EUROPEAN ASSOCIATIONS OF JUDGES v COUNCIL

(T-530/22, T-531/22, T-532/22 and T-533/22)

Overview of some key arguments

BACKGROUND

On 28 August 2022, four of the main associations of judges in Europe took the exceptional step of bringing proceedings before the General Court: the Association of European Administrative Judges (AEAJ), the European Association of Judges (EAJ), Magistrats Européens pour la Démocratie et les Libertés (MEDEL), and Rechters voor Rechters (Judges for Judges).[1]

The actions seek the annulment of the Council Implementing Decision of 17 June 2022 approving the Commission's positive assessment of the Polish Recovery and Resilience Plan ('the contested decision'), specifically as regards its rule of law milestones. The Associations consider that the three milestones concerned are inconsistent with the case law of the Court and insufficient to guarantee effective judicial protection:

- The Associations contend, firstly, that under relevant rule of law case law of the Court of Justice, the decisions by the **Disciplinary Chamber** of the Polish Supreme Court are unlawful under EU law and, thus, judges affected by them should be immediately reinstated without the need to bring "review proceedings" before another body, as provided for in the contested decision.
- The Associations moreover, secondly, challenge the fact that the Council considers that mere figleaf reforms will be capable of **re-establishing effective judicial protection in Poland**, as required by the RRF Regulation as a precondition for funds being paid out. In fact, the reforms stipulated by the Council amount to no more than partial compliance with a binding judgment of the Court of Justice and be wholly inadequate to allow judges called upon to adjudicate any cases concerning the proper disbursement of RRF funds to do their jobs properly, i.e. in conditions where their independence and impartiality are guaranteed.

Legal and factual context

The action comes in the context of several legislative reforms affecting the judiciary in Poland which, in breach of the non-regression principle, have brought Poland back into a situation where it falls short of effective judicial protection standards under EU law and the European Convention of Human Rights (ECHR). These reforms include, inter alia:

- An increase in the powers of the Minister of Justice, who is at the same time the Prosecutor General, in relation to the internal organisation of the courts, the appointment and dismissal of presidents and vice-presidents of the courts, and the areas of promotion and discipline.
- The transfer of the power to elect the fifteen judicial members of the National Council of the Judiciary (NCJ), which is responsible for the examination and assessment of candidates for the position of judge, from the respective assemblies of judges to the

[1] Formally, Rechters for Rechters is not an association but a not-for-profit foundation dedicated to defending the rights of judges and the independence of the judiciary.

Sejm and the premature termination of the terms of offices of judges elected under the previous regulations.

- The modification of the organisation of the Supreme Court by creating two new chambers: (1) the Disciplinary Chamber and (2) the Chamber of Extraordinary Review and Public Affairs. The judges of these new chambers were appointed by the President of the Republic on the recommendation of the new NCJ.
- The introduction of significant changes to the rules of the disciplinary liability of judges, so as to considerably increase the role of the Minister of Justice / Prosecutor General in the area of judicial discipline and allow the content of judicial decisions to be classified as a disciplinary offence involving judges of the lower courts.
- The taking of steps to by the Polish authorities to curb references to the Court of Justice for preliminary rulings on the question of the independence of the courts in Poland or to call into question the decisions of the Polish courts which have made such references.
- The introduction of new disciplinary offences and sanctions for judges, including for questioning the lawfulness of judicial appointments made with the participation of the new NCJ.

The Court of Justice has in numerous judgments found deficiencies in effective judicial protection in Poland. Serious concerns have been expressed by the European Parliament[2] and the Commission[3] in respect of the independence of the judiciary and the implementation of the judgments of the Court of Justice.

The controversial role played by the Disciplinary Chamber has occupied the Court of Justice in a number of cases, including the following:

a) In its judgment in *A.K.*[4], the Court of Justice identified a number of criteria to determine whether the Disciplinary Chamber of the Polish Supreme Court was independent and impartial. The Polish Supreme Court applied these criteria and held that the Disciplinary Chamber failed to fulfil the criteria of an impartial and independent court.[5] It later reiterated that finding, adding that the judgments of the Disciplinary Chamber deserve no protection and cannot, therefore, produce legal effects irrespective of the date of such judgments.[6]

