



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

**Contribution to DRFMG meeting
on latest developments in relation to the judiciary in Poland**

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**Filippo Donati
President of the ENCJ**

Dear Chair, I am very grateful for the opportunity to address this distinguished audience today.

I represent the ENCJ which gathers councils for the judiciary in the EU or similar autonomous bodies that ensure the final responsibility for the support of the judiciary in the independent delivery of justice. The ENCJ deals with justice systems and not judges individually. It is an institutional network of the Councils for the Judiciary that provide the all-important buffer between the judiciaries on the one hand and the executive and legislative branches of government on the other. The ENCJ aims to improve cooperation between, and good mutual understanding amongst, the Councils for the Judiciary and the members of the Judiciary of the European Union Member States. This objective brings with it a common responsibility to uphold the fundament of our common EU legal order, especially the Rule of Law and the independence of the Judiciary within that order.

The ENCJ Membership of the ENCJ consists of the 22 Judicial Councils (the Polish National Judicial Council is currently suspended) in the European Union.

Despite the KRS's suspension, the ENCJ has continued to follow the developments in relation to the judiciary in Poland.

First, I would like to speak about the ENCJ's actions in relation to KRS's suspension and more generally in relation to the recent developments in the Polish Justice system.

The ENCJ has taken the unprecedented step in **September 2018** to suspend the membership of the Polish National Council for the Judiciary (KRS) as it no longer met the requirements of ENCJ that it is independent of the Executive and Legislature so as to ensure the Independence of the Polish Judiciary.

Since then, the KRS is no longer allowed to participate in the ENCJ activities. Despite the KRS's suspension, the ENCJ has continued to follow the developments in relation to the judiciary in Poland.

It should be mentioned that on **10 January 2020** the ENCJ adopted an opinion in reaction to the adoption of the Muzzle Law by the Polish government. The Executive Board of the ENCJ called upon everyone in the European Union to defend the independence of judges and thus defend the European Union.

Furthermore, when fundamental EU Standards in the domain of Judicial Councils are at stake, the ENCJ does not and will not hesitate to act. In this vein the ENCJ sent a request for leave to intervene as a third party before the European Court of Human Rights. Up to now, the ENCJ intervened before the ECHR in the following three cases (all vs Poland):

- On 7 November 2019 the ENCJ has submitted 3rd party intervention before the ECHR- Grzęda v Poland case¹ ;
- In June 2020 the ENCJ has submitted 3rd party intervention before the ECHR – Zurek v Poland case² ;
- Recently, on 08 January 2021 the ENCJ has submitted 3rd party intervention before the ECHR – Tuleya v Poland case³

In addition, in a letter dated 21 **February 2020** to President Von der Leyen, the Presidents of the ENCJ, the Network of Presidents of the Supreme Courts of the EU and the European Judges Association demanded specific actions to be taken against Poland as a consequence of the entering into force of the Muzzle law in Poland.

In May 2020, the Board of the ENCJ concluded that unfortunately since the suspension of the KRS in September 2018, no positive developments were observed and proposed to expel KRS. The Board considered that the KRS does not comply with the statutory rule of the ENCJ that a member should be independent from the executive. The Board further, considered that the KRS is in blatant violation of the ENCJ rule to safeguard the independence of the Judiciary, to defend the Judiciary, as well as individual judges, in a manner consistent with its role as guarantor, in the face of any measures which threaten to compromise the core values of independence and autonomy. The Board considered that the KRS undermines the application of EU Law as to the independence of judges and tribunals, and thus its effectiveness. In doing so, it acts against the interests of the European Area of freedom, security and justice, and the values it stands for. And finally the Board concluded that the KRS has committed serious breaches of the aims and objectives of the Association as set out in Articles 3 and 4 of the Statutes, and is not willing to remedy these serious breaches.

¹ application no 43572/18: concerning the interruption of the term of office of a judge – member of the National Council of the Judiciary as a result of the 'reform' carried out in 2018 in Poland.

² application no 39650/18: concerning the interruption of the term of office of a judge – member of the National Council of the Judiciary, and repressions associated with his role as spokesperson for the National Council of the Judiciary.

³ application no. 21181/19: Judge Tuleya is accusing the Polish government of, inter alia, breaching his right to private life and his reputation in connection with disciplinary proceedings against him and summoning him as a witness in disciplinary proceedings against other judges in 2018. The intervention reiterates the ENCJ Standards on disciplinary proceedings against judges.

The proposed expulsion is still being considered by some of the ENCI Members and may be put to the vote in the first physical General Assembly that the ENCI will hold, hopefully later this year.

