resolutions adopting "Charter of Family Rights" (44 acts of this type). I must emphasize that there are significant differences between them and **the legal analysis**

and actions which I have undertaken so far on this matter, as outlined and explained below, **relate only to the "free from LGBT ideology" declarations.**

As far as my legal assessment of the resolutions is concerned, they shall be undoubtedly considered **unlawful**. Both the analysis conducted by my Office and a legal opinion provided on my request by a notable administrative law professor[1], have led to a conclusion **that the acts are not only symbolic declarations without legal effects.** As resolutions officially adopted by public authorities they must meet standards of the rule of law and should be examined as to compliance with the principle of legality. From that perspective, these acts not only **illegitimately interfere with fundamental human rights** and violate the principle of equal treatment, but also **exceed the competences of local and regional governments** as prescribed in the law. Consequently, they breach the Constitution of the Republic of Poland, Polish administrative law, and international and EU law – in particular the European Convention on Human Rights, the Charter of Fundamental Rights and the principle of free movement of persons. As a result of this assessment, exercising the competence granted to the Commissioner for Human Rights pursuant to the Article 14.6 of the Act of 15 July 1987 on the Commissioner for Human Rights, **I lodged complaints against 9 selected resolutions** to 6 different Voivodeship Administrative Courts, with the aim to revoke the acts[2]. Due to the alleged violation of the EU law, I have also **proposed to the courts to refer a question for a preliminary ruling to the Court of Justice of the EU.** The cases are pending as the hearings which were already scheduled were canceled due to the pandemic situation.

I must stress that the above-mentioned allegations are undoubtedly applicable to each resolution against "LGBT ideology". However, even with the best use of available resources, the Office of the Commissioner cannot complain against all of them. Thus, **the undertaken legal actions result from the exhaustive strategic planning based on different factors,**

[1] Dawid Sześciło, Opinion of 7 August 2019 on the admissibility of a complaint against resolutions "on counteracting LGBT ideology" adopted by some local and regional governments, available at: https://www.rpo.gov.pl/sites/default/files/Opinia%20dr.%20hab.%20Dawida%20Sze%C5%9Bci%C5%82o%20ws.%20uchwa%C5%82%20antyLGBT%20.pdf

[2] The lodged complaints concern resolutions of the municipalities of: Istebna (Śląskie Voivodeship), Lipinki (Małopolskie Voivodeship), Klwów (Mazowieckie Voivodeship), Serniki (Lubelskie Voivodeship), Niebylec (Podkarpackie Voivodeship), Osiek (Świętokrzyskie Voivodeship); resolutions of the counties: Tarnowski (Małopolskie Voivodeship), Rycki (Lubelskie Voivodeship); and a resolution of Regional Council of the Voivodeship Lubelskie. The complaints are published and available in Polish on the website: https://www.rpo.gov.pl/pl/content/rpo-skarzy-do-sadow-uchwaly-samorzadow-o-przeciwdzialaniu-ideologii-lgbt

such as: territorial jurisdiction and other procedural matters, the alleged level of interference, and the applicability of arguments to the particular act. My hope and belief are that if at least one of the courts which consider the complaints revokes the resolution, it will give a clear sign to other local authorities that there is no place for such acts in Polish and European legal systems. Consequently, **it should stop the still ongoing trend of adopting like-wise resolutions**, strengthen legal arguments against them in other annulment proceedings, **and weaken the chilling effect** which they have already caused.

Nevertheless, it shall be also recognized that the administrative proceedings against the resolutions, which I have initiated as the Commissioner for Human Rights, are not the only actions taken to condemn this phenomenon. Since the issue has **gained international attention,** there are more and more voices in public debate to strongly oppose the matter. A noteworthy response of the international community is a trend of **ending collaboration with Polish towns** which adopted the discriminatory resolutions, by other European towns that do not wish to continue twinning arrangements with partners that do not respect fundamental human rights[3]. Alongside this international criticism, there is strong opposition to the issue on the national level. For instance, following the abovementioned reaction of suspending collaboration with some Polish towns by their former foreign partners, a mayor of Włodawa wrote a letter to the French municipality of Saint-Jean-de-Braye and offered a twinning agreement, arguing that not all Polish towns are homophobic[4] and trying to erase the bad impression that prompted the French community's move. **A strong national opposition comes as well from the civil society movements,** represented

[3] Among the towns which have already taken this step are: Nogent-sur-Oise, Douai, Saint-Jean-de-Braye and the Region of Loire Valley in France, as well as the town of Stendal in Germany. As reported by the media, the other towns are also considering the same action, e.g. the Irish town of Fermoy: https://www.irishexaminer.com/breakingnews/ireland/fermoy-to-terminate-twinning-arrangement-with-lgbt-free-zone-town-in-poland-985991.html

[4] The letter has gained international attention and was reported, e.g. by **abc news:** https://abcnews.go.com/International/wireStory/polish-mayor-make-amends-towns-misstep-69101349

by projects like "Atlas of hate map"[5] and "LGBT free zones pictures"[6], reported broadly also by international media.

What derives from the examples outlined above is that the issue of "LGBTI free zones" can be described as both **legal and social phenomenon of unprecedented character**. My strong belief, which I have also presented above, is that the resolutions of self-government authorities that contain hateful homophobic language and demonstrate no tolerance for the LGBTI community are **discriminatory, unlawful, and should be revoked.** However, it must be also acknowledged that although the acts **certainly result with a chilling effect and could lead to unequal treatment,** the applicability of their provisions is questionable, as they impose legally unfounded obligations that cannot be fulfilled by the addressees. With no aim to underestimate the threat the resolutions cause, with regards to the question on the practice of existence of the "LGBTI free zones" I must state that I am not aware of any incident of unequal treatment which could be directly linked to the resolution serving as its legal base.

