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War in Ukraine as a Factor Determining the Scope of Judicial Review of Public Administration in Poland: Remarks on the Municipal Resolutions Providing Aid for Ukrainian Local and Regional Communities

Abstract: This paper aims to determine whether the war in Ukraine will affect the scope of judicial verification of public administration in Poland. According to new legislation (the so-called Aid Act), which Polish Parliament passed shortly after February 24, 2022, the Polish municipalities (cities) are entitled to provide aid for local foreign communities, especially those within the borders of Ukraine. The basis for such aid will take the form of a proper municipal or city council resolution. The main issue concerning this form of aid is the necessity of applying Ukrainian law, at least in the context of decoding who is entitled to be a beneficiary. Against this background, it is vital to determine whether such circumstances as war and humanitarian reasons should affect the scope of judicial review. In theory, two approaches are available, formalism and judicial relativism which both are inappropriate. The author argues that the doctrine of deference, as understood by justice A. Scalia must be applied to secure both rule of law principle and the legitimacy of administrative courts in Poland. The main subject of the analysis was the content of the law, which was the starting point for analysing the views of the doctrine and jurisprudence. Due to the international nature of the issue, it was necessary to refer to the achievements of Ukrainian law.

Keywords: *war in Ukraine, Polish judicial review, doctrine of deference, Polish self-government*

Friendship is the only cement that will ever hold the world together.
Woodrow T. Wilson

Introduction

The empirically confirmed fact[1] is that the Polish model of crisis management related to the war in Ukraine assumes entrusting many tasks to local government units, especially municipalities. The assistance provided, whether based on the regulations in force so far or the provisions of the Act of 12 March 2022 on assistance to Ukrainian citizens in connection with the armed conflict in the territory of Ukraine (Journal of Laws, item 583, as amended, hereinafter referred to as the "Aid Act"), is internal. It has already been revealed by the analysis of the subjective scope of the Aid Act, as it primarily concerns the citizens of Ukraine who came to the territory of the Republic of Poland directly from the territory of Ukraine in connection with hostilities conducted on the territory of that state.

In addition to many services and forms of deregulation addressed to Ukrainian citizens who found themselves on the territory of Poland, the legislator included in the Aid Act the possibility of providing external assistance by local government communities. Such financial, material, or humanitarian aid before February 24, 2022 was doubtful from the point of view of Polish law (e.g., Judgment of Supreme Administrative Court in Kraków of 6 May 1998, I SA/Kr 1409/97). It was assumed that there were no legal grounds for the municipal authorities to adopt an act that would result in the transfer of funds, material, or services to an entity of another state performing local tasks. Assistance as a form of cooperation of local government units was the national domain and found support, for example, in the scope of the municipal activity in art. 10 (2) of the Act of March 1990 on Municipal Self-government (Journal of Laws of 2022, item 559, as amended, hereinafter referred to as the "Municipal Act"). On the other hand, in the external aspect, there were forms of cross-border cooperation of the sister city type. This situation changed due to the armed conflict in Ukraine.

This study aims to measure the intensity and scope of judicial review of local government assistance activities in the context of the war in Ukraine. In particular, it requires determining whether the war constitutes a condition of obligatory deference or only a motive justifying the deference of the courts. The subjective scope of the research was limited to municipalities and cities due to the need to ensure the transparency of the analysis.

The research was based on a linguistic and logical analysis consisting of the use of methods, techniques and the conceptual apparatus of the broadly understood language sciences, logic and the achievements of scientific methodology to analyse law (Morawski, 2005). The main subject of the analysis was the content of the law, which was the starting point for analysing the views of the doctrine and jurisprudence. Due to the international nature of the issue, it was necessary to refer to the achievements of Ukrainian law. Hence

[1] Under Aid Act lawmakers refers to municipalities more than 50 times.

the fragment concerning the aid beneficiary in the light of Ukrainian law was prepared in consultation with Andrzej Shkolyk, LL.D. from the Ivan Franko National University of Lviv. In addition, it was also necessary to refer to studies in the theory and philosophy of law.

