fidh

Don’t Let Money Rule the Law

How the Polish government uses public and EU funds to destroy the rule of law

in collaboration with

ifp instytut finansów publicznych

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Abbreviations

BGK - Bank of National Economy *[pol. Bank Gospodarstwa Krajowego]*

CBA - Central Anti-corruption Bureau *[pol. Centralne Biuro Antykorupcyjne]*

CFR - EU Charter of Fundamental Rights *[pol. Karta Praw Podstawowych KPP]*

CJEU - Court of Justice of the European Union

CT - Constitutional Tribunal *[pol. Trybunał Konstytucyjny TK]*

ECtHR - European Court of Human Rights

ENCJ - European Network of Council of the Judiciary

EPPO - European Public Prosecutor's Office

IOSAI - International Organization of Supreme Audit Institutions

NCJ - National Council of the Judiciary *[pol. Krajowa Rada Sądownictwa KRS]*

NCBR - National Center for Research and Development *[pol. Narodowe Centrum Badań i Rozwoju]*

NIK - Supreme Audit Office *[pol. Najwyższa Izba Kontroli NIK]*

NRRP - National Recovery and Resilience Plan *[pol. Krajowy Plan Odbudowy KPO]*

OLAF - European Anti-Fraud Office

PFR - Polish Development Fund *[pol. Polski Fundusz Rozwoju]*

PiS - Law and Justice party *[pol. Prawo i Sprawiedliwość]*

RRF - Recovery and Resilience Facility *[pol. Funduszu Rozwoju i Odbudowy]*

Introduction

On August 26, 2023, Jarosław Kaczyński, the leader of the ruling coalition in Poland, stated – with regard to the country's upcoming parliamentary elections – that "if we [Law and Justice] win, we will also win our rule of law, which is very often trampled on today. By whom? By the courts. By those courts that are so defended. They very often mock the obvious facts. They are just mocking the rule of law. We will change this. No one will stop us this time. We'll change it."[1]

Background

In 2023, Poland remains in a permanent state of crisis of the rule of law. As the country approaches a key election that will decide the fate of the Polish nation for the next four years and beyond, there are no signs that the crisis that was sparked by the Law and Justice (PiS) party's first power grab in October 2015 might be dying down. Quite the opposite. As the Polish people prepare to go to the polls on October 15, to decide whether to renew their trust in a government that has been relentlessly trampling on democracy and undermining human rights and fundamental freedoms for the past eight years, the situation remains tense.

Poland has been the target of serious criticism at home and internationally since the current ruling coalition took power in 2015 and immediately started attacking independent institutions and weakening democratic checks and balances, with a view to consolidating control and removing obstacles on its path to absolute power. By progressively dismantling or taking control of independent institutions, especially the judiciary and the Constitutional Court, limiting the role of the opposition, and attacking independent media and independent civil society, the Law and Justice government earned Poland a spot on the team of Europe's so-called "illiberal democracies" – a political oxymoron which countries that have undergone democratic and rule of law backsliding in recent years have proudly claimed for themselves.

In spite of serious criticism raised at various levels against a progressive deterioration of rule of law and democratic standards in Poland, including at the EU level where Poland has been the subject of numerous procedures – not least the procedure laid down in Article 7.1 of the Treaty on European Union (TEU), the so-called "nuclear option" with which the EU has equipped itself to react to situations where there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU, including the rule of law – by which the Union aimed to hold Poland accountable for its repeated violations of EU laws and principles, this has only had a modest effect on the Polish government's conduct, and has ultimately failed to halt the backsliding.

Faced with the difficulty of reining in Warsaw's autocratic ambitions and ensuring that Poland complies with EU values, the European Union has equipped itself with new tools that allow for a more articulated and effective response to rule of law breaches. Among these, the Conditionality Regulation, which entered into force in 2021 and became applicable in 2022 – despite the Polish and Hungarian governments' attempts to sink it by questioning its legality – provides the Union with a novel mechanism to address rule of law violations that have an impact on the EU budget. By linking respect for the rule of law to actual – or indeed, potential – threats to the EU's financial interests, by means of investigating the impact that rule of law deficits can have on the use of EU funds, the Regulation offers the EU a powerful instrument to sanction rule of law breaches through the lens of their effect on EU money. As EU funds account for approximately 2% (in terms of net contributions) of Poland's GDP, making the release of EU funding to Poland conditional upon respect for the rule of law constitutes a powerful incentive to push the Polish government to comply with EU standards in this area.

1. https://oko.press/kaczynski-zapowiada-przejecie-sadow-po-wyborach

The polish parliament. @FIDH

The report

This report takes a closer look at how EU funding is being used by Polish authorities who are entrusted with its management and its spending, with a view to determining to what extent the current deficiencies – which have been widely documented – in the functioning of the rule of law system have affected, or are likely to affect, the way in which EU money is spent in Poland. By looking at specific cases where EU funding has been used in a fraudulent or otherwise irregular manner, in breach of the requirements set out in both national and EU law for the use of public, including EU, funding, and by exposing how the abuse has been made possible by loopholes in the rule of law and checks and balances systems that in a healthy democracy are entrusted with safeguarding public money against abuse, the research exposes the links that exist between such deficiencies and the abuse of EU money, which constitute an attack against the financial interests of the EU.

In the first chapter, by focusing on selected cases – investigated by FIDH in cooperation with Polish investigative journalists – where EU funding has been misused, the report exposes what seems to be a recurring pattern of abuse in the allocation and management of EU funds, which points to a more systemic practice of mismanagement and, in some cases, outright fraudulent allocation of public, including EU funding. It also looks at how the mechanisms that have been put in place to monitor the use of EU funds in some areas, and safeguard it from abuse, do not, in practice, provide sufficient guarantees against such abuse. Finally, it takes a peek at the recent dispute between the Polish government and the European Commission regarding the release of EU funds under the EU Recovery and Resilience Facility, which have been temporarily withheld pending compliance by Poland with so-called "milestones" – including rule of law milestones – and which adds to an overall picture of systematic noncompliance by the government with rule of law principles whose respect would guarantee the correct use of EU money.

The second chapter takes a step back and provides an overview of the institutional framework meant to ensure the correct spending of money from the public budget, including EU money managed – fully or partially – by national authorities, and to prevent its abuse. By looking at the institutions and mechanisms available at the national level in Poland to oversee such spending – including the Central Anti-Corruption Bureau, the Supreme Audit Office, and the prosecution service – and the extent to which they cooperate with EU mechanisms entrusted with overseeing the way EU money is being spent and with investigating and prosecuting corruption and fraud whenever EU funding is involved (namely the European Public Prosecutor's Office (EPPO) and the European Anti-Fraud Office (OLAF)), the report attempts to determine whether these instruments and institutions are fit for the purpose of ensuring the correct management of public, including EU, funding, and protecting EU money against abuse.

In the last chapter, the report builds on the findings presented in the previous chapters to assess whether, in the light of such findings, there are sufficient grounds to argue in favour of the activation of the Conditionality Regulation to address serious rule of law breaches in Poland that affect, or risk affecting, the Union's budget.

The report ends with a series of recommendations to decision-makers at both the national and the EU level, which aim at guiding the actions of public institutions in effectively addressing the issues identified by this research.

Methodology

The report is built on eight months of combined desk and field research. In addition to desk research conducted by FIDH's investigative team and FIDH's member and partner organisations in Poland, a fact-finding mission was conducted in Poland from May 28 to June 2, 2023. On this occasion, eighteen semi-structured interviews were conducted by the FIDH delegation in person in Warsaw with 27 interlocutors from public institutions, professional associations and bodies, independent media, civil society organisations, and activists. This included: the Supreme Audit Office, the office of the Commissioner of Human Rights of Poland, representatives of Lex Super Omnia, an independent prosecutors' association, and of Iustitia, an independent association of judges, representatives of the Warsaw Bar Association, journalists from independent media RadioZET and Gazeta Wyborcza, representatives from NGOs, such as the the Campaign Against Homophobia, the Helsinki Foundation for Human Rights, the National Federation of Non-governmental Organisations and Watchdog, public policy think tank the Institute of Public Finances, the Federation of Polish Entrepreneurs Confederation Lewiatan, 2 members of Parliament from different opposition groups and 3 members of the Senate[2].

In addition to the in-person interviews conducted during the mission, the investigators met – in person or online – with representatives of the European Commission, the European Parliament, and the European Union Agency for Fundamental Rights. The interviews were followed by an exchange of written correspondence and documents with the persons interviewed in Poland, in Brussels or online. FIDH also reached out, for the purposes of the investigation, to the Ministry of Justice, the National Prosecutor's Office and the Central Anti-corruption Bureau – but its requests for a meeting went unanswered.

Given the current situation in Poland, where those who are critical of the government are systematically targeted, discredited, and subject to attacks, our sources throughout the report have been anonymised, so as not to expose them to any further risk to their safety or reputation or eventual institutional retaliations due to their contribution to this investigation.

FIDH worked closely, for the purposes of this investigation, with three investigative journalists from Poland, who supported it in investigating the specific cases that are documented in this report, as well as with Polish civil society organisations, including FIDH member organisation the Helsinki Foundation for Human Rights (HFHR), the Institute of Public Finances (IPF), and the National Federation of non-Governmental Organisations (OFOP). The contribution of local members and partners has been crucial in ensuring an in-depth documentation and accurate reporting of the issues dealt with in the report. FIDH would like to warmly thank its local members and partners for their contribution to this investigation, as well as for their persistent and high-quality engagement in defence of democracy, the rule of law, and human rights in Poland.

The investigation and this report were conducted in the framework of a one-year project called "'Don't Let the Money Rule the Law: connecting EU funding abuse to the Rule of Law Crisis in Poland," funded by the Open Society Foundations. The project is inscribed in the context of FIDH's long-term engagement for the protection and promotion of the rule of law in Poland, by means of documentation, advocacy, litigation, awareness-raising, and capacity-building activities. FIDH would like to thank the Open Society Foundations for making this research possible through its financial support.

The author organisations are the only parties responsible for the content of this report, which cannot be considered to reflect the views of the Open Society Foundations.

2. The names of the institutions, organisations and individuals that FIDH interviewed for the purposes of the investigation have been mentioned only when the persons concerned consented to it.

CHAPTER ONE: Mechanisms Uncovered - How those in power use public and EU funding schemes to stay on a winning streak

> *"At the beginning we thought it was about taking over institutions, now we see that by doing so they prepared the ground for them to be able to use public money as they pleased to strengthen and consolidate their power. They created a space of impunity. They did it not only to protect their political but also their financial interests." – Krzysztof Śmiszek, a member of Parliament representing opposition party Lewica*

The following chapter takes a closer look at concrete cases that illustrate a practice of misuse of existing EU funds by national authorities in Poland entrusted with their management under so-called "shared management." Most cases that will be presented in this chapter relate to EU funds under shared management, such as cohesion policy funds.[3] With regard to the Cohesion Fund in particular, the report addresses situations where funding has been withheld due to noncompliance with "horizontal enabling conditions," namely the newly introduced requirement under the Common Provisions Regulation (CPR)[4] for programmes funded through such funds to comply with the EU Fundamental Rights Charter throughout their implementation. In this context, it also looks at procedures and bodies which have been established under the CPR to ensure such compliance, and to report on noncompliance. Our research demonstrates how – due to being largely disregarded, ignored, or misused by authorities entrusted with their management and implementation – these procedures and bodies cannot be considered as effective safeguards to protect the EU budget.

The report also looks at funding withheld due to the failure by the authorities to address EU institutions' concerns over the ongoing rule of law crisis in the country, and to meet the rule of law milestones set out by the EU Commission as a pre-condition for releasing funding to Poland under the Recovery and Resilience Facility (RRF).[5] As these funds are under direct management by the Commission, the latter can establish milestones and targets requiring the Member State concerned to adopt and implement reforms. It can also withhold or suspend RRF payments to the Member State when it finds irregularities that endanger the milestones' satisfactory fulfilment. Although Poland had its National Recovery and Resilience Plan (NRRP) approved by the EU Commission in 2022,[6] funding has not been released to Poland, pending a request for payment to the Commission, supported by proof that the milestones have been fulfilled.

I.I. Disintegration of the public finance system: restriction of democratic control over an important part of public finances

I.I.i Relationship of EU funds to public finances as a whole

The expenditure of European funds must be considered comprehensively and from a broader perspective, from the perspective of public finances as a whole.

Subjective relationship

First, because very often the same institutions are responsible for the distribution and management of national public funds and European funds. Some ministries under the supervision of politicians are intermediary, implementing or managing bodies for programmes financed with European funds. It is therefore useful to analyse how these institutions manage national public funds in order to avoid the risk of mismanagement of European funds.

In recent years, a number of irregularities in the management of national funds have been exposed. The NCBIR, for example, has both national and European funds in its budget. The irregularities at this

3. https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/cohesion-fund-cf_en.
4. https://commission.europa.eu/funding-tenders/find-funding/funding-management-mode/common-provisions-regulation_en.
5. https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en.
6. https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/country-pages/polands-recovery-and-resilience-plan_en.

institution are described in the next section. The Ministry of Science and Education is the intermediary body for the Operational Programme ***Knowledge Education Development***. And in recent months, irregularities have been uncovered in the management of national funds. One example is the awarding of grants to foundations and external institutes under the national programme ***Development of the Infrastructural Potential of Institutions Supporting the System of Schooling and Education***. The funds from this programme were allocated from the general reserve of the state budget at the end of 2022. An investigation by a journalist found violations in the distribution of these amounts. The funds went to foundations and institutes sympathetic to or associated with the current government. They went to foundations that had never operated before or had only recently been established. They were very large grants amounting to several million zlotys for the purchase of buildings and premises. The media referred to this case as the "Villa Plus affair"[7] This programme is in fact a new, creative solution. Previously, when there were grants and subsidies for foundations and external institutes, they were financing their day-to-day operations. Under this programme, the legislation was specifically changed and the scope of the allocation of funds was extended to include investment purposes, e.g. the purchase of real estate. Thanks to this, the authorities was able to give individual foundations and institutes very large grants for the one-time purchase of relatively expensive real estate. For some foundations, the value of the real estate exceeded many times the size of the institution's annual operations. The expansion of the catalogue has made the awarding of large grants possible in the first place. It would be difficult to justify a current expenditure grant that exceeds the annual operating budget of a foundation many times over. It would be difficult to justify an action or activity with such a large value. Hence the idea of distributing grants for capital expenditure. After a few years, the foundation could turn the property into money. Irregularities in this programme were also confirmed by the Supreme Audit Office (Najwyższa Izba Kontroli, NIK): the value of the whole programme was 40 million zloty, and the NIK proved irregularities in grants whose value was several million. The NIK pointed out that in the grant programmes provided by the Ministry of Science and Higher Education (Ministerstwo Nauki i Edukacji, MNiE), applications that were not recommended by the advisory teams were selected arbitrarily, representing between 15% and 64.4% of the total beneficiaries in each programme. When irregularities are found in the distribution of national funds, the fundamental question is whether such an entity should be certified and accredited as an intermediary body for programmes funded by European funds.

Economic relationship: the fiscal space perspective

The second argument for a broader consideration of the expenditure of European funds is that European funds create fiscal space in the national budget. If part of the state's public tasks are financed by European funds, national budgets do not have to be spent for these purposes, and this creates free space for extra discretionary spending under the control of politicians. In other words: If there are no democratic procedures and no proper control and monitoring of the national budget and national public funds, then the inflow of European money creates space for undemocratic governments to spend national public funds undemocratically. Even if there are no irregularities in the use of European funds, there can be irregularities in the use of national budgets, and this approach is easier when European funds create fiscal space for discretionary and arbitrary spending of national budget funds. After all, there is always some rigid expenditure in the budget that is not subject to arbitrariness and political influence. Once the rigid expenditures are fulfilled, the government is left with some discretionary budget to spend undemocratically.

The division into rigid and flexible spending is used in analyses and the literature on public finance. Total public finance expenditure can be divided into these two categories. This also applies to the household budget. A rigid expenditure of a household is the rent for a flat, which is fixed by a contract over several years. Flexible expenditure, on the other hand, is money spent for a cinema or a restaurant. Rigid expenditure of the state budget is the same as expenditure fixed by law. Rigid expenditure of the state budget is the part of public expenditure that the state is obliged to spend under national or international laws, agreements or court rulings. A classic case of rigid expenditure is pension expenditure. In the short term, these types of spending are beyond the control of politicians. They are determined by macroeconomic parameters, the demographic structure and the statutory rules for automatic indexation of pensions. Rigid spending also includes debt servicing costs, which depend on bond yields and the situation on the financial and currency markets. Flexible expenditures are expenditures for repairs, for investments and for grants to private institutions. Their amount is set each year in the budget law, but is

7. '"Willa plus". 1,5 miliona złotych na mieszkanie. Jest jednak problem', https://www.money.pl/gospodarka/willa-plus-1-5-miliona-zlotych-na-mieszkanie-jest-jednak-problem-6941042331904608a.html;
'"Willa plus". O co chodzi w aferze z Przemysławem Czarnkiem w roli głównej? Wyjaśniamy', https://wiadomosci.onet.pl/kraj/willa-plus-wyjasniamy-co-chodzi-w-glosnej-aferze-wokol-ministra-czarnka/cxz1fll;
'Minister Czarnek, nieruchomości i fundacje związane z PiS. Co wiemy o aferze "Willa plus"' https://wyborcza.pl/7,75398,29462455,minister-czarnek-nieruchomosci-i-fundacje-zwiazane-z-pis-co.html.

not prescribed by law. There is no law that prescribes how much the government must spend on grants in a given financial year. This is a discretionary decision. The rules for the distribution of funds are also largely discretionary. This does not mean that flexible spending is illegal. There is just no rule on how much it should be, and there are no rigid rules on how it is allocated. It's like spending on a cinema in a household. It is a discretionary decision. One month we can go to the cinema only once, and the next month we can go 7 times.

The influx of European money increases the scope for such a discretionary budget.

I.I.ii Adverse changes in the public finance system

For several years, the ruling majority has been massively engaged in creating public finance solutions that allow them to spend public money outside democratic and parliamentary control, outside the provisions of the Public Finances Act and outside the official state budget.

In 2022, 88% of the deficit was not officially presented to Parliament

The budgets of recent years, and in particular the 2022 budget, blatantly violate the principles, frameworks and limits[8] that public authorities should take into account when planning and subsequently adopting and implementing the state budget. The state budget is a constitutional institution and requires special protection.

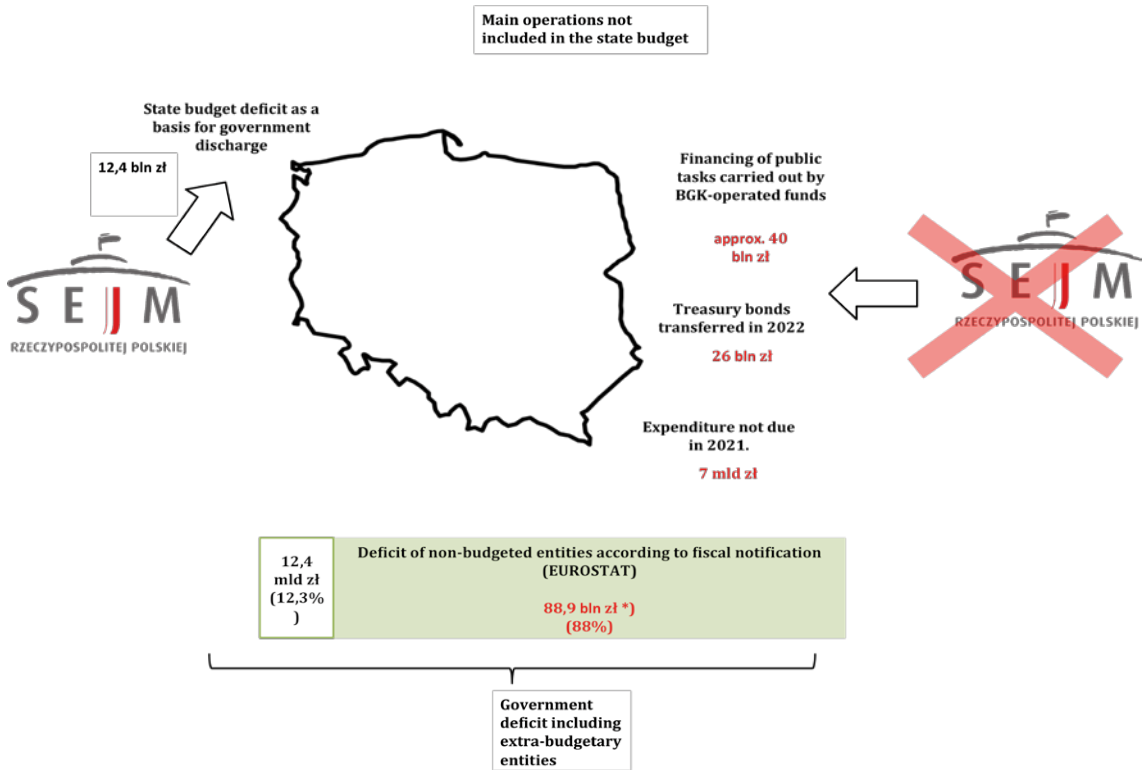
In 2022, the level of opacity and the extent of democratic control over the state budget[9] reached unprecedented levels. According to the Ministry of Finance, the deficit in the 2022 state budget amounted to 12.6 billion zlotys (0.4% of GDP), while 29.9 billion zlotys was foreseen in the 2022 budget law. In 2021, the state budget deficit was more than twice as high at 26.4 bn zlotys (1% of GDP). Juxtaposing these figures might give the impression that the state of public finances is excellent. Unfortunately, this is not the case, as the actual budget deficit is many times higher, as the data submitted to Eurostat and obtained by independent economists show[10]. In the report on the budget law submitted to Parliament, the government stated about 12% of the real state deficit, because the real state deficit is about 101 billion zlotys (see Figure 1). First of all, the underreported deficit does not include expenditures of the COVID -19 countermeasures fund, the armament fund or expenditures financed not by subsidies but by the transfer of bonds. The budget deficit understatement procedure is carried out in many ways.

8. The basic legal acts of public finance are: The Constitution, the Public Finances Act, the Local Government Revenues Act and the Responsibility for Breaches of Public Finance Discipline Act.

9. The state budget corresponds to a central sub-sector according to the European methodology, but due to creative accounting, its size is much smaller in the national budget process.

10. Benecki R., Dudek S., Kotecki L. (2023). ***Zagrożenia nadmiernego długu publicznego. Edycja 2023. Warsaw***, Instytut Odpowiedzialnych Finansów, Instytut Finansów Publicznych. https://www.ifp.org.pl/zagroznia_nadmiernego_dlugu_publicznego/.

Figure 1: The gray area of the 2022 budget - 88%.



Source: own compilation based on data from the Ministry of Finance, EUROSTAT.

After the event and with a long delay, EUROSTAT specialists and economists can estimate the real deficit of the national budget on the basis of the transmitted data. Since Eurostat data are statistical, the Polish Parliament receives formally incomplete data, both at the stage of budget planning and at the stage of monitoring government expenditure and discharging the government of its budgetary obligations. The government does not account to Parliament for the statistical data transmitted to Eurostat. Formally, the government is discharged on the basis of national data. The deficit of the state budget is the basic parameter for holding the government accountable for the implementation of the budget law. Thus, the Polish Parliament formally receives only 12% of the real central budget deficit for evaluation (see Figure 1).

For some years now, the government has come up with a new accounting trick to circumvent the official state budget and understate the deficit in the state budget every year. In 2020-2021, the level of evasion of the budget deficit was around 50% and this figure will increase to 88% in 2022.

Large amount of extra-budgetary funds

First, the government is creating extra-budgetary funds, agencies and institutes on a large scale. More than 50 new extra-budgetary units have been created since 2015. Of course, there were extra-budgetary entities in the Polish public finance system, state special-purpose funds, executive agencies, institutions of budget management or state legal entities. For example, the Social Insurance Fund, from which pensions are financed, the Labour Fund, from which unemployment benefits are financed, the Military Property Agency, the Agency for Restructuring and Modernisation of Agriculture and many others. At the same time, these funds are public finance sector entities within the meaning of the Public Finance Act, subject to all the strict rules and procedures laid down in this Act. These funds are not allowed to incur debt, also their deficits are explicitly visible in the deficit of the state budget in the form of grants to this fund, the agency. And most importantly, the financial plans of these funds are formally attached to the Budget law. They are subject to democratic debate in parliament. Of course, the ruling majority can vote on any design of the financial plans of these agencies, but the debate on these plans is public, and changes to these plans must be approved by Parliament each time. For example, thanks to the financial information provided to Parliament when the plan of the Justice Fund, managed by the Minister of Justice, was amended, it was possible to uncover what happened when the government bought the PEGASUS software, which it used to eavesdrop on the opposition.

Since 2015, however, quite exotic funds and institutions have begun to appear[11] (e.g. the St. Maximilian Maria Kolbe Institute for the Development of the Polish Language), which had vaguely defined goals and financed other, external institutions without clear criteria. Often according to a political key. The Justice Fund mentioned above, for example, funds housewives' circles and volunteer fire brigades instead of its statutory purposes. Expenditures from this fund are distributed in the form of cardboard cheques during the election campaign only by MPs from the party of Justice Minister Ziobro. In this way, such a palace structure has been created in Poland. The leaders of the different parties forming the coalition or the leaders of the different factions in Law and Justice (PiS) have their extra-budgetary units from which they distribute grants and cardboard cheques.

The staffing of the newly created units was also highly politicised. The dissolution of the public finance system and the channelling of public expenditure to budgets managed by numerous agencies and funds facilitates the arbitrary distribution of public funds[12]. The budget itself shows only the total grant to such an extra-budgetary unit, and the further distribution of funds is no longer done in the ministry concerned, but in smaller sub-funds of agencies or institutes staffed according to the political key. It is more difficult to change the accountant of the financial services or the internal auditor in a ministry. It is much easier to recruit flexible accountants in small budgetary units. It should be noted, however, that these entities are subject to the strict regulations of the Public Finances Act[13].

Extrabudgetary quasi-funds

Second, in 2020, under the guise of combating COVID -19, the government established the COVID-19 Countermeasures Fund. This is an extrabudgetary quasi-fund, as it is completely outside the Public Finances Act and not subject to the strictures and procedures set out in the Public Finances Act. The financial plans of this fund are not public, they are not attached to the budget law nor to the report on the Implementation of the budget law. It was established at Bank Gospodarstwa Krajowego (BGK), which is owned by the state. However, neither this fund nor the bank is a public financial institution in the sense of the Public Finances Act. This fund can get into debt, it issues bonds that are much more expensive than government bonds, which creates further costs for public finances. This fund only initially financed the tackling of COVID -19. As early as 2020, during the presidential election campaign, politicians from the ruling coalition travelled around Poland handing out cardboard cheques with grants from this fund to local governments. The fund, which is intended to counteract COVID -19, finances, among other things, a pig farm, the Maria and Lech Kaczynski Regional Centre for Patriotism, automated public toilets, an ice skating rink, the construction of the Bukovina Highlanders Cultural Centre, a dinosaur park, observation towers, playgrounds and swimming pools. This fund comprises two separate funds, the Governmental Local Investment Fund (Rządowy Fundusz Inwestycji Lokalnych, RFIL) and the ***Polish Deal*** fund, named after the title of the Law and Justice key policy programme. The Covid-19 Countermeasures Fund has essentially become an all-purpose fund. It is not a fully earmarked fund. It is de facto a parallel budget, removed from parliamentary and democratic control. Some of the money from this fund is allocated to

11. National Media Institute, Copernicus Academy, Juliusz Mieroszewski Centre for Dialogue, Wacław Felczak Institute for Polish-Hungarian Cooperation, National Agency for Academic Exchange, Marek Karp Centre for Eastern Studies Accessibility Fund, Vaccination Compensation Fund, Public Bus Transport Development Fund.

12. E.g. National Freedom Institute Centre for Civil Society Development, which finances right-wing extremist organisations, see https://oko.press/narodowcy-od-bakiewicza-z-3-milionami-dotacji-od-rzadowego-funduszu.

13. Article 9 of the Public Finances Act, regulating the subjective scope of public finance, lists the following entities covered by the Act:
1) Public authorities, including government administration bodies, state control and law enforcement bodies, and courts and tribunals;
2) Local government units and their associations;
2a) Metropolitan associations;
3) Budgetary units;
4) Local government budget establishments;
5) Executive agencies;
6) Budgetary management agencies;
7) State special-purpose funds;
8) The Social Insurance Institution and the funds administered by it, and the Agricultural Social Insurance Fund and the funds administered by the President of the Agricultural Social Insurance Fund;
9) National Health Fund;
10) Independent public health institutions;
11) Public universities;
12) The Polish Academy of Sciences and the organisational units created by it;
13) State and municipal cultural institutions;
14) Other state or municipal legal entities established under their own laws to perform public functions, with the exception of enterprises, research institutes, institutes operating within the framework of the Łukasiewicz Research Network, banks and commercial law companies;
15) Bank Guarantee Fund.

individual ministries. However, these funds do not go into the official budget accounts of the ministries, but into the so-called technical accounts, which are beyond the control of the Minister of Finance and also beyond the control of the special financial computer system of the Ministry of Finance TREZOR. The ministries de facto keep two sets of accounting records, that of the official budget and that of the parallel budget outside the control of Parliament. This is an organised system to circumvent the state budget.

Cardboard cheques for local governments – political distribution rules

The cardboard cheque subsidies mentioned above are distributed outside democratic control, without clear procedures, protocols or appeals processes. According to the Supreme Audit Office (Najwyższa Izba Kontroli, NIK), the procedure for selecting grant applications is a farce. The NIK found that statistically it takes several seconds to evaluate an investment application. It was impossible to evaluate the applications in such a short time, i.e. the selection was not based on the applications but on some other opaque criteria.

As numerous analyses, including by experts from the Batory Foundation[14], have shown, funds for local governments were distributed according to a political key. Although municipalities inhabited by 9% of the country's population have Law and Justice municipal officials in power, 28% of the subsidies provided under the programme went there. In the municipalities governed by officials of the Senate bloc (opposition), the proportions are exactly the opposite. Although the municipalities governed by them account for almost 1/2 of the country, only 10% of the subsidies went there. The average subsidy for the whole country is 83 zlotys per capita. In municipalities led by Law and Justice, the average subsidy is more than 250 zlotys per capita, while in municipalities governed by the Senate bloc the subsidy is ten times lower. Poorer and richer municipalities did not differ in this respect. The same pattern was repeated in both - local ruling party leaders could expect subsidies three times higher than the average, while opposition municipal officials could expect subsidies three times lower. However, the parties of the Senate bloc govern in almost every fourth impoverished municipality - so the drastic reduction of subsidies for such municipalities is not a marginal phenomenon, but affects a significant part of the country[15] (Flis and Swianiewicz, 2021).

In the past, the core of the budget debate consisted of discussions and arguments about how to allocate budgetary resources for municipal investments. Parliamentarians argued about where a bypass road should be built and where a football pitch. The current government has taken the democratic debate about the distribution of public funds out of the budget. It distributes these funds as it sees fit, according to a political key, without any procedures in place.

