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FINAL OPINION ON THE ACT INTRODUCING AMENDMENTS TO THE ACT ON THE NATIONAL COUNCIL OF THE JUDICIARY OF POLAND

POLAND

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Based on an unofficial English translation of the Act commissioned by the OSCE Office for Democratic Institutions and Human Rights.

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EXECUTIVE SUMMARY

As underlined in previous ODIHR opinions on judicial reform in Poland in 2017-2024, while every state has the right to reform its judicial system, such reforms should always comply with the country's constitutional requirements, adhere to rule of law principles, and be compliant with international law and human rights standards, as well as OSCE commitments. These underlying principles should guide the legislative choices to be made by the Polish legislators to execute the judgments against Poland concerning judicial independence. Therefore, with respect to the National Council of the Judiciary (NCJ), it is important that the modalities of reforming the NCJ can be duly justified in light of international law and human rights standards.

Invoking the existence of exceptional circumstances in order to resort to extraordinary measures runs the risk of setting a precedent whereby a changing political majority, which did not approve of the reform, would be tempted to proceed the same way. However, in this particular case, the substantial weakening of judicial independence in Poland caused by the successive judicial reforms since 2017 have been widely acknowledged by the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), international organizations, including ODIHR, as well as national observers and the Supreme Court and Supreme Administrative Court.

In the given extraordinary circumstances, the complexity and scale of the reform required to address such systemic deficiencies of the judicial system in Poland would justify swiftly reforming the NCJ and resorting to certain exceptional (one-time) measures to avoid perpetuating the systemic dysfunction as established by European courts. It would break the vicious cycle of the NCJ's potentially deficient decisions on judicial appointments and promotions, as well as subsequent judicial challenges, ultimately compromising the independence and functioning of the judicial system. At the same time, it is crucial to provide safeguards against any possibility of replicating similar measures in the future following any political shifts. The abundant jurisprudence of international courts with respect to Poland justifies these exceptional measures and adds legitimacy to the changes being undertaken. The breadth of the reform also requires elaboration of a thorough and coherent policy underpinning the entire judicial overhaul.

In this context, the reform of the composition of the NCJ should be among the priorities as the existing legal arrangement of electing the judge members of the NCJ by the *Sejm* (lower house of the Parliament) constitutes one of the structural dysfunctions which, among others, has led to systemic deficiencies of the judicial appointment and promotion system and may further aggravate the situation if not rapidly addressed. A sequenced approach to reform efforts could thus be justifiable in the present circumstances, providing that it is accompanied by a thorough reflection and a broader, meaningful, inclusive and participatory legislative reform process with a view to addressing the structural and systemic deficiencies of the judicial system in a more comprehensive, in-depth and systematic manner.

ODIHR welcomes that the Act of 12 July 2024 amending the Act on the National Council of the Judiciary (the Act) reinstates the principle of s/election of judge members of the NCJ by their peers to restore the NCJ's independence as exhorted by the ECtHR and in accordance

with recommendations elaborated at the international and regional levels. In addition, a number of provisions of the Act contain positive aspects that address some of the recommendations made by ODIHR in its opinions, particularly with respect to the representativeness of the judiciary at large within the NCJ, the openness and transparency of the election of the judge members and willingness to enhance public inclusion in the processes of the NCJ.

At the same time, a number of recommendations from the 2017 Opinion remain unaddressed, for instance with respect to the requirement of gender balanced composition of the NCJ to be taken into account throughout the nomination and s/election process, as well as the need to ensure the openness, transparency and inclusiveness of the modalities of selecting and appointing/electing *non-judge* members of the NCJ, which could deserve further attention in future amendments to the 2011 Act. Other recommendations provided in the 2017 Opinion, regarding the composition of the NCJ, in particular with respect to having active MPs and the Minister of Justice sitting as NCJ members, are reiterated, while acknowledging that any change in this respect would require constitutional amendments and would not be immediately implementable. Ultimately, for the purpose of gaining and maintaining the trust of society, the NCJ should also develop a culture of transparency and accountability.

Early termination of incumbent judge members of the NCJ

Transitional provisions of the Act provide that upon announcement of the election results of the new judge members**,** the mandates of judges who have been elected by the Sejm to sit on the NCJ following the 2017 Amendments are terminated. It must be stressed that simply invoking a general objective to enhance the independence or efficiency of the judicial self-governing bodies, or bring the legal framework closer to international standards would not in itself be sufficient to justify the early termination of mandates of council members. There should be a clear and demonstrated necessity for the reform, with no other possibility than terminating their mandate to remedy the situation, to achieve the aims of the reform and to ensure compliance with international norms and rule of law principles. In particular, early termination could be justified when initial appointments to the judicial council was made in clear violation of international standards and/or requirements of national legislation, which itself should be compliant with international norms and rule of law principles.

As noted above, the Act under review seeks to reverse the negative impact of the 2017 Amendments, introducing stronger guarantees of independence, thereby restoring the NCJ's ability to uphold the independence of the Polish judiciary as called upon by international courts and bodies. It is clear from the caselaw of the ECtHR and CJEU that the NCJ would not be able to regain its independence if the current model of electing judge members by the parliament remains unchanged and if incumbent judge members elected by the *Sejm* continue to sit in the NCJ. Therefore, this option of *ex lege* termination, as contemplated by Article 3 of the Act, appears to be valid and justifiable in the given extraordinary circumstances, as long as it remains an exceptional (one-time) measure.

The question arises as to whether the lack of access to court for incumbent judge members of the NCJ whose mandate would be terminated *ex lege* as a result of the reform would be objectively justified. The abundant international caselaw questioning the very independence of the NCJ on the basis of the excessive influence of the executive and legislative branches over the composition of the NCJ due to the modalities of election of the judge members by

the *Sejm*, may question whether there is any arguable right for the incumbent judge members to remain in office until the end of their mandates. Even if such an arguable right to remain in office would be recognized in light of the domestic legal framework in force at the time of their election, there are strong, legitimate justifications for excluding access to court given the ultimate goal pursued by the reform, to rapidly restore the independence of the NCJ and implement the judgments of European courts, with no other possibility than terminating the mandate of judge members to remedy the situation. Since the judge members of the NCJ continue to occupy their positions in the judiciary with the corresponding salary and only receive *per diem* when sitting as members of the NCJ, it is unlikely that the mere termination of their mandate *ex lege*, in the present circumstances, would be considered as crossing the threshold of seriousness involving a violation of the right to respect for private and family life. At the same time, should other rights and benefits closely interlinked with the discontinuation of their mandate as NCJ members be unduly impacted, they should be able to bring a claim before the competent court.

Ineligibility to the position of NCJ judge members

The Act also provides as a transitory measure that judges holding posts to which they were appointed or promoted by the NCJ after its composition changed following the 2017 reform are ineligible to the position of judge members of the NCJ, except in the case of promoted judges relinquishing promotion they received during this period. For the reasons described above, in the given extraordinary circumstances, limiting the possibility for these judges to stand for election would exclude (or bring to minimum) the risk of having the NCJ being composed of judge members whose legal status remains uncertain according to the Polish domestic legal framework because their appointments could be considered to have been made following a defective procedure according to the European courts. This approach may be considered a valid policy option, justifiable as an initial, exceptional transitory measure, prior to resolving the much broader and more controversial issue related to the status of judges appointed or promoted by the NCJ after its composition changed following the 2017 reform. Yet a less restrictive option could consist of reducing the personal scope of ineligibility, including by providing that all judges appointed by the NCJ before its composition was changed in March 2018 are eligible, even those who were promoted or transferred after March 2018. Indeed, it would not be justified to automatically limit these members of judiciary in their right to stand for election as judge members of the NCJ.

Status of Judges Appointed or Promoted by the NCJ after March 2018

The Opinion finally lays out general guidance as to the impact of the decisions of the NCJ as composed after the 2017 amendments on the status of judges as the transitional provisions of the Act are intrinsically linked to this issue. It emphasizes that any reform impacting the status of judges should comply with rule of law principles and international human rights standards. Any measure resulting in the blanket removal of all judges appointed or promoted by the NCJ after March 2018 without individual assessment of personal conduct or categorization of persons subject to such measures is likely to be disproportionate unless convincing reasons are invoked.

While acknowledging the margin of appreciation and Poland’s wider autonomy in choosing the way to cure the violations of the right to a fair trial by an independent and impartial tribunal established by law, the applied measures should be proportional and differentiated,

considering specific circumstances of individual appointments or promotions (whether individually or category-based), while respecting the rights of affected judges. It should also be noted that, in the interest of legal certainty, the passage of time may potentially necessitate the regularization of some of the appointments, even if originally flawed.

The effects of the deficient judicial appointments due to the involvement of the NCJ as composed after the 2017 Amendments may vary depending on the type of courts and positions within the judiciary, as explicitly acknowledged by the ECtHR. Hence, authorities may choose to opt for a categorization of judicial appointments/promotions. Such categorization could be made based on the caselaw of the ECtHR and CJEU with respect to specific appointments/promotions to certain high-level judicial positions and possibly other criteria, such as the dates when individual judges applied for promotion and the state of the reforms and their evaluation by European courts at that time or the unlikeliness that certain types of judicial appointments/promotions were carried out for improper political motives or perception thereof. On this basis, the status of certain categories of judges appointed or promoted by the NCJ as composed after the 2017 Amendments may be addressed *ex lege*, while others may require a more individualized approach.