[2] European Parliament Resolution of 9 June 2022 on the rule of law and the potential approval of the Polish national recovery plan (RRF) and Report on Primacy of EU law and jurisprudence of Polish Constitutional Tribunal: recent developments in the light of the Polish Constitutional Tribunal's case law.
[3] European Commission: 2022 Rule of Law Report, Country Chapter on the rule of law situation in Poland, Luxembourg, 13.7.2022, SWD (2022) 521 final.
[4] Judgment of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982.
[5] Judgment of 5 December 2019 (III PO 7/18) and Orders of 15 January 2020 (III PO 8/18 and III PO 9/18) of the Polish Supreme Court (Labour Law and Social Security Chamber). This is also set out in the order of the Vice-President of the Court of 14 July 2021, C-204/21 R, EU:C:2021:593, para 27.
[6] Interpretative Resolution of 23 January 2020 of the Polish Supreme Court.

b) In Case C-791/19 *Commission v Poland (Disciplinary regime for judges)*[7] the Court of Justice declared that Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) on a number of counts:

- by failing to guarantee the independence and impartiality of the Disciplinary Chamber;
- by allowing the content of judicial decisions to be classified as a disciplinary offence;
- by conferring on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts and, therefore, by failing to guarantee that disciplinary cases are examined by a tribunal 'established by law'; and
- by failing to guarantee that disciplinary cases are examined within a reasonable time, and by failing to guarantee respect for the rights of defence of accused judges.

c) In pending Case C-204/21 R, *Commission v Poland*, the Vice-President of the Court of Justice, at the request of the Commission, granted interim measures on 14 July 2021 ordering Poland to immediately suspend the application of national provisions on the competences of the Disciplinary Chamber of its Supreme Court, until the final judgement in the case is delivered.[8] This Order was confirmed in subsequent Orders of 6 October and 27 October 2021.[9]

The contested decision

Against this background, in a meeting on 1 June 2022 the College of Commissioners decided to give a positive assessment of Poland's Recovery and Resilience Plan (RRP). It did so despite the concern of several Vice-Presidents and Commissioners, notably Executive Vice-Presidents Timmermans and Vestager, Vice-President Jourová and Commissioners Johansson and Reynders voiced in formal statements or letters. This group thus comprised all of the Commissioners with the key portfolios related to the rule of law. The respective statements have been widely reported and are accessible on social media.

The Commission's positive assessment was then approved by the Council of 17 June 2022 via the contested decision. In section 1 of the contested decision, concerning the reforms and investments to be conducted by Poland, component F1 concerns the justice system and is subdivided into two:

- F1.1, to which milestone F1G is linked, is in essence concerned with remedying only *some* of the illegalities identified in the judgment of the Court of Justice in C-791/19 *Commission v Poland*.
- F1.2, to which milestones F2G and F3G are linked, is concerned with addressing the specific situation of judges affected by decisions of the Disciplinary Chamber.

The aspect of the contested decision which the Associations of Judges challenge concerns these three milestones, F1G, F2G and F3G, which are incorporated by reference into the

[7] Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges),* C-791/19, EU:C:2021:596.
[8] Order of the Vice-President of the Court of 14 July 2021 (C-204/21 R, EU:C:2021:593).
[9] Order of the Vice-President of the Court of 6 October 2021 (C-204/21 R, EU:C:2021:834); Order of the Vice-President of the Court of 27 October 2021 (C-204/21 R, EU:C:2021:878).

operative part of the contested decision and are preconditions to any payments being made. The Associations consider that the milestones are vitiated by infringements of EU law and manifest errors of assessment.

ADMISSIBILITY

Introduction

The standing requirements for the purposes of actions for annulment under Article 263 TFEU, which need to be satisfied by any applicant seeking to be heard by the EU Courts, were laid down in the 1963 *Plaumann* judgment.[10] The arguments regarding admissibility are necessarily convoluted and technical, but the Associations in essence have to demonstrate that they are directly and individually concerned by the contested decision.

The Applicants here make the overarching point that standing requirements fall to be applied taking into account the specific nature and potential vulnerability of the interest sought to be protected. In this regard, the CJEU has held that judicial independence and impartiality preclude not only any direct influence, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.[11] Therefore – in contrast to other situations – even merely indirect effects, and even the mere risk of political control over the content of judicial decisions, undermine the interests sought to be protected, and thus the rule of law. Justice must not only be done; it must be seen to be done.