Catalogue of Resolutions of the Municipal Authorities in Connection with the Armed Conflict in Ukraine

A description of external aid resolutions (i.e., for Ukrainian public law entities) must be preceded by a reconstruction of the catalogue of actions that are taken by the municipal authorities in connection with the conflict in Ukraine. The analysis of the legal provisions shows that these authorities will be entitled to undertake, inter alia, factual and registration acts, issue decisions and resolutions. The last category is not uniform. Therefore, a typology should be introduced when adapting the criterion of the territorial impact of a resolution, namely:

1. **Internal resolutions** that have legal, financial and material effects within the territory of the Republic of Poland, e.g.

a) **declarative (policy) aid resolution** – is an essentially non-normative declaration of solidarity with Ukrainian residents staying in the territory of a specific municipality. It is necessary to empower municipalities to speak about local matters in the spirit of inclusiveness. Given that, for example, every fifth inhabitant of Kraków is a citizen of Ukraine (Wojdat & Cywiński, 2022), adopting resolutions of this type seems highly desirable. However, the proactive attitude of the local government has clearly defined boundaries, e.g., related to non-discrimination. Hence, taking into account the experience of the so-called LGBT-free zones, any policy activities directed against a group of inhabitants of a municipality due to the country of origin would be illegal even if it would serve the implementation of such values as the protection of the national tradition.

b) **general aid resolution** pursuant to art. 12 (4-5) of the Aid Act. This competence is optional (Płonka-Bielenin, 2022). Interestingly, the failure to adopt this resolution in a specific "assistance" area is a *sine qua non* condition for Ukrainian citizens to take advantage of strictly national assistance funds, such as the government programme "Meals at School and Home" (Bochenek, 2022). The systemic analysis shows that this resolution is complementary to other forms of assistance (Misiejko, 2022) and only in terms of the resources available, which implies the conclusion that the performance of this task will not be reimbursed to the municipality.

c) **special aid resolutions,** e.g., a resolution on creating a special space for teaching under art. 51 (4) of the Aid Act.

2. **External resolutions** – aimed at producing dual effects for the finances of a municipality or city and material and financial effects directly on the territory of Ukraine. The legal basis for this type of activity can be found in the content of art. 10 (3) of

the Municipal Act introduced under the Aid Act. Creating a new competence for self-government communities is therefore inextricably linked with the events of February 24, 2022.

The review of the resolutions justifies the conclusion that municipal councils often misunderstand the purpose of the competence norm under art. 10 (3) of the Municipal Act is because it is cited as either the basis of a declarative (policy) action or an element of an aid resolution but an internal one. It is evidenced by resolution no. XXXVIII/465/22 of the Cieszyn City Council of 31 March 2022 on determining the scope of assistance to Ukrainian citizens in connection with the armed conflict in the territory of Ukraine, in the light of which the "Cieszyn Municipality will grant the citizens of Ukraine mentioned in art. 1 (1) of the Act of 12 March 2022 on assistance to Ukrainian citizens in connection with an armed conflict in the territory of Ukraine (Journal of Laws of 2022, item 583, as amended) assistance in financing the use of Cieszyn public transport". It is noteworthy that between the competence provided for in art. 12 (4-5) of the Aid Act and art. 10 (3) of the Municipal Act, there is an apparent contradiction, which we override through the interpretation of the term "local and regional community of another state". In this case, the issue does not concern the assistance to members of such a community who are temporarily staying on Polish territory due to an armed conflict but to the bodies of such communities, which are to meet collective needs in Ukraine.

Characterisation of Resolutions Adopted Pursuant to Art. 10 (3) of the Municipal Act

It should be assumed that an external aid resolution is a normative act of the local government council under public law (Leoński, 1996), creating the basis for granting aid to foreign entities, constituting the implementation of informal cooperation (Cybulska, 2021) established ad hoc between the entity granting the aid and the beneficiary. From the point of view of a municipality or city, adopting such a resolution means shifting financial resources (Niezgoda, 2012), excluding reciprocity, between the budget of a Polish local government unit and an entity that has public-law capacity within the meaning of Ukrainian law, and which has been organised based on the decentralised (local or regional) performance of tasks for the benefit of the residents.

The competence of the Polish self-government community in this area is optional. Legislative freedom of a municipality means that neither the omission of adopting a resolution nor the very fact of adopting it may be, *per se*, classified as illegal.