In light of the abundant international caselaw, the appointments made by the NCJ as composed after the 2017 Amendments to the Chamber of Extraordinary Control and Public Affairs and the Chamber of Professional Responsibility (a successor of the now abolished Disciplinary Chamber), as well as to other Chambers of the Supreme Court should be reconsidered. In this respect, authorities have a choice of various policy options at their discretion. This could be done for instance through regulating *ex lege* the status of these appointees. In case of *ex lege* invalidation of their appointment, new selection procedure should rapidly be initiated by a newly composed, independent NCJ, which would appear as a rapid and effective option; or potentially through other means, including by granting the power to a newly composed, independent NCJ to address their status, ensuring that fair opportunities are offered to all eligible candidates to occupy these high-level judicial positions. In case of *ex lege* invalidation, the legislation should also clarify the conditions and modalities of transfer of the judges concerned to their previous judicial positions or, if not possible, to a judicial office of equivalent status and tenure – ideally with the consent of the judges concerned, while ensuring that they have the possibility to appeal the administrative decisions regarding such transfers as well as related benefits.

For other senior appointments and promotions, such as presidents of courts, disciplinary spokespersons, judges of court of appeals, or judges of the Supreme Administrative Court, *ex lege* regulation for some of these categories could also possibly be considered as a valid legal/policy option. It is important however that these categories are defined on the basis of clear criteria, which would exclude potential arbitrariness or perception thereof. In order to formally implement the law in practice, individual administrative decisions regarding judges affected by such *ex lege* regulation adopted by a reformed (independent) NCJ may be needed, subject to judicial review. Alternatively, a reformed, independent NCJ, could be given a power to invalidate or validate such appointments, based on clear criteria and procedure for doing so.

In order to ensure expediency and efficiency of the rule of law restoration reform process, it would be acceptable if authorities also choose to regulate differently the status of other

categories of judicial appointments, rectifying irregularities in the appointment procedure due to the involvement of the NCJ as composed after the 2017 Amendments. While authorities enjoy certain discretion in revisiting the status of all judicial appointments (since March 2018), in the case of entry-level appointments and potentially some other categories of lower-level judicial appointments, validation or confirmation of status may be considered as a valid and appropriate policy option. In such cases, the legal drafters may consider providing legal grounds for a validation of all such appointments to be made by a (newly composed) independent NCJ, providing that this validation process would not create undue hardship on the functioning of this body. As the status of judges appointed after March 2018 is questioned due to the irregularities of the appointment procedure and the lack of independence of the NCJ, *ex lege* regulation validating the status of the judges may not suffice, unless followed by formal administrative decisions made by aa reformed (independent) NCJ.

Differentiating between different categories of appointments and promotions would reduce the breadth of the personal scope of measures by replacing a single, blanket response to the issue of judicial status with a more individualized approach. The legislation should clearly detail the different categories of judges, the criteria for categorization and possible validation or invalidation of appointments/promotions, the applicable procedure and consequences for each category, especially in terms of potential transfers, remuneration and other benefits and possible re-assignment or other measures. In any case, individual rights of the defectively appointed judges under Articles 6 and 8 of the ECHR will also need to be respected, to the extent that those rights are engaged.

An institutional mechanism to ensure that grounds for invalidation or validation of the appointments/promotions provided by law are rightly applied to an individual appointee may be required. Involving existing judicial bodies in the process, if they are composed in accordance with international standards and are effective/operational, such as an (independent) NCJ composed of judge members s/elected by their peers, possibly after seeking the opinions of the assembly of judges, is also important to fully insulate the process from potential politicization in the future. Any decision concerning the individual status of a defectively appointed judge should be subject to judicial review mechanism meeting the criteria of an "*independent and impartial tribunal established by law*" under Article 6 (1) of the ECHR, not themselves involving defectively appointed judges and with strict procedural rules for recusal in place.

As part of its mandate to assist OSCE participating States in implementing their OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing laws to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 21 March 2024, the Chair of the Justice and Human Rights Committee of the Sejm of Poland sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") an urgent request for a legal review of the Bill Amending the Act on the National Council of the Judiciary of Poland in its version as of 20 February 2024 (hereinafter "the Bill").[1]

2. On 28 March 2024, ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion on the compliance of these draft amendments with international human rights standards and OSCE human dimension commitments.

3. Given the short timeline to prepare this legal review, ODIHR decided to prepare an Urgent Interim Opinion on the Bill.[2] This Urgent Interim Opinion primarily focused on the most concerning issues relating to the reform of the National Council of the Judiciary (hereinafter "NCJ"). It did not address the issue of the status of judges appointed or promoted by the NCJ composed in accordance with the 2011 Act on the NCJ as amended by the Act of 8 December 2017.

4. This Final Opinion will review the Act as submitted to the President for signature on 15 July 2024, reflecting the amendments introduced to the Bill during the readings before the Sejm and those proposed by the Senate, as adopted by the Sejm on 12 July 2024. On 2 August, the President of the Republic of Poland, referred to the Constitutional Tribunal, in the form of a preventive review, the Act of 12 July 2024 amending the Act on the National Council of the Judiciary (hereinafter "the Act").[3] While acknowledging that more comprehensive reforms would be needed to address other fundamental issues pertaining to the rule of law in Poland, ODIHR's analysis exclusively focuses on certain key aspects of the Act. The absence of comments on certain provisions of the Act should not be interpreted as an endorsement of these provisions and the content of this Opinion is without prejudice to any written analysis and recommendations that ODIHR may provide in the future.

5. This Final Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.[4] It should also be read in light of the several opinions on judicial reform in Poland published by ODIHR between 2017 and 2023, in particular the ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland of 5 May 2017.[5]

1 The Council of Ministers adopted the Bill and submitted it to the Sejm on 20 February 2024; the Act was adopted on 12 July 20242024, see <Druk nr 219 - Sejm Rzeczypospolitej Polskiej>.

2 *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the National Council of the Judiciary of Poland*, 8 April 2024 here in English and here in Polish.

3 See Amendment to the Act on the National Council of the Judiciary referred to the Constitutional Tribunal \ Law \ Applications to the Constitutional Tribunal \ Official website of the President of the Republic of Poland (prezydent.pl).

4 ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments. See especially *OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area* (2008), point 4, where the Ministerial Council *"[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]"*.

5 *ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland* (5 May 2017, also in Polish here); see also Preliminary Opinion of 22 March 2017, in English and in Polish; ODIHR *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (30 August 2017), in English and in Polish; ODIHR *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (proposed by the President, as of 26 September 2017), 13 November 2017, in English and Polish; *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland* (as of 20 December 2019), 14 January 2020, in English and Polish; *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Supreme Court and Certain other Acts of Poland* (as of 16 January 2023), 25 January 2023, in English and Polish.

II. SCOPE OF THE OPINION

6. The scope of this Opinion covers only the Act as adopted on 12 July 2024. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the NCJ in Poland. The Opinion, although taking into account the existing legal and constitutional framework, does not purport to assess the constitutionality of the Act, which is a matter falling outside the scope of this legal review and to be decided upon by competent national institutions.

7. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The legal analysis also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation of other states, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

8. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*[6] (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[7] and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.

9. This Opinion is based on an unofficial English translation of the Act commissioned by ODIHR, which is attached to this document as an Annex. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail.

10. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Poland in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. Relevant International Human Rights Standards and OSCE Human Dimension Commitments and Background

11. For the relevant international human rights standards and OSCE commitments as well as background, reference is made to the *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the National Council of the Judiciary of Poland* of 8 April 2024.

12. The amended Bill as adopted in third reading by the Sejm on 12 April 2024 maintained the six Articles reviewed by ODIHR in its Urgent Interim Opinion with one key change introduced to Article 11j. A paragraph 2 was introduced under Article 11j proposing additional nominating bodies for the Council, namely the Supreme Bar Council (*Naczelna Rada Adwokacka*); the National Council of Attorneys-at-Law (*Krajowa Rada Radców Prawnych*); and the Polish National Council of Notaries (*Krajowa Rada Notarialna*). The amendments proposed by the Senate[8], some of which were adopted by the

6 *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "CEDAW"), adopted by General Assembly resolution 34/180 on 18 December 1979. Ukraine deposited its instrument of ratification of this Convention on 30 July 1980.
7 See *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.
8 See: Paper no. 378 - Sejm of the Republic of Poland.

Sejm on 12 July 2024, introduce the possibility for judges to cast up to six votes spread across three categories of judges and provide several clarifications of the election process of the NCJ members. They also address the expiry of mandates of individual NCJ members before the end of their term, providing the possibility for the judge who received the second-best results in the election process within the same category to assume membership where an incumbent member's mandate ends.

2. General Comments on the Scope of the Act

13. As underlined in previous ODIHR opinions on judicial reform in Poland in 2017-2023, while every state has the right to reform its judicial system, such reforms should always comply with the country's constitutional requirements, adhere to the rule of law principles, be compliant with international law and human rights standards, as well as OSCE commitments. Accordingly, and as emphasized by the ECtHR and the CJEU, any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies and should comply with rule of law principles and guarantees of judicial independence.[9] These underlying principles should guide the legislative choices to be made by the Polish legislators to execute the judgments against Poland concerning judicial independence.

14. In particular, it is important that the legislative options chosen to reform the NCJ are duly justified in light of international law and human rights standards, and that the legal drafters do not lightly invoke the existence of exceptional circumstances to resort to extraordinary measures, as this would run the risk of setting a precedent whereby a changing political majority, which did not approve of the reform, would be tempted to proceed the same way.[10] Avoiding the dangers of setting such a precedent is an important task, and here it is crucial to ensure that only compelling reasons and justifications for doing so are recognized. Regarding the scope of any precedent that might be set, it is a significant consideration that Polish authorities were called upon to "*rapidly elaborate measures*" to restore the independence of the NCJ through "*introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ*" in the *Wałęsa* pilot judgment of the ECtHR, which built upon a series of ECtHR and CJEU decisions. Nevertheless, the danger remains that rapid legislative changes without a proper, inclusive and participatory process and appropriate transitional period may be perceived to be used by the political majority to change the composition of the NCJ to its advantage.[11] As a result of the reform under review, the choice of new NCJ judge members is to be made not by the political authorities but, as the Act proposes, by judges themselves, who will elect candidates to fill these vacancies.