Direct concern

According to settled case-law, the condition that a natural or legal person must be directly concerned by the measure being challenged requires two cumulative criteria to be met; first, the contested measure must directly affect the legal situation of that person; and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules.[12]

Legal situation directly affected

The contested decision directly affects the legal situation of the Associations insofar as the introduction of review proceedings pursuant to *milestones F2G and F3G* presents an additional obstacle to judges subjected to unlawful sanctions being rehabilitated and reinstated, affecting them directly. This also has an impact on other Polish judges, who are subject to a chilling effect in the exercise of their profession as long as the situation of their colleagues has not been cleared,[13] as well as being simply (but tangibly) subject to a heavier workload as long as those colleagues remain suspended. The prolongation of the suspension

[10] Judgment of 15 July 1963, *Plaumann v Commission*, C-25/62, EU:C:1963:17.

[11] Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, para. 60, citing judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România'*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para. 197, with further citations.

[12] Judgment of 12 April 2013, *CISAC v Commission*, T-442/08, EU:T:2013:188, para. 66; judgment of 12 July 2022, *Nord Stream 2*, C-348/20 P, EU:C:2022:548, para. 43 with further citations.

[13] The Court of Justice has held that: "*The mere prospect, for the judges of the [Supreme Court] and the ordinary course, of being exposed to the risk of a disciplinary procedure capable of leading to proceedings being brought before a body whose independence is not guaranteed is likely to affect their own independence.*" Order of 8 April 2020, *Commission v Poland (Régime disciplinaire des juges)*, C-791/19 R, EU:C:2020:277, para. 90; Judgment of 15 July 2021, C-791/19, *Commission v Poland (Régime disciplinaire des juges)*, EU:C:2021:596, para. 82.

of judges affected by unlawful sanctions is moreover precisely the sort of factor likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals.[14] It thus directly affects the ability of all judges to properly fulfil the functions which are incumbent on them by virtue of their offices.

Milestone F1G likewise directly affects the legal situation of the Associations and their members as it is insufficient to re-establish effective judicial protection, which is a prerequisite for the functioning of an internal control system. Polish judges will thus be forced to adjudicate cases, including cases involving RRF funds, in professionally impossible circumstances where they will still be subject to unlawful pressures and curtailment of their independence and impartiality – or at very least where there risk being doubts about their independence and impartiality.

Polish judges would be forced to exercise their functions in circumstances where there would notably be doubts over their ability to (i) make references to the Court of Justice; (ii) give full effect to EU law where this is required to disapply provisions of Polish law, including provisions of the Polish Constitution found to be contrary to EU law; and (iii) render decisions against the interests of the Government or the ruling political party.

Ultimately, all three milestones directly affect all European judges, as well as the Associations in their own right, by virtue of the strong links between the legal orders of Member States and that of the Union.

No discretion

The existence of discretion must necessarily be assessed with regard to the specific legal effects referred to in the action, i.e. the three milestones F1G, F2G and F3G.

The role of the Commission under Article 24 of the RRF Regulation is in this regard limited to determining whether these milestones have been met. Where the Commission makes a positive assessment, it is bound to "adopt without undue delay a decision authorising the disbursement of the financial contribution". The milestones thus circumscribe the actions of the Commission. Neither the Commission nor Poland has a discretion to modify the milestones. The mere fact that an act being challenged may be the subject of implementing measures does not necessarily mean that there is a discretion as regards the addressees of that act.[15]

Individual concern

The Associations and their members are individually concerned by the contested decision because it affects them "*by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*".[16]

Under settled case law, where a measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of that group, those persons may be individually concerned by that measure inasmuch as they

[14] Judgment of 15 July 2021, *Commission v Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para 60.

[15] Judgment of 12 July 2022, *Nord Stream 2*, C-348/20 P, EU:C:2022:548, para. 96.

[16] Judgments of 15 July 1963, *Plaumann v Commission*, C-25/62, EU:C:1963:17, para. 107. and of 12 July 2022, *Nord Stream 2*, C-348/20 P, EU:C:2022:548, para. 156.

form part of a limited class.[17] In the present case, judges subjected to unlawful sanctions must in any event be considered to form part of such a limited class. Two of the Associations' members comprise Polish judges who have been the subject of disciplinary sanctions, and the overall number of judges in this position is strictly limited and ascertainable. The direct and individual concern of these judges is moreover manifest from the fact that interim measures have been granted by the ECtHR to a number of Polish judges subject to disciplinary measures.

