

Warsaw, 12 January 2023

**Position of the Committee for the Defense of Justice KOS  
on the parliamentary bill amending the law on the Supreme Court and certain other laws  
(print No. 2870)**

The parliamentary bill on amending the Act on the Supreme Court and certain other acts (print no. 2870) currently under consideration by the Sejm is presented by the proposers (although in fact the proposer is the government, as even its representatives publicly admit) as a normative act, the adoption of which will allegedly convince the European Commission to disburse the first tranche of funds from the Reconstruction Fund. During a meeting of the Sejm's Justice and Human Rights Committee, the Minister for European Union Affairs gave direct information that the assumptions of the project were allegedly positively assessed by the entire Commission as fulfilling the so-called "milestones" concerning the judiciary, attached to the National Recovery Plan signed by the Polish government.

The Committee for the Defense of Justice KOS unequivocally states that the legislative proposal in question maintains a state of incompatibility with EU law and the Polish Constitution and does not contribute to the realization of the so-called 'milestones' and thus the disbursement of funds from the Reconstruction Fund to Poland.

Above all, the submitted bill does not repeal the provisions of the so-called 'muzzle act' of February 2020, which provide, inter alia, that actions questioning the existence of a judge's official relationship, the effectiveness of a judge's appointment or the legitimacy of a constitutional organ of the Republic of Poland are prohibited and constitute a disciplinary tort punishable by the removal of a judge from the profession. This means that it will still be subject to prosecution if the court finds a violation of the citizens' fundamental right to an independent and impartial court established under the law - through the participation of persons appointed at the request of the politicised neo-KRS on the bench. The removal of the muzzle act from the Polish legal order is a prerequisite for the fulfilment of the milestones, as the EC President Ursula von der Leyen has repeatedly emphasised and as is clear from the CJEU's interim measure of 14 July 2021. (C-204/21 R), on the basis of which the milestones were shaped. Apart from this, both EU law, the European Convention on Human Rights and the provisions of Polish law absolutely require that any court can, ex officio, without any restriction or threat of disciplinary prosecution, examine the lawfulness of a bench.

Moreover, the draft law maintains a facade-like and purely ostensible (in fact, impossible to apply in real life) 'test of a judge's impartiality', as it prevents, in accordance with EU law, a fair assessment of the circumstances of a person's appointment to the position of judge - consequently failing to ensure the right to a fair trial. The very fact that, in the light of the submitted draft, the panels conducting the impartiality tests may include judges appointed with the participation of the neo-NCJ, who have an obvious personal interest in maintaining the status quo, undermines the efficiency and impartiality of the testing process.

In addition, the draft 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 follows (as already confirmed by numerous ECtHR judgments) that the mere fact of the participation of a politicized neo-NCJ in the judicial appointment process leads to a violation of the right to a 'court previously established by law'. A glaring example of this violation is the upholding of the decisions of the abolished Disciplinary Chamber (including those on the removal from office of judges), which, according to the EU Court of Justice, the European Court of Human Rights and the Polish Supreme Court, did not meet the criteria of a 'court'.

Finally, contrary to the wording of one of the 'milestones', disciplinary cases of judges according to the draft law are to be transferred to the Supreme Administrative Court (SAC) and not, as per the obligations enshrined in the milestones, to another chamber of the Supreme Court, which meets the criteria of Article 19 of the EU Treaty. The proposal is furthermore incompatible with the Constitution of the Republic of Poland (Article 184), which does not provide the SAC with the competence to hear disciplinary cases of all judges. Most importantly, due to the fact that currently about 1/3 of the SAC's composition is made up of so-called neo-judges, i.e. persons appointed to positions in this court by the politicized neo-NCJ, the project exacerbates the described risk of violation of the right to a fair trial. In addition, burdening the SAC with disciplinary proceedings and tests of judges' independence will paralyse the work of this court, which probably suits the government, as it will greatly slow down the recognition of citizens' complaints against the decisions of government bodies.

It is significant that at the time when another project is submitted, which is presented as a manifestation of the good will of the Polish authorities, at the same time repression of judges who apply the ECHR and EU law continues. A glaring example of such action is the refusal to enforce 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*".

In the opinion of the Committee for the Defence of Justice KOS, the bill currently under consideration in the Sejm will therefore fail to meet its declared objective of approving the 'milestones' for the judiciary and, as a result, the disbursement of funds from the Recovery Fund. The changes proposed by those in power are purely illusory, thus essentially exacerbating the already numerous violations of the Polish Constitution, European Union law and the European Convention on Human Rights. Such a bill should under no circumstances become law.