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COMMISSIONER FOR HUMAN RIGHTS

Adam Bodnar

VII.7010.2.2020.PF

**Honourable
Mateusz Morawiecki
Prime Minister**

Dear Prime Minister,

I would kindly ask you to clarify the inaccurate information in some of the statements made by yourself and by members of your government regarding the actions taken by the European Union to combat the coronavirus epidemic and its consequences. I have been following these pronouncements with concern as the motives for them are not clear to me, and the statements they contain are often not true.

Speaking as Head of Government, you also speak on behalf of the citizens of the Republic of Poland, who at the same time are citizens of the European Union. Therefore, when you address your words to Polish citizens, you also address them to EU citizens. The EU citizenship emphasizes our ties with other European nations. A special bond connects the citizens of the countries that history has sometimes set together and sometimes against each other. It is an expression of common historical roots, attachment to common values, sharing of existence as well as emotions.

With this address, I would like to appeal to you to reflect on the content of certain statements made by yourself and members of the Polish government in the context of our membership in the EU. **Dissemination of incorrect information, especially if intentional, becomes disinformation.** It violates the right to receive reliable information from the national authorities which is guaranteed to the citizens of our country by the Constitution (Article 54 and Article 61 of the Polish Constitution).

1. Importance of European integration for Poland and its citizens

For over 16 years Poland has been a member of the European Union - an organisation which, alongside the Council of Europe, represents the pan-European values of freedom, democracy, the rule of law and respect for human rights. With its participation in NATO, the European Union guarantees the external security of our country and the geopolitical stability that previous generations of our

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compatriots could have dreamed of.

The European Union provides Poles with the opportunity to legally work and live in the Member States of their choice. Polish goods and services are granted equal access to the common market of EU countries, the most open and developed market in the world. It supports scientific and cultural exchange and enables studying at prestigious European universities. Polish citizens can travel within the Schengen area without border control. Through multi-billion dollar investments, the Union has contributed to the civilizational leap in our country. Poland remains the largest beneficiary of successive EU budgets; since the beginning of its membership, our country has received considerably more than €100 billion in transfers of EU funds.

Our membership in the European Union has increased Poland's credibility in the eyes of investors, significantly influenced economic growth, incomparably expanded the opportunities for Poles and raised the standard of living of our country's citizens. Shortly after accession, Poland gained the position of an influential member of the EU and a good reputation in Europe. This was confirmed by changes of other countries' attitudes towards Poland and Poles, appointment of Poles to prestigious positions of President of the European Parliament and President of the European Council, good reception of the Polish Presidency in 2011 and Polish initiatives within the Union, such as the Eastern Partnership.

2. Statements concerning the European Union made by the Polish Prime Minister and members of the Government

On one hand, both yourself and the Government have demonstrated your understanding of EU's key role in counteracting the negative economic and political consequences of the Covid-19 pandemic. Both you and some of the members of the Government have repeatedly expressed this in speeches and media statements.¹ Several days ago, you wrote in the Ukrainian press that the epidemic has put the Union in a situation where, more than ever, it needs solidarity, which today becomes the heart of the European project, as its weapon in the fight against the pandemic and as a common springboard for rebuilding the common market.² Earlier, in your text for "*La Repubblica*" you wrote about the time of European hope, you called for an ambitious EU budget, an ambitious cohesion policy and a common agricultural policy that would help to rebuild the Union economically.³ You expressed similar views in "*Frankfurter Allgemeine Zeitung*";⁴ in "*El Mundo*" you have called for a substantial EU envelope for economic rebound,⁵ and appealed for European solidarity in "*Financial Times*".⁶

On the other hand, however, in some statements made by yourself and members of the Council of Ministers, one can also see incorrect information or inaccurate assessments. In your speech to the Polish Parliament, you stated that the European Union has not yet given a single euro cent to fight the

¹ <https://twitter.com/MorawieckiM/status/1249070867402895362>.

<https://twitter.com/MorawieckiM/status/1246785702374846464>, accessed on: 20.05.2020

² M. Morawiecki, *Солидарность и амбиция. Польша и Европа во время пандемии*, "Зеркало недели. Украина", 5.10.2020, https://zn.ua/international/solidarnost-i-ambiciya-353207_.html

³ M. Morawiecki, *Europa, non punire i deboli*, „La Repubblica”, 11.04.2020, p. 28.

