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# Act on the Supreme Court after the Senate's amendments: Poland closer to RRF funds? Commentary

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**The Polish Senate has adopted an amendment to the Supreme Court Act[1] with amendments to bring Poland closer to meeting the judicial 'milestones' and receiving funds in line with the National Recovery and Resilience Plan (NRRP). Although those amendments went in the desired direction, on 8 February 2023 the Sejm reversed them all. Poland thus still faces not only the risk that it will not fulfill the 'milestones' but also new proceedings before the CJEU and financial penalties regarding the solutions to the judicial system. In addition, an action is pending before the General Court of the European Union, which may result in the invalidation of the whole of the Polish NRRP.**

## Senate's amendments: closer to the 'milestones'

Compared to the parliamentary version, the amendments made to the Act on the Supreme Court by the resolution of the Senate of 31 January 2023 (Senate form no. 2991) increased the likelihood that the European Commission will consider that the requirements regarding the milestones related to the 'Justice System' from point F. of the Annex to Council Implementing Decision (EU) No. 9728/22 of 14 June 2022 on the approval of the Polish NRRP have been met.

Firstly, the so-called test of a judge's impartiality ('test'), set out in milestone F.1.1.d, has been

1 Act amending the Act on the Supreme Court and certain other acts of 13 January 2023 (Sejm form no. 2870) – hereinafter the 'Act on the Supreme Court'

made more flexible and brought closer to the requirements of EU law. Although the Sejm has removed the provision according to which the 'circumstances surrounding the appointment of a judge' could not be tested at all, it left the prohibition to determine whether a judge had been lawfully appointed in the Act. It simultaneously created a strange solution under which a breach of these provisions did not constitute a disciplinary offence. The Senate therefore rightly repealed the prohibition to determine or assess 'the lawfulness of a judge's appointment or the authority arising from that appointment to perform judicial tasks' and to question 'the legitimacy of courts and tribunals, constitutional state bodies, as well as audit bodies and bodies protecting the law', thereby allowing for the full implementation of European standards. The provisions on disciplinary liability have also been adjusted accordingly, in line with milestone F.1.1.c, so that judges cannot be held accountable for checking the requirements of impartiality, independence and establishment by law, as well as for the content of judicial decisions other than in exceptional cases of an obvious and gross breach of the law. Furthermore, a welcome addition was that any member of the bench will be able to request a test to be conducted, which will facilitate proceedings with multi-member benches.

In the light of the requirements of the case law of the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR), the ability to assess the lawfulness of a judge's appointment is necessary for determining whether a court is 'impartial' and 'independent' and 'established by law'. The statutory test was reasonably supplemented by this last element as early as at the stage when the bill was being processed by the Sejm. The Senate additionally removed the reservation that the threat to a judge's impartiality should only be examined in the context of the circumstances of the particular case. In the light of the judgments in *Simpson* (C-542/18 RX-II and C-543/18 RX-I)*/Astradsson* (26374/18), the European standard refers in this respect to objective criteria linked to a gross breach of the fundamental norms of the judicial appointment process (court established by law) or, in the light of the judgment in *A.K.* (C-585/18, C-624/18 and C-625/18), to the presence of the so-called cumulative effect (impartial and independent court). The presumption is that if the threshold for these tests is reached, this is sufficient to conclude that a judge cannot be considered impartial in a democratic society based on law. A judge's relationship to the particular case pending before them may also affect their impartiality, but, under European standards, this cannot be the only means of assessment.

Secondly, the Senate referred matters related to the application of the test to the Criminal Chamber of the Supreme Court (SC), as, after all, are disciplinary matters and cases of immunity of judges and other legal professions. Such a move brings milestone F.1.1.a closer to being met. According to this milestone, in 'all matters regarding judges', a chamber of the Supreme Court that meets the requirements of the principle of effective judicial protection arising from Article 19(1) TEU should be competent. The stipulation that only judges with at least seven years of experience in the Supreme Court can rule on test cases or disciplinary (immunity) cases eliminates, albeit only provisionally, the danger of so-called 'neo-judges' nominated to the Supreme Court after 2018 ruling on these cases. The defects in the process of their appointment mean these judges would not meet the requirements of Article 19(1) TEU and, furthermore, as they are affected by the problem of defective appointments, in a way, they would be adjudicating on their own case. The Senate's removal of the provisions granting the Chamber of Extraordinary Control and Public Affairs of the Supreme Court the jurisdiction to assess the lack of independence of a court or the lack of independence of a judge is also a requirement of milestone F.1.1.a. This change additionally implements the hitherto unexecuted CJEU interim measure in C-204/21 R, which has already cost the Polish taxpayer more than PLN 2 billion to date. The transfer of employment cases of judges of the

Supreme Court to the Labour and Social Insurance Chamber of the Supreme Court, which falls within the scope of milestone F.1.1.a, should also be assessed positively.