Following the example of the COVID -19 countermeasures fund, other funds are established at the BGK, including a fund to finance the modernisation of the army and an aid fund. The plans and sources of financing for this fund are not the subject of the budget debate and are not attached to the budget law. A similar fund is the Polish Development Fund, which pre-finances projects from the NRRP (National Recovery and Resilience Plan), among others, outside parliamentary control.

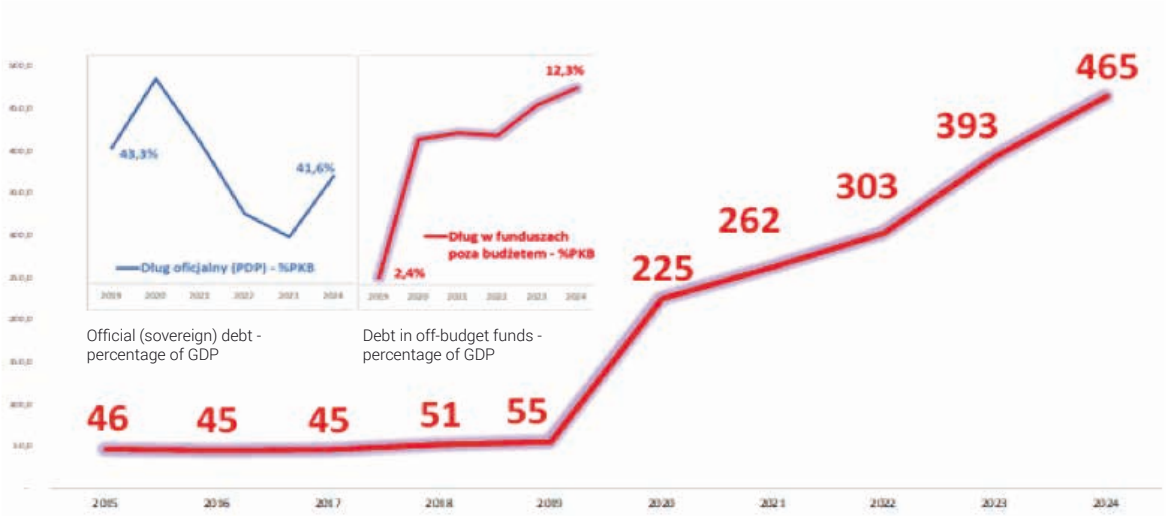
BGK funds generally have no revenue, with the exception of the National Road Fund, which existed before 2015 but has revenue from the fuel surcharge, it draws heavily on European funds, subject to democratic control and scrutiny by the European Commission. Moreover, this fund has strictly defined investment tasks based on the road and motorway construction programme. This fund is not used politically.

The newly created funds at BGK are financed by debt. The total debt of the funds, which are spent outside the budget, outside parliamentary control, now amounts to more than 322 billion zlotys. That is 21% of the total debt. According to the government's plans, this debt will continue to increase even though the state of COVID-19 pandemic is no longer in force. The government also plans to increase the debt of the COVID-19 Countermeasures Fund: it is expected to reach 393 billion zloty by the end of this year and 465 billion zloty by the end of next year, which is 22% of the total debt and 12.3% of GDP.

14. Flis J., Swianiewicz P., ***Rządowy Fundusz Inwestycji Lokalnych III – utrwalane wzory***, Fundacja Batorego 2021, https://www.batory.org.pl/wp-content/uploads/-2021/04/¬Rz%C4%85dowy-Fundusz-Inwestycji-Lokalnych_III.pdf [accessed on 15.10.2021].

15. Flis J., Swianiewicz P., ***Rządowy Fundusz Inwestycji Lokalnych – reguły podziału***, Fundacja Batorego 2021, https://www.batory.org.pl/wp-content/uploads/2021/01/-Rzadowy-Fundusz-Inwestycji-Lokalnych-regu%C5%82y-podzia%C5%82u.pdf [accessed on 15.10.2021].

Figure 2: Debt in funds that finance expenditure outside parliamentary control – percentage of debt



Note: Difference between sovereign and EDP debt. The former is calculated according to the national methodology, the latter according to an EU methodology (ESA 2010) for the purposes of the excessive deficit procedure (EDP).
Source: own calculations based on data of the Ministry of Finance.

Another accounting trick: government bonds instead of subsidies

Besides the parallel budget, the government uses many other tricks to downplay the deficit of the state budget, to decompose the budget and to reduce parliamentary control over public finances. For several years, the government has used the practice of giving away government bonds instead of subsidies. This ensures that these transactions are not recorded in the state budget as a subsidy, i.e. as an expenditure. This understates the government budget outturn and when bonds are transferred to entities[16] that are not covered by the expenditure rule, this contributes to the circumvention of the expenditure rule. For example, bonds are transferred to the public media as a supposed compensation for low revenues from radio and television licence fees. These entities receive a certain stock of Treasury bonds, they have to set up brokerage accounts to manage these bonds and incur additional costs, the bonds are then monetised (sold) and the funds from this sale are spent on the statutory purposes of these entities. In the past, these operations were handled with a normal budgetary grant. The number of institutions receiving a hidden subsidy in this form is rapidly increasing. Among others, universities, the Polish Baltic Shipping Company, the National Media Institute, the Central Transport Port and more recently mines receive bonds instead of subsidies.

This practice completely distorts the picture of public finances, even when looking more closely at the national methodology. It results in a decomposition of the budget deficit ratio and public debt. Moreover, such a practice creates additional costs for the entities receiving the bonds and additional debt management costs on the part of the Ministry of Finance, as the Ministry has to distribute these issues among different types of instruments in order not to disrupt the market, as these entities almost immediately (often) dump these bonds. This is unprecedented in the world. The scale of this practise is already enormous and growing. In 2020, the size of these transactions amounted to 18.3 billion zlotys, in 2021 it was already 22.3 billion zlotys and in 2022 the issues amounted to almost 26 billion zlotys. In the 2023 budget, these measures could reach almost 24 billion zlotys. Overall, thanks to this procedure, the deficit in 2019-2022 was understated by 100 billion zlotys[17].

Loans from the budget instead of grants work similarly: instead of transferring bonds, the government makes a loan from the central budget to another entity in the public finance sector. And this loan, like the bonds, is not included in expenditure.

16. Eg, the Public Television.
17. Benecki R., Dudek S., Kotecki L. (2023). ***Zagrożenia nadmiernego długu publicznego. Edycja 2023***. Warszawa, Instytut Odpowiedzialnych Finansów, Instytutu Finansów Publicznych, https://www.ifp.org.pl/zagroznia_nadmiernego_dlugu_publicznego/ and Dudek S., Kotecki L., Kurtek M. (2022). ***Zagrożenia nadmiernego długu publicznego. Edycja 2022***, Warszawa, Instytut Odpowiedzialnych Finansów, https://www.ifp.org.pl/dudek-s-kotecki-l-kurtek-m-2022-zagrozenia-nadmiernego-dlugu-publicznego-warszawa-instytut-odpowiedzialnych-finansow/.

In addition to understating the deficit, the government arbitrarily and at its own discretion spends the so-called general reserve in the budget. The general reserve is a special financial instrument that allows the Council of Ministers to respond, among other things, to emergencies that could not be foreseen and require immediate financial support. In 2015, the general reserve amounted to 198 million zlotys; in the draft state budget for 2023, it already amounted to almost 1 billion zlotys. Overall, the general reserve has increased by 397% under the Law and Justice government (2015-2023). Meanwhile it is spent on: Kalisz Diocese (7.8 million), ***Potrafisz Polsko*** Foundation connected with Paweł Kukiz (4.2 million), Historical Foundation "Dzieje" (10 million), Association "Diakonia Ruch Światło i Życie" (19 million) and another 9 million is requested for the +Centre for the Crusade for Human Liberation+. Funds from the general reserve have also been allocated to the ***Wprost*** Weekly Foundation, which has raised a total of 5.5 million zlotys in this way over the last two years.

The extent of the opacity of public finances and the undermining of the constitutional status of the state budget is such that an unprecedented situation has arisen. For the first time in the history of free Poland, the College of the Supreme Audit Office[18] has not given a positive opinion on the discharge of the government. In its analysis, the Supreme Audit Office states that "in the last three years, measures have been implemented on an unprecedented scale that violate fundamental budgetary principles, in particular transparency, uniformity, openness and annuality of the budget. They have the effect of diminishing the importance of the state budget as the main financial plan of the state under Article 219 of the Constitution and Article 109 (1) of the Public Finances Act. These measures not only distort the transparency of the public finance data presented, but also make it impossible to compare them in subsequent years and, most importantly, hinder parliamentary and public scrutiny over the collection and expenditure of public funds." In its conclusion, NIK "negatively assesses the direction of the changes in the system of public finances that have taken place in recent years".

The parliamentary majority, against the opposition and without reference to the NIK's analysis[19], ignored the lack of a positive assessment and voted for discharge.

The process of destroying the system of public finances and in particular deriving it from the formal state budget is a violation of the Constitution and the Public Finances Act. Article 219 (1) of the Constitution states: "The Sejm shall adopt the state budget for the fiscal year in the form of a budget law" and Article 109 (1) of the Public Finances Act states: "The budget law is the basis for the financial management of the State in a given fiscal year."

For several years the government has failed to attach to the budget law financial plans for the funds at BGK, which incur substantial debts and spend huge sums of billions of zlotys. This is what a commentary to the Constitution says: "The omission from the budget law of the financial plans of State organisational units performing public functions of fundamental importance for assessing the fulfilment of the State's constitutional and statutory functions, or the attribution of informative, non-binding significance to such plans, leads directly to a violation of Article 219(3) of the Constitution of the Republic of Poland."[20] The Supreme Audit Office also points out that the government must comply with the above provisions.

In the face of the collapse of the public finance system, there has also been a great mobilisation of many independent economists, lawyers, experts and organisations working for civil rights and integrity in public life. They issued an appeal to the authorities on 11 July 2023 to restore transparency to public finances[21]. The appeal states, among other things: "Citizens have the right to understand and influence how public funds are raised and spent. Unfortunately, this civil right has not been respected in recent years. The state budget is a constitutional institution and requires special protection. Neither a pandemic nor a war justifies trivialising it, removing huge sums of public expenditure from public scrutiny and using creative accounting tricks to downplay the budget deficit and circumvent budget rules."

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18. Article 226 of the Constitution states: "(1) The Council of Ministers shall, within five months of the end of the fiscal year, submit to the Sejm a report on the implementation of the budget law, including information on the state debt. (2) The Sejm shall examine the report submitted and, after considering the opinion of the Supreme Audit Chamber, shall pass within 90 days of the submission of the report to the Sejm a resolution to grant or refuse discharge to the Council of Ministers".

19. NIK, Analiza wykonania budżetu państwa i założeń polityki pieniężnej w 2022 roku, https://www.nik.gov.pl/plik/id,27852.pdf.

20. Prof. T. Debowska-Romanowska, 2016

21. ***Apel do Prezesa Rady Ministrów, Prezydenta Rzeczpospolitej Polskiej i Parlamentu Rzeczpospolitej Polskiej o przywrócenie przejrzystości finansów publicznych*** (the appeal of 60 economists), (Appeal to the Prime Minister, the President of the Republic of Poland and the Parliament of the Republic of Poland to restore transparency in public finances), https://www.ifp.org.pl/apel-do-prezesa-rady-ministrow-prezydenta-rzeczpospolitej-polskiej-i-parlamentu-rzeczpospolitej-polskiej-o-przywrocenie-przejrzystosci-finansow-publicznych/. The more than 60 signatories include former Ombudsman Prof. Adam Bodnar, former Prime Minister Prof. Marek Belka, two former Deputy Prime Ministers, Prof. Jerzy Hausner and Prof. Jacek Rostowski, 9 former finance ministers, 6 former deputy finance ministers, as well as many respected economists and a dozen civil society organisations and think tanks. Together they form the Coalition for Fiscal Transparency and declare their support for the work of the "Ombudsman for Fiscal Transparency" established at the Institute of Public Finance.

The Economic Council under the Speaker of the Senate, which includes leading Polish entrepreneurs, has also called for the restoration of transparency in public finances.

The rule of law includes the rule of law over public finances, democratic control of public finances and public accountability for their misuse. These cannot be separated from each other and require public oversight on the public income as well as public expenditure. It requires that the law binds equally the rulers and the ruled, and constitutes, added to the suffrage, the foundation of democracy. These principles cannot, as will be shown in this chapter, they cannot be guaranteed in Poland at present. This raises the fundamental question of whether a Member State of the European Union can be considered to have the rule of law if it does not respect the constitutional status of the budget, if it manages national public finances in an undemocratic, non-transparent and unaccountable manner, and if it ultimately uses these funds to finance the destruction of the rule of law in other areas, as we attempt to show in this report.

I.II. Fraudulent allocation of EU funds under shared management

> *"We are living in a 'private country,' which is worse than an authoritarian country. No competition, no skills, only political affiliation counts."*
>
> *"We published many big scandals but nothing happened. [The public prosecutor's office] wouldn't do anything that collides with the political interests of the ruling party." – a journalist from* Gazeta Wyborcza[22]

I.II.i The NCBR case – fast-tracking millions

The National Centre for Research and Development (NCBR) is a governmental executing agency which deals with, amongst other issues, allocating EU funding to grantees.[23] It was established in 2010 and was at the time supervised by the Ministry of Education and Science. After the 2015 and 2019 elections, the NCBR became one of the many politically-controlled institutional entities in Poland. Since August 1, 2022, the Centre's supervising authority has shifted to the Ministry of Funds and Regional Policy[24] – which is also responsible for controlling the overall spending of EU funding in the country.

NCBR's budget for 2021 amounted to 6.7 billion zlotys (approx. 1.5 billion euros) – the highest since its creation – of which 4.8 billion zlotys (approx. 1 billion euros) consisted of EU funds.[25] Out of that amount, 2 billion zlotys (approx. 448 million euros) were in turn allocated to the EU "Fast Track"[26] program for innovative projects. It is under this program that, due to the activity of independent journalists that FIDH partnered with in the context of this investigation, clearly evidenced instances of fraudulent allocations of EU funding were uncovered. Based on the evidence gathered in the course of the investigation, this chapter attempts to show how these instances of fraud and irregularities were made possible by the political capture of national public institutions entrusted with managing and overseeing the spending of EU funds and – simultaneously – by the lack of effective and independent mechanisms at the national level to investigate and prosecute them, both clearly linked to the ongoing rule of law crisis in the country since 2015.

a. NCBR and the "Black Coal" project as insurance against lost elections

After the parliamentary elections in 2015 and 2019, the winning coalition – in both instances the Allied Right (***Zjednoczona Prawica*** in Polish)[27] – was and remained committed to proceeding with systematic changes to most national public institutions. This included securing space for those close to the government at the level of executing agencies such as the NCBR, which oversee the administration of significant public funding (including EU funding).

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22. FIDH interview with representatives of ***Gazeta Wyborcza***, May 31, 2023.
23. https://www.gov.pl/web/ncbr/11112022-szybka-sciezka-innowacje-cyfrowe.
24. The Ministry of Funds and Regional Policy was created in 2019, following the transformation of the Ministry of Investment and Development. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20190002293/O/D20192293.pdf.
25. The funds managed by the NCBR are as follows: Smart Growth Operational Program, Operational Program Knowledge Education Development, Operational Program Digital Poland, European funds in new R&D formulas, Technical Assistance Projects, European Funds for Social Development, European Funds for Modern Economy, https://www.gov.pl/web/ncbr/fundusze-europejskie, all falling under EU cohesion policy funds.
26. https://www.gov.pl/web/ncbr/raport-roczny-ncbr-2021.
27. The Allied Right is comprised of Law and Justice, Sovereign Poland, the Republican Party, and the Odnowa Association (meaning the "Once Again" Association).

With people stationed at the right places within the internal structures of said agencies, and due to the system of shared management of the EU funding reaching Poland,[28] it became possible for these agencies to allocate significant portions of available public funds, including EU funds, to entities selected solely because of their political and/or personal affiliations. Shared management relies to a great extent on cooperation between EU institutions and the Member States. This translates into a significant amount of trust being put into the Member State in question, on which rests the responsibility for creating independent and effective national management and control mechanisms, including executive agencies such as the NCBR.

On June 22, 2023, Jacek Żalek, the vice-minister of Funds and Regional Policy at the time, gave an interview to the privately owned TV station "TVN24,"[29] where he stated that the NCBR was seen as a "form of insurance" in the event that the Allied Right lost the upcoming parliamentary elections set to take place on October 15, 2023. According to the vice-minister, money accessed through the NCBR-managed funding programmes was to be allocated to applicants who had direct ties with Adam Bielan – currently a member of the EU Parliament from the Republican Party, and previously in coalition with Law and Justice in the Allied Right.

The entire procedure was nicknamed the "Black Coal" project by those involved. Adam Bielan was labelled as the "sponsor" of the entire operation. However, after the interview took place, he denied all of the above and claimed he knew nothing of any "Black Coal" operation. Yet the recorded conversations, accessed by independent journalists, clearly show that featured interlocutors named Adam Bielan[30] explicitly as the brains behind the mechanism which consisted of creating boards within the NCBR and filling them with carefully selected people of the right political origin.[31]

The recordings and their transcripts were created by Krzysztof Bednarek, former head of the NCBR Investment Fund (NIF), who owed his position to people associated with Adam Bielan's Republican Party.[32] The original transcripts – in prepared format, meaning that only chosen quotes were written down, with most of the details presented in a descriptive manner – were delivered to the prosecutor's office by Jacek Żalek after he was questioned about the uncovered irregularities, and have become part of the criminal proceedings, which are now at the preparatory stage. No further details as to whether any other potential steps have been taken in the proceedings have been presented publicly.

However, due to the prosecutor's office remaining under political control, any criminal proceedings concerning the governing powers remain under strict political supervision, and can hardly be assumed to be effective or independent, as detailed in Chapter II. Indeed, proceedings can be and are launched, discontinued, or forced to remain in the preparatory stages for indefinite periods of time – depending on their value to the governing powers. Furthermore, the prosecutor's office is run entirely by people closely associated with the current Minister of Justice-Prosecutor General's (Zbigniew Ziobro's) party – Sovereign Poland – which is also part of the ruling coalition. Independent media have reported that preparatory proceedings have often been launched at politically strategic moments to keep other coalition members in check, and to be used as potential threats.[33] Once launched, they can be either discontinued or stalled, but could also lead to an indictment.

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28. Shared management means that "the responsibility for running a given programme is shared jointly between the European Commission and national authorities in EU countries. Around 70% of EU programs are run this way." However, it remains the Member States' responsibility to create a national system of allocation of EU funding which meets EU standards as set out in the regulations concerning each of the programs. https://european-union.europa.eu/live-work-study/funding-grants-subsidies_en.

29. https://tvn24.pl/premium/jacek-zalek-dla-tvn24pl-o-klamstwach-adama-bielana-slupie-w-ncbir-i-zorganizowanej-grupie-przestepczej-7187432.

30. Adam Bielan was also quoted in the transcripts as wishing for the European Union itself to "***f*** up, but that he also wants to remain in the EU Parliament for a fourth term and receive a European retirement fund."***

31. Transcripts of the recorded conversations (or rather their descriptions) were reported by Polish independent media RadioZet and Onet.pl, as they were considered of vast social importance. https://wiadomosci.onet.pl/kraj/tasmy-ludzi-z-czarnej-wiezy-ujawniamy-opisy-nagran/vxlsgy7. The transcripts were also examined by FIDH experts for the purpose of this report, through cooperation with independent journalists.

32. As evidenced by opposition MPs Dariusz Joński and Michał Szczerba, Krzystof Bednarek was a venture partner of the sister of one of the most controversial grantees of funds allocated from the NCBR, as well as of a second one, Piotr Maziewski, also a controversial grantee of the NCBR, who later introduced Krzysztof Bednarek to Jacek Żalek. https://tvn24.pl/polska/narodowe-centrum-badan-i-rozwoju-kontrola-poslow-miliony-zlotych-michal-szczerba-i-dariusz-jonski-uniewaznic-konkurs-ncbir-jest-oswiadczenie-instytucji-6758424.

33. Zbigniew Ziobro's prosecutorial service, as reported by opposition MPs, has reportedly launched proceedings against people close to the Prime Minister due to internal arguments over the PM's decision to cooperate with European Union institutions concerning the Conditionality Mechanism – instead of based on any justified suspicion of crimes of abuse of power having been committed. https://wyborcza.pl/7,75398,30097884,ziobro-straszy-mailami-dworczyka.html.

b. Chime Networks, Postquant: the most controversial NCBR beneficiaries on record

The Chime Networks case

On October 12, 2022, a call for grants was announced within the "Fast Track" program at the NCBR, with an overall budget of 645 million zlotys. The call targeted all categories of enterprises – big, medium, and small. The initial deadline for submission of proposals by potential grantees was November 4, at 4 pm. On that day, however, it was announced – without any explanation – that the deadline would be prolonged to midnight.[34] After the second deadline passed, an official announcement stated that 434 proposals had been submitted. The allocated budget was also raised – to 811 million zlotys.[35]

Of those submitted, 117 proposals were approved, and were provided with funding amounting to 801 million zlotys in total. As was mentioned, this budget was divided between big enterprises (consisting of over 250 employees), medium ones (up to 250 employees), and small ones (up to 25 employees).[36]

The Chime Networks proposal (no. 233), described as "***providing solutions on the development of solutions in the field of cybersecurity of subsea infrastructure based on an innovative multi-core fiber technology and ultra-sensitive detection and identification of system hazards,***" was awarded 122.9 million zlotys of the 153.7 million zlotys it requested. Independent journalists who covered the case calculated that the awarded sum was 22 times higher than the average in this particular call, and ten times higher than the second highest award in the call.

Chime Networks is a micro-enterprise, and is registered in Białystok as a subsidiary of TBTelecom.[37] As funding proposals are not publicly available, it is difficult to determine the quality of Chime Networks' documentation, and whether the amount awarded to them was justified.[38] However, in addition to far exceeding the average amounts awarded to similar projects, it did not fulfill the conditions for the award under this particular funding programme. Indeed, the purpose of "Fast Track" projects is to support the research process, not to build functioning infrastructure, which the project purports to do. The amount of the project (153.7 million zlotys) is also considered a typical amount awarded for the development of infrastructure, rather than for research projects. Additionally, and interestingly enough, despite being awarded the highest amount out of the funding available, the Chimes Network proposal received only 11 out of the maximum 16 points, which means it passed the mark of acceptance by only one point.

Amongst those personally connected to TBTelcom is the signatory of the Chimes Networks proposal – Piotr Maziewski – who also sits on the board of such organisations as the Association of Catholic Academic Youth and the STER Education and Family Support Association.[39] Piotr Maziewski, as shown by opposition MPs Dariusz Joński and Michał Szczerba,[40] also appears to have introduced former NCBR Investment Fund president Krzysztof Bednarek to Jacek Żalek – the then vice-minister of Funds and Regional Policy responsible for the NCBR – whom he appeared to have known for a long time, as he and Żalek come from the same city, Białystok. Indeed, it was following this introduction that Krzystof Bednarek was appointed to the position of head of the NCBR Investment Fund. Additionally, as was revealed by opposition MPs Dariusz Joński and Michał Szczerba, Maziewski bought the company "Profi Fund" from Bednarek in October 2022.[41]

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34. https://www.gov.pl/web/ncbr/szybka-sciezka-innowacje-cyfrowe11112024.
35. https://www.gov.pl/web/ncbr/konkurs-11112022--szybka-sciezka--innowacje-cyfrowe---zwiekszenie-alokacji.
36. https://www.gov.pl/web/ncbr/zakonczenie-oceny-wnioskow-zlozonych-w-konkursie-11112022--szybka-sciezka-innowacje-cyfrowe.
37. Available online sources point to a very general outline of the project which was awarded funding from NCBR. https://www.tbtelecom.pl/bproject-chimeb/project-chime.
38. Piotr Maziewski has since filed a motion to the prosecutorial service concerning MPs Dariusz Joński, Michał Szczerba, and MEP Adam Bielan, saying that because the proposals were not public no one could actually assess their quality. As reported by TVN24: "The entrepreneur allegedly stated that Dariusz Joński, Michał Szczerba and Adam Bielan 'are bidding on which of them blocked the subsidy earlier' and indicated that none of them has the authority, competence or necessary knowledge to do so. 'I declare that the claims of MPs Szczerba, Bielan and Joński in this respect are untrue. Moreover, MP Bielan does it in a completely audacious and brazen way. He is misleading the public opinion by claiming that as a result of the NCBR audit carried out in early January, our application was excluded from funding. This is clearly untrue, for which I have appropriate documentation,' wrote the president of Chime Networks." In response to these actions MP Michał Szczerba was quoted by TVN24 as saying: "This [Chime Networks] project should not be assessed because it significantly exceeded the maximum amount of funding. We act in the public interest within the framework of our parliamentary mandate." https://tvn24.pl/polska/media-prezes-spolki-zamieszanej-w-afere-w-ncbir-zawiadamia-prokurature-ws-dariusza-jonskiego-michala-szczerby-i-adama-bielana-6847390.
39. https://rejestr.io/krs/827860/chime-networks.
40. https://wyborcza.pl/7,75968,29477735,nie-powinnismy-sie-przyzwyczajac-do-pis-owskiego-zlodziejstwa.html.
41. https://rejestr.io/krs/900916/profi-fund/powiazania?m=wszystkie.

According to Radio ZET sources, the first internal notification about noncompliance with formal requirements for the call by the Chime Networks project appeared even before the deadline on November 4, 2022. NCBR deputy director Hanna Strykowska raised these doubts to Paweł Kuch, acting director of the National Center for Research and Development, as early as August 9, 2022. Paweł Kuch is the brother of Karol Kuch – a lawyer who represents Adam Bielan in at least one of his court cases.

Despite the aforementioned doubts coming to light, on December 16, 2022 the Chime Networks project passed the screening by the "second panel of experts." The list of all projects selected for co-financing was officially published on December 22. At that time, Paweł Kuch was on sick leave. After returning to work, Kuch dismissed Ms Strykowska on unclear grounds. After Kuch dismissed her, Ms Strykowksa took the case to the labour court, but the decision on her case is still pending.

According to our sources, it also appears that the head of Chime Networks, Maziewski, participated in at least two meetings at the Ministry of Development Funds and Regional Policy concerning multicore fibre design. Jacek Żalek, the deputy minister at the time, was an ardent advocate of the Chime Network project.[42]

The Postquant case

The Postquant proposal (no. 423) was submitted following the call for proposals for the "Fast Track" program within the prolonged period after 4 pm on November 4, 2022. The application requested a 72.1 million zlotys grant, and was awarded 54.9 million zlotys, which was ten times higher than the average award.

The proposal was submitted by an enterprise established ten days prior to the deadline, with a share capital amounting to 5,000 zlotys, and a registration address corresponding to a private apartment. The enterprise consisted of one person, who was both the founder and the only shareholder.[43] It has no website, nor does it appears to have been conducting any activity, according to independent media who uncovered the case.

Also, similarly to what happened in the Chime Network case, the awarded proposal got the lowest possible ranking – 10 out of the possible 16 points. Indeed, the project did not withstand scrutiny regarding its innovative character, which projects funded under this scheme must demonstrate; solutions similar to the one proposed by the applicant have existed on the market for a long time. These facts shed doubt on the justification of awarding such a big grant to the Postquant proposal.

The company in question was founded by Kacper Wiśniewski, a 26-year old with no prior experience in running a business, only to receive 55 million zlotys in subsidies ten days after establishing his enterprise.[44] Based on information gathered by opposition MPs Dariusz Joński and Michal Szczerba in their inquiry report,[45] Kacper Wiśniewski appears to be the brother of Anna Olkowicz, who is a co-owner of another company called Silverberg, together with Emilia Bednarek, the wife of Krzysztof Bednarek,[46] who headed the NCBR Investment Fund from January to April 2023.

In addition, personal ties seem to exist between persons behind the Postquant project and right-wing organisations close to the governing coalition, such as "Defence League" or "Now Poland," according to our sources.

After the irregularities in both cases were uncovered by independent media, the entire funding programme was halted. The NCBR opened an internal investigation regarding the grant scandal on January 25, 2023, twelve days after Radio ZET submitted a request for information regarding the subsidies in the context of its investigation. In mid-February 2023, Paweł Kuch lost his position at the National Center for Research and Development, and Jacek Żalek resigned on March 9, 2023. At the beginning of April 2023, Krzysztof Bednarek also left his position at the NCBR Investment Fund. Before his departure from the position of acting director of the NCBR, Paweł Kuch reported to the prosecutor's office his suspicion of crime against persons unknown to the detriment of the National Center for Research and Development. The notification concerned two subsidies – those in the Chimes Network and Postquant

42. https://wiadomosci.radiozet.pl/polska/polityka/afera-z-dotacjami-ncbr-dostali-123-milionow-zl-choc-nie-spelniali-wymogow.

43. https://www.wyszukiwarkakrs.pl/profile/0000999225.

44. https://wiadomosci.radiozet.pl/Biznes/podejrzana-dotacja-od-rzadowej-agencji-zalozyl-firme-i-po-10-dniach-dostal-55-mln-zl.

45. https://ruleoflaw.pl/what-is-the-ncrd-scandal-about-huge-grants-for-suspicious-firms/.

46. https://rejestr.io/krs/623577/silverberg.

cases. To date, the prosecutor's office has not brought charges against anyone in this case, and refuses to provide information about how and whether the investigation is progressing at all.

I.II.ii Funding abuse at the NCBR continues: shell companies, wooden houses, and hotel chains

a. Shell companies: Piezo Vest and Storage Energy

On May 4, 2023, ***Gazeta Wyborcza*** unveiled how, under the BRIdge program Alfa, financed from European Regional Development Funds (ERDF) under the Programme Operational Smart Growth 2014-2020, shell companies were being co-financed.[47]

The investigation revealed that two Łódź-based companies – Storage Energy and Piezo Vest – both established in autumn 2021, received grants under the BRIdge Alfa program.

On December 6, 2021, Storage Energy received 764,000 zlotys, and on December 22, 2023, Piezo Vest received 868,000 zlotys. The heads of these companies were talented 30-year-old mathematicians, but neither had any recorded experience in running a business or working on innovations.

One of them, Chrystian Chałubiński, the owner of Piezo Vest and a graduate in physics and mathematics from the University of Lodz, when summoned by the police in March 2023 regarding a case of embezzlement in one of the currency exchange offices in Szczecin, unexpectedly began to talk about the shell companies which benefit from subsidies from the NCBR. Mr Chałubiński testified that he transferred the money from the grant to two exchange offices in Wrocław and Szczecin, from where they were taken by the man who wrote Chałubiński's application to the NCBR for the grant. Chałubiński gave a name – Maciej Ż. – and said that he met him on the internet and that he (Maciej Ż.) dealt with EU funding and research grants. Chałubiński claimed that Maciej Ż. effectively helped him to obtain the grant for his company, Piezo Vest; the grant was for around a million zlotys, and was given to him as part of the granting scheme coordinated by the NCBR. Chałubiński claimed that he got it for "research on a vest that was supposed to treat cystic fibrosis and lung disease. Such a quirky design for a lot of money. This Maciej Ż. was supposed to help sort everything out. It was definitely a dirty business, which involved my company plus others. In general, it was such an organization of criminals in velvet gloves. There are people who have received many millions of zlotys from this Centre [NCBR]. And the money keeps on flowing." According to Chałubiński***,*** the arrangement between the two men was that Maciej Ż. would help obtain needed funds and keep 200,000 zlotys for himself, but after the money was transferred by the NCBR, it was taken entirely by Maciej Ż. Chałubiński also said that the project that won him the grant was supposed to be implemented, but that so far nothing was required from him and the NCBR had never asked him how the money was spent. According to Chałubiński, 400,000 zloty has been spent in alignment with the project.