⁴ M. Morawiecki, *Ein neues Gleichgewicht für Europa*, "Frankfurter Allgemeine Zeitung", 22.04.2020,

<https://www.faz.net/aktuell/politik/ausland/morawiecki-fordert-einen-groesseren-eu-haushalt-16735604.html>.

accessed on:

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⁵ M. Morawiecki, *Los problemas de la UE estan a la vista: la lentitud y los particularismos*, "El Mundo", 17.04.2020,

<https://www.elmundo.es/internacional/2020/04/16/5e9892f4fdddfff3588b45c8.html>, accessed on: 20.05.2020

⁶ M. Mrowicki, *EU budget is about more than arithmetic*, "Financial Times", 19.02.2020.

virus.⁷ Other members of the Government spoke in a similar tone: Minister of Digital Affairs ("The EU has not provided any new funds for the fight against Covid-19 in PL, not even €1")⁸, or the Minister of Funds and Regional Policy.⁹ In turn, in the aforementioned interview in the Spanish daily, you spoke about tardiness of EU's actions.¹⁰ And the Minister of Justice went as far as stating that the EU disgraced itself during the crisis.¹¹

I would like to point out the attempts to unduly shift responsibility for the difficulties caused by the epidemic crisis onto EU institutions. In my view, the impression of a lack of coordination at the beginning of the epidemic stemmed not so much from insufficient activity on the part of the EU institutions as from lack of preparedness of the Member States themselves to deal with such a sudden threat - to coordinate efforts and take joint action at supranational level. Therefore, the statements mentioned here may lead to the infringement of citizens' rights to receive reliable public information from organs of public authority (Article 61 of the Constitution of the Republic of Poland) and to receive information consistent with the actual state of affairs (Article 54 of the Constitution).

3. The right to accurate information about the activities of the European Union

The citizens have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions (Article 61 par. 1 of the Constitution), and public institutions themselves are to operate diligently and efficiently (see the Preamble to the Constitution). By nature, accurate information is the information that is true, up-to-date and complete.

The right to receive accurate information from the bodies of public authority is directly related to the constitutional foundation of our country: the principle of Nation's sovereignty (Article 4 par. 1) and the principle of the democratic rule of law (Article 2). The sovereign must not be misled or manipulated by the bodies of the state whose legitimacy to exercise power is vested upon them by same sovereign. This would be a complete reversal of the subjective nature of the relationship between the citizen and his country. True, reliable information is a condition for the conscious participation of citizens in public life and the operation of a democratic society.

By becoming a member of the European Union, through the will of the Nation expressed in the accession referendum, Poland assumed co-responsibility for implementation of the integration objectives of the Union. In the spirit of the principle of good faith, the most fundamental principle of international law, Poland has committed itself to cooperate loyally with the Union, to support it in carrying out its tasks under the Treaties, to fulfil its obligations under Union law and to refrain from taking measures which jeopardise the objectives of the Union (Article 4(3) of the Treaty on European Union, **TEU**).

The accusation of a complete lack of action and support from the Union in an epidemic situation is not true and creates a distorted image of this organisation in the public consciousness. It leads to an unwarranted juxtaposition of the EU and Poland, contradicts the membership obligations. The inhabitants of our country, Polish citizens, who are also citizens of the European Union, have the right

⁷ <https://wiadomosci.gazeta.pl/wiadomosci/7.173952.25825335.mateusz-morawiecki-w-seimie-unia-europejska-niedala-eurocenta.html>, accessed on: 20.05.2020

⁸ <https://twitter.com/ZagorskiMarek/status/1243550589579124739>, accessed on: 20.05.2020

⁹ <https://www.wnp.pl/fmanse/iarosinska-iedYnak-na-walke-z-koronawirusem-bedziemY-mogli-przeznaczyc-ok-17-proc-srodkow-z-ue.384621.html>, accessed on: 20.05.2020

¹⁰ See footnote 5 above, also <https://www.goy.pl/web/niemcy/premier-morawiecki-w-el-mundo-problemy-ue-powolnosc-i-partvkuarvzmy>, accessed on: 20.05.2020

¹¹ <https://www.polskieradio24.pl/5/1222/Artvku/2493845.Ziobro-o-UE-zamiast-pandemia-zaimuie-sie-praworzadnoscia-w-Polsce>, accessed on: 20.05.2020

to expect accurate information about the real role of the EU in fighting the epidemic from the representatives of the authorities.

The pandemic situation is not related to any action or omission of the EU, and the deficiencies in preparedness of the Polish state, and above all of the health care sector, to face the epidemic - especially in terms of providing appropriate medical personnel for people in need of help with the disease, securing personal protective equipment, medical equipment and diagnostic means - did not result from negligence on the part of EU institutions. Therefore, the entire responsibility must not be shifted onto them.