The normative nature of the aid resolution results from the fact that it creates certain obligations on the part of the authorities, e.g., a municipality or a city. In light of the provisions in question, it is controversial whether fulfilling these obligations requires the conclusion of a separate agreement, which would be of a civil law nature and constitute the basis for pursuing claims before the court. It seems it is not necessary for two reasons. The first is

factual (Karciarz, 2022); it is a temporary obstacle to concluding an agreement, especially in areas under direct military operations. The second is legal and results from the wording of art. 10 (3) of the Municipal Act, where the legislator explicitly indicates that the resolution is the basis for providing assistance; ergo, the requirement to conclude an agreement has been waived by default.

Subjective Aspect

In the Ukrainian context, determining the entity to which this assistance may be legally provided requires an analysis of relevant provisions of foreign law, starting with the Constitution. Art. 140 of the Constitution of Ukraine defines local self-government as the "right of a territorial community […] to independently resolve issues of local character[2] within the limits of the Constitution and the laws of Ukraine". The financial basis for the functioning of local government is, apart from movable and immovable goods, also other funds. In turn, under art. 143 of the Constitution of Ukraine, local property management was transferred to local government units or the bodies they created (Zieliński, 2007). According to the announcement of art. 146 of the Constitution of Ukraine, issues related to local self-government have been detailed, inter alia, in the Act on local self-government in Ukraine[3].

Legal aid may therefore be granted to any entity that, under Ukrainian law, is entitled to dispose of financial or material resources for issues of local or regional importance. In practice, bearing in mind the unclear public-law status of communities[4], the aid is addressed to the community, but the formal recipient of the aid will be its body (council) because only this body can exercise property rights on behalf of and for its benefit.

Objective Aspect of the Aid

In the objective aspect, the aid resolution contains a declaration of the will of the authority to grant financial and material assistance, which not only means the transfer of ownership of things within the meaning of civil law but also includes the provision of services (Judgment of Voivodeship Administrative Court in Gliwice of 3 March 2010, III SA/Gl 255/10). The experience of the application of national aid (Judgment of Supreme Administrative Court of 3 March 2015, II GSK 207/14) resolutions shows that the purpose of the aid is to support the implementation of public tasks that are not financed from another source, especially from central funds. This task is to be clearly and precisely defined (Judgment of Voivodeship Administrative Court in Warszawa of 6 March 2007, V SA/Wa 668/07) and,

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[2] In Ukrainian самостійно вирішувати питання місцевого значення.

[3] In Ukrainian Про місцеве самоврядування в Україні.

[4] According to Ukrainian jurisprudence. By the way of example Постанова від 07.10.2020 № 362/2592/17 Верховний Суд. Касаційний адміністративний суд.

additionally, it should be an own task (Judgment of Supreme Administrative Court of 3 March 2015, II GSK 207/14). In the case of financial assistance, it is necessary to specify the amount in numbers (Judgment of Supreme Administrative Court of 10 March 2020, I GSK 89/20). On the other hand, the indication of the type of assistance in the text of the assistance resolution is important in terms of the competence of the supervisory authority. In the case of financial assistance, it will be the regional accounting chamber, and in the case of the material one – the voivode (Talik, 2008).

The difficulty in granting external legal aid also results from the fact that the beneficiary must have the right to dispose of the aid provided under Ukrainian law. The lack of such a possibility would make the Polish aid resolution illegal. That is to say since aid resolution is external, its legality is conditioned not merely by Polish provisions but indirectly by foreign law. As manifested, the resolution must include such elements as beneficiary, amount, and type of aid. These internal criteria condition the legality of the Polish municipality's behaviour and are intertwined with laws that govern the competence under which the aid will be distributed. One may argue that illegality in an analysed case is a two-tier phenomenon. The primary illegality means that formal and substantive criteria were not met. By way of example, we are verifying whether the "beneficiary" is indicated. In this tier, the only important factor is that the "beneficiary" is foreign. In turn, the question of who the aid receiver is and whether this subject is entitled to consume aid for local and regional communities of other countries will be verified on the second tier (secondary legality of administrative action). In the lack of mutual agreement between the Polish municipality and its counterpart in Ukraine, it is plausible that a receiver will be a designed entity with no competence to distribute aid; hence resolution will not be feasible (unenforceable). Feasibility (enforceability), on the other hand, seems to be a condition of legality since aid resolution is a normative act. The question is whether under applicable Polish laws there is a proper legal basis for annulment of the resolution that is not feasible (enforceable). On the one hand, according to art. 156 (1) Act of June 14, 1960, Code of Administrative Procedure (Journal of Laws of 2021, item 735, as amended), a public administration body declares the invalidity of the decision which was unenforceable on the date of its issuance and its unenforceability is permanent. On the other hand, in scholarly literature, it is stated that the annulment of the municipality's resolution does not perfectly match the types of illegalities of the administrative decision provided for in art. 156 (Łuczak, 2012). I believe that in this case, *per analogiam* mechanism applies but only if enormous (substantial) illegality occurs. There is also a less complex elaboration of the given argument, namely that under applicable Polish law, i.e., art. 10 (3) Municipal Act, one of the conditions of completing the competence that is "local and regional communities of other countries" have referring character and as a consequence of that foreign law applies but indirectly. An additional issue occurring in the analysed is whether the illegality of commented kind will ultimately lead to the annulment of resolution. As manifested under the doctrine of deference, it will not always be the case.