The Council moreover manifestly took account of the situation of Polish judges, particularly those judges subject to Disciplinary Chamber decisions: milestone F1G concerns the specific situation of judges in Poland, the scope of disciplinary liability of judges, and the procedural guarantees and powers of parties in disciplinary proceedings concerning judgments; milestones F2G and F3G concern even more specifically "the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court in disciplinary cases and judicial immunity cases."

Effective judicial protection requires a flexible approach to standing

A wider argument exists regarding a more flexible approach to the standing requirements in relation to the category of cases involving serious a breakdown of the rule of law and based on the second subparagraph of Article 19(1) TEU, in particular in circumstances where other avenues of effective judicial protection may already have ceased to be available. In the present case, due to deficiencies in effective judicial protection, the availability of a remedy through the preliminary reference procedure can no longer be assumed.

Also, the purpose of actions relying on Article 19(1) TEU is not to catch all possible issues arising with regard to the national judiciary, but only those of a certain gravity and/or of a systemic nature, to which the internal legal system is unlikely to offer an adequate remedy.

At the same time, because the rule of law is not merely one of the objectives of the Union (Article 3 TEU), but one of its founding values (Article 2 TEU), and therefore a part of the "very identity" of the Union,[18] actions protecting the rule of law are special in that all European citizens and legal persons subject to the law are in principle affected. It cannot be the case therefore that, by virtue of the magnitude and the severity of the infringement at issue, the standing requirements of Article 263 TFEU stand in the way of any action to defend the fundamental values at stake. It cannot be the case that because everyone is affected, nobody can act.

SUBSTANCE

The actions advance five pleas in law, which can conveniently be grouped into three groups:

- The first two pleas are concerned with the unlawful disciplinary sanctions imposed on some Polish judges, and the "review procedure" which the Council has seen fit to impose on them instead of requiring their immediate rehabilitation and reinstatement. This, on the one hand, fails to pay due regard to judgments of the Court of Justice on the matter and thus infringes Articles 2 and 13(2) TEU; on the other hand,

[17] Judgment of 12 July 2022, *Nord Stream 2*, C-348/20 P, EU:C:2022:548, paras. 157-158.
[18] Judgment of 16 February 2022, *Hungary v European Parliament*, C-156/21, EU:C:2022:97, para. 127.

it infringes the treaty provisions interpreted by the Court of Justice in the judgments concerned, i.e. Articles 2 and 19(1) TEU and Article 47 of the Charter.

- The third and fourth please are concerned with the ineffectiveness of controls in the absence of effective judicial protection in Poland, apparently accepted by the Council in its decision, which means that the Council either misunderstood the legal requirements incumbent on it by virtue of the RRF Regulation and Article 325 TFEU, or that it committed manifest errors of assessment in considering that figleaf reforms could re-establish effective judicial protection.
- The fifth plea concerns the Council's statement of reasons, which – while diplomatic – is legally inadequate and self-contradictory.

Failure to pay due regard to judgments of the Court of Justice and infringement of the treaty provisions interpreted by the Court

The contested decision, and more specifically milestones F2G and F3G, deviate from and are inconsistent with the case-law of the Court of Justice concerning the Disciplinary Chamber. While the case-law in question requires judges unlawfully sanctioned by the Disciplinary Chamber to be reinstated and rehabilitated, notably by virtue of the direct effect the second subparagraph of Article 19(1) TEU, the contested decision purports to make reinstatement of judges subject to "review proceedings" in front of a court, thereby adding a procedural burden, uncertainty and delay. By acting inconsistently with the case-law of the Court of Justice, and in according legal effects to unlawful decisions of the Disciplinary Chamber, the Council has infringed the duty of mutual sincere cooperation imposed on EU institutions by Article 13(2) TEU as well as the rule of law itself.

In addition, it results from settled case law that EU institutions cannot give guarantees concerning the compatibility of specific practices with EU law or authorise practices which are not compatible with the Treaties. In *Bosman* the Court of Justice made the following statement in relation to the Commission, which is transposable to the Council:[19]

"… except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty […]. In no circumstances does it have the power to authorize practices which are contrary to the Treaty."