The current situation should also not be used as a pretext not to comply with the member states' obligations to protect the rule of law, let alone criticise the Union for insisting on compliance. Judicial independence and the independence of judges continue to be requirements of EU law. An epidemic situation does not exclude them. Moreover, the measures taken by national authorities, leading to severe restrictions on many individual rights and freedoms, make it all the more clear that there is a need to ensure effective judicial control, encompassing the normative solutions being introduced and the implementation of the law. Judicial control, by virtue of the Constitution of the Republic of Poland (Article 45 par. 1, Article 77 par. 2) and European standards (Article 6, par. 1 and Article 13 of the European Convention on Human Rights, Article 47 of the Charter of Fundamental Rights of the EU), is expressed in the right of access to a court independent of political power and a court ruling issued by an independent and impartial court. In recent weeks, I have repeatedly submitted addresses to yourself as well as to individual members of the Council of Ministers and other government administration bodies, in which I have pointed out the threats or violations of human rights resulting from measures taken to prevent and combat the coronavirus epidemic.

4. Competence of the European Union in the field of healthcare

Being well versed in European Union law, which you studied, among others, at the University of Basel, and as a co-author (with Professor Frank Emmert) of a textbook on European law, you are well aware of the modest extent of the competences entrusted to the Union by the Member States in the field of health protection. Under Article 6 of the Treaty on the Functioning of the European Union (TFEU), in the area of protection and improvement of human health, Member States have conferred on the Union only the competence to carry out actions that support, coordinate or supplement national actions. Therefore, by virtue of the will of the States themselves, the members of the Union retain the competence to provide adequate health protection to persons under their jurisdiction, while the EU competence is only subsidiary.

The EU's competence is regulated in more detail by Article 168 of the TFEU. It indicates the primary responsibility of the States and only a complementary role of the EU in the field of healthcare. It provides that Union action "shall complement national policies". (Article 168(1) of the TFEU, second sentence) and the Union 'shall encourage cooperation between Member States' and 'if necessary, lend support to their action'. (Article 168(2) of the TFEU, first sentence). However, the European Commission may take 'any useful initiative to promote coordination' between health-promoting policies and programmes of Member States (Article 168(2) of the TFEU, first sentence). The responsibilities of the States in the field of health protection are also explicitly confirmed by Article 168(7) of the TFEU, indicating that they include the management of health services and medical care and the allocation of the resources assigned to them.

The Treaty provides a detailed legal basis for legislative acts in the field of health protection in three narrowly defined areas: standards of quality and safety of organs and substances of human

origin, blood and blood derivatives; veterinary and phytosanitary regulations directly aimed at protecting public health; standards of quality and safety of medicinal products and medical devices (Article 168(4)(a-c) of the TFEU). At the same time, the Treaty stipulates that legislative competence is conferred here "by way of derogation" from the Union's complementary role in the field of health protection. It should therefore be interpreted strictly. Furthermore, it should also be borne in mind that it remains subject to the Treaty principles of subsidiarity and proportionality when exercising the Union's non-exclusive competence (Article 5(3) to (4) TEU),

The definition of EU competence in the event of an epidemic does not go beyond a supportive role, complementing the measures taken by the States. Under the TFEU, Union action in this field shall be limited to supporting research into the causes of the epidemic, ways of their spreading and prevention, support for health information and education, and support for monitoring serious cross-border threats to health, early warning of such threats and combating them (Article 168(1) sentence 3 of the TFEU). To this extent, the European Parliament and the Council may establish 'incentive measures' to protect and improve human health (Article 168(5) of the TFEU).¹²

In the existing tripartite division of EU competences into exclusive, shared and supportive, the Treaty creators have assigned health protection to the weakest, third category of competence. According to Article 2(5) of the TFEU, this means, firstly, that Union competence does not replace national competence in this area; and, secondly, that Union acts relating to health protection cannot lead to harmonisation of the laws and regulations of the Member States (with the exception mentioned above, set forth in Article 168(4) of the TFEU). The Treaty solutions therefore clearly indicate that the Union cannot undertake an autonomous health policy in this area and does not assume responsibility for ensuring the protection of the health of the inhabitants of EU countries. On the contrary, this competence belongs to the state sphere. It is still the Member States that can, and indeed must, develop their health policy and secure adequate medical care, as the competence of the State in this case implies their legal obligation to act and their responsibility for carrying it out.

Accusing the European Union, or even suggesting that it has failed to take the action it was supposedly obliged to take in the face of the coronavirus pandemic, is not supported by treaty regulations and the division of competences between the members of the Union and the Union itself. It does, however, undermine the trust of the citizens of our country in the EU and its institutions, and is inconsistent with both the legal and factual situation.