A similar mechanism was used in the case of Storage Energy. Chałubiński stated that Maciej Ż. also took part in obtaining a grant for them. He was supposed to have helped Chałubiński's friend and the owner of Storage Energy – Mikołaj Widzibor, who died in 2022 – get the money, but instead he took "everything from Dzibor." According to Chałubiński, Widzibor was addicted to drugs and it was easy for Maciej Ż. to write a proposal and to seize around 1 million zlotys from him before his passing. "***Sometimes the National Centre finances shell companies. And all the money is lost,***" Chałubiński told the police.

The NCBR confirmed when asked by ***Gazeta Wyborcza*** that both Piezo Vest and Storage Energy received grants that have not yet been accounted for. For several weeks, however, the NCBR resisted disclosing which private fund was a partner to both companies in projects for which the NCBR provided subsidies. The participation of such a fund is obligatory under the BRIdge Alpha program, and it needs to cover 20 percent of the shares in the company that is to receive a grant. Each project subject to the funding is first analysed by the Investment Committee of each fund, and then the needed money is acquired from the NCBR.[48]

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47. As stated by the NCBR, "BRIdge Alfa is an innovative initiative of the NCBR as part of the BRIdge programming. Thanks to the cooperation of the government agency with experienced investors, it was possible to create an ecosystem which supports the financing of technological start-ups. Investors receive non-repayable support provided by the National Centre for Research and Development for somewhat of an investment vehicle. The main objective of the program is to strengthen the mechanisms of commercialization of Polish research projects in the initial phases of development and increase their chances of market success."

48. https://wyborcza.pl/7,75398,29721265,wyborcza-ujawnia-zeznania-swiadka-wielkie-Pieniadze-z-ncbir.html#S.embed_link-K.C-B.1-L.1.zw.

The fund that invested in Piezo Vest and Storage Energy is called the SciTech Fund. Its president is Jerzy Gessler, who worked at the NCBR from February 2019 to July 2021 as the supervisor of the group funds under the BRIdge Alfa grant program. Journalists at ***Gazeta Wyborcza*** also discovered that the owner of the SciTech Fund is the above-mentioned Silverberg company, which had as shareholders Anna Olkowicz (the sister of the 26-year-old who received almost 55 million zlotys in subsidies from the NCBR in the Postquant case) and Emilia Bednarek, the wife of the above-mentioned Krzysztof Bednarek, the head of NCBR Investment Fund from January to April 2023.

Interviewed by ***Gazeta Wyborcza***, opposition MP Michał Szczerba added that: "This is where the system closes. We see political and personal connections, we can see where these 123 and 55 million zlotys came from. And I think we have a hypothesis who it was supposed to go to."[49]

Michał Szczerba and Dariusz Joński, also an opposition MP, also established as part of their inquiry that Anna Olkowicz is Emilia Bednarek's partner in four companies[50]. Krzysztof Bednarek, for his part, left these same companies at the end of October 2022, when he already knew – based on promises from the Republican Party – that he would become the head of the NCBR Investment Fund. According to MP Szczerba, he then transferred his shares and/or the chairmanship to his wife, who remained Anna Olkowicz's partner.

An investigation into the practices revealed to the police by Christian Chałubiński, and related to the extortion of money from the NCBR through shell companies, is headed by the prosecutor's office in Szczecin. Alice Macugowska-Kyszka, spokeswoman for the Szczecin district prosecutor's office, told ***Gazeta Wyborcza*** that investigators are pursuing fraud charges initiated based on Chałubiński's claims. However, no further details were disclosed.

b. The hotel chain and wooden house cases

On August 7, 2023, ***Gazeta Wyborcza*** unveiled yet another case related to irregularities in the awarding of EU funds by the NCBR. According to our sources, multi-million zlotys subsidies for the development of video games under the EU GameINN program were received by tech giants like CD Projekt, Techland, and 11 Bit Studios, but also by a hotel company registered at a student dormitory, and by a company that makes wooden houses.

In 2020, as much as 3.6 million zlotys was received by the Apis company, which had been involved until then in the production of wooden houses. "As part of diversification," the company promised to "create a set of innovative tools to support the development and maintenance of MMORPG games." In an interview with ***Gazeta Wyborcza***, the head of Apis, Henryk Oziębło, emphasized that this "set" is reportedly ready, and its prototype was promoted at the Digital Dragons and Game Industry Conference. In 2021, Apis received another grant from the NCBR – as part of the "Fast Track" program – amounting to over 4 million zlotys for an engine which "supports balancing of turn-based strategic games."

According to our sources, there have been other cases of companies which were created shortly before receiving substantial grants through the "GameINN" re-granting scheme. These include:

- Educational Entertainment One, which received 6.6 million zlotys for the "development of elements of a prototype of an innovative educational game for learning foreign languages, based on a proprietary method of learning." The company was registered just before the start of the competition, in January 2020, with a small share capital of only 6,000 zlotys. In 2023, the company received another 7 million zlotys in subsidies from NCBR.

Haptology sp.z o.o., which received 4 million zlotys for creating a "ring of haptic interaction in video games." The company was established in February 2020 with a share capital of 12,500 zlotys.

In 2019, right before the announcement of the results of the selection process, the funds available under the GameINN program were increased from 100 to 120 million zlotys. Following this increase, the highest grant amounting to 11.4 million zlotys was awarded to a company – Mountain Resorts Holding – which scored lowest in the grant-awarding procedure, and which without this sudden "raise" in the overall funding would not have received any grant at all.

Mountains Resorts Holding in theory remains a hotel business – for example, it owns a prestigious four-star facility in the popular tourist town of Szklarska Poręba. The former head of the company, Paula

49. https://wyborcza.pl/7,75398,29727052,afera-w-ncbir-wyludzenia-na-slupy-i-ludzie-bielana.html.

50. Silverberg Investments z o.o., Silverberg sp. z o.o., DIM Investment sp. z o.o., Scitech Fund sp. z o.o.

Plucińska, was previously associated professionally and personally (the founder is her mother, Ewa) with another company, Evip,[51] a capital and investment group whose core business consists in helping to obtain financing for various projects from EU funds.

Mountain Resorts Holding proposed creating an "educational tool in the form of an application for mobile and web platforms using the gamification model, machine learning and data science solutions." A year after obtaining funding, the company changed its name to Predict Systems. Its significant shareholders became Adam Świtalski (CEO of Evip) and another member of the Pluciński family, Filip.

Predict Systems has no website, nor an accessible email address, and no one manages the company's social media presence. According to registration documents, the headquarters of Predict Systems are located in a student dormitory in Wrocław. The manager of the building admitted in an interview with ***Gazeta Wyborcza*** that in fact "there are always some letters coming to the dorm for Predict Systems," but they get returned, as Predict Systems no longer leases the premises.

The NCBR confirmed that so far Predict Systems has received 9.97 million zlotys. According to the NCBR, the project has been completed, but is considered to still be ongoing in terms of its reporting obligations.[52]

I.II.II Other cases of illicit use of EU funding: the "Forrest.tv" case

The NCBR is not the only State agency which appears to have been granting millions of euros to those in good political or personal standing with the government or the public institutions it controls. The National Fund for Environmental Protection and Water Management (NFOŚiGW) and Puszcza.tv (Forest.tv in English) affair is yet another similar case.

Puszcza.tv[53] is a website which was supposed to show the beauty of the Białowieża Forest and encourage tourism. Despite the millions of zlotys that the authorities have granted to the project, it never became popular. The project consisted mainly of three permanent cameras set up in the Białowieża Forest, showing live what is happening around them.

Puszcza.tv has a Facebook profile, created on May 24, 2017, that has managed to gather 1.4 thousand likes and 1.6 thousand followers (though their identities are not available). The PortalPuszczaTV Twitter (aka X) account has only 140 followers. On Instagram, @portalpuszczatv has 218 followers and only 30 posts, and on YouTube, where the feed from the three cameras from the Białowieża Forest was broadcast, there are only 1,210 subscribers.

When the project was created, journalist Katarzyna Gójska, of the Independent Media Foundation, which received money for Puszcza.tv, asserted that: "There will be a great multimedia portal showing the wealth of Polish nature and the successes of those who protect it on a daily basis."

The Independent Media Foundation was established in 2009. It was founded by Tomasz Sakiewicz, editor-in-chief of the weekly ***Gazeta Polska***, which has supported the governing party for years. Joining him on the Foundation's board were Katarzyna Gójska (formerly Hejke) and Piotr Lisiewicz, both deputy editors-in-chief of ***Gazeta Polska***.[54]

Gójska is married to Michał Rachoń, who, after the governing coalition took power in 2015 and then took over the public media in Poland, became one of the biggest names on Polish public television, which quickly became a symbol of propaganda supporting the ruling camp. Media such as ***Gazeta Polska*** are financed by Law and Justice every year through the purchase of advertisements by State-owned companies and various State institutions. For example, in the years 2016-2019 – according to a report by media expert Professor Tadeusz Kowalski[55] – ***Gazeta Polska*** received advertisements from State-owned companies worth 33 million zlotys. In comparison, the much more popular weekly ***Newsweek***, which is critical of the government, at the same time received 2.4 million zlotys in advertisements from companies funded by the State treasury.

51. https://evip.com.pl/.
52. https://wyborcza.biz/biznes/7,177150,30045647,pol-miliarda-z-ncbir-na-gry-ktorych-nie-ma-Tworza-je-tez-hotelarze.html.
53. Puszcza.tv.
54. https://www.gazetapolska.pl/redakcja.
55. https://www.researchgate.net/publication/339800640_Analiza_wydatkow_reklamowych_spolek_skArbu_panstwa_SSP_w_latach_2015-2019.

In May 2016, Sakiewicz's Independent Media Foundation submitted a proposal to the NFOŚiGW for the project "Promotion of knowledge about biodiversity, protection, the idea of sustainable development, Nature 2000 institutions by building and running the multimedia portal Puszcza.tv." 6 million zlotys from the EU Operational Programme Infrastructure and Environment 2014-2020 were awarded to the proposal, even though the Foundation had no experience in implementing educational programs, and environmental protection appeared to have been added to its statutes just before submitting the application for co-financing from the NFOŚiGW.[56]

Additionally – in accordance with the regulations of the competition launched by the NFOŚiGW – only "non-governmental environmental organizations" were eligible to compete for the grants, meaning those "whose statutory goal is environmental protection," and the Independent Media Foundation did not meet this requirement.[57]

The call for proposals in question was originally supposed to end on April 29, 2016, but the deadline was extended twice, with the final deadline set for May 23, 2016. On May 9, 2016, the board of the Independent Media Foundation changed its statutes so that the NFOŚiGW could grant it funding, by entering "environmental protection" into its statutes.

This move was criticized by the Supreme Audit Office (NIK), which in its document "Information about the results of the inspection on the implementation in 2016 of the financial plan of the National Fund for Environmental Protection and Water Management" of June 2017, wrote that "in connection with the findings regarding application no. POIS 02.04.00-00-0091/1641 NIK pointed out that the second extension (until 23 May 2016) of the deadline for submitting applications to the competition was not justified, because the amount of co-financing under the Competition initially amounted to 12,875.0 zlotys, while in the second period the amount of co-financing, resulting from the submitted applications, was 2.5 times higher than the amount allocated for the competition."[58]

The 6 million zlotys that the NFOŚiGW eventually awarded the Independent Media Foundation for Puszcza.tv was almost half of the entire budget allocated to the call. One of the arguments supporting the decision to award the grant was the fact that three advisers were named in the application, who were supposed to support the implementation of the project. ***OKO.press***, an independent media outlet, managed to obtain the application submitted by the Foundation to the NFOŚiGW, and it appears that the advisers were: Katarzyna Szyszko-Podgórska, Father Tomasz Duszkiewicz, and Mateusz Liziniewicz.

Szyszko-Podgórska was the daughter of the Minister of the Environment at the time, Jan Szyszko from Law and Justice (who died in 2019); Father Duszkiewicz was a friend of Minister Szyszko, with whom he shared the passion for hunting; and Liziniewicz is a forester and the brother of Jacek Liziniewicz, who writes for ***Gazeta Polska*** about the environment and forests.[59]

After the articles authored by ***OKO.press***, which were also quoted by other independent media in Poland, the European Commission became interested in the case.[60] An inspection of the NFOŚiGW was initiated by the European Anti-Fraud Office (OLAF). The investigation concerned the organization of the competition "Nature protection and ecological education," the selection procedures under this competition, and the evaluation of the project under the name "Promotion of knowledge about biodiversity, protection, the idea of sustainable development, Nature 2000 institutions by building and running the multimedia portal Forrest.TV."

56. https://oko.press/niepokorni-dziennikarze-6-mln-zlotych-panstwowego-funduszu.
57. http://poiis.nfosigw.gov.pl/skorzystaj-z-programu/zobacz-ogloszenia-i-wyniki-naborow-wnioskow/ochrona-przyrody-i-edukacja-ekologiczna/art,3,nabor-dla-dzialania-2-4-po-iis-2014-2020-5b-budowanie-potencjalu-i-integracja.html.
58. https://www.nik.gov.pl/plik/id,14199.pdf.
59. https://oko.press/6-milionow-zlotych.
60. https://oko.press/sakiewicz-puszcza-komisja-europejska-interweniuje-publikacji-oko-press.

Without waiting for OLAF to conclude its investigation, on December 20, 2017, the Independent Media Foundation withdrew its application for a subsidy from the NFOŚiGW. According to the NFOŚiGW spokesman at the time Sławomir Kmiecik, the contract with the Independent Media Foundation has been terminated.[61]

However, public funding for Puszcza.tv was not halted – it simply no longer included euros. In January 2018, the NFOŚiGW signed another contract with the Independent Media Foundation for a project with exactly the same name as the previous one: "Promotion of knowledge about biodiversity, protection, ideas for sustainable development, the Nature 2000 institutions through building and running a multimedia portal Forrest.TV." The contract amounted to 7.1 million zlotys, and the money came from the "Environmental Education" program and was financed from national funds at the disposal of the NFOŚiGW. The call for proposals under this separate programme closed on December 27, 2017, just one week after the termination of the first contract with the Independent Media Foundation for the creation of the Puszcza.tv portal.

This contract was criticized by the Supreme Audit Office (NIK) in its post-audit statement on the implementation of the budget of the NFOŚiGW for 2018. They explicitly concluded[62] that the NFOŚiGW was doing everything in its power to fund the Independent Media Foundation.

What should be highlighted is that no criminal charges have been brought against anyone involved in the case so far, in spite of the NIK's conclusions referred to above, and the OLAF investigation (which did, however, lead to the suspension of the funds).[63]

On January 30, 2018, the contract No. POIS.02.04.00-00-0091/16-00 was signed. In the agreement No. 26/2018/Wn-50/EE-EE/D, it was specified that by 2021 the project's outreach would amount to over 20 million people. Despite these predictions, on February 26, 2019, the beneficiary reported that the number of visits to the Puszcza.tv portal was 186,000, and on YouTube about 61,500 views, thus a number significantly lower than anticipated – which was confirmed by auditors on March 19, 2019.[64]

The Puszcza.tv project ended on June 30, 2021,[65] with a final cost of 5.5 million zlotys of national funding.

The NFOŚiGW continued to support the Independent Media Foundation. Originally, the signed contract stated that Puszcza.tv was to generate 20 million views, 240 articles, and 300-400 photos every month. In the annex to the contract signed on June 30, 2021, regarding the project completion date, these targets were updated, and drastically lowered to only 500,000 views, 60 articles, and 80 photos per month.

It also turned out that a significant part of the funding from the NFOŚiGW subsidy went not to the Puszcza.tv website, but to its promotion in ***Gazeta Polska*** and ***Gazeta Polska Daily*** – weekly and daily newspapers supportive of the government. The publisher of ***Gazeta Polska Daily*** is the Forum company founded by Tomasz Sakiewicz – the founder of the Independent Media Foundation – and of which he was the first president.[66]

61. https://oko.press/sukces-oko-press-6-milionow-zlotych-trafi-pseudo-ekologicznej-fundacji-Tomasza-sakiewicza-projekt-puszcza-tv-wycofany.
62. https://www.nik.gov.pl/plik/id,20789.pdf.
63. https://oko.press/europejski-urzad-ds-zwalczania-naduzyc-finansowych-bada-dotacje-nfos-dla-fundacji-sakiewicza-pieniadze-projekt-puszcza-tv-wstrzymane.
64. https://www.nik.gov.pl/plik/id,20789.pdf.
65. https://konkret24.tvn24.pl/polska/projekt-puszcza-tv-zakonczony-ujawniamy-na-co-poszly-miliony-publicznych-pieniedzy-ra1063991-ls5790533.
66. There are multiple other examples of government-friendly media dipping into public funds through their ties with representatives of the authorities. For example, the cost of an advertising banner displayed on the website ***Niezalezna.pl*** (meaning "Independent") associated with ***Gazeta Polska*** was approximately 810,000 zlotys. The publisher of the ***Niezalezna.pl*** website is the company Independent Word, headed by Tomasz Sakiewicz. Ryszard Czarnecki, an MEP from the governing party, also sits on the Supervisory Board of Sakiewicz's company Forum. https://konkret24.tvn24.pl/polska/projekt-puszcza-tv-zakonczony-ujawniamy-na-co-poszly-miliony-publicznych-pieniedzy-ra1063991-ls5790533.

No indictment if the defendant comes from party ranks

In order to highlight how difficult prosecuting cases with some political affiliations is in current-day Poland, one should assess the methodology of the Prosecutor's Office behind either going forward with an act of indictment or withdrawing one. More on this topic is uncovered in Chapter II.

On April 12, 2022, ***Gazeta Wyborcza*** revealed a scandalous decision of the district prosecutor's office in Gdynia. On this occasion, Minister of Justice-Prosecutor General Zbigniew Ziobro took advantage of a special procedure, which had just been introduced at the time, and withdrew the indictment against former Law and Justice MP Zbigniew K[67] and three other men from the court.

Investigators initially accused Zbigniew K. and three others of a fraud of significant value, which worked to the detriment of the company EnergiQ Polska and extorted support from the Polish Entrepreneurship Development Agency (PARP). The men were associated with said company (Zbigniew K. was its president from January 3, 2014 to December 15, 2014) and had allegedly – according to the prosecutor's office – extorted a loan of 2 million zlotys from PARP to finance their investments. To obtain it, they fraudulently led PARP to believe that the company had secured 1 million zlotys of EU funding to finance part of the investment. Before the next tranches of the loan were given to them by PARP, they submitted false contracts and invoices to prove this point. Ultimately, they did not pay off the loan.

However, on April 4, 2022, there was a surprising development in the case, as the prosecutor's office in Gdynia submitted a request to the court to withdraw the indictment. This important decision was taken not by the author of the indictment, but by her superior – Anna Piórkowska, the chief of the district prosecutor's office in Gdynia. To do so, Piórkowska reached for a mechanism provided for under Art. 14 (2) of the Polish Code of Criminal Procedure. By withdrawing the act of indictment, the prosecution once and for all deprived itself of the possibility of further prosecuting this case, because "a new indictment against the same person for the same act itself is unacceptable."[68] According to this provision, prosecutors may withdraw the indictment until the start of the trial at the first main hearing, and during the trial before the court. In the first instance, withdrawal of the indictment is admissible only with the consent of the accused.

It was only when a scandal broke out after the reporting by ***Gazeta Wyborcza*** that the prosecutor's office went back on its decision, withdrew its previous application, and instead asked the court to return the case to the prosecutor's office in order to supplement the evidence. The regional prosecutor's office in Gdańsk reported that a withdrawal of the "incorrectly worded" application by the Gdynia district prosecutor's office had been ordered, and further claimed that the true goal was to submit an appropriate application "which will enable the prosecutor's office to supplement the material evidence in this case and re-direct the indictment."

Yet another twist in the case came soon after: the proceedings were indeed withdrawn from the Gdynia prosecutor's office and transferred to a higher level – the regional prosecutor's office in Gdańsk.[69] No further developments have been reported.

I.III. We got it, but we didn't: the Recovery and Resilience Funds case

Following the COVID-19 pandemic and the crisis it sparked throughout the European economy, the EU has taken decisive steps to boost Member States' economies and development through Next Generation EU, a 750 billion euros temporary recovery instrument,[70] often nicknamed the next "Marshall Plan" for a resurrecting Europe. Its main element, considered the "centrepiece" by the EU Commission, is the Recovery and Resilience Facility (RRF), a mechanism through which 338 billion euros worth of grants and 385.8 billion euros in loans became available to every Member State which complied with standards set out by the Commission,[71] to boost their recovery and ignite growth.

67. Zbigniew K. joined Law and Justice in 2004 and was its representative in Gdynia and even a candidate for mayor of the city. In the years 2005-2011 he was a Law and Justice MP, and after 2015 became the vice-president of a State-owned company, EnergaOperator.
68. Article 14 of the Polish Criminal Proceedings Code. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970890555/U/D19970555Lj.pdf.
69. https://wyborcza.pl/7,75398,28682490,sprawa-zbigniewa-k-bylego-posla-pis-idzie-na-Skrecenie-dostal.html.
70. https://commission.europa.eu/strategy-and-policy/eu-budget/eu-borrower-investor-relations/nextgenerationeu_en.
71. https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en.

I.III.i A brief history of Poland not receiving RRF funding

In order to access the funding available under the Recovery and Resilience Facility, Poland and all other Member States had to prepare and submit a National Recovery and Resilience Plan, which would detail the Member State's plans on how they intend to use the funding they would obtain from the EU.

Because of the unprecedented nature of the Recovery and Resilience Facility, the EU Commission made sure to establish additional mechanisms of protection for the EU funds involved in the program. Besides checking that the management and control systems put in place by the Member State are appropriate to prevent any potential risks to the EU budget, the Commission did so by establishing milestones and targets that Member States have to fulfill in order to access EU funds under the RRF. In the Polish case, and due to existing concerns regarding the rule of law in Poland, the Commission made the release of RFF funds to this Member State conditional upon the achievement of a series of "rule of law milestones" ("RoL milestones"), which require Poland to adopt and implement reforms aimed at strengthening compliance with rule of law principles and standards. These include:

- reforms aimed at strengthening judicial independence;
- reforms aimed at strengthening anti-fraud and anti-corruption policies and structures; and
- reforms aimed at improving anti-money laundering procedures and structures.[72]

To receive RRF funding, Poland will have to submit payment requests and prove that they have reached the milestones. In case the Commission assesses that the milestones have not been reached, it can suspend payments or, if the milestones remain unattained six months after the Commission's negative assessment, reduced.[73]

RoL milestones under the RRF constitute yet another instrument by which the EU can ensure compliance with EU RoL principles and protect the Union's budget. However, as the milestones mostly consist in obligations to enact reforms that would address the Commission's RoL concerns, their achievement does not guarantee per se that the reforms will be correctly and effectively implemented and will lead to actual changes in practice.[74]

This makes it all the more important to use the opportunities offered by the RRF Regulation in combination with other instruments – such as the Conditionality Regulation – to effectively protect the EU budget while enforcing the RoL. As detailed below, the Rule of Law Conditionality Regulation provides for an additional, more comprehensive and effective protection layer, encompassing situations falling outside the RFF – or other mechanisms' – specific scope, and allowing for a more systematic and thorough monitoring over the way EU funding is used.

Although Poland had its NRRP approved by the EU Commission on June 1, 2022,[75] the release of RFF funding to Poland was made conditional on the achievement of specific milestones, including two RoL milestones, pending whose achievement the funding has yet to be released. Poland's RoL milestones concerned two aspects that have been at the centre of the ongoing rule of law dispute between the European Commission (and the Council under the Article 7.1 TEU procedure) and Poland, namely:

- the need to adopt reforms to strengthen the independence and impartiality of Polish courts; and
- the need to adopt reforms that would remedy the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court in disciplinary cases and judicial immunity cases.

According to the standards set out by the Commission regarding rule of law issues, all disciplinary cases against judges are now to be adjudicated by a court – different from the (then) Disciplinary Chamber – that complies with EU law requirements, in line with the case law of the Court of Justice of the European Union (CJEU) and that is thus independent, impartial, and established by law. Secondly, judges cannot be subject to disciplinary liability for submitting a request for a preliminary ruling to the CJEU, for the content of their judicial decisions, or for attempting to verify whether another court is independent, impartial, and established by law. Thirdly, the procedural rights of parties in disciplinary proceedings

72. https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI(2023)741581_EN.pdf.

73. In addition, the EU Commission can reduce, recover, or ask for repayment of RRF funds if it finds evidence of fraud, corruption, or conflict of interests not being corrected by the Member State. However, this procedure has not yet been used, since Poland has not yet implemented the milestones, and has not received any funding – except for pre-financing – under the RFF.

74. See also "The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context," Study requested by the European Parliament's BUDG Committee, Policy Department for Budgetary Affairs, Directorate-General for Internal Policies, PE 747 469 – April 2023.

75. https://data.consilium.europa.eu/doc/document/ST-9728-2022-INIT/en/pdf.

are to be strengthened. Finally, all judges affected by past Disciplinary Chamber rulings have the right to have these rulings reviewed without delay by a court that complies with EU requirements and is thus independent, impartial, and established by law.[76]

After the Council adopted the Polish National Recovery Plan on 17 June 2022, it was clearly stated that in order to submit the first payment request, the Polish government would have to comply with the previously designed milestones relating to the judiciary system[77]. This meant introducing changes to the law so that an independence of the judiciary would be reinstated and judges and prosecutors would not be disciplined for following the rule of law.

The main concerns laid down by the EU Commission were:

- the lack of an independent and legitimate constitutional review
- the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland

The Polish government has attempted to introduce two major amendments to the law in order to meet the criteria set out by the EU Commission, but these cannot be considered to truly meet the milestones.

> *"I don't think milestones are anywhere near to being met.*
>
> *There's a Polish saying that goes: Tea doesn't get sweeter just because you mix it.*
> *They removed the Disciplinary Chamber but then took the same people who had been appointed in the same faulty manner and they appointed them to the new chamber. It is the same people under a new name." – a representative of the Warsaw Bar Association[78]*

The first attempt, in July of 2022, consisted of changing the Disciplinary Chamber of the Supreme Court – a body that has been widely criticised, and is considered to be undermined – into the Chamber of Professional Accountability.[79] This change came after a CJEU ruling from July 2021 which confirmed the Disciplinary Chamber's lack of independence due to the procedure by which judges were appointed for participation in its panels by the National Council of the Judiciary (NCJ), which in turn had become subject to political influence due to changes in the law in 2017.[80] Apart from its new name, however, the Chamber of Professional Accountability did not bring about many changes. Judges whose nominations come from the politicized NCJ can still be elected to sit on its panels and to judge disciplinary cases. The July amendments of 2022 did not alter any aspect of the NCJ's functioning, nor did it give it independence from politicians.

Judges critical of the government continue to be persecuted for opposing the rule of law crisis. A recent example of this concerns Judge Jaskłowski, who ruled against Tomasz Sakiewicz and ***Gazeta Polska*** in a case about a cover of their magazine which infringed upon the rights of the persons depicted (human rights activists who were compared to Wehrmacht soldiers). After the unfavourable judgement was announced, Sakiewicz filed a motion to the regional Disciplinary Spokesperson Adam Jaworski (a neo-judge himself),[81] requesting that the judge be disciplined.[82] The Disciplinary Spokesperson claims the charges brought against the judge do not relate to the case of Tomasz Sakiewicz, however the timeline of the events suggests otherwise.

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76. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375.
77. https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI(2023)741581_EN.pdf
78. FIDH interview with representatives from the Warsaw Bar Association, May 31, 2023.
79. The Act of 9th June 2022 on changes to the law on the Supreme Court and other laws. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001259/T/D20221259L.pdf.
80. The 9th of December 2017 Act on changes to the law on the National Council of the Judiciary and other laws https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000003/T/D20180003L.pdf. In case C-487/19 the CJEU, after examining the question of whether a politicized body can appoint a court within the meaning of EU law, the CJEU ruled that this was a breach of EU treaty standards. https://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrec=de&jge=&td=%3BALL&jur=C%2CT%2CF&num=C
81. In this context, a "neo-judge" is someone who was nominated to their position or promoted by the politicized National Council of the Judiciary.
82. http://rzecznik.gov.pl/wp-content/uploads/2023/09/Komunikat-ZRD-przy-SA-w-Warszawie-z-1.09-2.pdf. https://oko.press/dyscyplinarka-okladka-z-wermachtem.

"A sword of Damocles is hanging above judges. The government won't let anyone dismiss these cases. The repression against judges has not gone away." – a lawyer from the Warsaw Bar Association representing some of the judges who have been subject to disciplinary proceedings[83]

"The muzzle law has not been suspended completely. […] The chilling effect actually works. What happened to the prosecutors happened to the judges as well. […] Even if corruption cases were to go through the prosecution, they would die in court. Because of the chilling effect." – a judge representing independent judges association IUSTITIA[84]

The second bill, which was an additional attempt at meeting the milestones by the Polish government, came in December of 2022, when shifting the disciplinary proceedings to the Supreme Administrative Court was suggested. However, this attempt, apart from the opposition of administrative judges, also led to the President sending the draft to the Constitutional Tribunal for its opinion before he would sign it into force, which has stalled its implementation for the time being. It should also be mentioned that the President acted on February 14, 2023, whereupon on February 15, 2023, the European Commission announced that it had filed another complaint against Poland to the CJEU – this time in the case of the Constitutional Tribunal itself, which, in the opinion of the Commission, does not meet the requirements of an independent and impartial court established by law.[85] The case is still pending at the time of writing. This, and the other criticism[86] raised by multiple sources to the Constitutional Tribunal's independence, suggest that even in the event that the Constitutional Tribunal were to confirm the constitutionality of the proposed bill, this can hardly be considered a guarantee of the law's compliance with the Constitution.

For the time being, Poland is therefore considered by many in Poland not to have met the needed threshold to pass the set milestones, and cannot expect that RRF funding, whose release has been made conditional upon their implementation, will be forthcoming.

According to the most recent information gathered by our investigators, the Polish government will have filed an updated version of its NPRR on September 1, 2023, preliminary to making a request for payment of advances from the newest REPowerEU funds, which were added to the funding under RecoverEU. By submitting an updated NRRP, Poland hopes to receive 20% of the funding requested from the RePowerEU funds, which would amount to 23 billion euros in loans and 2.76 billion euros in grants. If the updated NPRR were accepted by the EU Commission, the Polish government – without meeting the milestones necessary to receive all of the funding – may still be able to access the aforementioned advances.[87]

I.III.ii If it does not come from the EU RRF, then from where?

Given that the RRF funding has been stalled due to Poland's government failure, to date, to demonstrate that it has met the rule of law milestones set out by the EU Commission, and because the government already wanted to proceed with the pre-financing of RRF-branded projects, it quickly became strained for funding. The Polish government seemed to be convinced[88] that it was only a matter of time before the RRF funds were unblocked, as the EU would eventually relent in its efforts to push the government to return independence to its courts and prosecutors. As soon as it became clear that this was not the case, pending reforms and a request for payment that Poland was to submit to the EU Commission in order for the funding to be released, the government – not wishing to announce that it would not be able to realize the strategy laid out in the Resilience and Recovery Plan, especially when a crucial election was approaching in October 2023 – began searching for other avenues of funding.