The case-law of the Court of Justice concerning the Disciplinary Chamber authoritatively interpreted the obligations flowing from the provisions of primary EU law at issue in those proceedings as requiring decisions of the Disciplinary Chamber to be considered null and void. In the circumstances, no legal effects can be attributed to any decisions of the Disciplinary Chamber purporting to impose sanctions on judges, and judges affected by such decisions are required to be reinstated and rehabilitated with immediate effect.

Notwithstanding this, the milestones F2G and F3G, rather than requiring Poland to immediately suspend the Disciplinary Chamber and to reinstate and rehabilitate the judges who were the subject of unlawful disciplinary proceedings with immediate effect, instead purport to introduce "review proceedings" for judges affected by unlawful disciplinary sanctions.[20]

[19] Judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, para. 136.

[20] Annex to the contested decision, p. 200.

These milestones, on which the contested decision is founded, are inconsistent with the case-law of the Court of Justice concerning the Disciplinary Chamber in that they:

a) accord legal effects to the decisions of the Disciplinary Chamber rather than considering them null and void; and
b) impose additional procedural burdens, uncertainty and delays on judges affected by unlawful decisions of the Disciplinary Chamber by requiring the judges in question to commence a new set of proceedings before a newly constituted chamber in the Supreme Court to clear their name; and
c) do not even foresee the judges in question being at least temporarily reinstated pending the outcome of any review proceedings.

Furthermore, the Council has exceeded its competences by purporting to decide that the review procedures set out therein will remedy the situation of judges affected by the decisions of the Disciplinary Chamber and by purporting to authorise a Member State to take steps which are incompatible with the case-law of the Court of Justice concerning the Disciplinary Chamber.

A corollary of disregarding the case-law of the Court of Justice concerning the Disciplinary Chamber in the Contested Decision, in the ways mentioned above, is that the Council infringes Article 2 and 19(1) TEU and Article 47 of the Charter – the provisions interpreted by the Court of Justice in its relevant case-law.

Ineffectiveness of controls in the absence of effective judicial protection

Milestones F1G, F2G and F3G are insufficient to re-establish effective judicial protection in Poland, which – as the Council has expressly recognised[21] – is a prerequisite for the functioning of an internal control system. The Contested Decision accordingly infringes Article 22 of the RRF Regulation and Article 325 TFEU, which require effective and efficient internal controls.

Article 22(1) of the RRF Regulation requires Member States, as recipients of funds, to take all appropriate measures to protect the financial interests of the Union and to ensure that the use of funds in relation to measures supported by the RRF complies with the applicable Union and national law, in particular regarding the prevention, detection and correction of fraud, corruption and conflicts of interests. To this effect, the Member States must provide an effective and efficient internal control system and the recovery of amounts wrongly paid or incorrectly used.

In accordance with Article 20(5)(e) of the RRF Regulation, milestones linked to the protection of the financial interests of the Union should be set out in order to ensure compliance with Article 22 of that Regulation. However, in the absence of effective judicial protection (by independent and impartial judges), there can be no guarantee that EU law will be applied in detecting and sanctioning fraud and corruption, and ensuring that funds unduly paid are effectively recovered.

By way of consequence, to the extent that the Contested Decision purports to authorise payments to a Member State in circumstances where effective judicial protection is not guaranteed, and hence in circumstances where no functioning internal control system is in

[21] Recital 45 to the RRF Regulation.

fact ensured, the Contested Decision infringes Article 22 of the RRF Regulation and Article 325(1) TFEU and/or is vitiated by a manifest error of assessment.

That is the case in at least three respects:

a) It is impossible to ensure respect for Article 19(1) TEU as long as the Constitutional Tribunal does not fulfil the requirements of an independent and impartial tribunal established by law and considers the provisions of the EU Treaties to be incompatible with the Polish Constitution, expressly challenging the primacy of EU law;
b) Incoherence and manifest error of assessment in setting the timeline for reforms;
c) The reforms required by the milestones fail to address the deficiencies identified by the EU institutions themselves and are thus inadequate in ensuring effective judicial protection or a functioning internal control system.

Consequently, by authorising payments to a Member State in circumstances where effective judicial protection is not guaranteed, the decision infringes Articles 22 of the RRF Regulation and Article 325(1) TFEU. Alternatively, it is vitiated by manifest errors of assessment in considering that, notwithstanding the absence of effective judicial protection and/or the multiple, serious and ongoing infringements of Article 19(1) TEU by Poland, a functioning internal control system could exist.