5. Actions of the European Union with regard to the coronavirus epidemic

The European Union's actions in the fight against the coronavirus epidemic are primarily conducted by the European Commission, and take various forms: from practical measures securing access to the necessary medical equipment and medications, through support for research on vaccines, diagnostics and methods of treatment of Covid-19 pneumonia, assistance in the return of EU citizens to their countries, to measures of economic and financial nature. These include transfers within the EU

¹² On this basis, Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC, OJ EU 2013 L 293/1, OJ EU 2015 L 231/16 was adopted. See also its implementing acts: Commission Implementing Decision (EU) 2017/253 of 13 February 2017 laying down procedures for the notification of alerts as part of the early warning and response system established in relation to serious cross-border threats to health and for the information exchange, consultation and coordination of responses to such threats pursuant to Decision No 1082/2013/EU of the European Parliament and of the Council, OJ L 50, 13.2.2017, p. 1. EU 2017 L 37/23; Commission Implementing Decision (EU) 2018/945 of 22 June 2018 on the communicable diseases and related special health issues to be covered by epidemiological surveillance as well as relevant case definitions, OJ EU 2018 L 170/1.

structural funds, including work on a new EU budget taking into account the crisis situation.

Recently, the European Union has embarked on an ambitious plan to jointly develop the diagnostics, treatment and development of coronavirus vaccines: *Global Coronavirus Response*.¹³ Over a short period of time, some €7.5 billion of funding has been mobilised for its implementation. Poland has declared to participate only in the amount of € 750,000, which seems a modest contribution, taking into account the possibilities and aspirations of our country, which has enjoyed economic growth in recent years. The European Commission has already taken action to support research on vaccines, diagnostics and treatment of Covid-19 by funding about 20 research projects to a total amount of approximately €200 million. Several entities from Poland participate in these projects.

The Commission organises joint purchases of medical equipment, tests and personal protective equipment for Member States. Four such tenders were carried out at the beginning of the epidemic, in February and March 2020. The fact that Poland did not participate in the first two tenders did not result from tardiness on the part of the Union, and there were no obstacles for Polish government to sign up for this procedure as soon as initial information about the coming epidemic emerged.

Within the framework of the Digital Poland programme, financed from EU funds, an additional PLN 120 million has been allocated to extend the functionality of the e-health programme. These include e-prescriptions and e-consultations. Remote forms of healthcare provision are particularly important in situations where the risk of coronavirus infection through direct contacts between people is being reduced.

In turn, the "rescEU", a system complementary to the EU Civil Protection Mechanism, gathers medical equipment, ventilators, protective masks, gloves, medication and other therapeutic products. The stockpiles are financed entirely from EU funds and the products will be sent to countries where there is the greatest shortage of them.

As citizens of the Union, citizens of Member States may benefit from European consular protection should they find themselves outside the borders of the Union and it would be impossible or very difficult to obtain assistance from the foreign offices of their own country. Through the European Civil Protection Mechanism, the EU also facilitates repatriation of Member States' nationals who have been prevented from returning home on their own due to suspension of international travel. Participation in the programme is free of charge for repatriates. The first flight under the programme took place on 31 January 2020, and a total of approximately 60 000 Union citizens benefited from the programme. There were only 390 Polish citizens in this group, as the Polish Government joined the action only after a delay, on 23 March of this year. As a result, many citizens of our country had to bear the high costs of repatriation organized by the government administration and LOT Polish Airlines.

The European Union is a complex, multi-level legal, political and economic organism. It enables Member States, their residents and economic operators to operate within the common market, taking into account national interests and European solidarity. The current epidemic crisis will unfortunately have a significant impact on the economic situation of the Union's citizens and threatens to cause a deep economic crisis for EU countries and the EU economy as a whole. Within the limits of its competences and legal instruments, the Commission has swiftly taken a number of measures to help the Union's members in the short and medium term to overcome the difficulties that already exist and those that are coming.

¹³ https://global-response.europa.eu/index_en, accessed on: 20.05.2020

For example, the European Commission has taken the immediate decision to reallocate €37 billion of EU funds to purchase medical equipment and address social and economic consequences of the epidemic crisis. Under this solution, Poland could draw as much as €7.4 billion. The Commission has also offered complete flexibility in the use of Cohesion Fund resources that have not been used so far.

In order to preserve jobs and enable companies at risk of bankruptcy to continue operating, the Commission set up the SURE initiative, to the amount of €100 billion. This temporary support instrument for reducing the risk of unemployment is intended to help pay wages of employees and self-employed persons from public funds. EU support is also possible under the Fund for European Aid to the Most Deprived.