The Polish government initially planned to finance projects that it had intended to implement through RRF funds through two different routes, both using the Polish Development Fund (PFR), a government-established fund. These were specified in the Act of 28 April 2022 on the rules for the implementation of tasks financed from European funds in the 2021-2027 perspective.[89] The Act identified the two sources of financing of investments by PFR as:

83. FIDH interview with representatives of the Warsaw Bar Association, May 31, 2023.

84. FIDH interview with representatives of IUSTITIA, May 31, 2023.

85. https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842.

86. https://ec.europa.eu/commission/presscorner/detail/en/statement_21_3726.

87. https://oko.press/polska-kpo-zaliczki-zmiana-ke.

88. https://konkret24.tvn24.pl/polityka/krajowy-plan-odbudowy-mateusz-morawiecki-o-pieniadzach-z-kpo-jak-zmieniala-sie-narracja-premiera-st6639057.

89. https://orka.sejm.gov.pl/proc9.nsf/ustawy/2022_u.htm.

1. financing investments from non-repayable funds received from the EU by transferring them to a separate account within the PFR, and then using them to cover the implementation of investments and reforms (this remains inapplicable due to the fact that EU funding has been stalled); and

2. financing investments and reforms with funds resulting from the issuance of bonds guaranteed by the State Treasury, as well as from the reimbursement of funds from aid granted to Polish entrepreneurs under so-called financial shields, during the pandemic.

However, what was initially a back-up plan of the government – i.e. to finance the projects through bonds and from the debts assumed by entrepreneurs – turned into the sole source of financing of RRF-related projects due to the fact that the funding has been withheld by the EU pending important rule of law reforms.

Recorded media statements by the head of the PFR[90] show that the pre-financing has already been launched, and it has already reached a significant stage of advancement (approx. 3.6 billion zlotys), and may reach 20 billion zlotys by the end of 2023. This means that these expenses are being almost entirely financed through the repayment of aid granted to Polish businesses by the government in loans during the pandemic (for which the expected repayments by the end of the year amounts to approx. 20 billion zlotys).[91]

In short, national funds are used to create a fictitious view of RRF projects being implemented without any problems or threats of non-funding and thus contribute to the overwhelming narrative of EU funding flowing into the country without issues.

The adopted method of financing/pre-financing RRF projects creates a rather complicated situation in the context of the upcoming first buy-outs of the aforementioned bonds issued by PFR. The bonds which are worth 16.3 billion zlotys should be bought out in 2024, and those worth 33.7 billion zlotys should be bought out in 2025.[92] Originally, the government planned to effect these buy-outs with the money retained from repayment of the loans which were issued to entrepreneurs. Seeing as these are now being used in the pre-financing mechanism already, however, the bonds will have to be bought through funding from other parts of the State budget, and will increase the country's loan needs. There is also no telling if the government will manage to find the budget needed to do this, or if it will have to search for outside sources of capital to cover the bonds.

I.III.iii The RRF funding and its role in the Polish government's anti-EU propaganda

From the official governmental website: https://www.gov.pl/web/premier/projekt-ustawy-o-zasobach-wlasnych-przyjety-przez-rzad-polska-bedzie-mogla-skorzystac-z-770-mld-zl-w-ramach-budzetu-ue

90. https://www.gov.pl/web/planodbudowy/finansowanie-kpo.

91. The scope of publicly accessible information about the PFR pre-financing, and more generally about the degree of advancement of the investments, is limited to media information presented by the head of PFR – no reports about payments made by PFR are available on the websites of the Ministry of Regional Development or of PFR SA.

92. Numbers provided by the Institute of Public Finance for the purposes of this report.

Although the RRF funding continues to remain in the EU's hands, and far from the Polish government's reach, various narratives have been launched to inform the public about these funds, and about how much of it is theoretically going to be reaching the country soon. A massive billboard campaign spread throughout Poland in March and April of 2021 with information on how the Polish government managed to negotiate and obtain 770 billion zlotys for Poland from the EU. All were co-signed by the European Conservatives and Reformists, with whom Law and Justice MEPs also sit.[93] After not receiving the RRF funding, though, the governing authorities have started blaming the EU Commission for not unblocking it. Recently, Marcin Przydacz, the head of the Presidential International Affairs Bureau, stated that the Commission declared that Poland will meet the rule of law milestones if the December 2022 Act which was sent to the Constitutional Tribunal enters into force.[94] He further claimed however, that he would not be surprised if "it suddenly turns out that they remembered that there is a small element somewhere on page 64 in a footnote, etc.," which would prevent them from unblocking the RRF funding for Poland. Przydacz also declared that "were it not for the election campaign, perhaps RRF funds would have been unblocked," thus suggesting that the reasons behind the delay in releasing the RRF funding are political, rather than related to the Polish government's failure to meet the conditions for the funding to be released.

The above facts clearly show how the narrative around the RRF funding can easily change and be bent to the government's evolving needs. On the one hand, billions were declared to have been secured for Poland, and reforms promised to its citizens, which were to be funded through the Resilience and Recovery Plan. But these projects were started using pre-financing whose sources are unclear, and which may not eventually be coverable by the available public budget. On the other hand, the authorities are preparing Poles for the funds not being unblocked by complaining of the EU Commission's "arbitrary" decision, and turning this to their advantage in the highly polarised political context leading up to the country's parliamentary elections in October 2023.

I.IV. Monitoring Committees: an effective safeguard against EU funding abuse?

Currently, Poland benefits from the fourth EU funding perspective for the years 2021-27, and is still using funding left over from the 2014-20 period.[95] In this context, it is implementing ten national programs and 16 regional ones using the following funding streams:

- European Regional Development Fund
- European Social Fund+
- Cohesion Fund
- European Maritime, Fisheries and Aquaculture Fund
- Just Transition Fund

The funds and their intended purposes:

The European Regional Development Fund (ERDF)
- alleviate disparities in the development of European regions
- raise the standard of living in the most disadvantaged regions

European Social Fund+
- provide support for the socio-economic development of member countries, with financial resources invested in people, specifically those who have difficulty finding a job

Cohesion Fund
- provide support to Member States with a gross national income (GNI) per capita below 90% EU-27 average to strengthen the economic, social, and territorial cohesion of the EU

European Maritime, Fisheries and Aquaculture Fund
- provide support for developing innovative projects, ensuring that aquatic and maritime resources are used sustainably

93. https://oko.press/billboardy-pis-ekr.

94. https://www.tvp.info/71294327/marcin-przydacz-ke-oddzialuje-politycznie-na-sytuacje-w-polsce. In an interview with FIDH, the European Commission's services rectified this statement, clarifying that, following the Constitutional Tribunal ruling, the Commission will be able to start ***assessing*** Poland's compliance with the milestones, not that it will automatically release the funding. Interview of FIDH with the European Commission, Director-General for Justice and Consumers, September 13, 2023.

95. https://www.funduszeeuropejskie.gov.pl/strony/o-funduszach/fundusze-2021-2027/umowa-partnerstwa/.

Just Transition Fund
- provide support to Member States having identified the territories expected to be the most negatively impacted by the transition towards climate-neutrality[96]

These all fall under the EU cohesion policy funds, which, together with the so-called "Home" Funds (Asylum, Migration and Integration Fund – AMIF; Internal Security Fund – ISF; Instrument for Financial Support for Border Management and Visa Policy – BMVI) are regulated under the "Common Provisions Regulation."[97] The Regulation lays down common financial rules, including regarding mechanisms that must be established to protect the EU's financial interests in connection with these funds.

Under the Common Provisions Regulation, regular EU funding programs rely on the so called "Partnership Agreement" – designed to ensure that EU standards are met when spending the accessible funding. The Agreement defines the objectives, the scope of the interventions, the institutions responsible for managing funds, the programs, and their financing. It is addressed to both officials and beneficiaries who implement projects.[98]

One of the most crucial elements of the Partnership Agreement is the regulation of the creation and functioning of Monitoring Committees and the institution of the plenipotentiary of EU funds. The aim of both these mechanisms is to contribute to the overall safeguarding of EU funds being managed through the shared management system[99] by ensuring that these are implemented in line with EU law and standards. The Monitoring Committees are meant to ensure effective and thorough monitoring of operational programmes under the cohesion policy's design and implementation with a view to ensuring their compliance with the so-called "horizontal enabling conditions," including compliance with public procurement and State aid rules, and with the EU Fundamental Rights Charter (the Charter).[100]

I.IV.i The main issues surrounding Monitoring Committees in Poland

Regulation 2021/1060 distinctly provides for the Monitoring Committees as a mechanism to oversee the programmes' performance and implementation and act as a consultancy body, comprising social partners (including the NGO sector). According to the provisions set out in the Regulation, Member States are obliged to set up such Monitoring Committees "to monitor the implementation of the programme, after consulting the managing authority, within 3 months of the date of notification to the Member State concerned of the decision approving the programme. Additionally, each Monitoring Committee shall adopt its rules of procedure, including provisions regarding the prevention of any conflict of interest and the application of the principle of transparency."[101]

However, as discovered by FIDH experts during this investigation – based upon consultations with representatives of NGOs and other social partners, including business representatives, who sit on the Monitoring Committees – notwithstanding these provisions, the current framework, at the time of the investigation, did not provide sufficient guarantees to effectively prevent conflicts of interests and ensure transparency, and cannot therefore ensure an effective and independent monitoring over EU spending.

> ***"The [Monitoring] Committees are an example that you can have a good law but use it in a bad way." – a representative of an NGO sitting on the Monitoring Committees***[102]

According to NGOs interviewed by FIDH,[103] although all members of the Committees are obliged to sign a declaration stating they do not have a conflict of interest, in practice it is unknown whether

96. https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes_en.
97. Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.
98. https://www.funduszeeuropejskie.gov.pl/strony/o-funduszach/fundusze-2021-2027/umowa-partnerstwa/czym-jest-umowa-partnerstwa/.
99. Shared management means that the EU funding entities rely on the Member States to create national and well-functioning distribution mechanisms for the funds.
100. See Annex III CPR, Article 15 CPR.
101. Article 38 CPR.
102. FIDH interview with NGO representatives, June 1, 2023.
103. FIDH interviews with NGO representatives, May-June 2023.

any consequences would arise should a member of the committee sign a false statement. ***[sample of declaration attached as photo]*** The only other place where the conflict of interest issue is raised is in the rules of procedure, where it is noted that any declaration of a conflict of interest shall be reported to the Committee. This potential for conflicts was further raised as a concern during interviews held by FIDH experts with representatives of the business sector.[104] Representatives of the business sector stated that those who represented unions of private businesses were acting in the name of multiple entities. Whereas if someone was representing just one business it was clear that he or she would only be representing themselves, and therefore was at greater risk of acting based on a conflict of interest.

> ***"It's like a battlefield. Everyone applies, all sorts of organisations because they all want to have an influence on the criteria, the selection of projects, etc. Normally people are excluded from the selection procedure on their own project, but only if they are 'kind enough' to mention that there is a conflict of interest." – a representative of an NGO sitting in the Monitoring Committees[105]***

The aforementioned Regulation also obliges each Member State to determine the composition of the Monitoring Committee by ensuring a balanced representation of the relevant Member State authorities and intermediate bodies, as well as of representatives of:

- regional, local, urban, and other public authorities;
- economic and social partners;
- relevant bodies representing civil society, such as environmental partners, non-governmental organisations, and bodies responsible for promoting social inclusion, fundamental rights, rights of persons with disabilities, gender equality, and non-discrimination; and
- research organisations and universities, where they are appropriate partners.

The process leading to their appointment ought to be transparent. However, according to the information gathered through this investigation, it appears that this criterion often goes unmet. NGO representatives interviewed by FIDH, and who sit on numerous Monitoring Committees, confirmed that the process of recruitment into the Monitoring Committees was neither transparent nor accessible. Managing authorities made it difficult to follow the calendar and therefore meet deadlines for applications, due to shifting timelines, while some applications were not examined at all. It was also reported that the forms for applying to the Committees were extremely long and complex.[106]

Additionally, although the Regulation does not define the term "civil society," it clearly states that it "respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union."[107] Under Article 9 of the CPR: "Member States and the Commission shall take appropriate steps to prevent any discrimination based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the preparation, implementation, monitoring, reporting and evaluation of programmes." This should also presumably be taken into consideration in the process leading to appointments to the Monitoring Committees.

However, it has been reported that representatives of far-right and openly anti-human rights organisations have been allowed to join as members of the Monitoring Committees. In one specific case, regarding an organisation named "Ordo Iuris"[108] – well known for its homophobic and anti-gender actions – that was brought to the European Commission's attention by European and national NGOs participating in the Monitoring Committee, the NGOs argued that this organisation should never have passed the formal assessment due to its activities that go clearly against EU law and values.[109] Following this action, the Commission reached out to a public body – the Council for Public Benefit – that is entrusted with assessing applications, but they replied that there were no irregularities in the procedure, after which no further action was taken and Ordo Iuris continues to sit in the relevant Monitoring Committees.

> ***"The European Commission thinks that procedures are all good. Instead, the reality is different." – an NGO representative[110]***

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104. FIDH interview with representatives of the Federation of Polish Entrepreneurs, May 29, 2023.
105. FIDH interview with NGO representatives, May 31, 2023.
106. FIDH interviews with NGO representatives, May-June 2023.
107. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1060.
108. https://ordoiuris.pl/.
109. https://ordoiuris.pl/dzialalnosc-miedzynarodowa/organizacje-lewicowe-probuja-usunac-ordo-iuris-ze-skladu-komitetu.
110. FIDH Interview with NGO representatives, May 31, 2023.

A Monitoring Committee has also been set up for the purposes of the National Recovery and Resilience Plan's (NRRP) implementation.[111] Not covered by the Partnership Agreement, the Committee has an advisory role and appears instead to be a discussion group.[112] Members of this Committee do not have any power to block or change the rules of implementation.

I.IV.ii The EU Charter of Fundamental Rights: another way to protect EU funds

> *"For us it is better not to get any money at all than to get it for the wrong projects. Don't give us the money if it is going to be spent to kill human rights – that has been our message." – an NGO representative*[113]

As previously mentioned, according to Article 9 of the CPR: "Member States and the Commission shall ensure respect for fundamental rights and compliance with the Charter of Fundamental Rights of the European Union in the implementation of the Funds." By declaring the fulfilment of this criterion, the Member State declares, ***inter alia***, that EU funds will be spent respecting the principles of non-discrimination and equality, and ensuring proper and fair working conditions.

The Monitoring Committees are entrusted with monitoring and reporting noncompliance with the Charter, along with other horizontal enabling conditions, during programme implementation. However, according to several Monitoring Committees' representatives, the way in which the committees operate in practice makes it difficult for its members to conduct a proper monitoring. Specifically, they believe the speed at which procedures and decisions are pushed through, the lack of debate – with all comments having to be sent by email rather than discussed during committee meetings, and remarks regarding compliance with fundamental rights and anti-discrimination standards often being left unanswered by the managing authority – and the lack of transparency around the granting procedures, all undermine the Monitoring Committees' role and effectiveness in monitoring compliance with the Charter and other enabling conditions under EU legislation. The lack of practical mechanisms to ensure the implementation of ideas and suggestions put forward by Monitoring Committee members to improve monitoring and ensure respect for the Charter and, in some cases, the lack of legal expertise of Monitoring Committee members to establish criteria and make them operational (i.e. verify compliance once the selection is made)[114] also undermine the effectiveness of the Charter's conditionality provisions and the role of the Committees in ensuring their application.[115] Although the Ombudsman is supposed to help ensure compliance with fundamental rights and anti-discrimination standards, his office can only review complaints after these have been violated.

As a result, and according to our sources, significant funding goes to organisations close to the ruling coalition, while other, independent organisations, such as LGBTI+ organisations, feel that they are being excluded from funding. The fact that there is no transparency regarding the way in which the funding is distributed also means that there is no clarity among Monitoring Committee members as to which organisations are receiving funding.[116]

The issue of compliance with the CFR has become most controversial in regards to Poland. Indeed, the Polish Prime Minister's Office declared in June 2022 that Poland does not and will not meet the criteria set out by the EU Charter of Fundamental Rights due to having signed the British Protocol to the Charter,[117] and that the Charter should therefore not be considered an instrument that Poland is expected to comply with from the start.[118]

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111. https://dziennikurzedowy.mfipr.gov.pl/media/110075/Dz19.pdf.
112. FIDH interview with NGO representatives, June 1, 2023.
113. FIDH Interview with NGO representatives, June 1, 2023.
114. An NGO representative interviewed by FIDH pointed out that specific legal expertise is needed to verify if a project meets the criteria, but that the people who sit on the Committees are not always legal or human rights experts who can carry out this compliance check. FIDH Interview with NGO representatives, June 1, 2023.
115. FIDH interviews with representatives of NGOs sitting on Monitoring Committees, May-June 2023.
116. FIDH interview with an LGBTI+ organisation, May 31, 2023.
117. On March 2, Polish MEP Zbigniew Kuźmiuk stated that "We [Poland] are excluded from the application of the Charter of Fundamental Rights because we have the British Protocol […] The Charter should not apply to our country."
118. https://oko.press/komisja-europejska-fundusze-spojnosci-karta-praw-podstawowych.

EU funds related to the implementation of the Cohesion Policy for 2021-2027 have thus effectively stopped flowing to Poland.[119] The amount in question is not insignificant, being over 76 billion euros (over 350 billion zlotys).

However, the lack of payments has not prevented the announcement of further competitions under EU programs, which transfers the risk to the beneficiaries, mainly local governments.[120] According to our sources, different sources of funding – some from additional funds added to the previous perspective during the pandemic, some from the advances to the new perspective,[121] and the so-called "technical aid" which amounts to 1-1.5% of all the funds available[122] – are being used to continue with new projects. However, many of the presumed beneficiaries who have applied for grants under the new perspective may be left to finance their projects on their own, seeing as most of the grants function on a re-funding basis, meaning that they have to be requested on the basis of evidence of the performance of a project. Since ministries responsible for the distribution of the funding are announcing calls for proposals and accepting projects, it would seem as if they are counting on the release of the money sooner or later.[123] Should the money not be released, many entrepreneurs may be faced with no access to funds to refund their expenses, due to the government's refusal to comply with standards set out in the EU Charter for Fundamental Rights.

> *"They say that if they run out [of money] they will go to the market and borrow. It is not the same interest rate though." – a representative of the business community*

This uncertain situation, coupled with the funds that have still not been released to Poland under the RRF due to noncompliance with the RoL milestones, puts a burden on those who are supposed to benefit from this funding, including Polish businesses.

> *"Employers have been calling from day 1 on the government to end this [dispute with the EU over noncompliance with EU principles and norms] and come back to business as usual with the EU. Our organisations and others throughout the years kept repeating that the rule of law is important for businesses and should be upheld and that the issues with the EU should be solved. […] This [the RoL crisis] is affecting trust – and trust builds slowly and evaporates quickly." – a representative of the Foundation of Polish Entrepreneurs*

> With regard to RRF Funds, the same representative said: *"Funds from the recovery instrument are very important for quick investments to contain the energy crisis, as well as to increase investment and provide relief. [This situation] affects the standing and the competitiveness of Polish companies on the EU market."*

I.V. Does money rule the law? The Conditionality Mechanism in practice

Without a doubt, one of the most crucial developments in terms of the safeguarding of EU funds in Member States in recent years was the adoption by the European Parliament and the Council of the European Union, on December 16, 2020, of Regulation (EU) 2020/2092, a general regime of conditionality for the protection of the Union budget.[124] The Regulation is the latest addition to the so-called EU Rule of Law toolbox. It aims at sanctioning rule of law breaches that affect, or risk affecting, the sound financial management of the EU budget or the EU's financial interests. In short, the idea behind the Regulation is that should actions taken by a Member State not fulfill rule of law standards set out in EU law and the Regulation itself, and by doing so affect, or risk affecting, the rightful spending of EU funds in a Member States, if certain other conditions apply, funding can be withheld.

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119. Under the CPR, the European Commission can suspend the approval of programmes, or amendments of programmes, in case of noncompliance with the Charter (Article 9 CPR). This provision has proved effective in preventing, e.g., the introduction of discriminatory measures in operational programmes (for instance, in the case related to the EU Commission's threat to suspend REACT-EY programme amendments to municipalities in Poland that declared themselves LGBTI-free zones). The Regulation also provides for the non-reimbursement of costs in case of noncompliance with the horizontal enabling conditions, including CFR compliance (Art. 15 CPR, Annex III CPR).
120. https://wiadomosci.wp.pl/unijne-fundusze-nie-plyna-do-polski-rzad-nie-widzi-problemu-6864260422675040a.
121. So far, Poland has received 8.4 billion zlotys in advances to the 2021-27 perspective for the Social Cohesion policy funds. https://www.pap.pl/aktualnosci/news%2C1577813%2Cpuda-polska-otrzymala-z-ke-zaliczki-na-realizacje-programow-polityki.
122. https://oko.press/ue-zablokowane-fundusze-nie-tylko-kpo.
123. Ibid.
124. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32020R2092.

Although the Regulation presents several advantages compared to other instruments by which the EU can hold Member States accountable for illegal conduct affecting the EU budget, it also faces limitations when it comes to its effectiveness. The Rule of Law Conditionality Regulation (or, as it is often referred to, the Conditionality Mechanism) is the only procedure addressing risks affecting all EU revenues and expenditures. It also provides comprehensive coverage of potential risks stemming from RoL breaches, and can be used preventively, as the regulation does not require that the risk has materialised as a condition for its application.[125]

However, the Regulation also requires that no other procedures exist that protect the EU budget more effectively, and that a "sufficiently direct link" exists between the rule of law shortcomings and the risks to the EU funds in question. This double test is not easily passed due to the often indirect – and therefore harder to prove – impact a general rule of law crisis has on specific funding lines. Also, considering the recent character of the Regulation, and the fact that the relevant case law does not provide further explanations that would assist the Commission in leaning towards a broader, or indeed a more restrictive interpretation,[126] applying the test inevitably entails some discretion in deciding whether such a link may be established.[127]

In the case of Poland, the cases highlighted in this section and a closer look at the institutional framework (see chapter II) – including the public authorities involved in the implementation, management and/or control of EU funds, as well other authorities whose conduct is relevant to the sound financial management of those funds and of the financial interests of the Union – lead us to conclude that the conditions have been fulfilled for the situation to fall under the Conditionality Regulation's scope and warrant its application. The specific cases detailed in this chapter suggest that the abuse they led to would have been virtually impossible to commit were it not for gaping loopholes in the rule of law system that was created and/or abused by the public authorities in this Member State.

The adoption of the Conditionality Mechanism was preceded by turbulent discussions and debates within the European family,[128] with opposition from some countries which rightfully feared from the start that the adoption of the Regulation might mean a near-automatic withholding of funds from them. This fear proved to be justified only to a certain extent. Although powerful in theory, the Conditionality Mechanism, as mentioned already, must meet two main criteria in order to be applied against a Member State: the "complementarity test" – requiring that the risks to the EU budget cannot be more effectively addressed by other procedures set out in EU law to protect the Union's financial interests – and a "sufficiently direct link" between a violation of the rule of law standards and the real or potential damage to EU funding.

Even though the Conditionality Mechanism was often regarded as having limited chances of actually being employed, due to the need to fulfill the above-mentioned criteria, notably to prove a concrete breach of the rule of law standards which directly resulted in the mismanagement of EU funding or threatened its being spent in a proper manner, Poland and Hungary both filed complaints to the CJEU concerning the Regulation after its adoption,[129] claiming it constituted a breach of treaties. This can be considered an attempt at preventing the possibility that EU funds might not reach the two countries – which are both suffering a rule of law crisis.

125. "The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context," Study requested by the European Parliament's BUDG Committee, Policy Department for Budgetary Affairs, Directorate-General for Internal Policies, PE 747 469 – April 2023.

126. A restrictive interpretation would suggest that in order to demonstrate the existence of a direct link between a breach of the rule of law and the real or potential damage to the EU budget, hard evidence must be provided, whereas under a broader interpretation, hard facts would not be necessary, as long as ascertained rule of law breaches can be considered, with a high probability, to pose a risk to EU financial interests. Ibid.

127. Due to the fact that the Conditionality Mechanism was supposed to become the newest and most effective means to protect the RoL within the European Union, an unclear and indirect phrasing could make all the difference between making it possible to establish a clear link between a specific action of a Member State and a breach of the rule of law. Thus, the Commission adopted a set of guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget.

128. Spanning from 2018 to 2020. https://www.cambridge.org/core/services/aop-cambridge-core/content/view/F649CD318CB03DFC14A77979CDA72B75/S2071832222000177a.pdf/linking-money-to-values-the-new-rule-of-law-conditionality-regulation-and-its-constitutional-challenges.pdf.

129. Hungarian case no. C-620/18 https://curia.europa.eu/juris/document/document.jsf?text=&docid=208030&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=512420; Polish case no. C-626/18 https://curia.europa.eu/juris/document/document.jsf?text=&docid=209487&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=513934.

However, on February 16, 2022, the CJEU dismissed the actions brought by the two countries, stating that the Mechanism was adopted on an appropriate legal basis, is compatible with the procedure laid down in Article 7 TEU, and respects in particular the limits on the powers conferred on the European Union and the principle of legal certainty.[130] The Court additionally highlighted the fact that the Mechanism is in truth not intended as an additional penalty, but that it aims to protect the Union budget from effects resulting, in a sufficiently direct way, from breaches of the principles of the rule of law. The CJEU also underlined the need for Member States to comply with EU values not only on their road to joining the EU, but throughout their membership in the Union. Finally, the Conditionality Mechanism was deemed to fall within the power conferred by the Treaties on the European Union to establish "financial rules" relating to the implementation of the Union budget.

@Dwi Anoraganingrum / Geisler-Fotopress / dpa Picture-Alliance via AFP

130. https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf.

I.V.i Linking rule of law breaches to the EU's financial interests

a. The complementarity test in the Polish case

The first criterion that must be met in order for the Conditionality Mechanism to be applicable, per the Regulation (and the Guidelines issued by the European Commission in March 2022 to provide guidance on the conditions for its application[131]), is that it must be demonstrated that the Mechanism would be the most effective instrument available under EU legislation to address the situation (the "complementarity test").

Throughout this section, we have showed that the risks to the EU budget resulting from the documented actions or omissions by national authorities managing or exercising control over EU funds across programmes, or deriving from far-reaching reforms and changes to the legal system in Poland, are such that they can only be effectively addressed through the Conditionality Mechanism. Indeed, the observed breaches are so widespread and severe that they are likely to have an impact on the EU budget across programmes – including those that do not require compliance with horizontal enabling conditions[132] for the funds to be released – and beyond individual cases where irregularities may be detected in the functioning of a given institution or body managing or overseeing the implementation of specific EU funds. The Conditionality Regulation specifically allows the Commission to address all RoL breaches linked to the actions or omissions of national authorities – including, e.g., the public prosecutor, the judiciary, and other authorities who may not be directly involved in the management or control over EU funds, but whose actions could indirectly influence the way EU funds are used, and including RoL breaches that do not automatically entail non-respect for fundamental rights – as long as they represent a threat to the EU budget. It does not require that the risk has materialised, but only that there is a high probability that it will materialise.

The fact that the Mechanism can be applied in combination with other mechanisms and procedures that are meant to protect the EU budget from specific risks linked to specific programmes, also strengthens the protection afforded to the EU budget under those instruments while addressing risks resulting from RoL violations that are not – or not so effectively – addressed under other, ad hoc procedures. These can be activated alongside the Conditionality Regulation, thus strengthening the protection afforded to the EU's financial interests.

The fact that the Conditionality Mechanisms gives the Commission broad flexibility with regard to the measures to be adopted in response to the violations also ensures that solutions can be found – through, e.g., remedial measures proposed by the Member States in response to the Commission's concerns – which provide an incentive to remedy the situation, with the decision to suspend or withhold funds being a last resort in case the Member State does not wish to cooperate to remedy the damage (or the risk thereof) caused to the EU budget.

b. A "sufficiently direct link" between RoL breaches and the EU budget

The second test that documented situations need to pass in order to fall under the Regulation's scope and warrant its application, is the one requiring that the observed RoL breaches result in real or potential damage to the EU budget and the EU's financial interests.

The "sufficiently direct link" is defined under Article 4(2) of the Conditionality Regulation by combining two sets of criteria: the first one relating to the author of the action or omission that results, or is likely to result, in a breach of a RoL principle; the second one to the specific conduct or activity whose performance may result in a breach of a RoL principle.[133] Whereas the link is clear and easy to establish when the RoL breach results from actions or omissions by the authorities responsible for managing or overseeing the use of EU funds – as deficiencies in the national management and control system pose a direct and real risk of financial damage to the EU budget – establishing a direct link is more challenging when the breach results from actions or omissions of public authorities not directly involved in the use of EU funds (e.g. the public prosecution service, the judiciary, administrative authorities in charge of investigating and sanctioning corruption or fraud), or from far-reaching reforms to the national law or administrative procedures relevant to the implementation of EU funds. In the latter case, the CJEU case law regarding

131. https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en

132. They are not applicable to programmes supported by the AMIF [Asylum, Migration and Integration Fund], the BMVI [Border Managment and Visa] and the ISF [Internal Security Fund], more on this here: https://oceans-and-fisheries.ec.europa.eu/system/files/2021-03/2021-02-24-EMFF-05-General-Intro-presentation_en.pdf

133. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2020.433.01.0001.01.ENG&toc=OJ:L:2020:433I:TOC

the application of the Common Provisions Regulation lends a hand by suggesting that the link can be established when national law or nationwide administrative decisions breaching the RoL have direct and concrete implications for EU funding programmes implemented by national authorities. When the breach results from actions or omissions by public authorities not directly involved in managing EU funds or overseeing EU funds' implementation, a restrictive interpretation would require hard proof that the RoL breach has affected, or risks affecting, the EU budget, whereas a broader interpretation would be satisfied with proof that the harm is very likely to occur under the circumstances.

Although neither the European Commission's Guidelines nor the EU Court's case law provide assistance in leaning towards either of the two interpretations, given the Mechanism's preventive (rather than corrective) nature, and the fact that the Regulation specifically states that the risk to the EU's financial interests resulting from the RoL breaches must not have materialised, leaning towards a broader interpretation seems the most sensible approach to determining what falls under the Regulation's scope. This approach would also be more aligned with the complementary nature of the Mechanism, which provides an additional, more comprehensive, and more effective layer of protection to the Union's financial interests in cases that are not (or not effectively) covered by other instruments, and which offers the flexibility and case-sensitive approach that other procedures lack.

- *Actions or omissions by national authorities involved in implementation, management, and/or control over EU funds that affect, or risk affecting, the EU budget*

Based on our research findings, we can conclude that a high number of legislative acts and executive decisions in Poland undermine respect for RoL principles in the management of EU funds. Besides a general failure by the Polish authorities involved in managing and implementing EU funds to meet basic transparency principles, a systematic failure to ensure respect for the right to access public information; the failure to adopt legislation requiring politicians to declare their assets; decisions to withhold resources from public authorities entrusted with preventing or combatting fraud and corruption in using public – including EU – funds; and decisions by public authorities managing EU funds to offer preferential treatment to some applicants due to their political affiliation or personal interests, are among the actions taken by national authorities that pose a threat to the EU budget.