15. There is a clearly defined and well-justified need for urgency in reforming the NCJ since as underlined by the ECtHR, "*the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuates the systemic dysfunction as established above by the Court and may in the future result in potentially multiple violations of the right to an 'independent and impartial tribunal established by law', thus leading to further aggravation of the rule of law crisis in Poland*".[12] In several of its judgments, the ECtHR has called upon Poland for "*rapid remedial action*"[13] and to "*rapidly elaborate measures"* to address defective

9 See ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, para. 323, where the Court emphasized that "*the Convention does not prevent States from taking legitimate and necessary decisions to reform the judiciary […] and agrees with the view expressed by, inter alias, the United Nations Special Rapporteur on the Independence of Judges and Lawyers that the power of a government to undertake reforms of the judiciary cannot be called into question. However, any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies*"; and CJEU, *Repubblika v Il-Prim Ministru* [GC], C-896/19, 20 April 2021, para. 63, where the CJEU concluded that "*A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU*".

10 *Ibid.* See also UN Special Rapporteur on the Independence of Judges and Lawyers (UNSRIJL), *2005 Annual Report*, UN Doc E/CN.4/2005/60 (2005), para. 45.

11 The Venice Commission raised such a concern in a different context in relation to proposed reforms of the judicial council of Georgia in circumstances where the choice of new NCJ members was to be made by the political authorities; see Venice Commission, CDL-AD(2020)016, *Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court*, para. 38.

12 See ECtHR, *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 318.

13 See ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, no. 49868/19 and 57511/19, 8 November 2021, para. 353.

procedure for judicial appointments including by restoring the independence of the NCJ,[14] as also echoed by other regional and international bodies.[15] At the same time, there are other aspects of the judicial system that need to be reformed as shown in previous ODIHR opinions and the above-mentioned abundant caselaw of the ECtHR and the CJEU and various reports and analyses issued by international and regional bodies. As noted above, a more comprehensive and in-depth reform would be needed to guarantee judicial independence and address fundamental issues pertaining to the rule of law in Poland. In its previous opinions, ODIHR warned against numerous, frequent and piecemeal amendments to legislation on the judiciary which may raise doubts as to whether there is any thorough and coherent policy underpinning the reform process and may create legal uncertainty.[16] As specifically noted by the CCJE, too many changes within a short period of time should be avoided, if possible, especially in the area of administration of justice.[17]

16. In light of the foregoing, it is demonstrated that the need to reform the NCJ and to review the composition and modalities of election of the NCJ's judge members is urgent, as the passing of time simply leads to the perpetuation of the systemic flaws of the judicial system and to further potential violations. The Action Plan presented by the Minister of Justice and the regulatory impact assessment that accompanies the Act tend to suggest that there is a certain coherence and willingness to carry out a more comprehensive and in-depth reform, including of the NCJ, in the longer run. Consequently, it would appear acceptable under the current circumstances in Poland to consider a sequenced approach to judicial reform, providing that the adoption of the Act is accompanied by a thorough reflection and a broader, meaningful, inclusive and participatory legislative reform process addressing the structural and systemic deficiencies of the judicial system in a more comprehensive, in-depth and systematic manner.

17. Finally, it is important to acknowledge at the outset that by reinstating the principle of s/election of judge members of the NCJ by their peers, the Act addresses one of the fundamental deficiencies of the Polish justice system and is to be welcomed. In addition, a number of provisions of the Act contain positive aspects that address some of the recommendations made by ODIHR in its 2017 opinions, particularly with respect to:

- measures to ensure that judges from first instance courts (district courts) are also represented among the judge members of the NCJ, while respecting a certain proportion between all instances of courts and all branches of the judiciary;
- increasing the openness and transparency of the election of the judge members; and
- enhancing the public inclusion in the processes of the NCJ, which is done through the establishment of the Social Board contemplated in the Act, as an advisory body to the NCJ (see Sub-Section III.6 below).

18. At the same time, a number of recommendations from the 2017 Opinion remain unaddressed and are relevant to further reform the NCJ, for instance with respect to **the requirement of gender balanced composition of the NCJ** to be taken into account throughout the nomination and s/election process, as well as the need **to ensure the openness, transparency and inclusiveness of the modalities of selecting and appointing/electing the other, *non-judge* members of the NCJ**, which deserves

14 See ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329.

15 See e.g., Venice Commission, *Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws*, CDL-AD(2020)017-e, para. 61, calling upon Poland to "*return to the election of the 15 judicial members of the National Council of the Judiciary (the NCJ) not by Parliament but by their peers*" *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, A/HRC/38/38/Add.1, 5 April 2018, para. 85; European Commission, *2023 Rule of Law Report Country Chapter on the rule of law situation in Poland*, pp. 5-6; Universal Periodic Review, *Report of the Working Group* (2023); ENCJ's Decision of 28 October 2021 to expel the NCJ from the ENCJ. See also Council of Europe's Group of States against Corruption (GRECO), *Second Interim Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Polandv*, GrecoRC4(2023)4, paras. 41 and 47.

16 See e.g., ODIHR *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (proposed by the President, as of 26 September 2017), 13 November 2017, para. 149; and *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Supreme Court and Certain other Acts of Poland* (as of 16 January 2023), 25 January 2023, para. 104.

17 See CCJE, *Opinion no. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy*, para. 45.

further attention in the current Act or at least in future amendments to the 2011 Act.[18] It would also be important to envisage providing that **the term of office of the members nominated by the Sejm and the Senate are different or at least not start at the same time**, in order to safeguard the independence of the NCJ and protect it from any or any perceived political influence represented by the majority of the selection/appointing body, and no pre-emptive renewal of the Council's members should take place following parliamentary elections.[19] The Act is also silent with respect to **potential mechanisms to strengthen the accountability of the NCJ as an essential element to rebuild public trust in this institution**. Regarding this last point, the recently published *ODIHR Warsaw Recommendations* along with the CCJE Opinion no. 24 (2021) could serve as useful guidance (see further elaboration on some of the above-mentioned gaps in below Sub-Sections).

3. COMPOSITION OF THE NATIONAL COUNCIL OF THE JUDICIARY

3.1. Representativeness of the Judiciary at Large

19. Article 11f (1) provides that the fifteen judge members of the NCJ should include one Supreme Court judge, two appellate court judges, three regional court (*sąd okręgowy*) judges, six district court (*sąd rejonowy*) judges, one military court judge, one Supreme Administrative Court judge, and one regional administrative court judge. This provision will help ensure a better representation of the judiciary at large, including judges from first level (district) courts, in line with international recommendations and good practices.[20]

3.2. Gender and Diversity Considerations

20. The *ODIHR Warsaw Recommendations* (2023) emphasize that the rules on the composition of judicial councils or similar bodies and on the selection and appointment of their members should be designed in a way that ensures gender balance and diversity.[21] *CCJE Opinion No. 24 (2021) on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems* also expressly state that composition of the judicial council should reflect "*diversity of gender and regions*".[22] The CEDAW Committee calls upon States Parties to adopt legislation and other measures to ensure parity (50/50) in decision-making positions at all levels in the judiciary.[23]

21. The Act remains silent on how gender-balanced representation will be ensured and diversity will be promoted throughout the nomination and election process.[24] To achieve such a goal, it is recommended that gender requirements be introduced in both the nomination process to identify candidates, as well as in the respective rules and procedures governing the process of electing judge

18 *ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, para. 51, recommending to consider consultation mechanisms to facilitate the involvement of external autonomous entities/bodies (e.g., universities, non-governmental organizations, bar associations, etc.) and/or civil society representatives in the process of nominating candidates to become non-judge members of the NCJ. See also ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 6; and Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary in Albania*, CDL-AD(2016)009, 14 March 2016, paras. 15-16.

19 See ENCJ, *Compendium on Councils for the Judiciary* (2021), p. 8.

20 See e.g., ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 2. See also ENCJ, *Compendium on Councils for the Judiciary* (2021), p. 6, which recommends the "*the widest possible representation of courts, instances, levels and regions, as well as diversity of gender*".

21 ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 3; see also para. 40, which provides: "*Executive, legislative and judicial authorities should adopt measures to ensure gender parity in judicial self-governing bodies and in senior positions in the judiciary*". See also ODIHR publication *"Gender, Diversity and Justice: Overview and Recommendations"* (2019); and the OSCE Athens Ministerial Council Decision on Women's Participation in Political and Public Life (2009), which calls on participating States to "*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies".*

22 See *CCJE Opinion No. 24, Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, 2021, para. 30. See also ENCJ, *Compendium on Councils for the Judiciary* (2021), p. 6; and Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), para. 190 under Strategic Objective G.1. "Take measures to ensure women's equal access to and full participation in power structures and decision-making", which urges states to establish the goal of gender balance in the judiciary.

23 See CEDAW Committee, *General recommendation No. 40 on equal and inclusive representation of women in decision-making systems*, 23 October 2024, para. 49(a).