Scope and Intensity of Judicial Verification

The functioning of the courts in times of crisis (e.g., COVID-19, the armed conflict in Ukraine) or threats to the rule of law (reform of the judiciary in Poland) prompts reflection on the place and function of judicial control of the executive. The operability test of a specific vision of the judiciary to achieve the expected states is best carried out in the context of the atypical behaviour of public administration bodies. As it seems, the external aid resolution meets this condition since we are dealing with a discretionary operation of a self-governing body and the necessity to apply foreign law during judicial review.

Admissibility of Court Proceedings

An a priori assumption on the admissibility of judicial review on these matters requires verification. The external aid resolution is not an act of local law, but as adopted in matters of public administration in the performance of local tasks, it is subject to appeal to an administrative court. In the wording of art. 10 (3) of the Municipal Act, the legislator decided that the granting of assistance by a specific municipality to a specific community of a foreign country is included in the tasks of the municipality. But, if we accepted the necessity to conclude an agreement in the execution of the resolution, the resolution itself would be appealable to the administrative court, while issues related to the validity and pursuing claims under the agreement itself would fall within the scope of civil proceedings (e.g., art. 220 (3) Act of 27 August 2009 on public finance Journal of Laws of 2021, item 305, as amended).

The question of the *locus standi* also raises doubts. The external aid resolution creates obligations on the part of the Polish municipality and a possible entitlement on the part of the Ukrainian community. For these reasons, the municipality's inhabitants may not lodge a complaint with the administrative court to appeal against the resolution, be it in terms of the declaration of will to grant assistance, its type or amount. In this case, *locus standi* is similar to the budget resolution. In the jurisprudence (Judgment of Supreme Administrative Court of z 24 November 2010, II GSK 952/09), it is consistently assumed that the mere fact of living in a municipality or paying taxes there does not create a basis for lodging a complaint. In this context, the problem **of compensating for the lack of the right to complain of individual residents of a municipality with the use of participatory forms** becomes relevant. The hospitality of Polish society was widely echoed in the liberal world. However, it should be remembered that humanitarian attitudes are not immune to the passage of time (Taub, 2022). Hence, participatory elements should be introduced in borderline cases, especially public consultations referred to in art. 5a (1) of the Municipal Act. The decision-making process should also consider that Ukrainian citizens will, over time, become part of the Polish local communities (Bodnar, 2022) since belonging to it is not conditioned by citizenship (Dolnicki, 2021) but by residence.

Related to the locus standi, or more often to its lack, is the specific dual nature of the judgment dismissing the complaint against the external aid resolution. Such a judgment not only qualifies the resolution as lawful but also legitimises the action of the municipal authority in relation to the community. The latter is conditioned both by the high trust of the municipal residents in the courts and the assumption that legitimacy is a "relational concept in that it reflects how the individual or organisation is seen by others in its social concept" (Brown, 2010, p. 940). From this perspective, trust in the judiciary automatically influences the perception of the municipality and its organs, thanks to the judicial decision. However, the ultimate responsibility for the action taken lies with the municipal authority. So, if the inhabitants, despite the court verdict, continue to negatively evaluate the aid resolution, they will express it in the next elections; since "participation in the selection of leaders" (Glassman, 2017, p. 45) is the category of the rational components of legitimacy. The administrative court's ruling directly shapes the relationship of legal nature, and its potential impact on local politics is, at best, an external effect of the conducted judicial verification.