The latter especially appears to fall squarely under the Conditionality Regulation's scope, due to the effect that such preferential treatment is bound to have on the sound financial management of the EU budget. When looking at what actions breaching the RoL may be considered to affect, or seriously risk affecting, the sound financial management of the Union budget or the protection of the financial interests of the Union, the Commission's Guidelines point to Article 2(59) of the Financial Regulation which defines "sound financial management" as "implementation of the budget in accordance with the principles of economy, efficiency and effectiveness."[134] The ways in which public authorities managing EU funds – such as the NCBR – allocate EU funding, as detailed in the cases presented in the report – i.e. through unlimited resources being allocated to chosen entities close to the governing authorities – clearly violates the principles enshrined in the Financial Regulation. Furthermore, as stated in the Guidelines, the mere risk to EU funding may be enough to constitute an effect of the breach. Therefore, the cases documented in this report and related to the NCBR – which can no longer be considered a safeguard of EU funds, due to uncovered cases of mismanagement of the funds – should be viewed in the perspective of said risk.

Additionally, as pointed out in the Poland chapter of the 2023 EU Commission's Rule of Law report, no progress has been made on separating the function of the Minister of Justice from that of the Prosecutor General, which calls into question the very possibility of independent criminal proceedings in the country – including in regard to EU funding. Other areas, though seemingly unrelated to EU funds spending, such as ensuring that fair, transparent, and non-discriminatory procedures are adhered to for the granting of operating licenses to media outlets, have also not improved, and what should be highlighted is that this allows for unclear standards in this regard to remain in place. This may further result in arbitrary actions being taken against non-compliant media outlets, and promote the influence of those favourable towards the government, who may also be subsidized by public funds – including those that come from EU programs (such as in the case of Puszcza.tv). What was also noted in the Rule of Law report by the EU Commission is the worrisome fact that no progress has been made on strengthening the rules and mechanisms intended to enhance the independent governance and editorial independence of public service media, taking into account European standards on public service media.[135]

134. https://commission.europa.eu/publications/eu-financial-regulation_en

135. https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en

Our findings also point to a general failure by the authorities to prevent and combat fraud and corruption in using EU funds. As detailed in Chapter II and exemplified in Chapter I, the national authorities entrusted with investigating and prosecuting crimes against the EU's financial interests are either politicised, ineffective, or otherwise fall short of their mandate to prevent, correct, and sanction irregularities in the way EU funds are being used. This includes serious deficiencies in the management and control systems that escape the scrutiny of other EU mechanisms aimed to protect the EU budget. The systematic refusal to cooperate with EU bodies entrusted with investigating and prosecuting fraud and other crimes affecting the Union's financial interests – such as OLAF and the EPPO – (see Chapter II for more details), is the best example.

In all these cases, the link between RoL breaches and the risk to the EU's financial interests is clear, as serious deficiencies in the national management and control system in Poland, such as the ones highlighted above and in the present report, cannot but pose a direct and real risk of financial damage to the EU budget.

- *Actions or omissions by national authorities not directly involved in managing or controlling EU funds that affect, or risk affecting, the EU budget*

Actions and omissions by public authorities that are not directly involved in the management and/or control over EU funds, but which play a role in protecting the EU's financial interests, can also have an impact on, or represent a threat to the EU budget. This includes actions or omissions by the police and the public prosecution services that result in a failure to investigate or prosecute fraud, corruption, and other crimes against the EU's financial interests (Article 2(2)c CR). It also includes the lack of an effective remedy before independent courts against actions or omissions by public authorities managing or controlling EU funds, or entrusted with investigating their misuse (Article 2(2)d).

In both cases, our findings – along with substantial evidence provided by national and international actors, including the European Commission in its annual report on the situation of the Rule of Law in all the 27 Member States including Poland, and the CEU and the European Court of Human Rights, which have repeatedly condemned Poland for breaching rule of law principles and standards in relation to the independence of the judiciary[136] and the prosecution services – prove that systemic and widespread RoL deficiencies in the functioning of the judiciary and the public prosecution in Poland cannot but represent a serious threat to the sound financial management of the EU budget, and a risk for the protection of the EU's financial interests.

With regard to the judiciary, Poland cannot rely on its judicial bodies due to a general politization – or indeed subjugation – of the judiciary, and especially due to the complete politization of the body (the National Council of the Judiciary) responsible for nominating new judges and promoting those already in courts to higher instances. As seen in para. 16 of the Guidelines and highlighted in CJEU case law, good management of EU funds "cannot be fully guaranteed in the absence of effective judicial review designed to ensure compliance with EU law; the existence of such review, both in the Member States and at EU level, by independent courts and tribunals, is of the essence of the rule of law." The above-mentioned politization of the body in charge of appointments, promotion, transfers, and dismissals, whose members have for the most part now been appointed by the government; the politicised use of disciplinary proceedings against judges to sanction those members of the judiciary who dare express criticism towards government policies or apply EU law in Poland – which has not stopped in spite of the Commission's recommendations, including in the context of the approval of the Polish NRRP and related RoL milestones; and the chilling effect of these measures over the judiciary as a whole, fundamentally undermine the judiciary's external and internal independence and impartiality, and result in a lack of effective judicial review of cases concerning the use of EU funds.

136. i.e. https://www.europarl.europa.eu/news/en/press-room/20211015IPR15016/poland-constitutional-tribunal-is-illegitimate-unfit-to-interpret-constitution , https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4341, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7987743/

Judges, prosecutors, lawyers and supporters demonstrate in a rally in front of a court in support of judical indepencence in Poland. Krakow, Poland on August 18, 2021. Some prominent judges, including judge Igor Tuleya, have been suspended from their public office duties after they had protested against the government's overhaul of the judicial system, which has been condemned as a violation of the rule of law by a wide range of international institutions and expert bodies. @Beata Zawrzel/ NurPhoto / NurPhoto via AFP

As for the prosecution service, this also suffers from severe RoL shortcomings, as detailed in Chapter II and exemplified in the cases presented in Chapter I. These relate in particular to the vast politization of the national prosecutor's office, following reforms that merged the roles of Prosecutor General and Minister of Justice, and entrusted it with very far-reaching powers. These include in the first place the power to appoint, transfer, and temporarily second prosecutors. This exceptional power has been used repeatedly in the prosecutors' offices dealing with the most politicised cases, appointing young prosecutors transferred in a temporary basis from the provinces to deal with the most serious corruption cases instead of senior prosecutors, virtually destroying the guarantee of prosecutors' irremovability, because the junior prosecutor must follow the orders without hesitation, knowing that otherwise the appointment will be terminated and the young prosecutor sent back to the province. The Prosecutor General is entitled as well, to issue specific instructions in ongoing cases; to inform people who are not parties to the proceeding about findings from ongoing investigations; and to initiate operational activities during investigations, without the obligation to file a motion to the court. Since it is clearly stated in the Regulation that "failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities," such a political capture of the prosecutor's office along with the extensive powers conferred upon him, can also constitute a breach of rule of law standards that affects, or risks affecting, the EU budget, especially in the light of proven cases of politically-motivated actions or omissions by said prosecution in cases related to EU funding.

Thirdly, and perhaps most immediately relevant, as pinpointed in para. 21 of the Guidelines, "the Commission notes that, among these specific situations or conduct of public authorities, non-effective or untimely cooperation with the EPPO and OLAF constitutes a ground for action under the Conditionality Regulation." This rings true for Poland in particular since, although it does receive OLAF notifications of abuses in terms of EU funding, as found by FIDH experts through this research, it does not keep track of how many of them result in actual prosecution among the numbers gathered by the National Prosecutor's Office. This in turn shows that there is no possibility of verifying the factual effectiveness of cooperation (except on a case-by-case basis) between the Member State and one of the most important anti-fraud bodies among EU institutions. This concern is especially valid since the Guidelines also state that cooperation with OLAF further obliges the Member State to "ensure appropriate and timely follow-up to OLAF reports and recommendations upon completion of its investigations, reporting back to OLAF on the action taken."

The case of the EPPO remains even more problematic. Poland is not party to the EPPO, and refused to cooperate with the Office for a significant amount of time, leading the EPPO to address a letter to the EU Commission about this matter. Lack of effective cooperation with the EPPO is particularly concerning for Member States that do not participate in the EPPO, and that lack an effective and independent national prosecution service to investigate and prosecute crimes against the EU budget, as this state of affairs provides no alternative to the national prosecutor's office as the only office responsible for investigating and prosecuting crimes affecting the EU's financial interests. Additionally, Poland only began cooperating once it enacted changes into its Criminal Proceedings' Code, but which still oblige a prosecutor to refuse cooperation with the EPPO should a request coming from the Office be deemed a risk to "national sovereignty." Such a provision clearly provides grounds for anticipating an ineffective cooperation between the EPPO and Polish authorities, and shows that there is no guarantee of protecting EU funds, even in cases of a transnational nature initiated by the EPPO. Without a clear declaration and proof of legally binding provisions on the side of the Polish authorities that all evidence/actions, etc., requested by the EPPO will be carried out, due to their obligation of sincere cooperation, the EPPO can easily be left in the impossibility of completing its initiated transnational proceedings.

In light of the above, it can be concluded that the RoL breaches that have been widely documented in Poland with regard to the public prosecution service and the judiciary affect, or risk affecting, the EU budget in a sufficiently direct way that they warrant the application of the Conditionality Regulation. According to a broader interpretation of the notion of "sufficiently direct link," there is indeed a high probability that such breaches could pose a risk to the EU's financial interests because they fundamentally undermine the possibility that fraud, corruption, and other crimes against the EU budget would be effectively investigated and prosecuted by the competent authorities at the national, and also at the EU level, or that any abuse committed in the management, implementation, and/or control over EU funds by the competent national authorities would be subject to effective and independent judicial review. Even when opting for a more restrictive interpretation though, our research findings show that in some specific cases, as documented in this report, there is evidence – that in some case has materialised in a concrete and direct risk to the EU budget – that the deficiencies in the RoL system, notably in the public prosecution service, but also in the judiciary, have negatively affected the EU's financial interests to an extent that requires the Conditionality Mechanism to be activated.

CHAPTER 2: THE INSTITUTIONAL FRAMEWORK: What does not work, but should – the Polish and EU anti-corruption mechanisms

Poland boasts an array of mechanisms which are intended to prevent fraud and corruption. However, in reality they function rather differently. As will be detailed in this chapter, the Polish prosecutorial service has been brought under political influence, and the same can be said for the Central Anti-Corruption Bureau (CBA). The country's Supreme Audit Office, meanwhile, a constitutionally-established body which is entrusted with exercising supervision over and auditing public entities, cannot effectively carry out its mandate due to State-run entities refusing to cooperate with its auditors, and because the Office itself and its members have been targeted by the authorities due to their investigations. Lastly, Poland refuses to cooperate with the newly established European Public Prosecutors' Office (EPPO), and passes laws which are meant to mask this reality so as to convince the EU that such cooperation has been provided. Specifically, Poland has provided an entry-point for the EPPO to submit motions requesting evidence, whereas in fact a simple finding that such a request may hinder Polish sovereignty results in an automatic decision not to disclose the requested evidence. Under the circumstances, the probability that public funding, including EU funding, in Poland could be subject to fraud, corruption, or other forms of mismanagement is high. Apart from a politicized prosecutorial service, an incapacitated Supreme Audit Office, and a questionable anticorruption service, the Polish judicial system, influenced by judges nominated by a politically-influenced National Council of the Judiciary,[137] cannot guarantee the right to a free trial or to an effective remedy against abuse. Research undertaken by FIDH further reveals that without an effective checks-and-balances mechanism functioning on the national level, even notifications from EU bodies, such as OLAF (the key anti-fraud EU institution), do not result in effective prosecution of fraud and/or corruption. The following chapter will enumerate and analyse the weaknesses in the institutions that are meant to prevent corruption and fraud at the national (and EU) level. As we will see, these weaknesses are closely linked to the deterioration of independent democratic institutions, and to the rule of law crisis in Poland more broadly.

FIDH has based its investigations and this report on the following definitions:

- **fraud** – a deliberate act of deception intended for personal gain or to cause a loss to another party[138]
- **corruption** - the abuse of entrusted power for private gain[139]

Issues with the Polish Constitutional Tribunal. According to rule of law defenders it is an entity currently used:

- to rubber-stamp changes made to the constitutional system by the ruling majority.
- to resolve controversial and socially objectionable matters that have not been addressed through amendments to legislation.
- to provide Polish authorities with constitutional law arguments within their apparent conflict with EU institutions, aimed at undermining the core values of the EU.
- to exempt Polish authorities from the obligation to comply with international law and European Union law
- to release Polish authorities from part of their electoral promises (e.g. the declaration on assets of the politicians' families).

The activities of the Constitutional Tribunal demonstrate that it has ceased to be an independent institution upholding the Constitution and serving as a cornerstone of the human rights protection system. Proceedings before the Constitutional Court in its current form carry the risk of infringing an individual's right to have their case heard by an independent body established by law.[140]

137. M.Kalisz, M.Szuleka, M. Wolny, The cost of a "reform". The work of the justice system, 2015-2022 https://hfhr.pl/upload/2022/12/cost-of-a-reform-report.pdf

138. *Article 3(2) of* Directive (EU) 2017/1371

139. https://home-affairs.ec.europa.eu/policies/internal-security/corruption_en.

140. More on this: M.Kalisz, M.Szuleka, M. Wolny, The cost of a "reform". The work of the justice system, 2015-2022 https://hfhr.pl/upload/2022/12/cost-of-a-reform-report.pdf

II.I. The hindered prosecutorial service – politics vs effectiveness

The functioning of the public prosecutor's office in Poland is regulated primarily by a 2016 law (the "Act")[141]. According to the Act, the public prosecutor's office is responsible for executing tasks related to prosecuting crimes and for maintaining the rule of law. The Act regulates among other things, the organization of the public prosecutor's office and the position and jurisdictions of the supervising prosecutors.. The other jurisdictions of the prosecutors (such as initiating criminal proceedings or joining pending proceedings) are regulated by specific statues such as the Code of Criminal Procedure.

The work of the public prosecutor's office is led by the Prosecutor General (who is also the Minister of Justice), and managed by the National Prosecutor. The organization of the public prosecutor's office is four-fold: the National Prosecutor's Office, 11 regional offices, 46 circuit offices and 358 district offices[142].

Each year, the public prosecutor's office deals with ca. 1 413 cases whereas there are 5 907 prosecutors in total.

II.I.i A brief history of the political capture of Poland's prosecutorial service by the ruling party

One of the key issues concerning the organization of the office of the public prosecutor of Poland is its lack of independence from political influence, especially subsequent to the combination of the positions of the Minister of Justice and of the Prosecutor General. The Polish Constitution does not provide for any specific standards of independence concerning prosecutors. Aside from a prohibition of combining the roles of a member of parliament or a senator with that of a prosecutor, the Polish legal framework lacks any regulations regarding the structure or composition of the prosecutor's office or any guarantees regarding the independence of prosecutors in making individual procedural decisions.

Since 1989, there has been a practice of subordinating the prosecutor's office to the authority of the Minister of Justice[143]. The only exception concerned the period of 2012-2016 during which the roles of Minister of Justice and Prosecutor General were separated.

In 2016, the Parliament adopted the new Act concerning the public prosecutor's office. The Act merged, once again, the roles of the Minister of Justice and the Prosecutor General. In this new model, the Minister of Justice - Prosecutor General gained unprecedented powers, allowing him to directly interfere in criminal proceedings conducted by the prosecutor's office.
The law adopted in 2016 was strongly criticised by civil society[144] and international organizations. During the legislative process, critical opinions emerged regarding the new law, highlighting various adverse consequences of merging the positions of Minister of Justice and Prosecutor General, including the undermining of the Prosecutor General's role as a "guardian of rule of the law"[145].

Furthermore, the Council of Europe's European Commission for Democracy through Law ('Venice Commission') pointed out that the procedure for appointing the Minister of Justice - Prosecutor General deviates from international standards[146]. The Venice Commission also criticized the Minister - Prosecutor's authority to intervene in individual criminal proceedings, suggesting that it may lead to the political misuse of the granted powers[147].

Lastly, the merger of the position of Minister of Justice and Prosecutor General was also highlighted in the European Commission's Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European

141. The Act of 28 January 2016 on the Law on Prosecution (Journal of Laws of 2023, item 1360).

142. Poland, Central Statistical Office, Small statistical journal. 2023.

143. Kardas, Rola i miejsce prokuratury w systemie organów demokratycznego państwa prawnego, Prokuratura i Prawo 9 (2012)

144. Helsinki Foundation for Human Rights, HFHR brief on the new Act on the prosecution (all links in this section were accessed on August 21, 2023)).

145. A. Sakowicz, Legal opinion on the Act on prosecution, VIII term of office of the Sejm, documents no. 162, 162a and 163.

146. European Commission for Democracy through Law (Venice Commission), Poland – Opinion on the Act on the Public Prosecutor's office, as amended, adopted by the Venice Commission at its 113th Plenary Session (Venice,December 2017).

147. European Commission for Democracy through Law (Venice Commission), Poland – Opinion on the Act on the Public Prosecutor's office, as amended, adopted by the Venice Commission at its 113th Plenary Session (Venice, December 2017).

Union[148]. The Commission pointed out that the aforementioned reform results in "the accumulation of too many powers for one person" with direct negative consequences for the independence of the prosecutorial system from the political sphere adn for the independence of the judiciary, the separation of powers and the rule of law in Poland. The issue of prosecutorial independence was also raised in the 2022[149] and 2023[150] European Commission's reports on the rule of law. The Commission recommended that Poland among other to separate the functions of the Minister of Justice from that of the Prosecutor General, as well as that it guarantee the functional independence of the prosecution service.

Although the Act on public prosecutor's office maintained the principle of independence for prosecutors in carrying out prosecutorial activities, it introduced numerous exceptions that almost rendered its practical significance almost null. Pursuant to the Act, the Minister of Justice-Prosecutor General, as well as the National Prosecutor (the First Deputy of the Minister of Justice-Prosecutor General) are entitled, among other things, to:

- issue binding regulations, guidelines and orders[151];
- amend or revoke all decisions issued by subordinate prosecutors;
- discretionarily take over cases handled by subordinate prosecutors;
- arbitrarily transfer cases from one prosecution unit to another;
- publicly disclose information about ongoing criminal proceedings or disclose it to certain individuals.

Binding orders of the Minister of Justice - Prosecutor General and the National Prosecutor may also concern procedural actions. While they should be issued in writing, the parties involved in criminal proceedings are not informed about their issuance. Nor are such orders included in the main case files. A prosecutor who disagrees with an order regarding procedure has the right to request a change of the order or to be excluded from the case. However, the decision in this matter rests with their immediate superior. Furthermore, the Act on Prosecution lacks a mechanism guaranteeing that specific cases are assigned to prosecutors based on neutral criteria, rather than based on criteria aimed at obtaining a specific decision in a given case. Prosecutor Katarzyna Kwiatkowska, the Head of Lex Super Omnia association,an independent prosecutors' association, draws attention[152] to this issue, pointing out that by assigning very important and complicated cases to inexperienced prosecutors in an unstable professional situation, the authorities are able to influence their decisions simply by dangling prospects for their promotion, the consolidation of the salary and the temporary position becoming permanent or rewards in case they follow without discussion the superior orders, or for their dismissal in case of dissent. This mechanism is facilitated by the removal from the Act on Prosecution of any competitive procedures concerning promotion to higher prosecutorial positions, as well as a lack of precise rules for granting prosecutors financial rewards, the right to dissent from superior orders, and the guarantee of irremovability of the position.

Similarly problematic are the legal standards concerning the possible transfer of cases between different prosecution units. For such a transfer, only a written decision of the superior prosecutor is required. The law does not indicate any specific preconditions that have to be met. Although the decision to transfer the case is attached to the case file, it does not require formal justification.
Finally, the Act on Prosecution does not provide for serious guarantees of prosecutorial independence. It weakened the role of the National Council of Prosecutors - the main body responsible for ensuring the independence of prosecutors -, by amending the method in which council members are appointed[153]. As a result, the National Council of Prosecutors has been minimally active in fulfilling its primary role

148. European Commission, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law

149. European Commission, 2022 Rule of Law Report - Country Chapter Poland

150. European Commission, 2023 Rule of Law Report - Country Chapter Poland

151. The Act of 7 July 2023 amending the Code of Civil Procedure, the Law on the Organization of Common Courts, the Code of Criminal Procedure and some other acts, transferred some of the current authority of the Prosecutor General to the National Prosecutor, inter alia the right to issue binding orders to subordinate prosecutors, as well as the right to appoint the heads of specific prosecution units. As of 23 August 2023, the President of Poland has not yet signed the Act into force..

152. Podcasty.rp.pl, Rozmowa z Katarzyną Kwiatkowską.

153. The predecessor of the National Council of Prosecutors - the National Prosecution Council had a composition similar to the National Council of the Judiciary. It consisted of 25 members (the Minister of Justice, the Attorney General, a representative of the President, four members of parliament, two senators, 5 prosecutors elected by assemblies of prosecutors working in the supreme prosecution institutions, and 11 prosecutors elected by assemblies of prosecutors from appellate prosecutor's offices). Currently, the National Council of Prosecutors consists of the Deputy Attorney General, 4 prosecutors elected by assemblies of prosecutors from the National Prosecution Service, 1 prosecutor elected by the assembly of prosecutors of the Institute of National Remembrance, 5 prosecutors chosen by the Attorney General, and 11 prosecutors elected by assemblies of prosecutors from regional prosecutor's offices.

of safeguarding the independence of prosecutors. Between 2016 and 2021, the Council dealt with the issue of interference with prosecutor independence only twice. In neither case did it stand up for the independence of individual prosecutors[154].

The Act on the public prosecutor's office adopted in 2016 also significantly changed the procedure of appointing prosecutors. The prosecutor's office authorities gained the ability to appoint prosecutors at their discretion, bypassing any competitive procedures. Moreover, even in cases where a competition for a prosecutor's position was organized, the National Prosecutor has the competence to veto the selected candidate.

A weaker standard was also set for promotions within the prosecutor's office, as the law did not foresee any possibility of organizing a competition in this regard. This means that prosecutors are now promoted to higher positions in a completely arbitrary manner.

Non-compliance with the authorities' agenda and its repercussions

The leadership of the prosecutor's office employs various methods to interfere with the independence of individual prosecutors. These methods include initiating disciplinary and criminal proceedings against prosecutors, suing specific prosecutors for their critical assessments of the prosecution service, and transferring prosecutors to remote prosecution units without their consent for a period of up to six months. Many of these actions have been directed at prosecutors who actively engaged in public discourse concerning the rule of law in Poland. These prosecutors faced disciplinary proceedings as a result of their involvement in demonstrations defending judicial independence[155], their criticisms of the politicization of the prosecutor's office[156], and even their contributions of op-eds to newspapers[157].
Another strategy employed by the National Prosecutor's Office has involved attempting to use civil proceedings to curtail any form of criticism regarding the operation of the prosecutor's office. Katarzyna Kwiatkowska, the head of the Lex Super Omnia Association, was targeted by such actions. The National Prosecutor's Office filed a SLAPP (Strategic Lawsuit Against Public Participation) against her, demanding a payment of 250,000 zlotys for a social purpose and the publication of apologies in the media. The lawsuit's claims are related to the alleged violation of the personal rights of the National Prosecution Service associated with the press interview[158] of Prosecutor Kwiatkowska. According to the National Prosecution Service, the statements contain "insinuations that the leadership of the National Prosecution Service is involved in criminal activities and other violations, which are unlawful. They undermine the authority of the National Prosecution Service and harm its reputation"[159]. The total cost of this demand amounted to around 2 million zlotys (ca. 500 000 EUR)[160].
Furthermore, prosecutors who were particularly active in opposing the ruling Law and Justice party's policy on prosecution were subject to involuntary transfers to remote prosecution units for up to six months, without their consent or any justification[161].
These retaliatory actions, however, were not restricted to persecuting individuals who opposed the functioning of the prosecutor's office or its subordination to political power. There were also attempts to hold prosecutors criminally accountable for specific procedural decisions. For instance, when prosecutors attempted to press charges against a prominent political figure, they were subsequently removed from the case and accused of illegally delaying the collection of evidence[162].
Similar punitive measures were directed at prosecutor Ewa Wrzosek, who initiated an investigation into the decision of state authorities to hold presidential elections during the pandemic[163]. However, Wrzosek's superior terminated the investigation merely three hours after it had commenced. Media reports suggested that the National Prosecution Unit assessed Prosecutor Wrzosek's decision to

154. National Council of Prosecutors Resolution of 16 March 2021, regarding the request by the prosecutor of the Circle Prosecution Unit in Białystok on 22 February 2019 to investigate their case in relation to the standard of prosecutorial independence; National Council of Prosecutors, Resolution of 16 March 2021, regarding the request by the prosecutor of the Regional Prosecution Unit in Kraków on 29 August 2019 to investigate their case in relation to the standard of prosecutorial independence.

155. Wyborcza.pl, Śledczy może protestować. Nie będzie dyscyplinarki za obronę sądów.

156. Commissioner for Human Rights, Commissioner for Human Rights actions in the case of prosecutor Krzysztof Parchimowicz.

157. Wyborcza.pl, Prokuratorka ścigana dyscyplinarnie za felieton w "Wyborczej"

158. Wyborcza.pl, Ukarana prokuratorka ostrzega szefów: Nie chcę nikogo straszyć, ale gromadzimy dowody

159. National Prosecution Service,; Prokuratura Krajowa wystąpiła na drogę sądową w związku ze szkalującymi wypowiedziami jednego z prokuratorów

160. Oko.press, Nad prokurator Kwiatkowską wisi pozew o 2 mln zł.

161. Onet, "Niepokorni" prokuratorzy delegowani do innych jednostek. "Chcą nam dać nauczkę".

162. Wyborcza.pl, Dyscyplinarka dla prokuratorów to odwet za reportaż TVN?

163. Wyborcza.pl, Prokurator Wrzosek ścigana karnie za śledztwo ws. wyborów kopertowych.

initiate the investigation in terms of potential excessive use of authority, which is a crime punishable by up to three years of imprisonment.
Prosecutor Justyna Brzozowska also faced comparable punitive actions. The National Prosecutor's Office sought to hold her criminally responsible for one of her procedural decisions to discontinue the criminal proceedings related to irregularities in the process of restitution of properties in Warsaw that were confiscated during the communist era. However, the court eventually dismissed the indictment submitted by the National Prosecutors' Office on formal grounds[164].

II.I.ii No proceedings where no political gain recognized – how political interest became the key factor in the decision to initiate proceedings

Attempts to hold prosecutors criminally accountable are not the only mechanism through which the prosecution leadership influences criminal proceedings. Essential tools within this system include issuing formal orders to make procedural decisions and deciding to transfer cases to other units of the prosecution.
In practice, this manoeuvre is frequently applied in cases of a public nature that attract media attention. This happened, among others, in the case concerning a hate speech scandal in which the Deputy Minister of Justice and some members of the National Council of the Judiciary were implicated[165].
An analysis of the Minister of Justice-Prosecutor General's X (former Twitter) account indicates that he intervenes relatively frequently in publicly discussed cases, instructing prosecutors under him to bring charges against individuals suspected of specific statutes. In line with actions, the Minister of Justice-Prosecutor General also ordered prosecutors to submit a request for temporary arrest in a specific case.
In the years 2022 and 2023, the Minister of Justice – Prosecutor General has ordered the initiation of preparatory proceedings against an opposition party MEP for alleged defamation of Border Guard officers[166], changed the description of an offense attributed to a suspect accused with murder[167], intensified the charges against another suspect[168], as well as ordered the apprehension and charging of a specific individual[169].
The Prosecutor General has also the power to replace the lead prosecutor on a particular case. In one case, a prosecutor who was responsible for a case that could be important for the ruling majority refused to submit a cassation appeal, stating that the judgement was just and correct. Following this decision, the case was taken away from him and assigned to another prosecutor, which also declined to appeal. At the same time, the latter prosecutor informed the Prosecutor General of her retirement, indicating that her decision related to pressures from her superiors and her concerns about the negative consequences for her personal situation of not appealing[170].
Furthermore, prosecutors issuing or supervising the issuance of procedural decisions that are not approved by the prosecution authorities must also face the possibility of losing their official positions. This happened in 2023 to a deputy district prosecutor in Poznań who lost her position after public criticism from the Minister of Justice-Prosecutor General concerning one of the cases that she had allegedly supervised. However, media findings contradict this last fact, indicating that she became a scapegoat in this case[171].
The wide range of means by which interference can be exercised in ongoing preparatory proceedings risk creating a chilling effect among prosecutors or else encouraging sycophancy towards prosecutorial authorities - raises doubts about the integrity and independence of the prosecutor's work. It also raises doubts about the integrity and independence of prosecutor's work and thus about the motives behind the prosecutorial decisions made in politically significant cases that were dealt with between 2016 and 2023. Among these, we can list inter alia:

- the discontinuation of proceedings concerning unlawful refusal to publish binding judgments of the Constitutional Tribunal[172];
- the refusal to initiate proceedings concerning alleged fraud committed by the leader of the ruling party[173];

164. Oko.press, Klęska prokuratury Ziobry. Sąd nie zgodził się na proces prokurator Brzozowskiej z Lex Super Omnia.
165. TVN24, Śledztwo w sprawie afery hejterskiej przeniesione do innej prokuratury.
166. Z. Ziobro, Z. Ziobro's twitter.
167. Ibid.
168. Ibid.
169. Ibid.
170. Wyborcza.pl, Mamy dowody na naciski i zastraszenie prokuratorów. "Wyborcza" dotarła do pisma.
171. Onet, Kozioł ofiarny Ziobry. Kulisy interwencji w sprawie Mariki Matuszak.
172. TVN24, Umorzono śledztwo w sprawie niepublikowania wyroków TK
173. RMF24, Prokuratura odmawia wszczęcia śledztwa w sprawie wież Kaczyńskiego

- the discontinuation of the proceedings concerning financing the convention of the ruling party using funds from the European Union[174];
- the refusal to initiate proceedings regarding the purchase of medical equipment by the Ministry of Health during the COVID-19 pandemic[175];
- the decision to withdraw from court and discontinue a criminal case concerning the head of the oil refiner and retailer Orlen[176];
- the decision to initiate an investigation concerning the abuse of power by judges of the Court of Justice of the European Union[177];
- the passivity of the prosecutor's office in clarifying the circumstances of the influence exerted by the leadership of the Ministry of Foreign Affairs on decisions regarding the issuance of Schengen visas by Polish consulates.

When describing the activities of the prosecutor's office, it is also important to draw attention to the media-highlighted ineffectiveness of the prosecutor's office in utilizing information provided by the European Anti-Fraud Office (OLAF)[178], the refusal to share information held by the Polish prosecutor's office with the European Public Prosecutor's Office [179], and the decision of Poland not to participate these bodies' work. All these decisions have a negative impact on the effectiveness of both national and European institutions in combating financial (and other) crimes committed to the detriment of Poland and the European Union.