By the same token, there has been a misapplication of the criteria laid down in Article 19(3) of the RRF Regulation, which requires the Commission to assess the relevance, effectiveness, efficiency and coherence of the recovery and resilience plan, taking into account criteria set out in that article, applied in accordance with Annex V to the RRF Regulation. The Council committed a manifest error of assessment in declaring the milestones to be "adequate arrangements" for the prevention, detection and correction of corruption in Poland. Specifically, the Council failed to properly verify the application by the Commission of the criteria of Article 19(3) of the RRF Regulation. Contrary to what is required by those criteria:

- the RRP manifestly cannot be expected to contribute to effectively addressing "all or a significant subset of challenges identified"[22] in circumstances where only compliance with a single judgement of the Court of Justice (in Case C-791/19) is sought – and then only in part as set out below, against a background of dozens of serious ongoing infringements;
- the arrangement proposed manifestly cannot be "expected to ensure an effective monitoring and implementation" of the RRP, and neither can they be "expected to prevent, detect and correct corruption, fraud and conflicts of interests when using the funds provided"; in circumstances where internal controls are fatally undermined by a formal declaration of unconstitutionality of several Treaty provisions, including Article 19(1) TEU, as declared by the Polish Constitutional Court in its judgments in case P 7/20 and case K 3/21, where there is a challenge to the principle of the primacy of EU law, and where moreover to date references to the Court of Justice continue to be obstructed; [23]
- the RRP likewise manifestly cannot be considered to contain measures for the implementation of reforms that "represent coherent actions"[24] in circumstances

[22] Article 19(3)(b) of the RRF Regulation.
[23] Article 19(3)(h) and Article 19(3)(j) of the RRF Regulation.
[24] Article 19(3)(k) of the RRF Regulation.

where compliance is sought only with a single apparently arbitrarily chosen judgement of the Court of Justice (in Case C-791/19).

- the RRP cannot be "expected to prevent, detect and correct corruption, fraud and conflicts of interests when using the funds provided",[25] in circumstances where there currently is no functional independence of the prosecution service from the government, the Minister of Justice also holding the office of Prosecutor-General.

Overall, the "reforms" set out in component F1.1, and thus required pursuant milestone F1G, are not based on any coherent overarching assessment of what is required to re-establish effective judicial protection, in the light of the broad range of deficiencies identified by the institutions, but rather arbitrarily hone in on the obligations incumbent on Poland by virtue of the judgment in Case C-791/19.

Inadequate statement of reasons

Article 296 TFEU requires that legal acts must state the reasons on which they are based. Moreover, the principles of legality and legal certainty require decisions of the Institutions to be clear, precise and consistent.[26]

In particular, the reasoning underpinning the Contested Decision is insufficient in relation to milestones in that it fails to explain:

- why the milestones were based on of the judgment of the Court of Justice in Case C-791/19 rather than any of the other judgments finding breaches of rule of law;
- why it was considered sufficient, in order to re-establish effective judicial protection, to obtain compliance with that single judgment;
- why it was for example not considered necessary to address in milestones the apparent conflict between the Polish Constitution and Article 19(1) TEU or the current challenges to the primacy of EU law in Poland;
- no reasons are given for the assessment as "adequate (Rating A)" given to the arrangements to prevent, detect and correct corruption, fraud and conflicts of interest as recorded in recital 44 of the Contested Decision, in circumstances where there should have been real doubts.

In relation to the decision to subject judges affected by unlawful sanctions of the Disciplinary Chamber to "review proceedings", rather than permitting and requiring them to be reinstate and rehabilitated immediately, no reasoning whatsoever is given. Additional failures to give reasons and/or incoherence in this regard are:

- why automatic reinstatement and rehabilitation is not required by milestones F2G and F3G;
- why not even a temporary reinstatement pending outcome of review proceedings was envisaged in the milestones;
- why it was considered possible to start making payments under the RRF at a time when not all judges affected by unlawful sanctions have been reinstated.

[25] Article 19(3)(j) of the RRF Regulation.

[26] See e.g. judgments of 15 September 2005, *Ireland v Commission*, C-199/03, EU:C:2005:548 at para. 69 and of 15 June 2010, *Mediaset v Commission*, T-177/07, EU:T:2010:233, para. 179.