Thirdly, the removal of the Supreme Administrative Court (NSA) as having jurisdiction over disciplinary cases of judges as well as the test, which was stipulated by the Sejm, not only brings milestone F 1.1.a ('a different chamber of the Supreme Court') closer to being met, but can also contribute to the avoidance of a breach of the requirements of milestone F.1.1.e(i), according to which, disciplinary cases, in particular those involving ordinary court judges, should be heard within a reasonable time. This is because it has been pointed out that the number of cases with which the Supreme Administrative Court would be burdened could significantly slow down their processing, or even paralyse the adjudicatory activity of the Supreme Administrative Court. Such a move also eliminated the potential unconstitutionality of this solution mentioned by many experts. The Constitutional Tribunal (TK) already held in case K 12/18 that the provisions specifying the Supreme Administrative Court's jurisdiction with regard to the judicial review of the NCJ's resolutions in the process of nominating judges to the Supreme Court are unconstitutional. The Supreme Court was found to be structurally more competent for exercising such control. The risk of a similar ruling being repeated would be significant. On the other hand, derogation of the provisions implementing the milestones would be problematic. This is because, given the horizontal nature of the 'judicial' milestones, they should be satisfied throughout the period of disbursement under the NRRP.

Fourthly, the Senate's amendments invalidated all rulings issued by the Disciplinary Chamber of the Supreme Court by law. Although, in this respect, milestone F.1.2 only requires cases already decided upon by the abolished Supreme Court Disciplinary Chamber to be re-examined by a court meeting the European requirements, there is a growing indication in the CJEU case law that rulings of a judicial body that does not meet the requirements of impartiality, independence and establishment by law should remain legally ineffective. The Senate's amendments are in line with this trend and, additionally, strengthen the effect of the resolution of the three joined chambers of the Supreme Court of 20 January 2020. Meanwhile, the abolition of the Professional Liability Chamber of the Supreme Court and awarding the parties the ability to review its judgments would avoid the need in the future to reverse the effects of a very likely breach of European standards, not only with regard to judges. Relevant proceedings before the ECtHR are already in progress, and the first interim measures have already been issued with respect to the Professional Liability Chamber of the Supreme Court, which cast doubt on whether this chamber meets the requirements of a court established by law under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) because of its formation and the participation of neo-judges.

## What can contribute to the acceptance that the milestones have been reached?

The Senate's amendments have been removed in the Sejm on 8 February 2023, which moves Poland further away from meeting the requirements that are necessary for the disbursement of the RRF funds. Furthermore, also with the desired amendments of the Senate, a number of objective problems could additionally have been noted in the context of the milestones that could reduce the effectiveness of the solutions proposed in the Act on the Supreme Court.

Firstly, the manner in which the Sejm worked on the Act on the Supreme Court does not meet milestone F.2.1. The fact that this is a members' bill and the pace of legislative work adopted (2 days passed from the first reading to the adoption of the bill), in principle, makes it impossible to hold extensive public consultations and make a reliable impact assessment. The accelerated pace of the procedure is not justified in the circumstances of this case. After all, the Regulations

of the Sejm, the Senate and the Council of Ministers on this have still not been amended, even though this is a requirement of milestone F.2.1.

Secondly, the test of impartiality is being examined, also in the Senate's version, with account taken of the circumstances accompanying the judge's appointment and their conduct after the appointment. The use of the conjunction 'and' here implies a high risk that the circumstances surrounding the judge's appointment alone are still not sufficient to conclude that a judge does not meet European standards. This is directly in conflict with the case law of the ECtHR and the CJEU. However, national courts can eliminate such a shortcoming in their application of the law by applying the principle of primacy and pro-EU interpretation in the context of the second subparagraph of Article 19(1) TEU, which meets the requirements of direct effect.