II.I.iii Doubtful effectiveness of the prosecution effectively leading to non-prosecution

According to the HFHR report[180], the organisational changes introduced to the prosecutor's office after 2016 have had a negative effect on the way the prosecution works, as they increased the number of cases that have not been concluded in a given reporting period, resulting in the growing backlog of cases in the prosecution units. Furthermore, the HFHR compared the number of initiated cases and total number of cases dealt with by the prosecution service. The data indicated a significant decrease in the number of cases in which law enforcement authorities decided to launch preliminary proceedings. The ratio of launched proceedings fell from 60-64% (in the years 2010-2015) to 53% in 2020, resulting in a "situation where almost every second person seeking state protection is confronted with a decision not to investigate their complaint"[181].

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174. In 2013, the party of the Minister of Justice, Zbigniew Ziobro – Solidarna Polska, organized a convention in which they presented a draft of a new constitution. The event was held under the slogan: "New state, new constitution." In November 2016, Newsweek Polska revealed that the convention had been funded by the European Parliament for organizing a climate convention. This way, the expenses (approximately 40,000 euros) were accounted for in the annual financial report of the Movement for a Europe of Liberties and Democracy (MELD), to which Solidarna Polska belonged in the European Parliament. According to the prosecutor's office, a significant portion of Solidarna Polska's conference indeed dealt with domestic issues, but "matters related to the climate package were also present." The prosecutor's office also received a list of speakers from Solidarna Polska who were supposed to discuss climate-related topics during the conference. This contradicts the findings of Newsweek journalists, who did not observe such statements on the conference recording. After the publication of the article, the recording of the conference was deleted from Solidarna Polska YouTube channel. https://www.newsweek.pl/polska/zbigniew-ziobro-konwencja-solidarnej-polski-za-unijne-pieniadze/d78j5yn,https://wiadomosci.onet.pl/tylko-w-onecie/zbigniew-ziobro-nadzorowal-sledztwo-w-sprawie-nielegalnego-finansowania-wlasnej/z9p4gwp

175. Rp.pl, Prokluratura umorzyła śledztwo w sprawie zakupu respiratorów

176. Before becoming the President of PKN Orlen, Daniel Obajtek faced accusations, among other things, of accepting financial benefits and committing fraud. According to the prosecutor's office at the time, these actions resulted in a financial loss of 1.4 million zlotys for the company where D. Obajtek was employed. In 2016, following the victory of the Law and Justice Party in the elections and subsequent organisational changes in the prosecution system, Daniel Obajtek's case was transferred to a different prosecutor's office. During the same period, the Polish Parliament amended the Criminal Procedure Code, including a provision allowing the prosecutor's office to withdraw an indictment filed with the court. According to this regulation, in cases where an indictment was filed with the court before August 5, 2016, the court was obliged to transfer the case back to the prosecution service when the prosecution submitted a suitable motion indicating that significant circumstances had emerged in the case, there was a need to search for evidence, or other activities were necessary to clarify the case.
The prosecutor's office decided to exercise this option and withdrew D. Obajtek's case from the court. During the course of the investigation by the prosecutor's office, they discontinued proceedings against Daniel Obajtek. In other aspects, the case was subsequently resubmitted to the court. https://wyborcza.pl/7,75398,26858443,lex-obajtek-tak-pis-zmienial-prawo-by-oczyscic-prezesa-orlenu.html, Korupcyjna sprawa Daniela Obajtka została umorzona

177. Prawo.pl, Śledztwo prokuratury w sprawie sędziów TSUE

178. Rp.pl, Prokuratorzy mało skuteczni w sprawach unijnych nadużyć

179. Rp.pl, Polska blokuje unijne śledztwa. Chodzi o nadużycia w wydawaniu pieniędzy

180. M. Kalisz, M. Szuleka. M.Wolny, A state of accusation. Polish prosecution service 2016-2022.

181. M. Kalisz, M. Szuleka. M.Wolny, A state of accusation. Polish prosecution service 2016-2022.

The organisation of the prosecutor's office as well as the tools the prosecutor's office top management have at their disposal to oversee the works of the office may exert a chilling effect among prosecutors that discourages them from taking any actions that may potentially expose them to repercussions from their superiors or politicians from the ruling camp. On the other hand, the existing regulations concerning the transfers of prosecutors to higher-level prosecutor's offices, lack of clear rules regarding promotions or rewards encourage prosecutors' loyalty to the ruling political party.
Both phenomena directly threaten the role of the prosecution, hinder its function as a guardian of the rule of law and create a friendly environment for white collar crimes and other offences committed by state officials or persons with close ties to the ruling coalition. They directly undermine the basic principles of the Polish Constitution and EU law and paves the way for violations of the laws and provisions that regulate the conduct of State business, including when EU funding is involved.

II.II. The CBA – a story of a political corruption task force

The Central Anti-Corruption Bureau (CBA) was created by Law and Justice in its first term in power in 2006 as a means to give substance to electoral slogans about fighting corruption, by creating a separate (from the prosecution and police services) entity entrusted with this mission. It quickly became apparent, however, that the office would rather perform the role of a political police, dedicated to uncovering corruption scandals regarding persons with ties to the opposition, rather than to pursuing corruption cases regardless of their origin. Citizens and experts alike became very concerned regarding the Bureau's activity and the authority it was granted.[182]

> *"[The CBA] is manifestly a political police meant to deal with opposition members. Set up to be a new political police who would handpick its targets and boasting a nasty history, [the CBA] is still very much a primary instrument of political repression which does not target people involved with the ruling party, only the opposition." – a representative of the Warsaw Bar Association[183]*

II.II.i The numbers and mechanisms of the Central Anti-Corruption Bureau (CBA)

The Head of the CBA is appointed for a four-year term by, and may be dismissed by, the Prime Minister, after consulting the President of the Republic of Poland, the Committee for Secret Services, and the Parliamentary Committee for Secret Services. He may be re-appointed only once. The Prime Minister, at the request of the Head of the CBA, appoints and dismisses the Deputy Heads of the CBA.[184] This shows how close to the governing authorities the CBA is, and how dependent it remains on them due to the nomination procedures and the powers that the ruling coalition retains over its executives.

The CBA's overall budget for 2022 amounted to over 240 million zlotys,[185] while its budget in 2021 was 256 million zlotys.[186] In comparison, in 2014 the CBA had a budget of a bit over 111 million zlotys.[187] In terms of cases taken on by the Bureau, the increase amounted to 477 operational proceedings in 2014 in comparison to 750 in 2022.

What remains most controversial, however, is the way the budget is being spent by the CBA, and how additional funding reaches it from other government-controlled sources. A clear example of this was the purchase of the Pegasus spyware program by the CBA in 2017. Pegasus was purchased in the fall of 2017 in a roundabout way – not from the State budget, but from a special fund (the Justice Fund) operated by the Ministry of Justice, out of which 25 million zlotys were transferred to the CBA through a procedure that the Supreme Audit Office deemed illegal.[188]

The Pegasus spyware was used to wiretap opposition leaders, activists, lawyers, and independent prosecutors, as was confirmed in the draft report issued by the European Parliament's Committee of

182. https://images.transparencycdn.org/images/2012_NISPoland_PL.pdf.
183. Interview between FIDH and representatives of the Warsaw Bar Association, May 31, 2023.
184. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20061040708/U/D20060708Lj.pdf.
185. https://cba.gov.pl/ftp/dokumenty_pdf/Informacja_o_wynikach_dzialalnosci_Centralnego_Biura_Antykorupcyjnego_w_2022_roku.pdf.
186. https://tvn24.pl/polska/raport-z-dzialalnosci-cba-w-2021-roku-analiza-5682933.
187. https://cba.gov.pl/ftp/zdjecia/Informacja_o_wynikach_CBA_2014.pdf.
188. https://tvn24.pl/polska/pegasus-inwigilacja-nik-ujawnia-faktury-pieniadze-dla-cba-z-funduszu-sprawiedliwosci-na-zakup-srodkow-techniki-specjalnej-5559012.

Inquiry to investigate the use of Pegasus and equivalent surveillance spyware.[189] Its usage is also non-compliant with Polish law, as was highlighted by the Ombudsman's office several times in statements issued to the authorities.[190]

The pardoned convicts behind the CBA and other key figures of the Polish anti-corruption services

Although the CBA has been mentioned time and again as an actual anti-corruption body functioning within the national and international mechanisms Poland is party to, the authors feel it is essential to provide an inside look at the people behind it. This verified and detailed network of ties between those who created the bureau and those who run it feeds into the main argument regarding its politization and lack of independence from bodies the CBA should be able to independently and impartially investigate and prosecute.

The CBA was first headed by Mariusz Kamiński, the current Minister of Interior Affairs and Administration, until 2009, when he was removed from the post by then-Prime Minister Donald Tusk, along with his deputies Ernest Bejda and Maciej Wąsik.[191] Simultaneously, charges were filed against Kamiński for abuse of power. In March 2015, Mariusz Kamiński was found guilty of exceeding his powers by the court of first instance, and sentenced to imprisonment.[192]

According to the court, Kamiński used his position as head of the CBA to exceed his powers in 2007. According to the District Court for Warszawa-Śródmieście, the CBA incited corruption, when there were no legal or factual grounds to initiate an operation concerning land use practices in the Ministry of Agriculture. It was further stated that CBA agents created a fictitious situation in which a controlled bribe was passed. Additionally, the CBA used wiretapping and produced fictitious documents to set up chosen perpetrators. Kamiński was sentenced to three years in prison and banned from holding public office for ten years. The former deputy head of the CBA, Maciej Wąsik, was sentenced by the court to three years in prison. Both judgements were appealed by the defence.

The CBA was then headed by Paweł Wojtunik for the following two terms until the shift back into power in 2015 of Law and Justice, at which point the previously dismissed Ernest Bejda was chosen to become the next Head of the Bureau.[193] Bejda was also suspected of having disclosed professionally obtained information and was "checked" by the prosecutor's office around the time of his nomination.[194] After the end of his single term as Head of the CBA, he received a post at the State-controlled insurance company PZU.[195] Media reported that the presumed salaries in PZU amounted to 1-2 million zlotys per year.[196]

Independent media suspected Bejda did not stay for a second term, despite his loyalty to Mariusz Kamiński, because the Bureau under his rule did not manage to thoroughly check the assets of then-Finance Minister Marian Banaś, which resulted in a scandal when Banaś was elected by Law and Justice as the President of the Supreme Audit Office, and the private TV station TVN revealed that rooms were let by the hour in a building he was subletting to third parties.[197] After the scandal reached the media, CBA announced investigated Banaś's properties, but he himself refused to step down from the Supreme Audit Office, and instead started increasing audits in ministerial compounds and other entities with ties to Law and Justice politicians.[198]

The CBA is currently headed by Andrzej Stróżny, who, when questioned by a Parliamentary Investigation Commission about his involvement in an operation which resulted in the suicide of a person being arrested when he was the deputy head of the Internal Security Service, lied about why he was present at the location.[199] After this was discovered by the Investigation Commission

189. https://www.europarl.europa.eu/doceo/document/A-9-2023-0189_EN.html.
190. https://bip.brpo.gov.pl/pl/content/rpo-mswia-inwigilacja-pegasus.
191. https://www.cba.gov.pl/pl/aktualnosci/313,dok.html.
192. https://tvn24.pl/polska/mariusz-kaminski-winny-w-sprawie-afery-gruntowej-ra528769-3296890.
193. https://www.prawo.pl/prawnicy-sady/ernest-bejda-nowym-szefem-cba,182406.html.
194. https://www.newsweek.pl/polska/szef-cba-ernest-bejda-ujawnial-tajemnice-sprawdza-go-prokuratura/fyppve4.
195. https://wiadomosci.onet.pl/tylko-w-onecie/ernest-bejda-czlonkiem-zarzadu-pzu-kim-jest-przeszlosc-polityczna/zcw7dr2.
196. Ibid.
197. https://tvn24.pl/polska/tvn-wygral-sprawe-z-powodztwa-mariana-banasia-po-reportazu-pancerny-marian-i-pokoje-na-godziny-7114857.
198. https://www.rp.pl/polityka/art9171051-wolta-prezesa-nik-banas-nie-chce-zlozyc-dymisji.
199. https://orka.sejm.gov.pl/opinie6.nsf/nazwa/Stanowisko_SKBB_projekt_20110613/$file/Stanowisko_SKBB_projekt_20110613.pdf.

in 2007, the then-head of the Internal Security Agency Krzystof Bondaryk stripped Stróżny of his access to state secrets.[200]

In turn, Mariusz Kamiński and Maciej Wąsik were both pardoned by the President of Poland, Andrzej Duda, as soon as Law and Justice regained power in 2015. This created an atmosphere of overpowering shock within the legal community due to the fact that the pardon came through before final judgements were passed in their cases – given that both were still in the appeals process.

In 2017, the Polish Supreme Court overruled the presidential pardon by stating that it was impossible to pardon an accused who had not yet received a final judgement. Judge Jarosław Matras concluded that "***as long as we have a constitution, justice is administered by the courts. For 95 years of the constitution being in force in Poland, no one applied the law of pardon before a final judgement. The right of pardon may only apply to persons who have been validly convicted."***[201] The presidential bureau stated that it would not comply with the Supreme Court ruling, and that the usage of the presidential pardon is not subject to limitations. The politically controlled Constitutional Tribunal subsequently confirmed this in a judgement rendered on June 2, 2023.[202] In turn, this decision of the Tribunal was invalidated by the Supreme Court which ruled on June 6, 2023 that the presidential pardon had no procedural consequences due to the fact that it was "preventive."[203] This ruling can consequently mean that both Wąsik and Kamiński may be now facing a renewal of criminal proceedings they had hoped to avoid.

Mariusz Kamiński currently holds the positions of Coordinator of Security Forces and Minister of Interior Affairs and Administration, where he directly supervises the work of the Commander-in-Chief of the Police and the Commander-in-Chief of the Border Guard. The Security Department, the Control Department, the Internal Supervision Office and the Minister's Office also report to him.[204] Maciej Wąsik holds the position of Secretary of State in the Ministry of Interior Affairs and Administration.[205]

II.III The NIK – the Polish Supreme Audit Office

Poland's key State auditing institution is the Supreme Audit Office (NIK). It is a constitutionally established entity.[206] The NIK audits the activities of government administration bodies, the National Bank of Poland, State legal persons and other State organizational units from the point of view of legality, economy, purposefulness, and reliability. It may also audit the activities of local government bodies, municipal legal persons, and other municipal organizational units. Moreover, the NIK is also entitled to audit the activities of other organizational units and business entities concerning the extent to which they use State or municipal property or funds and meet their financial obligations to the State.

Supreme Audit Office in Warsaw, Poland on October 17, 2019. @Mateusz Wlodarczyk / NurPhoto via AFP

200. https://tvn24.pl/polska/andrzej-strozny-pelniacy-obowiazki-szefa-cba-nie-powiedzial-prawdy-zeznajac-w-sprawie-smierci-barbary-blidy-4245555.

201. https://static.im-g.pl/im/2/26107/m26107432,KSIEGA-PREZYDENCKA.pdf#S.embed_link-K.C-B.1-L.1.zw.

202. https://wiadomosci.radiozet.pl/polska/polityka/trybunal-konstytucyjny-podjal-decyzje-jest-orzeczenie-ws-ulaskawienia-kaminskiego , https://www.prawo.pl/akty/m-p-2023-549,21840579.html.

203. https://www.newsweek.pl/polska/polityka/ulaskawienie-wasika-i-kaminskiego-sad-najwyzszy-uchylil-umorzenie-sprawy/mwpql0y.

204. https://www.gov.pl/web/premier/mariusz-kaminski.

205. https://www.gov.pl/web/mswia/maciej-wasik.

206. Article 202-207 of the Polish Constitution, https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm, https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

The Supreme Audit Office submits to the Polish Parliament (Sejm) a yearly analysis of the implementation of the State budget and monetary policy assumptions, along with an opinion on the discharge for the Council of Ministers, and other types of information about the results of inspections, conclusions, and statements when needed.

The President of the Supreme Audit Office is appointed by the Polish Parliament with the consent of the Senate for a period of six years, and may be reappointed only once. He may not hold any other position, with the exception of the position of professor at a higher education institution, or perform other professional activities. He is also prohibited from belonging to a political party or trade union, and from engaging in public activities incompatible with the dignity of his office. The President of the Supreme Audit Office may not be held criminally liable or deprived of his liberty without the prior consent of the Sejm. He also may not be detained or arrested, except for the case of apprehending him in the act of committing a crime, and if his detention is necessary to ensure the proper course of the proceedings. The Marshal of the Sejm is to be immediately notified of the detention, and may order his immediate release.

Although these provisions – enshrined in the Polish Constitution – seem to guarantee the stability and effective functioning, independent from political interference, of the NIK, they have been undermined by the measures taken by and the lack of cooperation from the governmental side. These include:

- a substantial decrease in the budget allocated to the NIK in 2023[207]
- serious restrictions on the NIK's Council (see below for more details)
- a lack of access to information during audit procedures conducted by the NIK, especially when these concern State-owned enterprises.
- a lack of cooperation from the public prosecution services.[208]

II.III.i NIK reports – an eyesore for the Polish government

Reports published by the NIK remain a powerful tool of influence in terms of presenting an alternative, yet still State-sponsored, source of information about national finances and the functioning of State-controlled entities. To provide an example, at the parliamentary plenary session in July 2023, the President of the NIK presented the results of the audit of the budget execution in 2022. The NIK ***negatively evaluated trends in the public finance system, as a result of which the state financial economy*** was considered to be run ***largely outside the state budget***. The Council of NIK did not approve granting discharge to the Council of Ministers. This was NIK's first negative decision of this type since 1994.[209]

Other types of NIK reports, apart from the one concerning the execution of the State budget, have also become a difficult pill to swallow for the Polish government. Indeed, the NIK also audits EU funds spent in Poland by intermediaries, which for the most part are the various ministries. In its report concerning the implementation of the Digital Poland programs, financed from the EU's Multiannual Financial Framework (MFF) for 2014-2020 within the Lubelskie voivodship, the NIK negatively evaluated the implementation of construction projects for fast broadband network in the region, as well as the process of co-financing them from the Digital Poland budget for 2014-2020. In the viewpoint of the NIK, the beneficiaries did not perform the tasks in the projects in accordance with the originally adopted schedules, and Digital Poland did not properly select projects or supervise their implementation, including the financing.[210] NIK officials also reported the practice of creating fictitious beneficiaries for the programmes:

> *"Money is allocated, but when we go check, the money is not there. Sometimes beneficiaries are not there, because they don't exist." – a representative of the NIK*[211]

The NIK also continues to advocate for a larger role in auditing EU funds. In a letter sent by its president to Ursula von der Leyen in February 2022, he argued that the NIK has been wrongfully marginalized, and that the institution can and should play a more crucial part in monitoring the spending of EU funds which reach Poland. Among the jurisdictional roles that the NIK sought for itself in this context, the letter pointed to its intention to act as:

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207. According to NIK, this includes employees' salaries, which would now be 30% below the average in ministries, rendering it very difficult for the Office to employ people and retain them.
208. FIDH interview with NIK, June 1, 2023. In addition to the limitations listed above, NIK's president claimed to have been the target of surveillance and inspections undertaken by the authorities against him and his family members.
209. https://www.nik.gov.pl/en/news/nik-president-about-the-state-budget-execution-in-2022.html.
210. https://www.nik.gov.pl/kontrole/P/20/069/LLU/.
211. Interview of FIDH with NIK representatives, June 1, 2023.

- an audit authority, preparing an annual audit opinion and an annual monitoring report in all national operational programmes
- a member of the Monitoring Committee in each national operational programme
- a member of the Control and Audit Committee of the Structural Funds and the Cohesion Fund
- a member of the Committee on Designations

"We [currently] lack a comprehensive and clear overview over EU funds in Poland. Often EU funds are mixed with non-EU funds and these funds follow different procedures. It is hard to audit them. […] There is a lack of clear and transparent control mechanisms in Poland and those that are there are mostly ineffective." – a representative of the NIK[212]

[letter attached]

In situations where the NIK finds irregularities which may lead to criminal proceedings, including corruption or fraud charges, under the Act on the Supreme Audit Office the NIK is entitled to file a notification of suspicion of a crime to the prosecutor's office. However, although the NIK has reportedly done that frequently, its notifications appear to be systematically disregarded by the prosecutor's office.[213]

II.III.ii Current problems of prosecution and persecution of auditors

The NIK currently faces many challenges, ranging from a lack of cooperation from its governmental counterparts,[214] all the way to charges being filed against NIK auditors following their attempts to audit State-run institutions. This, despite the fact that the prosecutor's office cannot, in principle, launch an investigation against the NIK due to its immunity.

Following an attempt at performing an audit of the biggest State-owned company, a gas and oil company called Orlen (which also owns most local news outlets nationwide – 170 newspapers and 500 websites – since acquiring the conglomerate Polska Press in 2021[215]), the NIK wrote a letter to the Speaker of the Polish Parliament – Elżbieta Witek, in which it alleged the following:

"Despite repeated attempts to undertake audit activities in the above-mentioned company [Orlen], its attorneys refused to allow the Supreme Audit Office auditors to commence audit activities, emphasising that PKN Orlen S.A. is not subject to audit by the Supreme Audit Office. We have full documentation in this matter, which we can submit for your review. What is more, in connection with the refusal to submit to audit, relevant notices to the Prosecutor's Office on suspicion of committing an offence (Article 98 of the Act on the Supreme Audit Office) were sent by the Supreme Audit Office on respectively: 25 May 2022, 1 June 2022, 22 June 2022. The Prosecutor merged the above notices and on 15 September 2022 issued a decision on refusal to initiate an investigation for the above three notices concerning the thwarting of audits at PKN Orlen (twice thwarted) and Orlen Foundation.

At the same time – and this is a precedent – PKN Orlen SA filed a notice against the Supreme Audit Office, as a result of which the prosecuting authorities summoned as witnesses 12 inspectors involved in the above-mentioned inspections. It follows from the summonses to the Supreme Audit Office in this case that they relate to the investigation conducted under case no. 3041-1 Ds.88.2022 on the alleged exceeding of powers by employees of the Supreme Audit Office consisting in attempts to carry out audits at PKN Orlen and others which were allegedly detrimental to private interests, i.e. an act under Art. 231 par. 1 of the Penal Code (abuse of power)."[216]

[original of letter attached]

212. Interview of FIDH with NIK representatives, June 1, 2023.

213. A good example of this was the prosecution's refusal to launch proceedings following the notification of a suspected crime filed by NIK in regards to the organisation of ballot presidential elections in Poland in 2020, where abuses of power were confirmed following an NIK investigation. https://wiadomosci.radiozet.pl/polska/polityka/Prokuratura-zamierza-odmowic-NIK-wszczecia-sledztwa-ws.-wyborow-kopertowych.

214. An example of this was the continued refusal to allow access to NIK auditors into the TREZOR system (an online system of managing the state budget), correspondence shared by NIK with FIDH on the 7th of June 2023.

215. https://www.money.pl/gielda/pkn-orlen-przejal-polska-press-transakcja-sfinalizowana-6613738055903776a.html.

216. NIK officials interviewed by FIDH confirmed that auditors have been consistently denied access to State-owned companies such as Orlen (but also, e.g., KGHM) and that, rather than intervening in their favour, the public prosecutor's office failed to take any action and instead launched an investigation into NIK's activities.

The Orlen case not only points to the inaction of the prosecutor's office in regards to notifications filed by NIK auditors who could thus not perform their constitutionally-guaranteed tasks,[217] but also to the swift actions taken by the prosecutor's office against them upon the motion filed by representatives of Orlen.

Another case that was reported to FIDH concerns the CBA's interference in an investigation conducted by NIK's Warsaw branch, where the branch director who was leading an audit into the Ministry of Justice was allegedly detained by the CBA and held for 24 hours before being released. The NIK executive was eventually suspended from her position based on a request by the CBA. According to our sources, although the NIK challenged the decision, the prosecutor's office failed to investigate the case.[218]

These examples showcase how a politicized and selective prosecution service works in a State where the mechanisms whose role is to safeguard the rule of law are no longer able – due to their lack of independence or other reasons – to perform their functions and ensure that the principle of equality before the law, as well as the right to an effective remedy before an independent court, among other rights, are upheld. Absent those mechanisms, there is no guarantee that protection against offences committed by the State or other actors, including corruption and fraud, can be effectively afforded.

> ***"In order to make sure we can work correctly, we would need a normal environment. But we are dealing with an authoritarian type of government that does not respect the law in the country. […] We are coming back to what it used to be [ndlr: under communism]." – NIK executive***[219]

II.III.iii International concerns over the case of the NIK

These concerns were echoed in the European Commission's 2022 Rule of Law Report, where the Commission stated that the Polish Supreme Audit Office currently operates under ***adverse conditions.***[220]

Among the issues identified by the Commission, there is the continued refusal of the Speaker of the Polish Parliament (Sejm) to appoint candidates proposed by NIK President Marian Banaś to the Council of NIK (an advisory body). This applies also to the appointment of the Director General of NIK. Between August 30, 2019 and July 11, 2022, Marian Banaś addressed the Marshal of the Sejm nine times and submitted 34 motions to appoint new members of the NIK Council. Only seven candidates received positive opinions by the Sejm Committee on State Audit and, as a consequence, were appointed by the Marshal of the Sejm to the NIK Council.

The EC's 2023 Rule of Law Report in turn reiterated these concerns and stated the need to ensure more systematic follow-up to findings by the Supreme Audit Office, as well as, as a matter of urgency, the appointment of the College Members of the Supreme Audit Office in order to ensure its effective functioning.[221]

The International Organization of Supreme Audit Institutions (IOSAI) further pointed out that recent measures adopted with regard to NIK "***prevent [NIK] from efficient discharge of its constitutional and statutory obligations based on the respect of the principle of independence."***[222] The IOSAI in its report – which was part of the Supreme Audit Institutions Independence Rapid Advocacy Mechanism – stated further that the cuts made to NIK employees' remuneration (which amount to nearly 51 million zlotys) are a violation of the international principles of Supreme Audit Institutions, and constitute an attack on the NIK's financial independence.[223]

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217. According to figures provided by NIK, out of tens of motions filed by NIK to the public prosecutor's office over the past two years, only two led to investigations.
218. FIDH Interview with NIK representatives, June 1, 2023.
219. Ibid.
220. https://commission.europa.eu/system/files/2022-07/48_1_194008_coun_chap_poland_en.pdf.
221. https://commission.europa.eu/system/files/2023-07/48_1_52627_coun_chap_poland_en.pdf.
222. https://www.nik.gov.pl/en/news/a-shattering-assessment-report-on-system-constraints-on-independence-of-the-supreme-audit-office-of-poland.html, https://www.nik.gov.pl/plik/id,27698,vp,.pdf.
223. "In line with Principle 8 of the Mexico Declaration on SAI Independence, Supreme Audit Institutions should be provided with human, material, and financial resources necessary for its appropriate operations. However, on 25 October 2022, the Sejm Committee made an amendment to NIK's budget for 2023, cutting remunerations of NIK employees by the total of nearly 51 million zlotys. At the same time, the State Labour Inspectorate received a 15% pay rise, and the budget of the Chancellery of the Prime Minister increased by 80%." https://www.nik.gov.pl/en/news/a-shattering-assessment-report-on-system-constraints-on-independence-of-the-supreme-audit-office-of-poland.html.

Cutting public funding to an institution which refuses to align with the government's political agenda is a tactic previously employed by the Polish government towards, for example, the Ombudsman's office, which was a key actor in the struggle for the maintenance of the independence of the judiciary, the prosecutor's office, and civil rights. In 2016, the budget of the Ombudsman was cut by 3 million zlotys to 35.6 million zlotys.[224] In 2021, when the ruling coalition was sure it would be the one to nominate the new Ombudsman following the end of Dr Adam Bodnar's term in office, the budget was raised to 51 million zlotys (compared to 45 million in 2019). In comparison, and to give a sense of the unequal treatment to which public institutions are subject depending on their, or their members', political leanings, in 2021 the Institute of National Remembrance and its Commission for the Prosecution of Crimes Against the Polish Nation[225] – a broadly political entity which recently became known for being entrusted with tracking down those who cooperated with the former communist government prior to the transition to democracy in the 90s – was awarded a budget of 400 million zlotys.

II.IV. The EPPO – a blocked promise of the future?

What is the EPPO?

The European Public Prosecutor's Office started operating at full scale on June 1, 2021, after years of negotiations between Member States regarding its very creation, followed by a discussion about the terms according to which this first international – and fully independent from any national pressure (as well as from any form of pressure from the European Commission) – prosecutorial service would function. The EPPO operates based on the provisions set out in Council's Regulation (EU) 2017/1939 of 12th October 2017.[226] All this was made possible on the basis of Article 86 of the Treaty on the Functioning of the European Union (TFEU). According to Art. 86(2) of the TFEU, the EPPO is responsible for investigating, prosecuting, and bringing to justice, where appropriate in cooperation with Europol, the perpetrators and accomplices in crimes against the financial interests of the EU. EPPO prosecutors may bring proceedings before the competent courts of the Member States in relation to these offences. Therefore their role is not merely that of an investigative and notification service such as in the case of OLAF.

Pursuant to Article 22 of the Regulation on the EPPO,[227] the Office works on cases concerning offenses affecting the EU's financial interests, regardless of whether the offense constitutes a separate crime in the particular Member State. This means that the EPPO has its own set of independent definitions of the crimes it takes an interest in, regardless of national legislation. These are set out in the 5th of July 2017 Directive (EU) on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive").[228] This also shows how the EPPO was designed to remain as effective as possible, even if national laws were to change in order to protect perpetrators with ties to the ruling government.

As for VAT-tax related crimes, the EPPO can act only if such a crime is committed on the territory of two or more Member States, and involves a total loss of at least 10 million euros. The EPPO also has jurisdiction over offenses involving participation in organized crime within the meaning of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime,[229] but only if the purpose of the criminal organization is to commit one of the crimes the EPPO was set up to track. The EPPO does not, however, have jurisdiction over matters related to domestic direct tax offences, including offences inextricably linked to them. The Regulation on the EPPO also has no effect on the structure and functioning of Member States' tax administrations.

One of the most crucial aspects of the functioning of the EPPO is the fact that EPPO prosecutors (called the "delegated prosecutors") function within the national prosecutorial service and are at the same time national prosecutors from the participating Member State. However, they also have the

224. https://oko.press/mniej-na-koleje-i-mieszkalnictwo-ale-sa-2-mld-dla-tvp-analizujemy-budzet-na-2021-rok.

225. https://ipn.gov.pl/pl/kontakt/centrala/26059,Glowna-Komisja-Scigania-Zbrodni-przeciwko-Narodowi-Polskiemu.html

226. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. https://eur-lex.europa.eu/eli/reg/2017/1939/oj.

227. https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:32017R1939&from=EN.

228. DIRECTIVE (EU) 2017/1371 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1371.

229. https://eur-lex.europa.eu/legal-content/pl/TXT/?uri=CELEX%3A32008F0841.

power to initiate investigations and continue proceedings. The EPPO itself also has the right to take over cases in the participating Member States, once having informed national authorities about it.

