

Warsaw, 12 January 2023

**Position of the Justice Defence Committee, KOS,
on the members' bill amending the Act on the Supreme Court
and certain other Acts (form No. 2870)**

The members' bill on the amendment of the Act on the Supreme Court and certain other Acts (form no. 2870) currently under consideration by the Sejm is presented by the proposers (although the proposer is actually the government, which even its representatives publicly admit) as a normative act, the enactment of which will allegedly convince the European Commission to disburse the first tranche of funds from the Recovery Fund. During a meeting of the Sejm's Justice and Human Rights Committee, the Minister for European Union Affairs directly stated that the bill's assumptions were allegedly positively assessed by the whole of the Commission as meeting the so-called "milestones" regarding the judiciary, which are attached to the National Recovery Plan signed by the Polish government.

The Justice Defence Committee, KOS, unequivocally states that the legislative proposal in question is still incompatible with EU law and the Polish Constitution and does not contribute to the achievement of the so-called "milestones" and hence the disbursement of funds from the Recovery Fund to Poland.

The submitted bill primarily does not repeal the provisions of the so-called "Muzzle Act" of February 2020, which provide, *inter alia*, that actions questioning whether someone holds the office of judge, the effectiveness of a judge's appointment or the legitimacy of a constitutional body of the Republic of Poland are prohibited and constitute disciplinary offences punishable by the removal of a judge from the profession. This means that, if a court finds that the fundamental right of the citizens to an independent and impartial court established by law has been breached – as a result of the inclusion of people appointed on the motion of the politicised neo-NCJ in the bench – this will still be subject to prosecution. The removal of the Muzzle Act from the Polish legal order is a prerequisite for achieving the milestones, as EC President Ursula von der Leyen has repeatedly emphasized, and which arises directly from the CJEU's interim measure of 14 July 2021 (C-204/21 R), on the basis of which the milestones were laid down. Furthermore, both EU law, the European Convention on Human Rights and the provisions of Polish law unconditionally require that any court is able to examine whether a bench is legal, *ex officio*, without any restriction or threat of disciplinary action.

Additionally, the bill maintains a façade-like and purely ostensible (in fact, impossible to realistically apply) "test of a judge's impartiality", as it prevents a fair assessment of the circumstances of a person's appointment to the office of judge in accordance with EU law – consequently failing to ensure the right to a fair trial. The very fact that, in the light of the bill that has been submitted, the benches conducting the impartiality tests can include judges appointed with the involvement of the neo-NCJ, who have an obvious personal interest in maintaining the *status quo*, undermines the effectiveness and impartiality of the testing process.

Furthermore, the bill does not take into account the standard of the European Convention on Human Rights, with which EU law must also comply, including the "milestones", from which it arises (as already confirmed by numerous ECtHR judgments) that the mere fact that the politicised neo-NCJ is involved in the judicial appointment process leads to a breach of the right to a "court established by law". A glaring example of this breach is the upholding of the decisions of the abolished Disciplinary Chamber (including those on the removal of judges from office), which, according to the Court of Justice of the EU, the European Court of Human Rights and the Polish Supreme Court, did not satisfy the criteria of a "court".

Finally, according to the bill, contrary to the wording of one of the “milestones”, disciplinary cases of judges are to be transferred to the Supreme Administrative Court (SAC) and not, as per the obligations written into the milestones, to another chamber of the Supreme Court, which satisfies the criteria of Article 19 of the EU Treaty. Furthermore, the proposal is incompatible with the Constitution of the Republic of Poland (Article 184), which does not give the SAC the competence to hear disciplinary cases of all judges. Most importantly, given that about 1/3 of the SAC’s members are currently so-called neo-judges, namely people appointed to positions in that court by the politicised neo-NCJ, the bill exacerbates the risk in question of breaching the right to a fair trial. In addition, burdening the SAC with disciplinary proceedings and tests of independence of judges will paralyse the work of that court, which probably suits the government, as it will greatly slow down the consideration of complaints of citizens against the decisions of bodies of the government administration.

It is significant that, at the time of submission of a further bill, which is presented as a sign of good will on the part of the Polish authorities, judges who apply the ECHR and EU law are still being repressed. A glaring example of such action is the refusal to implement the ECtHR’s interim measure of 6 December 2022 (Application no. 39471/22, 39477/22, 44068/22) by reinstating three repressed judges of the Warsaw Court of Appeal to their previous positions, the justification of which states that “*the interim measure issued by the ECtHR is not binding*”.

Therefore, according to the Justice Defence Committee, KOS, the bill currently under consideration in the Sejm will not achieve its declared objective, which is the approval of the “milestones” regarding the judiciary and, as a result, the disbursement of funds from the Recovery Fund. The changes proposed by the ruling party are purely illusory, thereby essentially exacerbating the already numerous breaches of the Polish Constitution, European Union law and the European Convention on Human Rights. Under no circumstances should such a bill become the applicable law.

Partners of the Justice Defence Committee (KOS):

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Polish Judges’ Association “Iustitia”
Association of Judges “THEMIS”
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