Thirdly, if account is taken of the judgments of the Constitutional Tribunal (CT) passed in the context of the removal of a judge in cases such as P 13/19, P 10/19 and P 22/19, and, additionally, the elimination of the rulings of the CJEU and the ECHR by the CT in cases P 7/20, K 3/21, K 6/21 and K 7/21, no matter how the status and legal effects of the CT's judgments are assessed, the examination of the circumstances accompanying the defective appointment of a judge is completely excluded from the level of the Constitution. Therefore, there is a substantial risk that the legal environment of the Act currently being processed will not provide the opportunity to conduct a test in the manner required by milestone F.1.1.d. There is also a risk that the solutions adopted will be removed from the legal order by the CT, which would open up a problem regarding the obligation to continue to meet the horizontal milestones throughout the period of the NRRP.

## Milestones – a cure for all evil?

The milestones, which are the result of negotiations between the Commission and the Polish government, are not intended to implement all of Poland's international obligations regarding the judiciary, while the RRF is not, in principle, an instrument for protecting the rule of law. The requirements regarding the courts have arisen here in two contexts. Firstly, because of the need to effectively control the implementation of the NRRP and protect the EU's financial interests. Secondly, in order to 'improve the investment climate', which is required by the recommendations of the 'European Semester' for Poland accepted in the assessment of the NRRP. The mechanisms of effective judicial protection must be strengthened in order to meet these requirements. At the same time, however, both levels leave the Commission and the EU Council with a great deal of discretion. The milestones are therefore the Commission's proprietary political choice and only express the expectation that Poland will perform a certain minimum in this respect. Also, the later assessment of whether the milestones have been met is discretionary. This means that the risks and problems with the milestones referred to in this text, as well as the removal of the Senate's amendments by the Sejm, may not ultimately prevent the disbursement of RRF funds for purely political rather than legal reasons.

It should also be borne in mind that, apart from the circumstances specified in the milestones, the Polish judicial system still fails to meet European requirements in other respects. This primarily applies to half of the members of the Supreme Court who have been appointed since 2018 without taking into account the rulings of the international courts. In the light of the judgments in *Reczkowicz* (43447/19), *Advance Pharma* (1469/20) and *Dolińska-Ficek and Ozimek* (49868/19 and 57511/19) the new judges do not meet the requirements of a court established by law under Article 6(1) ECHR. The CJEU also indicated such an assessment in the light of EU law in its judgment in C-487/19 W.Ż. regarding the judges of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court in the light of Article 19(1) TEU. The test that was introduced does not guarantee that judges who do not meet European standards will not rule if the ECHR or EU law is applied. Therefore, regardless of the possible (political) acceptance of the solutions in the Act on the Supreme Court for the purposes

of the NRRP, there is a risk that the Commission will continue to conduct proceedings against Poland under Articles 258 and 260 TFEU, which can result in further fines and the persistence of legal uncertainty regarding the solutions adopted in the area of the judiciary. These proceedings can apply to the lack of independence of the National Council of the Judiciary, the defective process of nominating judges, but also to the CT, with respect to which the Commission's proceedings are already at an advanced pre-judicial stage.

## *Deus ex machina*: invalidation of the whole of the Polish NRRP?

There is another risk. Even if the Commission, acting politically, accepts the proposed legislative solutions, it should be borne in mind that four European associations of judges have brought an action before the EU General Court regarding the invalidity (Article 263 TFEU) of the EU Council's implementing decision approving the Polish NRRP (T-530 to 533/22). These associations claim that the milestones negotiated by the Commission do not meet the requirements of CJEU case law. They also believe that, to a certain extent, issues of judicial independence, which fall within the scope of the 'identity of the EU legal order' (C-157/21), are not negotiable at all. As the 'judicial' milestones are of a horizontal nature, the implementation of the whole of the Polish NRRP depends on their fulfilment. Therefore, if the Court finds for the applicants, this opens up the possibility of cancelling the Polish NRRP in whole. These complaints also have a weakness. This is because it is questionable whether the applicant associations have the standing to file an action in this case. However, the complaint contains a number of new arguments based on the role of national courts and values of the rule of law (Article 2 TEU) as an element of EU identity. The EU General Court will therefore have the opportunity, as, after all, in the recently decided precedent case T-791/19 *Sped-pro* (under EU competition law), to interpret EU rules, including those regarding the standing to bring an action regarding the annulment of an EU Council implementing decision, in an innovative manner in the light of EU values. For the time being, an expedited procedure has been applied to the proceedings in this case. And although the risk that the NRRP will be invalidated as a result of this action should be considered low, it cannot be ruled out at this stage.

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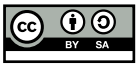

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