The EPPO delegated prosecutors who initiate and conduct particular proceedings may also independently make use of mechanisms available to them under national criminal frameworks, and instruct other relevant authorities in a particular Member State to cooperate with them (insofar as the local mechanisms allow for a national prosecutor to do so). However, no confirmation by a national supervisory body is needed – which means that the delegated prosecutors benefit from a wide range of movement and independence within their respective national criminal justice systems. In the event that certain preparatory proceedings conducted by the prosecutors of the EPPO concern persons protected by privilege or immunity according to national law, and that such privilege or immunity constitutes an obstacle to the conduct of that particular investigation, the European Chief Prosecutor may submit a written and justified request for waiver of said privilege or immunity in accordance with the procedures laid down in national law as applicable to each country in question. Furthermore, a delegated prosecutor of the EPPO may, in accordance with the law applicable in similar domestic cases, order the detention of the suspect or accused person.

One of the most crucial aspects of the overall mechanisms that regulate the EPPO is the fact that without the consent of the European Chief Prosecutor, a Member State may not dismiss or initiate disciplinary proceedings against a delegated prosecutor for reasons related to their duties. This supplies a certain degree of independence and autonomy, which protects them from attacks and undue interference by national authorities.[230]

Currently, 22 out of 27 Member States of the European Union – not including Poland – have opted to participate in the EPPO.

II.IV.i A brief history of Poland not joining the EPPO

Poland remains one of the 5 EU Member States which are not party to the EPPO.[231] The authorities have justified the decision to opt out on the grounds that the issues dealt with by the EPPO are under exclusively national jurisdiction, and thus must be dealt with using national prosecutorial mechanisms.[232] Also, according to them, the EPPO decision-making process would impose many additional bureaucratic obligations on national authorities.

The country's accession to the Office, amidst its national and ongoing rule of law crisis, has been a widely discussed topic in the public debate in Poland. For a while it was even seen as one of the possible[233] sources of leverage for the opposition when discussing whether to vote in favour of the government-proposed National Recovery and Resilience Plan (NRRP). The ratification of the NRRP was in turn crucial for Poland to access the EU Recovery and Resilience Fund. Because the opposition (both in the Sejm and within local government structures) and human rights defenders[234] lacked confidence in the independence of the national mechanisms that would be responsible for overseeing the spending of, as well as the investigation and prosecution of crimes involving, EU funding, a clear commitment to accession to the EPPO seemed to present an opportunity to introduce controls separate from those that were politically captured, as was and continues to be the case with the National Prosecutor's Office. However, due to the political duress to which the opposition was subjected by the governing party, and

230. https://wyborcza.pl/7,75968,29508673,kpo-nie-za-wszelka-cene-praworzadnosc-jest-wazniejsza-niz-pieniadze.html.

231. Hungary and Sweden have, like Poland, not joined the EPPO, whereas Ireland and Denmark have opted out of the area of freedom, justice, and security (AFSJ). Source: https://www.eppo.europa.eu/en/members.

232. When questioned by an opposition MP, Andrzej Maciejewski, as to the reasons for his government's refusal to join the EPPO in 2018, Łukasz Piebiak, the former undersecretary of State in the Ministry of Justice stated that "***the government of the Republic of Poland from the beginning of the negotiations, both on the draft regulation on the establishment of the European Public Prosecutor's Office, as well as on the draft Protection of the Union's Financial Interests Directive, consistently pointed out that that Poland cannot support solutions that exclude the exclusive competence of the Member States over the prosecution of VAT crimes****. Detailed information was also mentioned in the argumentation of the Ministry of Finance, which boils down to recognizing that **VAT revenues constitute the direct revenue of the budget of the Member States and only indirectly and in drastically smaller portions the income of the EU budget, so it is difficult to talk about damage done to the financial interests of the EU, as it primarily concerns national budgets.** Additionally, the jurisdiction of the European Public Prosecutor's Office over related crimes was questioned in cases where the harm done to the EU budget would be vastly surpassed by the damage suffered by the national budget*," https://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=565CA1EC&view=null (emphasis added). However, the argumentation above stands in contrast to the fact that the EPPO does not grant powers to prosecute VAT-related offences.

233. https://wyborcza.pl/7,75398,28344332,polska-prokuratura-potrzebuje-wsparcia-prokuratury-europejskiej.html.

234. https://www.rp.pl/polityka/art8600221-kpo-wyslany-do-brukseli-spor-miedzy-lewica-a-ko-trwa.

significant time constraints, the NRRP was ratified[235] without setting any additional requirements for the government to meet, which also meant no ultimatum was imposed to become party to the EPPO.

II.IV.ii What now? How Poland refuses to cooperate with the EPPO while claiming the opposite, and what this means for the EU prosecutorial service and the protection of EU financial interests

On February 16, 2022, the European Chief Prosecutor, in line with point 16 of the Regulation on the conditionality mechanism,[236] sent a letter addressed to the European Commission concerning the lack of any cooperation by Poland with the EPPO. As stated by the Chief Prosecutor, ***though Poland does not take part in the enhanced cooperation on the establishment of the EPPO, cooperation between the EPPO and competent judicial authorities in Poland still has to rely on the existing instruments for judicial cooperation and mutual recognition. This includes essential instruments for cross-border criminal investigations like the European Investigation Order (Directive 2014/41/EU) and the European Arrest Warrant (Framework Decision 2002/584/JHA). Accordingly, all the Member States participating to the EPPO notified the EPPO as a competent authority for the application of existing instruments for judicial cooperation.***[237] The letter in question was sent at a time when 23 proceedings of the EPPO involving Poland (among other States), were stalled due to lack of established cooperation. Indeed, although Poland has chosen not to participate in the EPPO, under Article 325 TFUE – providing that protecting the EU budget is an obligation for all Member States – non-participating Member States must still cooperate with the EPPO in accordance with the sincere cooperation principle.

Poland declared at the time that it could not cooperate with the EPPO until the newly created mechanism had been written into the provisions concerning international cooperation in the national Criminal Proceedings Code. This was meant to change in December of 2022, when an amendment to the Code to this effect was signed into law. However, instead of establishing effective cooperation between Poland and the EPPO, the new law raised further obstacles to Poland's effective cooperation with the EPPO. First, the new law made it obligatory for all communications issued to the EPPO to go through the National Prosecutor's Office. It further states that in the case that the activities or providing of information would be contrary to the laws of the Republic of Poland or "a violation of its sovereignty,"[238] the court or prosecutor is to prohibit the activities or decline to provide the information.[239] Under the new rules, it is the National Prosecutor's Office – with direct ties to the Minister of Justice-Prosecutor General – which effectively has retained the last word in terms of disclosing any information or allowing for EPPO activity as regards persons in Poland, based on a vague definition that gives it excessive discretion in deciding in which cases this cooperation can be carried out.

The described changes cannot therefore be considered as positive steps towards an effective cooperation, nor they can be deemed exempt from political influence. They effectively allow the authorities in Poland to continue not to cooperate with the EPPO, should the evidence in question or the activities for which the EPPO requests Polish authorities' cooperation not be in line with their agenda. They undermine mutual cooperation in criminal matters and are at odds with the requirements enshrined in the Treaties and in other EU legislation, including the Conditionality Regulation, meant to protect this and other EU principles – including the rule of law – that underpin them.

Upon a request for more information on the cooperation between the EPPO and the Polish authorities submitted by the FIDH, a response has been issued that such a link has been established through the 2022 changes to the Polish Criminal Procedure Code[240].

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235. https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=1123.

236. (16) ***The identification of breaches of the principles of the rule of law requires a thorough qualitative assessment by the Commission. That assessment should be objective, impartial and fair, and should take into account relevant information from available sources and recognised institutions, including judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission's annual Rule of Law Report and EU Justice Scoreboard, reports of the European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO) as relevant, and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission, in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary. The Commission could consult the European Union Agency for Fundamental Rights and the Venice Commission if necessary for the purpose of preparing a thorough qualitative assessment.*** https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R2092.

237. https://www.eppo.europa.eu/en/news/letter-sent-european-commission-regarding-polands-refusal-cooperate-eppo.

238. https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/zmiana-ustawy-kodeks-postepowania-karnego-oraz-ustawy-prawo-o-21763307.

239. https://www.prawo.pl/prawnicy-sady/prokuratura-polska-bedzie-wspolpracowac-z-unijna,516305.html.

240. Answer received from the EPPO following e-mail correspondence by the FIDH on file.

The key European institution which was created to address and investigate cases of fraud and or/corruption affecting EU financial interests is the European Anti-Fraud Office, better known as OLAF.[241] OLAF is not fully independent, as although it does enjoy operational independence, it is a European Commission-integrated service. The body plays its role as an auditor concerning all matters where the EU budget remains at risk, however it does not possess prosecutorial powers such as those entrusted to the EPPO. OLAF auditors are not prosecutors, though whenever they detect an irregularity that poses a threat to the EU budget, they do notify national prosecutorial services in order for them to launch proceedings based on their findings. OLAF is further entitled to recommend the recovery of misused EU funds.[242] Its main limitation is therefore that it relies on cooperation with national authorities to further investigate and prosecute financial abuse involving the EU budget.

Another shortcoming is that OLAF investigations lack transparency, making it difficult to access information regarding its operations. For the purposes of this publication, FIDH experts have reached out to the Polish prosecutorial service in order to gain knowledge on how many investigations launched into corruption cases concerning EU funding have been started following OLAF's notifications. However, the official answer received from the National Prosecutor's Office was that it is not possible to check within the IT system how many of the overall proceedings concerning abuse involving EU funds were launched due to notifications from OLAF.[243]

241. OLAF was established on the basis of the Decision 1999/352/EC, ECSC, Euratom of April 28, 1999, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31999D0352.

242. https://anti-fraud.ec.europa.eu/about-us/faqs_en.

243. See official correspondence between FIDH and the Polish National Prosecutor's Office, August 30, 2023.

Conclusions

This report establishes a clear connection between a deteriorating rule of law and proven irregularities on the one hand, and the risk of further ones on the other, in the use of EU funding in Poland. Whether it is about EU funds managed by national authorities being allocated contrary to EU rules and in some cases in a fraudulent manner – as was the case in the examples provided in Chapter I – or about institutions and mechanisms that are meant to oversee such funds' implementation and safeguard them against abuse, falling short of their mandate due to limited independence or effectiveness, the report points to a widespread and systemic failure by the authorities to ensure adequate protection to funds awarded to Poland under the various EU funding instruments and programmes.

By presenting a few, selected cases where EU funds have been misused by public authorities – who have fraudulently allocated them to people close to the ruling coalition and/or with personal ties to the very same authorities who are entrusted with their management – and showing how the abuse is aggravated by the general impunity surrounding it, the report shows how the abuse happens in practice, and how the national mechanisms established to exercise control over EU spending have proved unable to effectively prevent it. This, and the continued failure by the government to enact genuine reforms upon which the release of future funding – particularly under the EU Recovery and Resilience Facility, but also, e.g., under cohesion policy – has been made conditional, point to a systematic pattern of abuse in the way this funding is being used and a refusal to comply with required standards, which a deficient rule of law system is rendering possible, and which, in turn, hastens its further deterioration. Indeed, when looking at the intricate network of political appointments, dismissals, investigations, and prosecutions surrounding the whole system which manages and controls public (including EU) funding's use, and at the way in which public institutions are being manoeuvred by the ruling coalition in order to favour its supporters (including friends and family members) and to discipline or persecute its enemies, it is hard not to link the deteriorating rule of law system, characterised by politically controlled institutions and weakened and ineffective checks and balances, to the funding abuse that has been observed and has been documented – albeit in a non-exhaustive manner – in this chapter.

This conclusion is only corroborated by the analysis, elaborated in the second part of the report, of the institutional framework surrounding the use of public, including EU, funding. At first blush, this framework may seem apt to ensure that public money is spent correctly and to prevent, and address, abuse. Yet a closer examination of existing mechanisms available at the national level – and at the EU level, insofar as these rely on cooperation with national authorities for their effective functioning in Poland – shows how these can hardly be considered effective safeguards for the protection of the EU (and of the State) budget. As the main reasons for these mechanisms' ineffectiveness appear to be their lack of independence from political power, or the power limitations that prevent them from exercising effective control over government spending, their inability to properly perform their functions can be, at least primarily, attributed to the rule of law deficits that affect them, along with the whole public authority system.

The research conducted for this report proves that significant changes to national legislation and to the public institutional system must be made in order to build a solid framework able to effectively prevent and address funding abuse in Poland. Without changes to the laws regarding the judiciary and the national prosecutor's office, as well as actual guarantees of their independence (in law and in practice) and the effective implementation of existing provisions concerning auditing and anti-corruption bodies that would ensure their independence from political power and their effectiveness in investigating and prosecuting crimes against the State budget in an independent, impartial, thorough, and effective manner, Poland cannot be considered to have effective safeguards in place that would guarantee efficient State control over the transparency of public funding and prevent its abuse on the one hand, and ensure accountability on the other. Additionally, national actors should recognise the need for a much more profound cooperation with the EU, in terms of effective implementation and cooperation with European safeguarding mechanisms and standards relevant to EU funding, including rule of law standards. This study confirms that a functioning rule of law system is key not only to ensuring respect for democratic and human rights standards, but also to preserving the public budget (i.e. taxpayers' money) – including the part of it that comes from the EU budget through the various programmes and funding schemes that apply to Poland, along with all other Member States – from abuse. In the case of Poland, the fact that such abuse directly contributes to further backsliding in democracy and the rule of law, and to worsening encroachment upon fundamental rights and freedoms, is yet another compelling argument for promptly and effectively correcting it.

In the light of these findings and conclusions, and in the absence of genuine cooperation by the authorities in Poland on rule of law-related matters that years of fruitless dialogue between the government and EU institutions have laid bare, the report makes the case for further EU action in response to a continued deterioration of the rule of law in Poland, which also represents a threat to the EU's financial interests. Regardless of whether this threat has materialised – as in the cases the report highlights – or remains potential – as in other situations that have not yet materialised but which could easily result from the deficiencies that have been highlighted in this study – the report argues in favour of the activation, by the European Commission, of the mechanism that has been established to deal with cases where rule of law breaches pose a serious risk to the EU's financial interests, i.e. the Conditionality Regulation. By calling for the use of the Conditionality Mechanism to address the rule of law violations that have been documented in Poland when these are proved to have a negative impact on the EU budget, the authors propose to complement existing mechanisms and add strength to other ongoing actions by which the EU has been responding to continued rule of law backsliding in Poland – including infringement proceedings, the recommendations made by the Commission to the Polish government in the context of the annual Rule of Law report 2022 and 2023, and the Article 7.1 TEU procedure. Given the political sensitivity surrounding the Polish rule of law debate, and on account of the virtual stalemate reached by the Council in its Article 7.1 TEU discussions, the Mechanism could open up new avenues for accountability for rule of law violations that present a budgetary dimension.

With a view to guiding national and EU-level actors in their action in relation to the issues examined above, and based on the findings which undergird this publication, its authors formulate the following, specific recommendations to stir much-needed reforms in Poland and spur action by the EU institutions in response to the documented deterioration, and to ensure compliance with constitutional, European, and international rule of law, transparency, and anti-corruption standards essential to ensuring a sound public finance system and a thriving democracy.

Recommendations

To the government of Poland:

In relation to the judiciary:

- To promptly and fully restore judicial independence in Poland, in accordance with the decisions and recommendations issued, inter alia, by the European Commission, the Court of Justice of the European Union and the European Court of Human Rights, so as to ensure full access to the right to an effective remedy for people in Poland. This includes, in particular:
    - to reform the law regarding the rules for appointing Constitutional Court judges, to ensure that these can exercise their functions independently and free from political influence, and can effectively accomplish the constitutional review of laws;
    - to reform the law concerning the National Council of the Judiciary, so that it may regain its full independence from any political influence; all nominations and promotions of judges made by the National Council of the Judiciary in its current form, which permits doubts regarding its independence, should be reassessed and verified as to their legality;
    - to repeal amendments to the law on the Supreme Court (SC), which have undermined its independence, and remove the jurisdiction for disciplinary proceedings against judges from SC bodies whose independence from political influence cannot be guaranteed; this includes the recently established Chamber of Professional Responsibility, which in no way can be considered as an adequate response to the European Commission's criticism related to the independence of the former Disciplinary Chamber of the Supreme Court; to comply with the rule of law milestones set by the Commission as a pre-condition for the release of EU funding under the EU Recovery and Resilience Facility (RRF); and
    - to discontinue all disciplinary actions or proceedings against judges, including decisions to waive their judicial immunity, and refrain from initiating new ones due to political reasons, namely on account of criticism expressed by judges against justice reforms enacted by the current government and/or of their decision to refer cases for preliminary ruling to the Court of Justice of the European Union; to clarify the scope of disciplinary liability of judges, so as not give rise to abuse, and to ensure that judges affected by decisions of the bodies in charge of carrying out disciplinary proceedings against them have means to effect the review of their case by an independent and impartial court of law, as requested also by the EU Commission as part of the rule of law milestones set as a pre-condition for the release of EU funding under the RRF.

In relation to the Public Prosecution Service :

- To amend legislation concerning the public prosecutor's office so that it regains its full independence from political influence, including by separating the functions of Prosecutor General and Minister of Justice and reducing their powers, namely with regard to appointments, promotions, demotions, and transfers of prosecutors, and the power to interfere in proceedings;
- To ensure that the public prosecutor's office promptly, effectively, impartially, and thoroughly investigates and prosecutes allegations of crimes against the State (and the EU) budget, including fraud, corruption, and other illegal conduct in the management and implementation of public funds, including EU funds;
- To join the European Public Prosecutor's Office as a participating State; pending a decision on Poland's participation to the EPPO, to effectively cooperate with the EPPO in cases that concern the investigation and prosecution of crimes against the EU's financial interests and which are of a transnational nature, and to repeal any legislation which provides for arbitrary refusal of cooperation between Poland and the EPPO on the basis of vague and uncertain legal definitions of what constitutes a valid motive to refuse such cooperation;
- To ensure that the National Prosecutor's Office follows up on investigations conducted by the European Anti-Fraud Office (OLAF) with a view to promptly, effectively, thoroughly and impartially investigating and prosecuting fraud and corruption that could affect the EU's financial interests; to keep track of, verify, and report on how many OLAF notifications result in actual acts of indictment, and ensure public access to such data; and
- To repeal all decisions regarding transfers, demotions, and dismissals of prosecutors who have lost their positions or have otherwise been degraded since 2016 due to political reasons; to discontinue any disciplinary actions or proceedings against prosecutors

on account of their criticism of government reforms and/or of their decisions to/not to investigate or prosecute cases.

In relation to the Anti-Corruption Bureau (CBA):

- To reform the national anti-corruption authority, the Central Anti-Corruption Bureau, so as to guarantee its independence from any political influence and ensure that it can carry out its mandate to investigate crimes against the State (including the EU) budget in an independent, impartial, and effective manner; and
- To guarantee that any person holding office within the national anti-corruption authority undergoes a security clearance procedure prior to their appointment, so that their role in upholding the law can be guaranteed.

In relation to the Supreme Audit Office (NIK):

- To allocate sufficient resources to the Supreme Audit Office to carry out its functions according to the Constitution;
- To ensure that all motions presented by the Supreme Audit Office President's for appointing members to the Supreme Audit Office's College are accepted and that the appointments are made, according to the relevant provisions;
- To guarantee that the Supreme Audit Office's auditors are able to carry out their constitutionally-protected functions as regards control over all institutions dealing with public money, including State-owned companies, without hindrance, including any threat to their personal safety, or of administrative or criminal proceedings being brought against them to punish them for their work; and
- To guarantee that all relevant Supreme Audit Office motions to the public prosecutor's office regarding irregularities or abuse affecting the State (including EU) budget, are taken into consideration and result in an investigation and, should there be sufficient grounds for it, prosecution against the offenders, according to the provisions set out under the Polish Criminal Code and the Polish Criminal Procedure Code.

In relation to EU Cohesion Policy Funds and other funds under shared management:

- To ensure that EU funds under shared management by national authorities are managed and implemented by the latter in compliance with the provisions contained in the EU legislation regulating each funding programme, as well as with general provisions of EU law and the Charter of Fundamental Rights of the EU;
- To declare its full and non-questionable adherence to the principles and norms contained in EU law, including the EU Fundamental Rights Charter and ensure their respect, including – but not limited to – when implementing EU funded programmes; in this context, to refrain from funding programmes – both funded by the EU and from the State budget – that openly violate the rights enshrined in the Charter;
- To guarantee that Monitoring Committees established under the Common Provisions Regulation to monitor the implementation of EU-funded programmes with a view to ensuring the respect of the Charter and other horizontal enabling conditions function on the basis of the transparency principle and allow for proper monitoring by the Committees of the way EU funding is being spent; to ensure a balanced representation of social partners within the Monitoring Committees, and to exclude from them any representatives and organisations whose action or mandate appears contrary to EU law and values, particularly anti-rights, anti-gender organisations that promote an agenda at odds with the norms and principles enshrined in the Charter; and
- To ensure that any incident or allegation concerning possible abuse in EU funding management and implementation is promptly and effectively investigated by an independent body with a view to referring them to the competent authorities for further investigation and prosecution under Polish law.

In relation to the EU Recovery and Resilience Facility (RRF) Funds:

- To urgently enact and implement reforms that would genuinely address concerns raised by the European Commission with regard to the rule of law and meet the related milestones set as a precondition for releasing RRF funding to Poland; and
- To refrain from advertising programmes under the RRF until such reforms will be enacted and implemented and the Commission will give assurance as to the funds' imminent

release, with a view to avoid transferring the risk that the funding might not be released to the beneficiaries.

In relation to public finances:

- To enact a comprehensive institutional and organizational reform of the public finance system with a view to reducing funds and agencies, and redefining the "State budget" as the "budget of the entire central sector."
- To increase transparency over public finances, including by:
    - introducing an obligation to publish in the budget law the financial plans of all the units within the public finance sector, along with detailed information on the application of the expenditure rule;
    - changing the emphasis in the explanatory part of the budget law on the deficit of the public finance sector, the deficit of the entire central budget (including funds, agencies, and other units), and the deficit of the social security sub-sector, and presenting more details and transactions about the entire sector;
    - creating a public register of all the units within the public finance sector with financial information, including employment and salaries;
    - creating a register of all public taxes, contributions, and payments equivalent to them; and
    - establishing, without delay, at the micro-level, a central register of public finance sector contracts, whose introduction was initially set for January 2024, but which Parliament has postponed until 2026.
- To ensure that adequate safeguards are in place against the manipulation of fiscal rules by:
    - introducing into the Constitution a definition of public debt in line with EU standards;
    - sealing the stabilizing expenditure rule so that it covers, in principle, all spending transactions within the meaning of EU law, including the procedure of issuing government bonds within the scope of the rule, i.e. treating them as subsidies (expenditures);
    - requiring a two-thirds parliamentary majority to approve changes to the fiscal rules, and basing the exit clause from the fiscal rules on state of emergency provisions, as specified in the Constitution; and
    - establishing a politically independent Fiscal Council, where representatives of the scientific sector and civil society would have a leading role, and entrusting it with broad powers to evaluate and monitor all parameters and data in the field of public finance, as is necessary to ensure the openness and transparency of public finances at the micro level.

In relation to independent media and civil society:

- To halt any harassment against independent media and independent civil society organisations, including those involved in investigating cases concerning fraud, corruption, and other abuse of public funding, including EU funding. This includes:
    - discontinuing any administrative, civil, and criminal proceedings launched against them due to their work and refraining from initiating new ones;
    - refraining from taking any action aimed at disciplining or otherwise sanctioning reporters, including politically motivated dismissals, namely in public media;
    - ensuring that independent media and civil society organisations have access to funding, including public funding, on an equal basis with public media and pro-government media and NGOs to ensure a balanced information and civil society composition, along with the full exercise of the right to freedom of association and the rights to freedom of expression and media freedom;
    - halting any smear campaign or other public discourse aimed at discrediting independent media and independent civil society and undermining their work; and
    - stopping the use of and refraining from further purchasing and deploying any sort of illegal spyware or surveillance technology questionable in terms of its proportionality as regards its interference into the private life of citizens, to spy on independent media, civil society, and the opposition.

In relation to EU-Poland relations:

- To promptly and effectively comply with the recommendations put forward by the European Commission as part of its monitoring of the respect for the rule of law and other Article 2 TEU values by Member States, namely in the context of infringement proceedings, its annual Rule of Law Reports 2022 and 2023, its 2017 reasoned opinion under Article 7.1 TEU, and in other contexts (such as the European Semester);

- To promptly and effectively execute decisions by the Court of Justice of the European Union and the European Court of Human Rights, notably in cases regarding judicial independence and other aspects related to the respect of the rule of law by Poland;
- To promptly and effectively comply with the recommendations issued by the European Parliament in its resolutions adopted between 2016 and 2023 regarding the rule of law in Poland
- To demonstrate a genuine will to cooperate with the Council and Commission in the context of the procedure launched under Article 7.1 TEU against Poland in 2017, notably by enacting and implementing reforms that would genuinely address the concerns raised by the European Commission in its reasoned opinion, and others that have arisen since with regard to the respect of the rule of law in Poland.

To the European Union:

To the European Commission:

- To keep monitoring the respect for the rule of law and other Article 2 TEU values in Poland, with a view to detecting breaches and reacting to them, as appropriate. This includes continuing monitoring of the situation in the context of the annual Rule of Law review cycles, ongoing infringement proceedings, and as part of the monitoring over the implementation of CJEU judgments – notably with regard to judicial independence and disciplinary proceedings against judges – and other processes (such as the European Semester), with a view to ensuring compliance with EU principles and standards, and the correct implementation of recommendations and decisions issued in the context of past and ongoing monitoring and proceedings;
- To monitor the way in which EU funding is being used in Poland, including when this is subject to "shared management" by the Commission and national authorities who are in charge of their management, control, and implementation with a view to detecting irregularities and acting on them, as appropriate (i.e. as it is determined for each fund under the relevant EU legislation);
- To investigate rule of law breaches with a view to determining their impact, or potential impact, on EU funds and, in case the observed rule of law breaches affect or, risk affecting, the EU budget and the EU financial interests, activate the mechanism laid out in EU/ Euratom Regulation 2020/2092 (the Conditionality Regulation);
- To continue making the release of cohesion policy funds to Poland under the Common Provisions Regulation conditional upon full compliance by the Polish government with the horizontal enabling conditions set out in the regulation, including compliance with the EU Charter of Fundamental Rights, and concrete proof that any breach thereof has been remedied as per the Commission's request and indications; to question Poland on its funding, under the State budget, of projects that have previously been funded under the EU budget but from which EU funding has been withdrawn due to their noncompliance with the Charter (such as in the case regarding the "LGBTI-free" municipalities);
- To ensure that the criteria for being appointed to the Monitoring Committees under the Common Provisions Regulation are fulfilled, including with regard to the need for Committee members to comply with the Charter; to urge the authorities in Poland to refrain from appointing any organisation whose mandate or actions appear contrary to EU law and principles, including the Charter, to the Monitoring Committees, and to exclude those who have already been appointed; to ensure that the procedures that regulate work within the Committees are transparent and ensure meaningful participation of their members in decisions regarding the management and implementation of EU funded programmes;
- To make the release of any EU funding to Poland under the EU Recovery and Resilience Facility (RRF) conditional upon adoption and full implementation by the Polish government of reforms that would fulfil the milestones, including rule of law milestones, set out by the Commission as a pre-condition for the funding to be released; in its assessment, the Commission should not rely on the decision, pending before the Polish Constitutional Tribunal, on the proposed reforms' consistency with the Polish Constitution, as this decision is to be adopted by a court that cannot be considered as an independent court of law within the meaning of European law, and can therefore not be considered to be the result of an effective and independent constitutional review;
- To verify whether milestones and targets set out by the Commission in the context of the approval of the Polish National Recovery and Resilience Plan (NRRP) – including rule of law milestones – have been met, before considering accepting any amendment to the aforementioned NRRP, whose aim would be to receive new advance payments without the need to demonstrate compliance with previously set milestones;

- To consider expanding the scope of the review under Article 7.1 TEU by submitting an updated reasoned opinion that would take into account developments that have occurred since December 2017, and would include other rule of law breaches – besides the ones regarding judicial independence – and other Article 2 TEU violations;
- To ensure, in the context of the annual Rule of Law review cycles, that the recommendations issued to the government of Poland in previous years have been genuinely and effectively implemented and, should this not be the case, take action under other instruments from the EU Rule of Law Toolbox to enforce respect for the rule of law in Poland, and to hold its government accountable for failing to implement the Commission's recommendations;
- To improve cooperation between the Commission's services in charge of monitoring EU budget spending and the rule of law, with a view to pooling expertise and resources to more effectively and comprehensively address rule of law breaches that have an impact on the EU budget in Poland; and
- To closely monitor the upcoming parliamentary elections in Poland, with a view to verifying compliance with international and European standards on free and fair elections, and that these take place in a context where candidates from different political groups can compete on an equal basis and where voters' rights are respected; to monitor the possible use that could have been made of EU funding – as part of the State funding – for political financing, namely of the ruling coalition in the lead up to the elections, and how this respects EU rules on political party financing.

To the European Anti-Fraud Office (OLAF):

- To investigate the activity conducted by national authorities in Poland which are entrusted with managing, implementing, and/or exercising control over EU funding, to verify compliance with EU law and standards and detect irregularities, especially in regards to possible fraud/corruption networks set up within them;
- To establish a more profound cooperation with national audit institutions (i.e. NIK) and include their findings in their monitoring and investigation over EU funds; and
- To ensure better transparency with regard to their activities, including access to information regarding past and ongoing investigations, their findings, and conclusions.

To the European Public Prosecutor's Office (EPPO):

- To monitor the effectiveness of cooperation with non-participating States, including Poland, in cases regarding criminal offences against the EU's financial interests which have a transnational character, and to verify whether recently introduced changes to national laws enable such effective cooperation or rather impede it; and
- To inform the EU Commission on non-cooperation between the EPPO and Poland and on any such laws whose consistency with EU law and the sincere cooperation principle is doubtful, with a view to starting a procedure against the Member State.

