KOS KOMITET OBRONY SPRAWIEDLIWOŚCI

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Position of the Justice Defence Committee, KOS, on the Act of 13 January 2023 amending the Act on the Supreme Court and certain other Acts

The Act of 13 January 2023 amending the Act on the Supreme Court and certain other Acts (**the Act**), passed through the Sejm on 8 February 2023 after all the amendments proposed by the Senate were rejected. The President declared he would not sign the Act but forward it to the politically captured Constitutional Tribunal for constitutional review.

The Act allegedly implements the so-called "milestones" attached to Poland's Recovery and Resilience Plan regarding the improvement of judicial independence. It was itself adopted in a procedure breaching good law-making principles, the implementation of which is a separate "milestone" and is still not even close to being reached.[1]

The Justice Defence Committee, KOS, unequivocally states that the Act is incompatible with EU law and the Polish Constitution and does not contribute to reaching the so-called "milestones". Furthermore, it devastates the Supreme Administrative Court (SAC), which has the task of controlling the administration. This court will be compromised with unconstitutional tasks and blocked with disciplinary cases, while cases of citizens against public administration will wait for years to be addressed.

The Senate's amendments cured all the legal problems presented below, but were all rejected.

Firstly, milestone F.1.1. – *abolishment of the Disciplinary Chamber and conferral disciplinary cases on an independent chamber of the Supreme Court*, is not met, because:

- The milestone refers to a lawful chamber of the Supreme Court and not the Supreme Administrative Court. These courts have a completely different constitutional role in the Polish legal system. The SAC cannot oversee disciplinary cases of judges, because this is in conflict with its constitutional powers (Article 184 of the Constitution). Consequently, the SAC would become constitutionally compromised and functionally overloaded.

- The milestone explicitly states that disciplinary proceedings should be transferred to the chamber of the Supreme Court. The SAC is not an organisational part of the Supreme Court.

- One-third of the members of the SAC are so-called neo-judges and there is nothing in the Act preventing them from adjudicating on disciplinary cases. They will be biased, as the majority of disciplinary cases are launched against lawful judges who do not want to adjudicate in benches with neo-judges.

- The transfer of cases concerning disciplinary liability and "tests of judicial independence" to the SAC with benches consisting of 5 judges and 14-day speedy procedures will completely block the main function of the SAC, which is to control the legality of administrative decisions. Therefore, the nomination of the SAC for disciplinary cases means that the ruling majority will succeed in paralysing the only court which can control its decisions.

[1] Milestone F 2.1.

- Furthermore, the renamed Disciplinary Chamber (Professional Liability Chamber) would still adjudicate on disciplinary matters of attorneys-at-law and prosecutors, as well as pharmacists and notaries public, which discriminates those groups, as they will still be deprived of an access to independent court in their disciplinary cases. This practice will breach Article 19 TEU and Article 47 of The Charter of Fundamental Rights of the European Union.

- Furthermore, the Act upholds decisions of the Disciplinary Chamber made before its abolishment.

Secondly, milestone F.1.2 – *freedom of Polish judges to implement CJEU rulings and impartiality of the disciplinary provisions*, is not met because:

- The Act overturns the disciplinary offence of issuing a judgment that complies with the case law of the CJEU, but upholds Article 107(1)(1a) of the Act on the organisation of the ordinary courts, which allows a judge to be prosecuted on disciplinary charges for *"denying the administration of justice"* which was introduced by the so-called Muzzle Act of 2020. This is the "core" offence with which lawful judges are charged for refusing to adjudicate in benches with neo-judges, whose "rulings" shall be set aside according to the judgments of the European Courts. The upholding of this provision is in direct conflict with the interim measure of the Vice-President of the CJEU of 14 July 2021 (case C-204/21 R).

- The Act does not repeal Article 107(1)(3) of Act on the organisation of the ordinary courts, according to which "*actions that question whether a judge actually holds office, the effectiveness of a judge's appointment, or the legitimacy of a constitutional body of the Republic of Poland*" are a disciplinary offence, punishable by removal from the office. The upholding of this provision is also in direct conflict with the interim measure in case C-204/21 R).