I wish to assure the European Parliament that if these acts are in any case applied in practice with the result of unequal treatment or other harm to an individual, I will make every effort to exercise other legal mechanisms of protection in order to safeguard the fundamental human rights of every Polish citizen.

3. Ombudsman responses to the statements made by the Deputy Minister of Justice, Mr. Marcin Warchoł and by the ECR Group Deputy Coordinator in the LIBE Committee, Mr. Patryk Jaki

I would also like to take this opportunity to express my opinion regarding statements made by the Deputy Minister of Justice, Mr. Marcin Warchoł and by the ECR Group Deputy Coordinator in the LIBE Committee, Mr. Patryk Jaki.

[5] "Atlas of hate map" is a detailed and constantly updated database of all the resolutions which demonstrate no tolerance to LGBTI community, More information available on the project's website at: https://atlasnienawisci.pl

[6] A photographic project based on pictures of individual LGBTI citizens standing on the road next to a sign marking the name of a town and below a passage "LGBT free zone", which have spread through traditional and social media with an impression that the signs were placed there by the authorities. In fact, the signs where only an artistic happening, aimed to direct attention of the society on the possible real-life effects of the discriminatory resolutions, which are usually defended as symbolic declarations with no practical meaning. More information available on the project's website at: https://lgbtfreezones.pl/project

Mr. Jaki and Mr. Warchoł stated that in Poland no disciplinary proceedings are being conducted against judges submitting questions for a preliminary ruling to the CJEU. However, it should be noted that Disciplinary Proceedings Representative Przemysław Radzik, referring to the cases of judges who asked questions for a preliminary ruling, stressed that "Disciplinary Proceedings Representatives will consistently take action against judges participating in anarchization of law". Moreover, it should be noted that some disciplinary proceedings are conducted *in connection* to requests for a preliminary ruling from the CJEU (as a charge: abuse of judicial powers), *inter alia* in cases of judges Ewa Maciejewska and Igor Tuleya and judge Anna Bator Ciesielska. Thus, the statements on this matter are untrue and misleading.

Mr. Warchoł stated as well that it is not possible under Polish law to criminalize actions regarding application or implementation of the European law. Although I do agree that there is no valid legal basis to do so, in practice judge Paweł Juszczyszyn was suspended disciplinarily for a decision taken in order to assure compliance with the judgment of the CJEU of November 19, 2019 and then was criminally charged for this reason. Within a judiciary case he was in charge of, the judge sent a request to the Sejm to provide access to the list of judges who supported candidates for the National Council of Judiciary (a reference to the judgment of the CJEU of November 19, 2019) in order to establish if a judge (appointed by the new NCJ), who ruled in first instance, was legally appointed and could be considered independent. Although the decision of suspension from duties has been repealed by the Disciplinary Chamber of the Supreme Court at first instance, on February 4th the court, at second instance, decided to suspend him in his duties until the judgement in force is pronounced, as well as to reduce his salary by 40%. The judge appealed also against the decision of the Minister of Justice recalling him from the secondment to district court. On March 18th the administrative court pronounced that the decision is not susceptible of appeal and cannot be controlled. The Commissioner is preparing a reversal complaint against this decision.

Mr. Jaki noted that the CJEU declared inadmissible references for a preliminary ruling on the disciplinary system of judges (joined cases C-558/18 City of Łowicz and C-63/18 District Prosecutor's Office in Płock). It must be highlighted that the judgment does not mean that the Court has not noticed the concerns regarding the lack of guarantees of judicial

independence raised by two Polish courts. On the contrary, the reasoning of the judgment contains a number of elements confirming the need to provide the courts and judges with appropriate guarantees of independence, particularly by highlighting that judges should be guaranteed discretion and independence, free of the threat of disciplinary charges, in applying the EU law, in particular within the procedure of request for a preliminary ruling, which is exclusively within their jurisdiction. According to the judgement it constitutes a guarantee that is essential to judicial independence, which independence is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU. The fact that the case was assigned to the Grand Chamber of the CJEU and resolved by a judgment rather than an order indicates that it was of great importance, that the questions of the referring courts were relevant and required in-depth analysis and the adoption of conclusions that will be relevant for subsequent cases pending before the CJEU. The CJEU declared the applications of two Polish courts inadmissible for procedural reasons, pointing out that the specific disputes in the main (domestic) proceedings pending before those courts did not show a link with EU law, and the referring courts did in fact ask the Court about the compliance of the law regulating disciplinary liability regime with European Union law.

It should also be clearly emphasized that the resolution of the combined Chambers of the Supreme Court of January 23, 2020 was not, as Mr. Warchoł stated, "an anarchic attempt to take over the tasks of other constitutional bodies", but was an act of implementation of the judgment of the CJEU of November 19, 2019, which is key to guarantee the independence of Polish judges and preservation of the rule of law and right to fair trial in Poland.

I am aware that special procedures are needed due to the challenge of the global pandemic, which the world is facing. Nonetheless, I am convinced that even in this difficult time we cannot pay any less attention to the preservation of the rule of law and democratic standards. I hope that the above information will be useful in the work of the LIBE Committee.

Yours sincerely

Adam Bodnar

Commissioner for Human Rights

/- digitally signed/

Attachment:

The opinion of the Commissioner for Human Rights on the Act amending the Law on the System of Ordinary Courts, the Act on the Supreme Court and certain other acts