24 As per the existing composition as of November 2024, out of 25 members, 16 are men and 9 are women, see <Home (krs.pl)>.

members of the NCJ by judges.[25] While it is recognized that it may be challenging to ensure gender-balanced nominations, it would be beneficial for the legislation to provide clear guidance in this respect. This could be achieved e.g., by requiring that two nominees of each gender for candidates nominated by the groups of judges are proposed[26] and/or adapting voting modalities.[27] For instance, instead of selecting the longer-serving judge in case of a tie in the voting results (Article 11f (4)), the tie-breaking rule could first contemplate the selection of the candidate from the under-represented gender if the two candidates are not of the same gender. Public authorities should consider adopting similar measures to ensure the adequate representation of minorities within judicial self-governing bodies.[28] **It is recommended that the Act integrates specific guidance and/or offers modalities throughout the process of nominating candidates and electing the judge members of the NCJ to ensure gender balanced composition and adequate representation of diverse groups.**

3.3. Other Comments on the Composition of the National Council of the Judiciary

22. It is acknowledged at the international level that while judicial councils or other similar independent bodies should be composed of at least a small majority of judge members elected by their peers, they should not be composed completely or over-prominently by members of the judiciary, so as to prevent self-interest, self-protection, cronyism and also the perceptions of corporatism.[29] In that respect, the composition of the NCJ as envisaged in Article 187 of the Constitution and in the 2011 Act ensures a mixed membership with representatives of the judiciary (out of 25 members, 15 judges plus the First President of the Supreme Court and the President of the Supreme Administrative Court) and non-judicial members (eight members[30]). At the same time, international and regional bodies, including ODIHR, generally recommend a greater inclusion of lay members in such bodies to avoid the risk of corporatism and add a certain level of external, more neutral control.[31] The *ODIHR Warsaw Recommendations (2023)* specifically recommend judicial councils to be "*composed of a small majority of judge members elected by their peers",* while having *"a pluralistic composition with a diverse representation of legal professionals, including law professors, representatives of the Bar, and experienced and respected members of civil society with a demonstrated long record of fostering judicial independence and accountability*".[32] While acknowledging that such a change in the composition of the NCJ would require an amendment to Article 187 of the Constitution since membership of legal professionals or lay members is not contemplated therein, such an option should be kept in mind should a constitutional reform be possible and undertaken in the future.

23. As ODIHR noted in its 2017 Opinion, regional and international bodies, such as the CCJE, GRECO, the Venice Commission and the UN Special Rapporteur on the Independence of Judges and Lawyers, have questioned the practice of having active members of parliament and/or of the executive, especially the Minister of Justice, sit on judicial councils at all as this may enhance the risk of undue

25 See e.g., similar recommendation made in the context of nominating and electing the members of the Disciplinary Commission in charge of investigating disciplinary cases against judges, in ODIHR-Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic* (2014), para. 73.

26 For instance, in cases where public bodies or organizations nominate candidates for appointment, certain countries have introduced an obligation to always propose two nominees, a woman and a man (e.g., the example in Denmark, Appendix IV to the *Explanatory Memorandum on CoE Recommendation CM/Rec(2003)3)*).

27 See e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic* (2014), footnote 72, suggesting for instance to state in the Draft Law that each elector is required to vote for at least one candidate from list A (one gender) and one candidate from list B (other gender).

28 See ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 40.

29 See e.g., CCJE, *Opinion no. 24 (2021) on the Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, para. 20. See also e.g., Venice Commission, *Opinion on the Seven Amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones*, CDL-AD(2014)026-e, paras. 68-76.

30 i.e., the Minister of Justice, an individual appointed by the President of the Republic, four Deputies and two Senators (Article 187 (1) of the Constitution).

31 See *ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, para. 38; and ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 2. See also, Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, para. 82; and ENCJ, *Compendium on Councils for the Judiciary* (2021), p. 6.

32 ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 2.

influence of other branches of power over the judiciary.[33] At the same time, any change in this respect would in principle require amendments to the Constitution of Poland.[34] Should such an option be pursued and become feasible in terms of majority required for constitutional reform, it would also be advisable **to consider introducing in the Constitution certain safeguards to further strengthen judicial independence, including the independence and impartiality of the NCJ, and ultimately to prevent potential democratic backsliding in the future**.

24. Finally, as underlined in the *ODIHR Warsaw Recommendations (2023)*, for the purpose of gaining and maintaining the trust of society**, judicial councils and other self-governing bodies should develop a culture of accountability**, meaning that they should account for their actions, even without a legal duty to do so.[35] In particular, **they should make public as wide a range of information as possible, engage in frequent and regular dialogue with civil society, the media and the public at large, and the members of judicial councils should be subject to disciplinary proceedings, presenting the same procedural guarantees as for those applicable to judges subject to such proceedings**.[36] These recommendations remain pertinent as these matters are not addressed in the Act.

4. ROLE OF THE NATIONAL ELECTORAL COMMISSION

25. Article 1 of the Act introduces a new Article 11h which accords a central role to the National Election Commission (NEC) for supervising the conduct of the election of judge members to the NCJ. The Bill provides that the election shall be ordered by resolution of the NEC published in the Official Journal (Article 11h (1)). All the key aspects of the electoral process are set out in a Resolution that the NEC adopts and publishes no later than four months before the expiry of the joint term of office of the judge members of the NCJ, which shall include a number of essential information including the deadline for candidate nomination (21 days from the date on which the resolution is adopted and no later than two months before the election date) but also a specimen nomination form for candidates and a specimen list of judges supporting nomination. This means that such needed documentation and specimens will be prepared early enough to be conducive for ensuring the due process.

26. The NEC shall verify the correctness of nominations of candidates for judge members of the NCJ (Article 11l (1)). A resolution of the NEC refusing to accept the nomination of a candidate for a member of the Council may be appealed by an attorney to the Supreme Administrative Court within three days from the date the resolution is published (Article 11l (8)). The NEC should then announce in the NEC Public Information Bulletin the list of candidates and related information. The NEC also oversees the preparation of ballots (Article 11o) and shall hold a public hearing of the candidates (Article 11p), which shall be conducted by the Chairperson of the NEC or a person authorised by him or her (see also Sub-Section III.5.2 below on public hearings). Following the vote, the NEC shall count the votes and draw up an election report (Article 11r). At the request of a judge who stood for election as a member of the Council, the NEC shall promptly make available for inspection documents related to the election (Article 11s).

27. The modalities of election of the judge members of the NCJ prior to the 2017 Amendments provided that the assemblies of judges of a given level of jurisdiction were to elect the judge members from the respective level of jurisdiction.[37] The Act does not reinstate the previous system. The Explanatory

33 See ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 3; and *ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, para. 51. See also *Compendium on Councils for the Judiciary* (2021), p. 7, noting that "*the presence of the Minister for Justice as a member of the Council for the Judiciary is not considered appropriate as it clearly entails the risk of the executive power affecting the debates and choices made by the judicial order and may effectively constrain the frankness of debate and discussions*".

34 Another option could be to consider limiting the powers of the Minister of Justice as done, for instance, in Moldova where s/he is an ex officio member of the Judicial Council but cannot vote on matters regarding career, discipline, sanction and dismissal of judges (see Article 24 LP947/1996 (legis.md)).

35 ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 9.

36 *Ibid.* paras. 9-14.

37 2011 Act on the NCJ, as in force until 17 January 2018.

Note of the Bill does not provide the *rationale* for such a legal choice, although such election modalities are not *per se* against the OSCE and CoE recommendations. Overall, the election process as contemplated in the Act appears extremely and unnecessarily complicated. It could be organized instead within the judiciary as it used to be the case before the 2017 Amendments, especially as no specific justifications were provided for not doing so.

28. It is noted that currently, the NEC consists of two judges nominated for nine years by the Constitutional Tribunal and the Supreme Administrative Court and seven members nominated for a four-year term by political parties in proportion to their representation in the *Sejm*. No parliamentary group can nominate more than three members. The political appointees for the NEC must qualify as a judge *or* have a professional or academic legal background. Until the beginning of 2020, the NEC was composed of nine active or retired judges appointed by the President, with three members nominated from each of the Constitutional Tribunal, Supreme Court and Supreme Administrative Court. While it goes beyond the scope of this Urgent Interim Opinion to assess to what extent the NEC is an independent and impartial body, it is fundamental that this body fulfils the requirements of independence and impartial functioning to ensure the guarantees of a process that respects transparency, rule of law, and aims to uphold the independence of the judiciary. As underlined by ODIHR in its Limited Election Observation Mission Final Report on the Parliamentary Elections that took place on 15 October 2023, *"[t]he election administration generally enjoyed the trust of most ODIHR LEOM interlocutors. However, some raised questions about their impartiality due to the more political composition of the NEC.*"[38] It is also noted that the NEC consists of only men.[39]

29. Whatever **the body in charge of supervising the conduct of the election of judge members to the NCJ, it is important that such a body presents all guarantees of independence and impartiality**. In any case, **with the expansion of the NEC's functions in this field, it should also be given sufficient human and financial resources to carry out its additional mandate without any hindrances** (see also additional comments in Section 6 below regarding the publication of list of nominating judges by the NEC, the hearing of candidates by the NEC and the voting modalities).

5. Nomination and Election of Judge Members of the National Council of the Judiciary

30. At the outset, as noted above, it is welcome that the Act reinstates the principle of s/election of judge members of the NCJ by their peers, which addresses one of the fundamental deficiencies of the Polish justice system as underlined in the caselaw of the CJEU and the ECtHR, as well as in previous ODIHR Opinions.