- Furthermore, the Act does not repeal Article 89(1) of Act on the organisation of the ordinary courts, according to which "*demands, statements and complaints regarding matters related to the office held may only be submitted by the judge through official channels. In such cases, the judge may not approach institutions and third parties or make these matters public."*

- In addition to that, the Act does not repeal Article 29(3) of the Act on the Supreme Court, which states that "It is inadmissible for the Supreme Court or another authority to determine or assess the legality of the appointment of a judge or the resulting authorisation to perform tasks in the field of the administration of justice".

- Additional disciplinary proceedings have been initiated against Judge Paweł Juszczyszyn. Judge Juszczyszyn, as one of many judges, was suspended because of his attempts to implement the CJEU's rulings. His suspension lasted over 850 days. However, disciplinary proceedings instituted against him are still pending. The grounds of these proceedings are his latest comments in the media or private comments referring to the effectiveness of a judge's appointment or complaints raised in public about proceedings against him. After the adoption of the Act, the Polish legal system will still have regulations enabling disciplinary officers to charge judges. The Act continues to breach the CJEU judgment of 15 July 2021 (case C-791/19) and does not address the breach of the whole of the CJEU case law regarding Article 19(1) TEU and the principle of effective judicial protection by the "decisions" of the "Constitutional Tribunal".

- The removal of the Muzzle Act from the Polish legal order is a prerequisite for achieving the milestones, as the members of the European Commission repeatedly emphasised, and which arises directly from the CJEU's interim measure in case 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 clearly require any court to examine, on its own motion, whether it constitutes "an independent and impartial tribunal previously established by law", without any restriction or threat of disciplinary action.

- Additionally, the Act maintains a façade-like and purely ostensible (in fact, impossible to realistically apply) "test of judicial independence", 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 Act, the benches conducting these "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 Act does not take into account the standard of the European Convention on Human Rights, with which EU law, including the decision approving the milestones, must also comply. As already confirmed by numerous ECtHR judgments, 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" in the meaning of Article 6 ECHR. A glaring example of this breach is the upholding of the decisions of the abolished Disciplinary Chamber (including those on the suspension of judges from official tasks), which, according to the CJEU, the European Court of Human Rights and the Polish Supreme Court, did not satisfy the criteria of a "court".

Thirdly, milestone F.1.2. – *restitution of all dismissed judges,* is not fulfilled either.

Some of them were *de facto* reinstated but without the effective review of their suspension, which is in breach of the right to access to court. There is nothing in the Act preventing their further suspensions.

Furthermore, nothing is done about the possibility of never-ending disciplinary proceedings, one-month suspensions and forced transfers in breach of CJEU case law (case C-487/19).

It is significant that, at the time of submission of this Act, which is presented as a sign of good will on the part of the Polish authorities, judges who apply the standards of 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 nos 39471/22, 39477/22 and 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*".

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In view of the above, we call on the European Commission and European Parliament not to comprise the right of the Polish people to free courts, which will not be restored by the Act. On the contrary, the devastation of the rule of law will increase. The politically captured Constitutional Tribunal will not resolve any legal issues in the spirit of the *acquis*. It should be remembered that the same Tribunal is illegally composed and has already declared that no CJEU

and ECtHR rulings are binding in Poland. No restoration of the rule of law can be expected from an institution which has itself been politically captured.

We request all possible means to be applied to make the Polish authorities properly implement all the milestones and restore legal protection for the citizens of Poland. Polish citizens need both free courts and the Recovery and Resilience Funds. With the Act being submitted by President Andrzej Duda to the Constitutional Tribunal, perhaps there will be time for appropriate hearings and analyses of what is really going on with the rule of law in Poland.

Partners of the Justice Defence Committee (KOS):

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Polish Judges' Association "Iustitia"
Association of Judges "THEMIS"
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Free Courts Initiative
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