However, residents are protected against illegal activities of a municipality (city) by entities such as the prosecutor, ombudsman, or the regional accounting chamber, which have a *locus standi* to trigger a judicial review of such an act.

Intensity of Judicial Review in the Context of War in Ukraine

In the Polish system, courts are established under the Constitution to review public administration activities. The criterion for this review is legality. Three judicial review levels can be distinguished in the context of external aid resolutions.

At the first level, **judicial formalism prevails** as a condition for building the rule of law. At this stage, the examined elements include the competence base of the action, the authority's competence, or the obligatory elements of the procedure (e.g., Judgment of Voivodeship Administrative Court in Gorzów Wielkopolski of 4 February 2021, II SA/Go 810/20). Thus, if the municipal or city authority adopts the resolution following the procedure, the boundary conditions of legality will also be fulfilled. In this area, specific factual circumstances (here: armed conflict) do not justify deference to municipal authorities. The administrative court's ruling is not a tool for reconciling what is moral with what is legal. While this kind of tension accompanies humanitarian interventions (Janse, 2006), it is not for a court to cure apparent law violations. For example, if the city council authorised the mayor to independently decide to whom, in what form and amount to provide aid on the territory of Ukraine, this resolution, due to the illegal delegation of competencies (Judgment of Supreme Administrative Court of 10 March 2020, I GSK 89/20), would require removal from the legal system. The court would impose the sanction not because it does not support the assistance activities for the benefit of the Ukrainian self-government, as this is not within its competence, but because the assistance operation is defective. In this **respect, relativism is not permissible based on the rule of law**. Acceptance of judicial relativism may lead to

a state in which courts will be willing, beyond their mandate, to qualify the enforcement's actions as lawful only because of the circumstances in which the action was taken. Anyway, action taken under special conditions is usually not only legally but also socially and morally questionable, e.g., the COVID-19 experience. Therefore, administrative courts must formally fulfil their mandate regarding the boundary parameters of legality. Otherwise, we accept the existence of a blurred zone, which the executive can instrumentalise to take illegal actions but justified from the point of view of the circumstances in which they are taken, e.g., due to public health or an armed conflict in the country's borders.

At the second level, the **administrative court, as the superior interpreter, will rule whether the municipal authority correctly decoded the statutory authorisation**. The legal dispute before the court will concern the interpretation of such terms as *aid*, *financial aid,* or *local and regional community of another country*. In this regard, a restrained attitude seems to be advisable for two reasons. First, an overly active attitude in such sensitive matters may result in undermining trust in the courts, including questioning their legitimacy by members of the community (Fatima, 2017). The literature indicates that "concerns about legitimacy" are one of the reasons why an entity wants to engage in deference (Lawson & Seidman, 2019, p. 108). The second reason is systemic: The explicit statement of the legislator resulted in granting the competent authorities discretion under which they have a choice whether, within the scope of their resources, they will provide help and to whom. On the other hand, borderline issues seem problematic, as it is not difficult for the court to cross the border of what is legally permissible but too intense. For example, can the incorrect designation of the beneficiary, e.g., a group, and not its authority, which is competent to dispose of the funds anyway, be qualified as a significant violation of the law? Similar problems may arise from the issue of determining whether the purpose for which the aid is provided is to be an own task only under Polish or Ukrainian law. As it seems, in these situations, the courts should accept the interpretation of the law proposed by the self-government bodies as long as it is rational and falls within the limits of the legal order. Here we see space for adapting the doctrine of deference as understood by justice A. Scalia (1989). Further arguments also support the postulate of limited judicial formalism. In Polish jurisdiction, the administrative court, pursuant to art. 165 (2) of the Constitution is to protect the community against extensive interference in its activities and not be a source of such interference. An additional argument is that the action verified by the court was taken by a self-governing entity, which by definition has a democratic mandate, while courts "are a counter-majoritarian institution" (Zhu, 2019, p. 3). In a situation where the dispute concerns the interpretation of the law, which is ambiguous and at the same time authorising and not obliging to act, considering the indicated elements, the pro-municipal interpretation seems justified.