5.1. Nominating Entities

31. The nomination process is laid out in Article 1 of the Act in a detailed manner (Articles 11j and 11k of the Act) and presents a number of features that aim at ensuring the openness and transparency of the process. Indeed, all documents are available to the public, including the lists of judges supporting the nominations (Article 11m). A hearing of all the candidates is open to the public, and is broadcasted and recorded using audio and video recording equipment, and its recording shall be published (Article 11p). This is overall in line with the recommendations made in previous opinions to consider modalities for ensuring greater openness and transparency of the process.[40]

32. According to Article 11j (1), the right to nominate a candidate judge member of the NCJ requires the support of 10 judges among all eligible judges, except regional court (*sąd okręgowy*) judges who are

38 See ODIHR, *Republic of Poland - Limited Election Observation Mission Final Report, Parliamentary Elections of 15 October 2023* (27 March 2024), p. 8.
39 *Ibid.*
40 See e.g., *ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, para. 51.

nominated by 25 judges and 40 judges in the case of a district court (*sąd rejonowy*) judge. Article 11j (2) of the Act, as adopted in July 2024, now extends the right to nominate candidates to certain external autonomous entities/bodies (i.e., the Supreme Bar Council, the National Council of Attorneys-at-Law and the Polish National Council of Notaries), as recommended in the 2024 Urgent Interim Opinion.[41] These groups and entities may only nominate one candidate for membership in the NCJ (Article 11j (3)). Retired judges shall not have the right to support the nomination of a candidate for a judge member of the NCJ (proposed Article 11j (4)).

33. Article 11l provides that the NEC shall verify the correctness of nominations of candidates. In this respect, it requests the Minister of Justice, the First President of the Supreme Court, and the President of the Supreme Administrative Court to provide information on whether the candidate is a judge who is eligible to stand for election as a judge member of the NCJ (see Sub-Section 7.2 below), and whether the persons supporting the nomination are judges eligible to support a candidate for a member of the NCJ (Article 11l (2)). It is important that the NEC may be able to verify from a reliable source whether a judge is eligible to stand for election and whether a judge is eligible to support a candidate. At the same time, the CCJE has expressly stated that it "*does not advocate [for] systems that involve political authorities such as the Parliament or the executive at any stage of the selection process [of judge members of Judicial Councils]*".[42] As the Act is intended to address the adverse impact on the independence of the judiciary in Poland as a result of, among others, the politicization of the NCJ, it would be advisable not to involve the executive power in this matter. At the same time, if the Ministry of Justice is the only holder of reliable information on the status of judges and given that this role of verifying the eligibility status of judges would be rather formal, such an involvement could be considered acceptable as a transitory measure for the first election of judge members by the judiciary after the entry into force of the Act.

34. As it is, the contemplated process requires submissions in written form. While this may serve a particular purpose, the authorities could consider digitalizing the nomination and voting process for the purpose of effectiveness and efficiency, as long as safeguards remain in place to respect and uphold the integrity of the nomination and election process.

5.2. Hearing of Candidates

35. Article 11p provides that the NEC shall hold a public hearing of the candidates for judge members for the NCJ at least seven days prior to the elections. The procedure thereto foresees an announcement of the list of candidates and provides the possibility for natural persons to submit applications to take part in the public hearings, subject to limitation for reasons related to the size of the premises or for technical reasons. Any individual can apply to participate in the public hearing, provided they submit their first and last names, residential address, specify the candidates they wish to address, and indicate the number of questions they intend to ask (Article 11p (4)). These hearings shall be broadcasted and recorded. The Act includes a possibility to restrict the number of questions per participant and provides that any limitations are based on objective criteria, though that this may not lead to the impossibility of asking questions to a specific candidate (Article 11p (7)).

36. This is a welcome feature of the Act that may contribute to enhanced openness and transparency of the process, as also recommended in the 2017 ODIHR Opinion.[43] At the same time, the purpose of such hearings is unclear. It is presumed that they aim to offer an opportunity for the candidates to inform other judges/voters and allegedly the public about their platforms. While such transparency is desirable for public confidence in the candidates and the process, the modalities of such public hearings may to some extent appear to unnecessarily burden the process. This model may also prove

41 See e.g., *ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, para. 51. See also Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary in Albania*, CDL-AD(2016)009, 14 March 2016, paras. 15-16.

42 See CCJE, *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*, para. 31.

43 See e.g., *ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, para. 51.

unpractical for candidates/voters from remote locations who would need to travel to the location of the NEC to participate in the public hearing. Also, the possibility to participate remotely is not expressly provided.

37. It is also unclear what the scope of the hearings would be, especially as the membership in the judicial council is not tied to any particular merit criteria in the Act or the current 2011 Act on the NCJ, as amended,[44] nor to the presentation of a programme of the candidate that would have been made public in advance, ahead of the public hearing. The kind of information the candidates are expected to provide and types of questions that may be asked to them are not clearly determined. During the course of the public hearing, participants may also wish to direct questions to a different candidate than initially anticipated and may want to ask follow-up inquiries.

38. **In any case, the hearing of judge candidates should be held with due consideration of the principles of an objective, fair, and orderly hearing process, respect for judicial independence and for the right of the candidate to the protection of their honour, privacy and reputation as guaranteed under Article 17 of the ICCPR and Article 8 of the ECHR.** There should also be safeguards against the risk of politicization or abuse. For that purpose, it may also be useful for the Act or in subordinate documents that may be developed to regulate the scope and conditions of the process and to specify the nature of questions that may not be asked to the candidates during the public hearing, e.g., information pertaining to the private and family life of the candidate or health status, unless it is evident that it is necessary to discern whether the candidate could be deemed to be able to fulfil their role in the NCJ. The ability to enquire on sensitive, private matters should be excluded based on objective criteria.

39. More generally, it may be questionable to include such overly detailed provisions regarding the public hearing in the 2011 Act itself. The technical issues related to public hearings could be removed from the Act while empowering the NEC to regulate this aspect in its bylaws. This approach would contribute to enhancing the clarity of the legal text and enable the NEC to improve the technical issues, if necessary, in a faster and more flexible manner.

5.3. Voting Modalities for the Candidates to the NCJ

40. Article 11f (2) provides that the right to elect the judge members shall be vested in judges of the Supreme Court, judges of common courts, judges of military courts and judges of administrative courts who are serving judges on the election date. Per the Senate's amendments adopted by the Sejm on 12 July 2024, each judge may cast up to six votes in total as follows: *one* vote for candidates who are judges of the Supreme Court, of military courts, of the Supreme Administrative Court or of provincial administrative courts; *two* votes for candidates who are judges of appellate courts or of regional courts (*sąd okręgowy*); and *three* votes for candidates who are district court (*sąd rejonowy*) judges. A judge member of the NCJ can be elected with the plurality of votes and no majority is needed (Article 11f (4)). This addresses the concern raised in the Urgent Interim Opinion that these voting modalities may be problematic in terms of the legitimacy of the mandate of the elected members, both in the eyes of other judges and the general public.

41. The Act is silent in relation to the six non-judge members elected by the Sejm and the Senate (Article 9 of the 2011 Act on the NCJ) and the appointment of one member by the President of the Republic. With respect to the election by the Parliament, the Act could provide that **non-judge members are elected by a qualified majority of the respective chambers of the Parliament to ensure significant support or alternatively by providing in the legislation that non-judge members appointed from amongst the Parliament members should be equally representative of the**

44 See the Act of 12 May 2011 on the National Council of the Judiciary, as amended, available at: <Legal acts (krs.pl)>.

majority and the opposition.[45] Generally, such qualified majorities aim to ensure broad agreement and consensus, ensuring in principle that the majority will seek a compromise with the minority. However, such a mechanism also increases the risk of a stalemate for which an effective anti-deadlock mechanism should be devised.[46] More generally, it is also recommended to consider involving external autonomous entities/bodies (e.g., universities, non-governmental organizations, bar associations, etc.) and/or civil society representatives in the process of nominating candidates to become non-judge members of a judicial council.[47]

5.4. Appeals against the Resolutions of the NEC on Nominations and Election of a Judge Member

42. Article 11l (7) provides that a resolution adopted by the NEC refusing to accept the nomination of a candidate together with the reasons shall be published in the Public Information Bulletin of the NEC. The NEC resolution refusing the nomination may be appealed to the Supreme Administrative Court within three days of making the resolution public. The Supreme Administrative Court will consist of a bench of three judges who will examine the appeal in closed session and can either amend or uphold the resolution. There is no legal remedy against this ruling.

43. It is welcome that a legal remedy is provided to those judges whose nominations may have been rejected. In general, in electoral matters, a time limit of three to five days both for lodging appeals and making rulings seems reasonable for decisions to be taken before an election in order not to unduly delay the election process while also being long enough to make an appeal possible and guarantee the exercise of rights of defence.[48] The three-day time limit to lodge the appeal against the resolution of the NEC is rather short but not *per se* inconsistent with international good practices in electoral matters. Article 11l (7) requires that the resolution of the NEC contains a reasoning, which is essential to allow the candidates to challenge it effectively. It is however unclear what the scope of assessment by the Supreme Administrative Court is and whether this would refer to a review on both substantive and procedural grounds, which should be the case, although this is allegedly addressed in the Law of 30 August 2002 on Proceedings before Administrative Courts cross-referenced in Article 11l (10).[49] It is also unclear what consequences an 'amended' resolution would have, presumably that the nomination will be valid. **These matters should be clarified to ensure an effective remedy.**

44. Article 11t (1) provides that a judge who stood for election as judge member of the NCJ may lodge a protest with the Supreme Administrative Court against the validity of the election of a judge member. This right "to protest" is limited to those who stood for election. In principle, in electoral dispute matters, standing should be granted as widely as possible, at least for every candidate and for voters,

45 It is noted that, currently, two out of four deputies of the *Sejm* belong to the parliamentary majority, as do the two representatives of the Senate to the Judicial Council; see <http://www.krs.pl/pl/o-radzie/sklad-i-organizacja>. Pursuant to Article 26-31 of the Rules of Procedure of the *Sejm* (available at <http://www.sejm.gov.pl/prawo/regulamin/kon7.htm>), candidates may be proposed by the Marshal of the *Sejm* or at least 35 MPs; the representatives of the *Sejm* to the Judicial Council are chosen by an absolute majority. The two representatives of the Senate to the Judicial Council are also elected by an absolute majority with at least half of all Senators being present, among candidates proposed by at least seven Senators (see Articles 92-95 of the Rules of Procedure of the Senate, available at <https://www.senat.gov.pl/o-senacie/senat-wspolczesny/wybrane-akty-prawne/regulamin-senatu/>). See CCJE, *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*, para. 32; and Venice Commission, *2007 Report on Judicial Appointments*, para. 32. See also, for instance, Article 124 of the Constitution of Croatia, which states that "*[t]he National Judicial Council shall consist of eleven members, of whom seven shall be judges, two university professors of law and two members of Parliament, one of whom shall be from ranks of the opposition*", <http://www.legislationline.org/documents/section/constitutions/country/37>.