To the European Parliament:

- To continue monitoring the situation of the rule of law and human rights in Poland, including attacks against independent judges and prosecutors, the opposition, independent media and civil society organisations, human rights defenders and activists, and including when rule of law breaches affect, or risk affecting, the EU budget, through documentation, official visits, debates, and resolutions;
- To keep urging the other EU institutions, namely the European Commission and the Council, to promptly and effectively react to rule of law and other Article 2 TEU violations in Poland, through the different means they have available to that effect; in particular, to keep urging the Council to take forward the procedure laid down under Article 7.1 TEU against Poland, including by adopting recommendations and/or by holding a vote to determine that there is a clear risk of a serious breach in Poland of the values enshrined in Article 2 TEU, and to urge the Commission and Council to extend the review's scope so as to include developments occurred since December 2017 in relation to the rule of law and other Article 2 TEU values, as repeatedly requested by Parliament in its resolutions, including lastly in the July 2023 Resolution on the right to vote, the commission of inquiry and the rule of law in Poland[244];
- To urge the European Commission to activate the Conditionality Regulation with regard to Poland, on account of the impact that observed rule of law breaches have had, or could

244. https://www.europarl.europa.eu/doceo/document/B-9-2023-0319_EN.html

potentially have, on the EU budget and the Union's financial interests, as already requested by Parliament, notably due to the inaction of the EU Commission in this regard[245];
- To closely monitor the upcoming parliamentary elections in Poland, with a view to verifying compliance with international and European standards on free and fair elections, such that these take place in a context where candidates from different political groups can compete on an equal basis, and where voters' rights are respected

To the Council of the European Union and to EU Member States:

- To continue monitoring the rule of law situation in Poland and exerting political pressure on the Polish government as regards its compliance with rule of law standards and the other values protected under Article 2 TEU, namely in the context of the ongoing scrutiny under Article 7.1 TEU;
- To take the Article 7.1 TEU procedure forward, in the light of a continued deterioration of the rule of law and other Article 2 TEU values – including democracy and fundamental rights – in Poland, and of the Polish government's continued lack of sincere cooperation and genuine commitment to implement reforms that would effectively address EU concerns and ensure alignment with EU law and values, by adopting recommendations and/or holding a vote to determine that there is in Poland a clear risk of a serious breach of the values enshrined in Article 2 TEU;
- To consider expanding the scope of the scrutiny under Article 7.1 TEU to include developments that have occurred with regard to the rule of law and other Article 2 TEU values since the procedure was launched in December 2017, by addressing any such developments at hearings held under Article 7.1 TEU, when a clear link can be established between such developments and the issues identified in the Commission's 2017 reasoned proposal, and by submitting with the required (one-third) majority, a supplementary reasoned proposal under Article 7.1 TEU;
- In the event that the Commission were to establish that rule of law breaches in Poland have affected, or seriously risk affecting, the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way, to support any proposal by the Commission for an Implementing Decision on the appropriate measures to be taken in response to the situation;
- To green-light the release of EU funding to Poland under the EU Recovery and Resilience Facility (RRF) only after the Polish government demonstrates that it has enacted and fully implemented the milestones, including rule of law milestones, set out by the Commission as a pre-condition for the funding to be released;
- In its Conclusions adopted in response to the Commission's annual Rule of Law report, to address country-specific situations, particularly with regard to Member States, such as Poland, which have been undergoing serious rule of law backsliding in recent years and where serious concerns exist with regard to the respect of rule of law and other Article 2 TEU values, and to use the opportunity to follow up on specific recommendations made by the Commission in this regard by monitoring and reporting on any progress made by the Member State to execute them;
- To specifically address the links between rule of law breaches and EU funding abuse in the framework of the Council's Rule of Law dialogue, notably in the context of the dialogue's upcoming reform, with a view to acknowledging the connection between the two issues and to contribute to developing appropriate responses; and
- To foster cooperation with the other EU institutions, and other international organisations such as the Council of Europe, the United Nations, and the Organisation for Security and Cooperation in Europe to pool resources, expertise, and evidence with regard to the rule of law situation in Poland, and to coordinate their response.

245. https://www.europarl.europa.eu/doceo/document/B-9-2023-0319_DE.html https://www.reuters.com/world/europe/eu-parliament-sues-eu-commission-inaction-over-rule-of-law-concerns-2021-10-29/

Annex 1

KPK-KPP.011.104.2022	Warszawa, 29 December 2022

Mrs

Speaker of Parliament

(Sejm of the Republic of Poland)

Elżbieta Witek

Dear Mrs Speaker of Parlaiment,

In relation to the provisions of the Constitution of the Republic of Poland (Article 202), the Supreme Audit Office is the chief organ of state audit, which is subject only to the Sejm of the Republic of Poland (Article 202, paragraph 2). This subordination is related, on the one hand, to the creative function of the Sejm or the powers of the Speaker of the Chamber and, on the other hand, to the duties that the Supreme Audit Office has towards the Sejm.

The essence of the activity of the Supreme Audit Office is to carry out audit, which to some extent overlaps subjectively with the control function of the Sejm. I would like to remind you that Article 95, paragraph 2 of the Constitution generally delineates the scope of the control function of the Sejm, providing the basis for determining the subject and object scope of the Sejm's exercise of its constitutional and statutory powers. This provision indicates that ‚the Sejm shall exercise control over the Council of Ministers', but linking this provision to Article 146 paragraph 3 (the Council of Ministers directs government administration) and a number of other provisions relating to government administration bodies, it should be recognised that the subjective scope of control is much broader. It refers to all bodies and entities that are in the system of centralised administration, subordinate to the Council of Ministers, including companies owned by the State Treasury.

I would like to point out that in the course of its activities, the Supreme Audit Office has encountered numerous problems connected with audit of State-owned companies, or companies in which the State Treasury is a significant but minority shareholder. These problems relate primarily to the company PKN ORLEN S.A. and, incidentally, also to the ORLEN Foundation. Despite repeated attempts to undertake audit activities in the above-mentioned company, its attorneys refused to allow the Supreme Audit Office auditors to commence audit activities, emphasising that PKN ORLEN S.A. is not subject to audit by the Supreme Audit Office. We have full documentation in this matter, which we can submit for your review. What is more, in connection with the refusal to submit to audit, relevant notices to the Prosecutor's Office on suspicion of committing an offence (Article 98 of the Act on the Supreme Audit Office) were sent by the Supreme Audit Office on respectively: 25 May 2022, 1 June 2022, 22 June 2022. The Prosecutor merged the above notices and on 15 September 2022 issued a decision on refusal to initiate an investigation for the above three notices concerning the thwarting of audits at PKN ORLEN (twice thwarted) and ORLEN Foundation.

At the same time - and this is a precedent - PKN Orlen SA filed a notice against the Supreme Audit Office, as a result of which the prosecuting authorities summoned as witnesses 12 inspectors involved in the above-mentioned inspections. It follows from the summonses to the Supreme Audit Office in this case that they relate to the investigation conducted under case no. 3041-1 Ds.88.2022 on the alleged exceeding of powers by employees of the Supreme Audit Office consisting in attempts to carry out audits at PKN Orlen and others which were allegedly detrimental to private interests, i.e. an act under Art. 231 par. 1 of the Penal Code.

I would like to mention that at the moment the Supreme Audit Office is conducting audit P/22/013 Implementation of activities in the field of improvement of fuel security in the oil sector. The audit

covers all activities in the field of improving fuel security in the oil sector. The subject scope of the audit includes: Ministry of State Assets, Ministry of Climate and Environment, Ministry of Funds and Regional Policy (serving office , PKN Orlen SA, PERN SA and Gaz-System SA).

The Ministry of State Assets , the Ministry of Climate and Environment, the Ministry of Funds and Regional Policy and PKN Orlen SA are investigating issues related to the merger of PKN Orlen SA with Lotos SA and PGNiG SA. Key difficulties in the implementation of the audit, mainly due to the inability to carry out audit activities at PKN Orlen, include: black providing to the NIK auditors of the agreements concluded with the purchasers of the divested assets of Lotos Group (including Aramco Overseas Company B.V., MOL Group, Envien Group and Unimot SA), as well as the lack of source documentation produced in the company and commissioned by PKN Orlen to external advisors (Citi Global Group, EY, Pekao IB) for the consolidation process.

In connection with the fact that PKN ORLEN S.A and ORLEN Foundation put themselves above the law and unauthorisedly use law enforcement bodies to intimidate auditors of the Supreme Audit Office in the course of their tasks, using the powers imposed on the President of the Supreme Audit Office by art. 11a paragraph 1 of the Act on Supreme Audit Office, I hereby kindly request the Prime Minister to issue a motion to the subordinate minister [and further authorities of the audited entities] to issue binding orders aimed at making the requested documents available to the Supreme Audit Office. I would like to emphasise that the activities of the authorities of PKN Orlen S.A. and Lotos S.A. make it impossible for the Supreme Audit Office to carry out its audit activities, which have their basis both in the Constitution of the Republic of Poland and in the Act on the Supreme Audit Office.

The matter is extremely urgent, inter alia in view of the letter of 16 December 2022 from the five joint committees of the Senate: Legislative, Budget and Public Finance, Human Rights, Rule of Law and Petitions, Local Self-Government and State Administration and Extraordinary Committee for Climate Matters, addressed to the President of the Supreme Audit Office to carry out an ad hoc audit in the scope of „examining the correctness of the process of negotiations, changes in the terms and conditions and the final shape of the merger of PKN Orlen S.A. and Lotos S.A., together with the sale of the existing assets of the two above-mentioned companies, with particular regard to the legality of the above-mentioned actions". The letter implies that the sale of assets of the above companies may have been illegal, which may also result in an increase in fuel prices for citizens.

In this state of affairs - invoking the scrutiny function of the Sejm - I ask you, Madam Speaker, to provide any assistance in the matter presented.

My regards

[signed by Marian Banaś

President of the Supreme Audit Office of the Republic of Poland]

For information:

a) Law and Justice Parliamentary Club;
b) Koalicja Obywatelska parliamentary club - Civic Platform, Nowoczesna, Inicjatywa Polska, Zieloni;
c) Coalition of the Left (Nowa Lewica, Razem) parliamentary club;
d) Coalition Poland Parliamentary Club - PSL, UED, Conservatives
e) Confederation Parliamentary Club;
f) Poland 2050 Parliamentary Group;
g) Jarosław Gowin's Arrangement Parliamentary Group;
h) Kukiz'15 - Direct Democracy Parliamentary Group;
i) PPS Parliamentary Group;
j) Polish Affairs Parliamentary Group.

Annex 2

BOE.BOC.0700.004.2022 Warszawa, 7 February 2022

Mrs
Ursula von der Leyen
President of the European Commission

Subject: The role of the Supreme Audit Office (NIK) as the supreme, independent state audit authority in the Republic of Poland in the monitoring, control and audit of the amount of EUR 72 billion to be spent as EU funds allocated for the implementation of the cohesion policy in Poland in the period 2021-2027.

Pursuant to Article 174 of the Treaty on the Functioning of the European Union, the objective of the so-called cohesion policy is to strengthen economic and social cohesion by reducing disparities between levels of development of various regions.

General rules for programming, utilisation, management and audit of resources from the Structural Funds and the Cohesion Fund in Poland are defined for particular multiannual financial framework of the EU by Regulations of the European Parliament and of the Council and by national laws. Poland has so far taken part in two full periods of financing tasks within the framework of structural funds and the Cohesion Fund resources defined in the Multiannual Financial Framework of the EU for the years 2007-2013 and 2014-2021.

In the period 2007-2013 the legal basis on which the allocation of resources under the cohesion policy was made was Council Regulation (EC) No. 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999, which was subsequently replaced by Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

In the following programming period, i.e. 2014-2021, the distribution of funds under the cohesion policy was based on the Regulation of the European Parliament and of the Council (EU) No. 1303/2013 of 17 December 2013.

At the national level in Poland, the Act of 6 December 2006 on the principles of development policy applied to the implementation of programmes for 2007-2013, while for 2014-2020 the Act of 11 July 2014 on the principles of implementation of programmes in the field of cohesion policy financed in the financial perspective 2014-2020 applied.

Currently for the period 2021-2027 the distribution of funds under the cohesion policy will be implemented on the basis of the Regulation of the European Parliament and of the Council (EU) 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Fund for equitable transformation and the European Maritime, Fisheries and Aquaculture Fund and the financial rules for these Funds and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the instrument of financial support for border management and visa policy, and on the national level on the basis of a law which has not yet been passed. In Poland, on the other hand, work is still in progress on the adoption and implementation of legal solutions enabling the disbursement of the Cohesion Fund resources for the years 2021-2027.

I would like to stress that already the first so-called general regulation, i.e. Council Regulation (EC) No. 1083/2006 of 11 July 2006, which applied to projects implemented as part of structural funds for the years 2007-2013, provided for the necessity of appointing an **Audit Authority** in a Member State, understood as a body appointed by the Member State for each operational programme to verify the operation of the management and control system and characterised by independence from the managing and certifying authority. In addition, the above regulation introduced the obligation for the Member State to appoint a **Monitoring Committee** for each operational programme.

Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 retained the previous solutions, i.e. the need to establish an Audit Authority and a Monitoring Committee. Regulation of the European Parliament and of the Council (EU) No 1303/2013 of 17

December 2013 maintained the previous solutions, i.e. the need to set up an Audit Authority and a Monitoring Committee and, for the first time, introduced a new institution, which was the need for a Member State to prepare a **Partnership Contract**, henceforth understood as a document prepared by the Member State with the participation of partners in accordance with a multi-level governance approach, which defined the strategy of that Member State, its priorities and the conditions for efficient and effective use of the EFSI in order to deliver the Union strategy for smart, sustainable and inclusive growth, and which was adopted by the Commission following an evaluation and dialogue with the Member State.

I would like to point out that, in Poland, since the beginning of the possibility of using the resources of the Structural Funds and the Cohesion Funds under the various Multiannual Financial Frameworks of the EU, the role of the Supreme Audit Office of Poland (NIK), which in Poland plays the role of the constitutional, independent, supreme audit institution, has been marginalised.

Since 2008, the function of the Audit Authority was performed by the General Inspector of Financial Information, while since 1 March 2017 until now the function of the Audit Authority has been performed by the Head of the National Revenue Administration (KAS).

Despite the establishment of the Audit Authority on 20 December 2008. The Supreme Audit Office of Poland was not appointed as a member of the Committee for the Control and Audit of Structural Funds and the Cohesion Fund as a consultative and advisory body of the minister in charge of regional development. Regardless of the fact that the Committee for Designations was created as an advisory body to the minister in charge of regional development, the role of the Supreme Audit Office was limited to the possibility for the representative of the President of the Supreme Audit Office to participate in the meeting only at the invitation of the Committee Chairman (without the right to vote).

It should also be stressed that so far representatives of the President of the Supreme Audit Office (NIK) have been invited to participate only in three (out of six) Operational Programmes Monitoring Committees and only as observers (also without the right to vote).

Despite the lack of adoption of a national law enabling the use of funds from the Cohesion Funds for the years 2021-2027, it has been assumed that the function of the Audit Authority for national and regional programmes will continue (as in the perspective 2014-2021) to be performed by the Head of the National Revenue Administration (KAS).

I would like to emphasize that currently Poland is negotiating Partnership Agreement, which as a strategic document at the national level presents the strategy for the use of support from the cohesion policy by the Member State.

The Partnership Agreement is the subject of negotiations between the Member State and the European Commission and requires the approval of the European Commission. The Commission shall assess the Partnership Contract and its compliance with the General Regulation and the Fund-specific rules, observing the principle of proportionality, taking account of the strategic nature of the document, the number of programmes concerned and the total amount of resources allocated to the Member State. In its assessment, the Commission shall take into account, in particular, how the Member State intends to address the relevant country-specific recommendations, its integrated national energy and climate plan and the European Pillar of Social Rights. It should be noted that the European Commission may comment within three months of the date of submission of the Partnership Agreement by the Member State, i.e. by 15 March 2022.

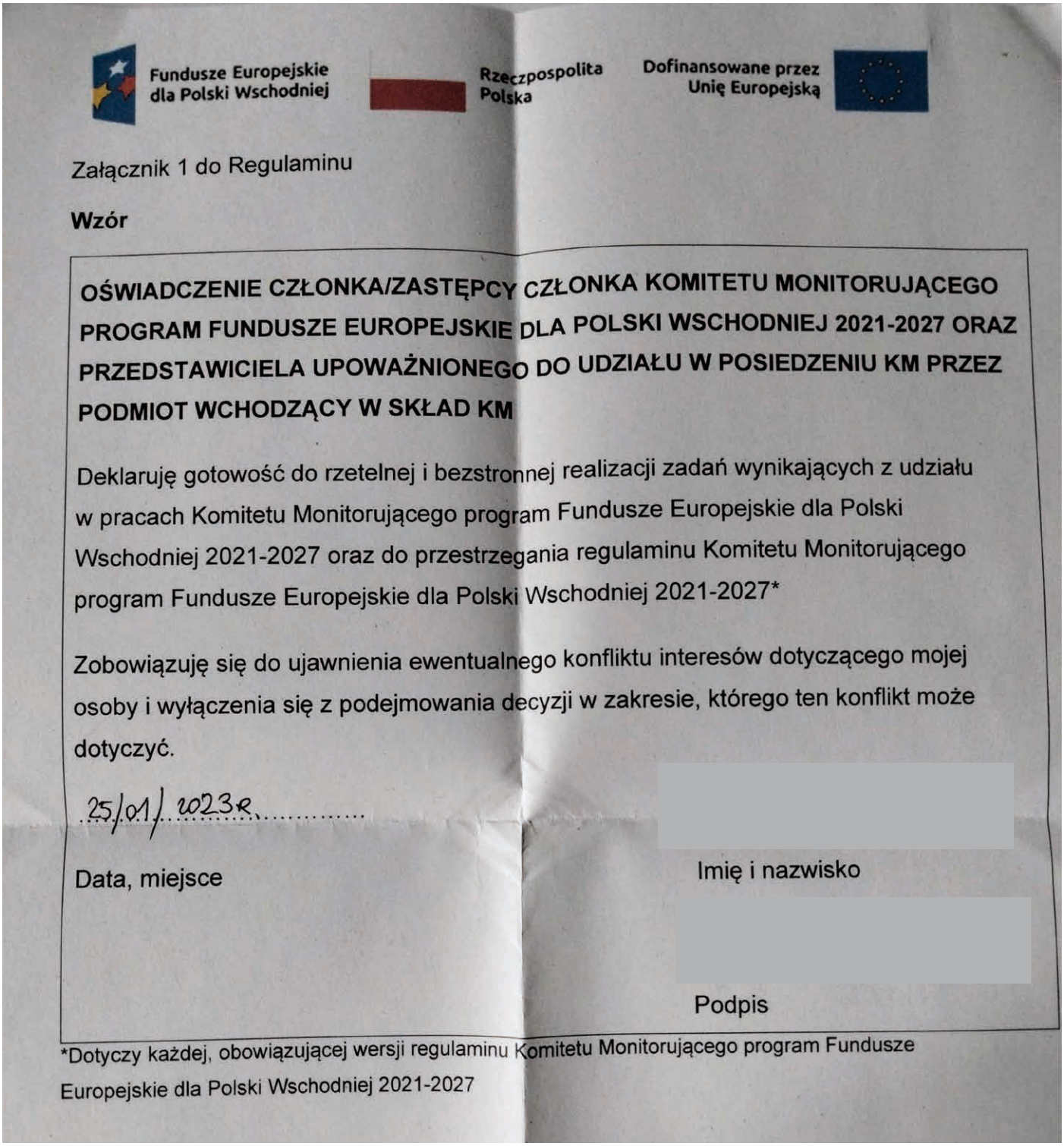
In view of the above and, in particular, due to the national legal solutions adopted, which limit and marginalise the role of the Supreme Audit Office of Poland (NIK) in the possibility of monitoring, controlling and auditing the disbursement in Poland of funds from the EU Cohesion Fund, I would like to propose to you, Mrs President, that, as part of the negotiation procedure for the Partnership Agreement, the European Commission should propose amendments to its provisions with the aim of providing the Supreme Audit Office of Poland (NIK) with the following powers, in accordance with which the Supreme Audit Office of Poland (NIK) could become:

1. An Audit Authority, preparing an annual audit opinion and an annual control report in all national operational programmes,
2. A member of the Monitoring Committee in each national operational programme,
3. A member of the Control and Audit Committee of the Structural Funds and the Cohesion Fund,
4. A member of the Committee on Designations.

Regardless of the above proposals, I would like to assure you, Mrs President, of my readiness to work out, together with the European Commission, another formula for the participation of the Supreme Audit Office of Poland (NIK) in the monitoring, control and audit of funds from the Cohesion Fund, within the framework of the Partnership Agreement currently being negotiated, amounting to EUR 72 billion.

Marian Banaś
President of the Supreme Audit Office (NIK)

Annex 3



Fundusze Europejskie dla Polski Wschodniej

Rzeczpospolita Polska

Dofinansowane przez Unię Europejską

Załącznik 1 do Regulaminu

Wzór

OŚWIADCZENIE CZŁONKA/ZASTĘPCY CZŁONKA KOMITETU MONITORUJĄCEGO PROGRAM FUNDUSZE EUROPEJSKIE DLA POLSKI WSCHODNIEJ 2021-2027 ORAZ PRZEDSTAWICIELA UPOWAŻNIONEGO DO UDZIAŁU W POSIEDZENIU KM PRZEZ PODMIOT WCHODZĄCY W SKŁAD KM

Deklaruję gotowość do rzetelnej i bezstronnej realizacji zadań wynikających z udziału w pracach Komitetu Monitorującego program Fundusze Europejskie dla Polski Wschodniej 2021-2027 oraz do przestrzegania regulaminu Komitetu Monitorującego program Fundusze Europejskie dla Polski Wschodniej 2021-2027*

Zobowiązuję się do ujawnienia ewentualnego konfliktu interesów dotyczącego mojej osoby i wyłączenia się z podejmowania decyzji w zakresie, którego ten konflikt może dotyczyć.

25/01/2023 r.

Data, miejsce

Imię i nazwisko

Podpis

*Dotyczy każdej, obowiązującej wersji regulaminu Komitetu Monitorującego program Fundusze Europejskie dla Polski Wschodniej 2021-2027

Annex 4

Nicolas Schmit
Europejski Komisarz ds. Zatrudnienia, Spraw Społecznych

Elisa Ferreira
Europejski Komisarz ds. Polityki Regionalnej

Do wiadomości:
Rada Działalności Pożytku Publicznego
Kancelaria Prezesa Rady Ministrów
Ministerstwo Funduszy i Polityki Regionalnej
Rzecznik Praw Obywatelskich, prof. Marcin Wiącek

Szanowny Panie Komisarzu Schmit,
Szanowna Pani Komisarz Ferreira,

My, niżej podpisane europejskie i polskie organizacje zajmujące się prawami osób LGBTI i prawami kobiet, piszemy do Państwa w sprawie kandydatury i wyboru Ordo Iuris - organizacji działającej aktywnie i jawnie przeciwko prawom osób LGBTI, prawom seksualnym i reprodukcyjnym, równości płci i prawom kobiet oraz wartościom UE - na członka Komitetów Monitorujących programy krajowe i regionalne finansowane z Funduszu Spójności na lata 2021-2027 w Polsce.

Komitety Monitorujące są istotnym sposobem zapewnienia udziału organizacji pozarządowych i nadzoru nad zarządzaniem funduszami unijnymi, w tym zapewnienia, że fundusze trafiają do projektów i organizacji, które działają zgodnie z Kartą Praw Podstawowych i wartościami UE. Jesteśmy bardzo wdzięczni za opracowanie jednoznacznego rozporządzenia w sprawie wspólnych przepisów (Common Provisions Regulation, CPR), które wymaga wprowadzenia skutecznych mechanizmów zapewniających zgodność z Kartą, a także nakazuje przestrzeganie horyzontalnej zasady niedyskryminacji, mającej zastosowanie na każdym etapie planowania, wdrażania i oceny projektów. Rozporządzenie stwierdza w szczególności, że wśród członków Komitetów Monitorujących powinny znaleźć się przedstawiciele "odpowiednich podmiotów reprezentujących społeczeństwo obywatelskie, takich jak partnerzy środowiskowi, organizacje pozarządowe oraz podmioty odpowiedzialne za promowanie integracji społecznej, praw podstawowych, praw osób z niepełnosprawnościami, równości płci i niedyskryminacji." Naszym zdaniem Ordo Iuris nie tylko nie spełnia wymogów wspomnianego rozporządzenia, ale wręcz aktywnie działa na rzecz polityk pro-dyskryminacyjnych i wzmacniania nastrojów antyeuropejskich.

Doceniamy dotychczasowe wysiłki podejmowane przez Komisję w ostatnich latach w zakresie przestrzegania praw podstawowych jako warunku horyzontalnego dla funduszy UE w Polsce w nawiązaniu do dyskryminacji osób LGBTI. Jednak wybór i dopuszczenie Ordo Iuris jako członka wspomnianych Komitetów Monitorujących stanowi bezpośrednie

zagrożenie dla zagwarantowania, że fundusze te będą wdrażane zgodnie z Kartą oraz zasadami równości szans i niedyskryminacji.

Ordo Iuris aktywnie atakuje środowiska LGBTI, prawa seksualne i reprodukcyjne, równość płci i prawa kobiet, działając przeciwko ustawie antydyskryminacyjnej i negując potrzebę wprowadzenia regulacji dotyczących przestępstw z nienawiści (m.in. poprzez zachęcanie do składania petycji przeciwko unijnej inicjatywie ustawodawczej w sprawie mowy nienawiści w Internecie na tle płciowym i transfobicznym), opowiadając się przeciwko dyrektywie w sprawie kwot na stanowiskach kierowniczych i równości płci w miejscu pracy, dążąc do wypowiedzenia przez Polskę Konwencji o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, walcząc z dostępem do aborcji oraz mobilizując ludzi do przyłączania się do licznych akcji przeciwko równości, niedyskryminacji i wartościom UE. Członkowie Ordo Iuris są także autorami dyskryminujących Samorządowych Kart Praw Rodziny, które zachęcają lokalne samorządy do niefinansowania działań na rzecz równości małżeńskiej oraz aktywnie bronią tzw. "stref wolnych od LGBT" i regularnie stosują pozwy sądowe typu SLAPP wobec obrońców praw osób LGBTI i kobiet. W załączeniu przesyłamy skargę wniesioną przez szereg europosłów i europosłanek dotycząca naruszenia przez Ordo Iuris kodeksu postępowania Parlamentu Europejskiego w zakresie rejestru służącego przejrzystości, w której wyszczególniono więcej szkodliwych działań tej organizacji.

Naszym zdaniem działania i oświadczenia podejmowane przez Ordo Iuris dowodzą, że nie przestrzegają oni zasad i wartości wymienionych w art. 2 Traktatu, Karcie Praw Podstawowych i innych przepisach antydyskryminacyjnych, a także porządku prawnego UE. Przestrzeganie tych wartości i zasad powinno być kluczowym kryterium dla podmiotów pozarządowych wybranych na kandydatów do Komitetów Monitorujących Fundusze UE.

Zwracamy się zatem z uprzejmą prośbą o spotkanie w najbliższym możliwym dla Państwa terminie w celu omówienia tej sytuacji i możliwych środków zaradczych tak, aby organizacje działające bezpośrednio przeciwko wartościom UE i Karcie Praw Podstawowych nie miały możliwości wpływania na metodologię i kryteria wyboru projektów finansowanych ze środków UE w komitecie monitorującym.

Jeszcze raz podkreślamy naszą wdzięczność za dotychczasową pracę, jaką wykonali Państwo w celu zapewnienia wydatkowania pieniędzy UE zgodnie z zasadą niedyskryminacji. Jesteśmy gotowi wesprzeć Państwa w procesie, aby w dalszym ciągu zapewnić jak najdokładniejszą jego realizację.

Z poważaniem,
KPH - Kampania Przeciw Homofobii
FEDERA - Fundacja na rzecz Kobiet i Planowania Rodziny
ILGA-Europe - europejski oddział Międzynarodowego Stowarzyszenia Lesbijek, Gejów, Osób biseksualnych, transpłciowych i interpłciowych
IPPF PL - Europejska Sieć Międzynarodowej Federacji Planowanego Rodzicielstwa
Human Rights Watch
European Civic Forum (ECF) - sieć ponad 100 organizacji pozarządowych i stowarzyszeń z ponad 29 państw europejskich
Center for Reproductive Rights
Women's Link Worldwide

Annex 5

RZECZPOSPOLITA POLSKA
PROKURATURA KRAJOWA
BIURO PREZYDIALNE
ul. Postępu 3
02-676 WARSZAWA

Warszawa, dnia 30.08. 2023 r.

1001-1.Ip.257.2023

Pani
Eliza Rutynowska
erutynowska@fidh.org

W odpowiedzi na Pani wniosek złożony w Prokuraturze Krajowej pocztą elektroniczną w dniu 16 sierpnia 2023 r., o udostępnienie w trybie ustawy z dnia 6 września 2001 r. *o dostępie do informacji publicznej* (Dz.U.2022.902) informacji o liczbie spraw dotyczących potencjalnej korupcji w zakresie funduszy unijnych, poniżej przedstawiam dane obejmujące liczbę wszczętych postępowań i wniesionych aktów oskarżenia za lata 2015 – 2023, według stanu na dzień 20 sierpnia 2023 r.

wyszczególnienie	wszczęte postępowania	akty oskarżenia
2015 r.	115	18
2016 r.	120	29
2017 r.	436	90
2018 r.	704	159
2019 r.	452	154
2020 r.	381	141
2021 r.	331	118
2022 r.	368	120
2023 r. (według stanu na dzień 20.08.2023 r.)	149	65

Dodaję, że funkcjonalność przeglądarek systemu informatycznego nie pozwala na wygenerowanie danych w zakresie wniosków prokuratora o zastosowanie

tymczasowego aresztowania oraz ilości postępowań, które zostały zainicjowane zawiadomieniem złożonym przez OLAF.

ZASTĘPCA DYREKTORA
BIURA PREZYDIALNEGO

Renata Macierzyńska-Jankowska

Institute of Public Finance (IFP) is an independent, non-partisan, fact-checking organization, that exposes the true condition of public finances and counteracts non-transparency and populism in public life. IFP supports democracy, the rule of law and civil society by highlighting the importance of transparency and citizens' right to information.
IFP also educates how public finances are spent and why citizens need to pay attention to this, as well as where to and how to look for information about it. Hence, our flagship project: Citizens' Ombudsman for Transparency of Public Finances that regularly monitors and records examples of pathologies and opacity in public and local finances.

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Coordinators:
Patrycja Satora, vice president Institute of Public Finance

Bio of Sławomir Dudek

Dr Sławomir Dudek

Founder, President and Chief Economist of the Institute of Public Finance.

Expert in public finance with over 23 years of experience in the Ministry of Finance. For many years, Director of the Ministry of Finance's Department of Macroeconomic Policy. In 2012-2019, he chaired the Polish delegation at the OECD's Economic Policy Committee's meetings. He was a member of the Statistics Council, the Government Population Council, and the Statistical Education Council (acting within the office of Prime Minister of Poland). He was a member of the supervisory boards of the National Health Fund, the Bank Guarantee Fund, and a company, Aplikacje Krytyczne. In 2020, he was appointed to the Economic Council – the Advisory Body at the office of the Marshal of the Senate of Poland. Member of the Association of Polish Economists (a member of its executive board in the years 2020-2022). Former coordinator of the Center of Monitoring Economic Situation at the Entrepreneurship Council. In 2023 was received the City of Warsaw Merit Award. Economic commentator in the trade press and news media. Graduate of the University of Economics in Poznań. He teaches at Warsaw School of Economics.

The Helsinki Foundation for Human Rights (HFHR) is the oldest and most experienced non-governmental organization working for the protection of human rights in Poland and Eurasia. It was founded in 1989 by members of the Helsinki Committee, an underground organization that had been operating in the field of human rights monitoring since 1982.

HFHR carries out activities to ensure that the rights of individuals, guaranteed by international treaties and the Constitution, are genuinely protected and respected. It intervenes in ongoing cases, becomes involved in precedent-setting legal proceedings that could impact regulations and the practical application of the law, formulates opinions on draft legislation, and suggests amendments to existing laws to ensure full consideration of human rights. The Helsinki Foundation for Human Rights is also engaged in advocacy activities, preparing reports for both national and international organizations and partners.

Since 2019, HFHR has been a member of FIDH (International Federation for Human Rights).

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Keep your eyes open

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The Worldwide Movement for Human Rights acts at national, regional and international levels in support of its member and partner organisations to address human rights abuses and consolidate democratic processes. Its work is directed at States and those in power, such as armed opposition groups and multinational corporations.

Its primary beneficiaries are national human rights organisations who are members of the Movement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.

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