The European Commission has also announced the launch of a new joint financial initiative with the European Investment Bank, whereby nearly €1.6 billion will support investments by private companies producing or processing food, bio-based materials and bioenergy. The Commission has also decided to use €1 billion from the European Fund for Strategic Investments guarantees for the European Investment Fund, which in turn will enable it to mobilise around €8 billion of funding for small and medium-sized enterprises affected by the economic consequences of the epidemic.

In addition, the EU is suspending fiscal rules, allowing Member State governments to be more flexible in supporting the economy by making budgetary spending decisions. The EU's relaxation - within the limits of the EU's rules on fair competition - of the rules on state aid provides real help for businesses. Since the beginning of the pandemic, the Commission has many times approved state aid to Polish companies - under the new temporary rules - in the total amount of approximately PLN 220 billion.¹⁴

It is also appropriate to note EU activities related to providing education in the situation where home isolation was introduced and schools were closed. Under the Digital Poland EU programme, the European Commission decided to spend PLN 180 million on computer equipment for schools, students and teachers. It also made a number of materials and tools for online learning available.¹⁵

6. Conclusions

Mr. Prime Minister, I am writing to you with the deep conviction that accurate information about the actions taken by the European Union to combat the threats and consequences of the current epidemic is not only in the vital political interest of Poland - and therefore of your government, which is indeed under the moral imperative to tell the truth - but is also based on the fundamental principles of both Polish and European legal order. In particular, public statements by members of the Council of Ministers should be timely, truthful and based on facts - as required by Articles 54 and 61 of the Polish Constitution.

¹⁴ See, among others https://ec.europa.eu/commission/presscorner/detail/pl/ip_20_596, https://ec.europa.eu/commission/presscorner/detail/pl/ip_20_614, https://ec.europa.eu/commission/presscorner/detail/pl/ip_20_635, https://ec.europa.eu/commission/presscorner/detail/pl/ip_20_720, https://ec.europa.eu/commission/presscorner/detail/pl/ip_20_726, https://ec.europa.eu/commission/presscorner/detail/pl/ip_20_745, https://ec.europa.eu/commission/presscorner/detail/pl/ip_20_760, https://ec.europa.eu/commission/presscorner/detail/pl/ip_20_853, accessed on: 20.05.2020

¹⁵ https://ec.europa.eu/education/resources-and-tools/coronavirus-online-learning-resources_pl, accessed on: 20.05.2020

It seems unjustified to attempt shifting all the responsibility for the problems and lack of effective action onto the European Union, its institutions and bodies. The image of the EU institutions built in this way, as distant, bureaucratic and inflexible, does not serve well to strengthen the protection of the rights of inhabitants of our country who are European Union citizens. Especially when considering the limited ability of EU institutions to reach Polish citizens with a direct message.

The current crisis triggered by the coronavirus epidemic has a global impact. Its social, economic and political consequences will be felt for a long time. They require reflection, responsibility and solidarity both at individual level and at European, transnational level. Weakening the European Union is not in Poland's interest. We are very much counting on the solidarity of the Union and its members, as demonstrated, for example, by the expectations voiced with regard to subsequent budgets and contemplated instruments of support from the Union. We should therefore show the same solidarity, understanding, and willingness to cooperate as we expect from the Union and its individual Member States.

It is with complete conviction that I emphasize that Polish membership in the Union is in the utmost interest of our country and Polish citizens. It is of strategic importance to us. It should be the focal point of rebuilding the consensus between main political forces, which guided the accession process and which remained present for many years after accession. Internal disputes should not be a reason or a justification for questioning the positive role of the Union for our country. Spreading unreliable information about the Union distorts its image, stirs up resentment and reinforces negative attitudes that question the need for it. It does not serve the purpose of constructive and responsible criticism, but leads directly to undermining the purpose of European integration, which is one of the greatest achievements of modern times.

Mr. Prime Minister, as Head of Government you carry a particular responsibility for your words, for verifying the truthfulness of the information provided, for balancing your assessments. I therefore appeal to you and to the members of the Polish Government to refrain, when it comes to assessing the activities of the European Union, from making statements which are not supported by fact or which are not in keeping with the state of law.

As a representative of the Republic of Poland, you sit on the European Council, members of your Government are members of the Council of the European Union. Therefore, you have the means not only to obtain accurate information about the activities of the Union, but also to contribute to shaping its policy and commitment to combat the social, economic and political consequences of the ongoing epidemic. Therefore, acting on the basis of Article 16(1) of the Act of 15 July 1987 on the Commissioner for Human Rights (Journal of Laws of 2020, item 627), I kindly request that you consider the position presented above.

Yours sincerely
Adam Bodnar

Commissioner for Human Rights
/-signed electronically-/