46 Any anti-deadlock mechanism needs to be devised carefully in order to be effective and not to be perceived as undermining an objective of seeking consensus. The primary function of the deadlock-breaking mechanism is to push the majority and the minority to find a compromise to avoid the crisis or malfunctioning of an institution; therefore such a mechanism should continue to incentivise the majority and the minority to seek an agreement, which may not be the case with rapidly decreasing a requirement for a qualified majority. The challenges of designing appropriate and effective anti-deadlock mechanisms must be acknowledged as there is no single model. Various solutions could be explored in this respect. For example, the participation in the vote could be made mandatory in order to have the required quorum. As underlined by the Venice Commission, beyond decreasing majorities in subsequent rounds of voting, which may not reach the intended goal, it is also possible to have recourse to the involvement of other, independent or more neutral institutional actors or consider establishing new relations between state institutions but each state has to devise its own formula; see Venice Commission, *Compilation of Opinions and Reports Relating to Qualified Majorities and Anti-Deadlock Mechanisms* (2023).

47 See e.g., *ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, para. 51. See also Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary in Albania*, CDL-AD(2016)009, 14 March 2016, paras. 15-16.

48 See e.g., Venice Commission, *Code of Good Practice in Electoral Matters* (2002), Explanatory Report, p. 39.

49 Available at: <Law on Proceedings Before Administrative Courts. - OJ 2023.1634 i.e. - OpenLEX>.

although for the latter, a reasonable quorum may be imposed.[50] **Limiting the possibility to lodge "a protest" exclusively to the candidate would be a restriction of the general right to seek remedy and should be reconsidered. It would also be beneficial to specify in the Act the procedural rights of the candidate who lodges an appeal.** In addition, to ensure effective legal redress and enhance the transparency of the process, **the Supreme Administrative Court could consider holding the appeal in an open session instead of a closed one, as currently provided in Article 11l (9).**[51]

45. Finally, as underlined by ODIHR in its 2023 Urgent Interim Opinion, since about 30% of the Supreme Administrative Court judges have been appointed by the NCJ as composed after the 2017 Amendments, it is very likely that some of them may be hearing such appeal/protest cases.[52] It is therefore probable that due to the deficient modalities of judicial appointments by this body, independence and impartiality of judges hearing these cases may also be questioned. **As recommended before, a mechanism ensuring that only judges whose independence may not be questioned on the basis of their appointment by the NCJ as composed after the 2017 Amendments should be considered, for instance by requiring, at least temporarily, a minimum number of years of serving as a judge of the SAC, such as ten years**.[53]

5.5. End of Mandates of Judge Members before the Expiration of Term of Office

46. Article 11u provides that when the mandate of a member of the NCJ ends before the expiration of his or her term of office, the judge who consecutively received the largest number of votes among the candidates for a member of the NCJ of the same category has the right to take up the mandate, provided that the judge still holds a position included in that category. However, if there was no candidate for a judge member fulfilling the required criteria, or if the eligible person did not submit the declaration required by the provision to take up a seat as a member of the NCJ within 7 days, the NEC would have to, on general principles, order by-elections. **This is a welcome feature in the Act.**

6. SOCIAL BOARD

47. The Act provides for the establishment of a Social Board attached to the NCJ (Article 27a of Act), which may give opinions to the NCJ particularly in relation to appointments to judicial office. The Social Board would be composed of nine members, with six members appointed respectively by the Supreme Bar Council, National Council of Legal Counsels, National Council of Notaries, General Council for Science and Higher Education, Commissioner for Human Rights, National Council of Public Prosecutors within the Office of the Prosecutor General plus three representatives of non-governmental organizations designated by President of the Republic of Poland (Article 27a (2)).

48. The Social Board's composition would provide a limited form of involvement of external stakeholders, including legal professionals and civil society representatives, which may be an attempt to overcome the weakness of the NCJ membership not having such external members (see Sub-Section III.3.3 above). The Senate's amendments adopted by the Sejm on 12 July 2024 require the NCJ to issue a justification where the Social Board's opinion has not been taken into account. While this solution could give greater weight to this body and its members, the role of external members would remain limited in terms of their influence.

49. At the same time, the establishment of a new body connected to the NCJ should be the subject of fairly careful scrutiny, considering the importance of the independence of the NCJ. In particular, if the establishment of this new body is pursued, there should be strong safeguards in place to ensure

50 See e.g., Venice Commission, *Code of Good Practice in Electoral Matters* (2002), Explanatory Report, p. 40.
51 See 2010 *ODIHR Kyiv Recommendations on Judicial Independence*, para. 22. See also, *Opinion n°17 on the evaluation of judges' work, the quality of justice and respect for judicial independence*, para. 41.
52 See *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Supreme Court and Certain other Acts of Poland* (as of 16 January 2023), 25 January 2023, in English and Polish, paras. 17-18.
53 *Ibid.* para. 18.

the independence, impartiality and accountability of its members, and effectiveness of its work, with clear, predefined criteria and procedure for suspending or removing members of the Social Board who would not comply with such requirements, in order to avoid the risk of potential undue external influence through this body on the work of the NCJ, or on the judiciary as a whole.[54]

7. TRANSITIONAL PROVISIONS

7.1. Consequences of the Election of the New Judge Members

50. Article 3 of the Act provides that upon announcement of the results of election of the new judge members, "*the activity in the National Council of the Judiciary of the persons elected by the Sejm to the National Council of the Judiciary under Article 9a (1) of the Law amended in Article 1 in its wording to date shall cease*". It is not for this Opinion to assess the constitutionality of the amendments of December 2017 to the 2011 Act that introduced the election by the Sejm, instead of their peers, of the fifteen judges who compose the NCJ according to Article 187(1) of the Constitution, and pronounce itself on the status of such individuals as "judge members" of the NCJ or not. Ultimately, this should be a matter for the competent jurisdictions of Poland to pronounce themselves.

51. The above-mentioned caselaw of the CJEU and the ECtHR is about the lack of independence of the NCJ, which was the direct result of the amendments of December 2017, but does not pronounce itself on the status of the judge members of the NCJ as this is a matter of Polish law. To remedy this situation, the caselaw does not specifically and explicitly state that it requires the termination of the terms of office of the sitting judge members of the NCJ as elected by the Sejm. As far as the ECtHR is concerned, the lack of such an explicit finding is consistent with the ECtHR's commitment to subsidiarity in relation to judicial reform, with the effect that it does not prescribe to member states the means by which they are to achieve the strengthening of judicial independence and the rule of law.[55] However, the ECtHR when pronouncing itself on the measures to be adopted to implement its judgments with respect to Poland underlined the need to rapidly adopt measures to "*restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ"*.[56]

7.1.1. Security of Tenure of Members of Judicial Councils as a Key Guarantee of Judicial Independence

52. From the international perspective, as underlined above, the CJEU, the ECtHR and various international, inter-governmental and regional organizations and bodies have recognized that the change of appointment modalities for the NCJ judge members from election by their peers to election by the *Sejm*, contrary to international recommendations, has impacted the composition of the council; this shift has put into question the very independence of the NCJ, which constitutes a key guarantee of independence of the judiciary and of individual judges.[57] At the same time, as underlined above, the security of tenure of the members of a judicial council is a key safeguard of its independence.

53. In its Opinion no. 24, the CCJE dealt with the security of tenure of council members after reaffirming its previous principles on the composition and modalities of appointment of a judicial council. These principles put special emphasis on presence of a majority of peer-elected judges, to ensure that the

54 See e.g., as a comparison, on the recommended safeguards pertaining to the status, composition, role and safeguards pertaining to the Public Integrity Council of Ukraine (composed of 20 members, representatives of human rights civic groups, law scholars, attorneys, and journalists) as an advisory body to the High Qualifications Commission in order to determine the eligibility of a judge or judicial candidate following the criteria of professional ethics and integrity, in *ODIHR Opinion on the Law of Ukraine on the Judiciary and Status of Judges* (2017), paras. 64-76.