Now, let me explain what our current concerns are. The first observation is that disciplinary proceedings have been started against members of the former KRS, against judges who protest against the reforms, and against judges who exercise their right as European judges to send preliminary questions to the European Court in Luxembourg. The disciplinary proceedings were also changed to limit the procedural guarantees of judges. From the EU Justice Scoreboard it becomes clear that even the practice of the Ministry of Justice appointing the disciplinary authorities is not in accordance with EU standards.

In addition, the Disciplinary Chamber, ignoring the requirement set up in the *C-791/19 R Commission v Poland case*⁴ that the Chamber will refrain from referring cases, continues to hear cases concerning the immunity of judges in criminal cases (lifting the immunity).

The total of the reform laws has as an effect the control of the Judiciary by the executive. The Public Prosecution Office, the Constitutional Court and the KRS have been subordinated to the executive power. In addition, the Supreme Court is now under the control of the ruling party and the concerns about this body have intensified with the nomination of Malgorzata Manowska, appointed in May 2020 as the First President of the Supreme Court.

In addition, despite the international outcry, the so-called “Muzzle law” enacted by the Polish government, which bars judges from ensuring observance of the right to a fair trial, from guaranteeing rights deriving from the EU Treaties, prevents judges from controlling the validity of judicial appointments and from criticizing authorities, still applies in Poland.

However, on 31 March 2021, a very welcome move from the Commission has been observed since the European Commission decided to refer Poland to the Court of Justice of the European Union regarding the law on the judiciary of 20 December 2019, which entered into force on 14 February 2020, and asked the CJ to order interim measures⁵. Hopefully, the CJEU interim could shield Tuleya (and other judges that fulfil their duty of speaking up for the Rule of Law) from prosecution.

The application of measures against judges Tuleya, Zurek, Grzeda and many others, has created a chilling effect on the whole judiciary’s ability to conduct its duties. Another example is the Polish Minister of Justice decision to transfer independent prosecutors hundreds of kilometers away from their home.

Since the government has started its campaign to take control of the judiciary, the Polish judiciary is relying on the courage of individual judges.

⁴ Case C-791/19 R, Order of the Court (Grand Chamber) of 8 April 2020, EU:C:2020:277

⁵ The Commission wants CJEU to halt the activity of the Disciplinary Chamber of the Supreme Court, including it lifting judicial immunity from criminal prosecution including rolling back immunities lifted so far.

It should be recalled that it is a rule of European Union law that every national judge in a European Member State is also a European Union judge. Since the EU is a community based on the rule of law, the respect for the rule of law is at the core of the functioning of the cooperation in the justice area, on the basis of mutual trust and recognition. Therefore, any interference on judges' independence should be condemned by all relevant authorities.

I believe that it is very important to show the judges and prosecutors harassed by the government that they are not alone in this battle. Therefore, the ENCJ expresses its full support and solidarity to the harassed judges and prosecutors. The ENCJ also offers its full support to the Judges' associations in Poland "Iustitia", "Themis" and civil society organisations that have not given up on the Rule of Law.

The changes made in the justice field weaken the effectiveness of the Polish judiciary system and undermines the judicial cooperation within the EU. Recent cases of courts refusing to execute European Arrest Warrant issued by Polish courts demonstrate how fragile judicial cooperation between the EU member states can be.

To uphold and protect the rule of law is a responsibility for both the judiciary and other state powers. The ENCJ calls on the Member States to respect fair and impartial courts, as the key institutions of an independent judiciary. For the effective implementation of the rule of law, independent and accountable justice systems are needed.

Ensuring the rule of law should be an absolute priority and has to be the joint commitment, of all the Member States (Executive, Legislature and Judiciary), and the EU institutions together.

The ENCJ wants to make absolutely clear that it remains very much committed to defend the independence of the Polish Judiciary, our colleague European Union Judges, and that it will continue to cooperate with all the judicial associations in order to defend and restore the independence of the Polish judiciary as soon as possible.

To conclude, while the situation keeps deteriorating in Poland, the ENCJ urges the EU institutions not to give up on the Rule of Law. Whilst today's session is dedicated to Poland, we are equally concerned about the situation in Hungary and we are also very aware that challenges to Judicial Independence may occur in other Member States. And let us never forget about the situation in Turkey. The ENCJ has on several occasions expressed its solidarity with those judges and prosecutors who, without due process or just cause have been unlawfully dismissed, detained and convicted and calls upon the relevant Turkish authorities to ensure speedy, open, fair and impartial judicial process for all detained judges and prosecutors. Reports of the trials against judges and prosecutors give little reason to believe that due process requirements are being observed or that justice is being valued.

I thank you for your attention.