In the discussed context, judicial deference does not mean that an aid resolution is lawful only because it was adopted in response to an armed conflict in Ukraine (relativisation of legality). However, a complaint should be dismissed if the way of understanding the authority to adopt it chosen by the municipality is legal. Intensive court interference in

assistance activities may prove costly in terms of building confidence in the judiciary and lead to an allegation of interfering in how the municipality implements policies, even if only unintentionally. Interestingly, in the jurisprudence of administrative courts, we find examples of the attitude of deference, but not resulting in a relativisation of legality. For example, in its judgment of 17/09/2021, II OSK 3735/18, the Supreme Administrative Court assumed that it is lawful to prohibit the provision of services that are contrary to public morality. At the same time, what is worth emphasising, the legal basis for adopting this resolution explicitly does not introduce such authorisation, as it reads: "In the area of the cultural park or its part, prohibitions and restrictions on […] conducting […] industrial, agricultural, farming, commercial or service activities may be established" This concerned the Historic Centre of Kraków which is a UNESCO World Heritage Site. The right to conduct business had to give way to the protection of cultural heritage. We are not dealing with the relativisation of legality understood as an a priori assumption that the city council's resolution is lawful only because it aims to protect the UNESCO World Heritage Site, and the act was upheld because this action was taken based on and within the limits of the law, the understanding of which, given by the act of concretisation of the authority, was accepted by the court following the doctrine of deference. We cannot be sure whether the legislator included the business activity harmful to public morality in the scope of the norm, the content of which was quoted. Similarly, there is no certainty that the legislator imposes an obligation on the municipality to assess whether the purpose for which the assistance is provided under Ukrainian law is the task of the community authorities or whether the necessary condition for providing assistance is only that the purpose of the assistance falls within the scope of the tasks of the Polish local government. Both cases, seemingly different in the aspect we are interested in, should be examined in the same way, resulting in judicial deference.

The third level concerns **issues important from the point of view of the local community, which are inherently beyond the scope of the judicial review**. The decision-making and interpretative independence of the municipality are total in the areas where the court is not entitled to interfere. There is no space for considerations of deference where the court does not have jurisdiction (Zhu, 2019). First of all, the scope of judicial review does not cover the assessment of whether the authority should adopt an aid resolution. There are no measures in Polish law forcing municipalities (cities) to act, and the court cannot assume that the mere fact of adopting a resolution is illegal. The same applies to the issue of the type of aid, its amount or proportionality. However, these issues may be subject to judicial review secondarily when the municipality appeals against the supervisory decision of the regional audit chamber. Finally, the administrative court cannot evaluate whether the provision of assistance will affect how the needs of the municipality residents are satisfied and to what extent.

Technical Barriers to Reconstructing the Review Pattern

Even if the administrative court consistently adopts a formalistic stance in the context of aid resolutions, the factual barriers to an intense attitude related to the need to re-apply Ukrainian law are updated. The secondary legality of the aid resolution as regards the beneficiary or the purpose of the aid may be conditioned by the content of the foreign law. Hence in order to recreate the review pattern, the court should request the Polish Minister of Justice who provides the text of this law and an explanation of foreign court practice (art. 51a (1) of the Act of 27 July 2001, Law on the System of Common Courts in connection with art. 300 of the Law on Proceedings before Administrative Courts).

The paradox of this case is that deference will often be of necessity. The legislator should clearly define for whom aid is to be provided by Polish municipalities (cities) and not de facto shift the burden of decisions in this regard to the courts. The Ukrainian context is evident here. Hence, the beneficiaries should have been named already in the act's wording.

Summary

As a unique factual circumstance, the armed conflict in Ukraine does not directly affect the scope of judicial review. However, the analysed case of aid resolutions shows that in borderline cases, judicial deference towards municipalities (cities) may prove necessary in terms of the court's legitimacy and the technical barriers to learning the review pattern. In their jurisprudence, courts often unconsciously apply the doctrine of deference, which is even more justified in aid cases. On the other hand, the impassable limit of deference is legality, which cannot be relativised primarily due to the risk of instrumentalisation of the law by the executive. In the coming years, that issue will undoubtedly lead to discussions on the legal forms of assistance to Ukrainian citizens, particularly the search for the most effective ones. Will aid resolutions be given this status? However, many legislative deficiencies may stand in the way if not immediately corrected.

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