55 See e.g., ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, para. 324.

56 See ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329.

57 EU Commission Recommendation 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, paras. 27-35, where the European Commission noted in this respect that "…*Until the adoption of the law on the National Council for the Judiciary, the Polish system was fully in line with these standards since the National Council for the Judiciary was composed of a majority of judges chosen by judges… the new rules on appointment of judges-members of the National Council for the Judiciary significantly increase the influence of the Parliament over the Council and adversely affect its independence in contradiction with the European standards*."

selection of council members "*supports the independent and effective functioning of the Council and the judiciary and avoid any perception of political influence, self-interest or cronyism*".[58] The CCJE specifically recommends that members of judicial councils should be appointed "*for a fixed time in office and must enjoy adequate protection for their impartiality and independence*"; except in cases of death, retirement or removal from office, for example as a result of disciplinary action for proven serious misconduct, a member's term should only end upon the lawful election of a successor to ensure that the Council is able to continue exercising its duties lawfully even if the appointment of new members takes time.[59] The CCJE has also underlined "*the importance that procedures which may lead directly or indirectly to termination of office are not misused for political purposes but respect fair trial rights. In this respect, this Opinion amplifies Opinion No. 10 (2007).*"[60]

54. Article 187 of the Constitution of the Republic of Poland specifically refers to the four-year term of judge members of the NCJ. Article 14 (1) of the 2011 Act provides for an exhaustive list of termination grounds for council members i.e., in case of death, relinquishing the mandate, expiry of the mandate of deputy or senator, expiry or termination from a judge's office or retirement as a judge. Thus, the general point of departure is that the early termination of the mandate of *duly* elected judge members, for no legitimate reason other than an amendment to relevant legislation, undermines the independence of such a body, and as a consequence of the judiciary as a whole. However, the controversies surrounding the domestic law about whether NCJ members appointed under the 2017 Amendments should qualify for this protection since they may not be considered as *duly* (s)elected, should be reiterated.[61]

55. The ECtHR looked at the issue of possible *ex lege* termination of the mandates of judicial council members and state practice across Europe in the case of *Grzęda v. Poland*. The ECtHR noted that early termination of judicial council membership has only happened in very few instances but that otherwise, there is no clear consensus in favour or against the possibility of legislative reform leading to such an early termination. The Court concluded that *"[t]he justification of such reform in a concrete situation and the existence of safeguards preserving the independence of courts and the judiciary, including transitional provisions, are relevant factors*", underlining that *"[u]ltimately, the balance between the benefit of the reform for the functioning of democratic institutions and the security of tenure plays an important role*".[62]

56. Hence, the ECtHR seems to suggest that early termination of membership in a judicial council in case of legislative reform is not completely excluded. However, such measures require clear justification. In this respect, the aim of reforming the legislation that contradicts international human rights and rule of law standards, the benefit of the reform in terms of judicial independence, the ultimate necessity for such changes, as well as existence of appropriate safeguards, including transitional provisions, should be taken into account to justify the reform. At the same time, simply invoking a general objective to enhance the independence or efficiency of the judicial self-governing bodies, or bring the legal framework closer to international standards would not in themselves be sufficient to justify a termination of mandates. There should be a clear and demonstrated necessity for the reform with no other possibility than terminating the mandate of council members to remedy the situation, to achieve the aims of the reform and to ensure compliance with international norms and rule of law principles.

57. With respect to the security of tenure of judges - which is a distinct issue from the tenure of judicial council members and has long been recognized as a key guarantee of judicial independence - the ECtHR and the CJEU have observed that the principle of irremovability is not absolute and that there may be some limited exceptions to this principle, providing that they pursue a legitimate objective

58 CCJE Opinion No. 24, Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, 2021, para. 27, and see further paras. 28-35.
59 CCJE Opinion No. 24, Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, 2021, paras. 36-37.
60 CCJE Opinion No. 24, Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, 2021, para. 38.
61 See e.g., ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, paras. 312-320
62 See e.g., ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, para. 171.

and are proportionate to that objective, and do not result in a perceived or real lack of independence and impartiality of the court.[63] In particular, the ECtHR underlined that "*upholding those principles at all costs, and at the expense of the requirements of 'a tribunal established by law', may in certain circumstances inflict even further harm on the rule of law and on public confidence in the judiciary. As in all cases where the fundamental principles of the Convention come into conflict, a balance must therefore be struck in such instances to determine* ***whether there is a pressing need – of a substantial and compelling character – justifying a departure from the principle of legal certainty and the force of res judicata*** *[…]* ***and from the principle of irremovability of judges****, as relevant, in the particular circumstances of a case*".[64]

58. Similar considerations are relevant with respect to the termination of the mandate of NCJ members. The authorities need to weigh the balance of, on the one hand, the important interest of the State in concluding fundamental reforms to restore the independence of the NCJ as called upon by international courts and, on the other, the principle of irremovability of NCJ judge members *vis-à-vis* the individual potential arguable right of the NCJ members to continue their terms of office until the end of the four years, in 2026.[65]

59. In light of the above, the abundant international caselaw questioning the very independence of the NCJ due to the change in the modalities of election of the judge members may serve as a legitimate ground for initiating a reform, potentially impacting the term of office of the judge members elected by the Sejm. As underlined by the ECtHR, maintaining the NCJ in its current composition will perpetuate the systemic dysfunction of this body,[66] as also widely acknowledged at the international and domestic level. The reform that is pursued by the Act aims at restoring the modalities of election of the judge members by their peers in line with international recommendations,[67] and ultimately to restore the independence of the NCJ. It is clear from the caselaw of the ECtHR and CJEU that the NCJ would not be able to regain its independence if the current model of electing judge members by the parliament remains unchanged and if judge members elected by the *Sejm* continue to sit in the NCJ. **This provides a solid ground for justifying an exception to the principle of security of tenure of council members and the early termination of membership in a judicial council in the specific circumstances of Poland.**

7.1.2. Existence of an Arguable Right under Article 6 (1) of the ECHR and Access to a Court

60. At present, the Act does not foresee any judicial avenue for the incumbent judge members of the NCJ to raise their grievances as a result of the termination of their mandates *ex lege*. The question arises as to whether the lack of access to court for judge members whose mandate would be terminated *ex lege* as a result of the reform would be objectively justified. The ECtHR in *Grzęda* held that the applicant could arguably claim, in light of the domestic legal framework in force at the time of election as NCJ judge member and during term of office, "*an entitlement under Polish law to protection against removal from his position as a judicial member of the NCJ during that period*".[68] At the same time, the abundant international caselaw questioning the very independence of the NCJ due to the change in the modalities of election of the NCJ judge members (including several decisions given before the second election in 2022, according to the new election modalities, by the Sejm, of the judge members) may question whether there should be an entitlement to protection against removal for the incumbent judge members, and hence whether there exists an arguable right to remain in office until the end of their mandates. Furthermore, as a matter of domestic law, it is noted that the

63 See e.g., CJEU, *European Commission v. Republic of Poland*, C-619/18, 24 June 2019; and ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 239.
64 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 240. Emphasis added.
65 See ECtHR, *Gyulumyan and Others v. Armenia* (dec.), no. 25240/20, 21 November 2023, para. 78.
66 See ECtHR, *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 318.
67 *ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland* (5 May 2017, also in Polish here), footnote 36.
68 See ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, para. 268. See also ECtHR, *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, para. 109.

constitutionality of the 2017 Amendments authorizing the election of judge members of the NCJ by the Sejm is a controversial issue in light of the series of decisions of the Supreme Court in December 2019 and January 2020, followed by a resolution the joined chambers of the Supreme Court,[69] and subsequent decisions of the Supreme Administrative Court.[70]

61. In general, once an applicant has demonstrated an arguable civil right – in this case the right of judge members of the NCJ to serve for four years - there is a presumption that Article 6 of the ECHR applies, unless it is demonstrated that (i) the domestic law contains an explicit or implicit (in the latter case in particular where it stems from a systemic interpretation of the applicable legal framework or the whole body of legal regulation) exclusion from access to a court; and (ii) the exclusion of access to a court should be "*justified on objective grounds in the State's interest*"[71] (so-called "*Eskelinen* test" as further developed in *Grzęda v. Poland*).

62. As to the first requirement, the Court in *Grzęda* left the question open given the opposing views of the parties to the case, noting however that access to a court should be excluded under domestic law prior to the time, rather than at the time, when the impugned measure concerning the applicant was adopted, as this would otherwise open the way to abuse.[72] This is an issue that goes beyond the scope of this legal analysis as this relates to the interpretation of Polish legislation. It should be noted though that pursuant to Article 79 of the Constitution of Poland, an individual whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration *has made a final decision*. This would suggest that an implementing measure adopted on the basis of the contested provision of the Act would need to be adopted, but that a constitutional complaint against legislation producing effects *ex lege* would not be possible. But even assuming that a constitutional complaint would be possible, it is worth mentioning the ECtHR case of *Xero Flor w Polsce sp. z o.o. v. Poland* (2021),[73] where the ECtHR concluded that "*the fundamental rule applicable to the election of Constitutional Court judges was breached, particularly by the eighth-term Sejm and the President of the Republic*" and that the Constitutional Tribunal failed to constitute a *"tribunal established by law"*.[74]

63. Regarding the second requirement, to assess whether the exclusion of access to a court in case of *ex lege* termination of a public fixed-term mandate may have been justified in the specific circumstances, the Court in *Grzęda* considers whether the exclusion is in the interest of State governed by the rule of law.[75] Where the public mandate in question is membership of a judicial council, the most relevant component of the rule of law is judicial independence and specifically the independence of judicial councils (where they are established) which are responsible for judicial selection and other sensitive aspects of institutional governance.[76] The ECtHR concluded, based on the impact that replacing the *duly and lawfully* peer-elected judge members of the NCJ with judge members elected by the legislature would have on the independence of the NCJ, and in turn its ability to uphold judicial independence in the legal system as a whole, that "*the exclusion of the applicant from a fundamental safeguard for the protection of an arguable civil right closely connected with the protection of judicial independence cannot be regarded as being in the interest of a State governed by the rule of law*"; it further noted that "*Members of the judiciary should enjoy – as do other citizens – protection from arbitrariness on the part of the legislative and executive powers, and only oversight by an independent judicial body of the legality of a measure such as removal from office is able to render*

69 See references to decisions of the Supreme Court in *Grzęda v. Poland* [GC], paras. 100-116.
70 See references to decisions of the Supreme Administrative Court in *Grzęda v. Poland* [GC], paras. 117-119.
71 See ECtHR, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007, para. 62.
72 See ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, paras. 290 and 294.
73 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021, paras. 4-57.
74 *Ibid. Xero Flor w Polsce sp. z o.o. v. Poland*, para. 289.
75 See ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, para. 326. See also ECtHR, *Żurek v. Poland*, no. 39650/18, 16 June 2022, para. 148, which states: "*the Court considers it necessary to take into account the strong public interest in upholding the independence of the judiciary and the rule of law*".
76 See ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, paras. 304-308.

such protection effective".[77] In *Grzęda v. Poland*, one of the determining factors was that the law itself was unjustifiable as it was undermining rule of law and judicial independence.

64. By contrast, the Act under review seeks to restore the independence of the NCJ, reversing the negative impact of the 2017 Amendments, by reinstating the modalities of s/election of NCJ judge members by their peers and hence introducing stronger guarantees of independence, thereby restoring the NCJ's ability to uphold the independence of the Polish judiciary as called upon by international courts and bodies. It should also be recalled that the ECtHR and European Commission have specifically requested the Polish authorities to rapidly adopt measures to restore the independence of the NCJ through legislative reform reinstating the election of judge members of the NCJ by their peers.[78] Under Article 46 of the ECHR, a member state remains free to choose the means by which it will discharge its obligations arising from the execution of the judgments of the ECtHR. It is clear from the caselaw of the ECtHR and CJEU that the NCJ would not be able to regain its independence if the current model of electing judge members by the parliament remains unchanged and if judge members elected by the *Sejm* continue to sit in the NCJ. As noted above, the need to reform the NCJ is urgent, as the passing of time simply leads to the perpetuation of the systemic flaws of the judicial system, flawed judicial appointments made by the NCJ in its current composition and to further potential violations of international standards, as the abundant ECtHR and CJEU caselaw has highlighted.

65. Given this stark distinction, there is reason to believe that the second limb of the *Eskelinen* test would be satisfied by a measure that seeks to restore the independence of the NCJ, which is necessitated in view of the caselaw concerning the NCJ's lack of independence.[79] This is further reinforced by the need to rapidly adopt measures to restore the independence of the NCJ as called upon by the ECtHR and the European Commission, as noted above. The lack of access to court is directly linked to the grounds justifying the reform, which aims to urgently bring the law governing the NCJ in line with international standards and the caselaw of international courts, to reinstate the independence of the body.

66. Even if one of the two conditions of the *Eskelinen* test would be considered not to be fulfilled and the application of Article 6 (1) of the ECHR therefore not excluded in the specific circumstances of *ex lege* termination provided by the Act, it is worth noting that the right of access to a court is not absolute. It may be subject to limitations that pursue a legitimate aim, providing that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, and that the said limitations do not reduce the access left to the individual in such a way or to such an extent that the very essence of the right of access to a court is impaired.[80]

67. The abundant caselaw of the CJEU and ECtHR, in addition to the above-mentioned domestic caselaw, accompanied by multiple reports of international and regional bodies, finding that the NCJ, as it is currently composed lacks independence, provide strong justification to undertake a reform to restore the independence of the NCJ by changing the modalities of s/election of the judge members. Such a reform pursues a legitimate aim. It remains to be assessed whether the early termination *ex lege* of council membership and the absence of access to a court to contest such a termination would be a proportionate measure. The early termination *ex lege* appears to be a valid legislative measure to regain NCJ's independence, which would remain compromised if the NCJ continues to function in its current composition. Hence, limiting the access to a court to contest the early termination of the

77 *Ibid. Grzęda v. Poland* [GC], paras. 326-327. See also e.g., ECtHR, *Pająk and Others v. Poland [GC],* no. 25226/18 and 3 others, 24 October 2023, para. 139.

78 ECtHR, Judgement, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329.

79 Though addressing the reform of the Constitutional Court and not a judicial council, as a comparison, in a recent case where judges of a constitutional court had lost their mandates as a result of constitutional reform, the ECtHR concluded that both conditions of the *Eskelinen* test were fulfilled, considering in particular that the implicit exclusion from access to a court was pursuing a legitimate aim – the necessary reform of the Constitutional Court, and was not directed specifically at the applicants, also noting the applicants' inability to have the loss of their mandates reviewed by a court; see ECtHR, *Gyulumyan and Others v. Armenia* (dec.), no. 25240/20, 21 November 2023, paras. 68-85.

80 See e.g., ECtHR, *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, para. 120. See also e.g., ECtHR, *Gumenyuk and Others v. Ukraine*, no. 11423/19, 22 July 2021, para. 70.

NCJ judge members' mandates would appear justified and proportionate to the aim pursued of restoring the independence of the NCJ.

68. At the same time, it should also be assessed whether the early removal from their mandates may constitute a violation of the right to respect for private and family life protected under Article 8 of the ECHR, in particular with respect to the effect on "inner circle", including personal well-being and family members, one's opportunities to establish and develop relationships with others; and social and professional reputation.[81] It is noted that, when serving, the judge members of the NCJ continue to occupy their positions in the judiciary with the corresponding salary and receive *per diem* when sitting as members of the NCJ. As such, the loss of their mandate as NCJ members does not impact the holding of their judicial positions and corresponding salaries, nor the general conditions of work or social benefits. While they will no longer receive the *per diem* attached to the exercise of their duties as NCJ members, this is unlikely to result in a significant reduction of their income, serious enough to amount to a violation of Article 8 of the ECHR. Indeed, *per diem* are not designed to constitute additional income but rather to cover the costs associated with the exercise of the mandate of NCJ member. Moreover, the early termination does not result in removal from the position of judge or demotion, or inability to re-apply for NCJ membership.[82] Even if opportunities to establish and maintain relationships, including those of a professional nature, may be affected, such impact is unlikely to be substantial. Finally, from the early termination of the mandate of the incumbent judge members, there are no inference of any poor professional performance or assessment of their personality, moral values or character, as it results from the mere operation of law, which is not based on personal criticisms of their conduct as individuals. Hence, from the above, it is unlikely that the mere termination of their mandate *ex lege*, in the present circumstances, would be considered as crossing the threshold of seriousness involving a violation of Article 8 of the ECHR. At the same time, should other rights and benefits closely interlinked with the discontinuation of their mandate be unduly impacted, they should be able to bring a claim before the competent court.

7.1.3. Concluding Comments

69. The Act opts for a legislative solution similar to the one challenged in the *Grzęda* case yet the situation is distinctly different. The Act is first and foremost aimed at restoring the rule of law and independence of the NCJ as called upon by international court and bodies, and it is part of a series of initiatives contemplated against the backdrop of a wider judicial reform. While the Act does not fully return to the *status quo ante* with respect to the election of judge members of the NCJ, the solution pursued by the Act is in line with international recommendations of having judge members chosen by their peers. The Act aims to restore and uphold the independence of the judiciary by ensuring that the members of this constitutional body are appointed in a manner that is in line with international standards and which reduces the influence of the legislature and executive over the NCJ members' appointment process. A balancing act must be carried out between the interests of justice and public interest in this very restoration of the rule of law in Poland and the arguable rights of the NCJ members to continue their terms of office until the end of the four years.

70. In light of the foregoing, there is a demonstrated necessity to swiftly reform the composition of the NCJ. Reinstating the modalities of electing the judge members of the NCJ by their peers to restore the independence of the NCJ would avoid perpetuating the systemic dysfunction as established by European courts and break the vicious cycle of NCJ's potentially deficient decisions on judicial appointments and promotions, as well as subsequent judicial challenges. Hence, **the comprehensive overhaul of the NCJ, with possible early removal of the judges who have been elected by the *Sejm* to sit on the NCJ following the 2017 Amendments, contemplated by Article 3 of the Act, appears to be a valid and justifiable policy option, as long as it remains an exceptional (one-time) measure in the given extraordinary circumstances.** To underline the exceptional nature of

81 See ECtHR, *Gyulumyan and Others v. Armenia* (dec.), no. 25240/20, 21 November 2023, paras. 88-95.
82 ECtHR, *Polyakh and Others v. Ukraine*, nos. 58812/15, 17 October 2019, paras. 158-159.

the proposed amendments and emphasize that they are "in the interest of a State governed by the rule of law", **the legal drafters could consider supplementing the Act by a Preamble elaborating the *rationale* for introducing such wide-ranging reform, including to execute the judgments of regional tribunals. In addition, even if the NCJ judge members could be said to have an arguable right to serve until the end of their mandate according to the legislation in force, limiting the access to a court to contest the early termination of the NCJ judge members' mandates would appear justified and proportionate to the aim pursued by the reform, of rapidly restoring the independence of the NCJ. In light of the above, the mere termination of their mandate *ex lege* is unlikely to be considered as crossing the threshold of seriousness involving a violation of Article 8 of the ECHR. Should other rights and benefits closely interlinked with the discontinuation of their mandate be unduly impacted, they should however be able to bring a claim in this respect before the competent court.**

7.2. Ineligibility of Judges Appointed or Promoted by the President following their Nomination by the NCJ as formed pursuant to Article 9a of the 2011 Act on the NCJ

71. Article 2 (2) (previous 3 (2)) of the Act deals with the question of whether judges appointed or promoted by the President following their nomination by the NCJ as formed pursuant to Article 9a of the 2011 Act (inserted by the 2017 Amendments), i.e., judges whose appointment or promotion was decided by the NCJ after its composition changed to include judge members elected by the Sejm, may be candidate NCJ judge members. It provides that the right of candidacy for a member of the NCJ shall not be granted to judges who were appointed or promoted in this way with the exception of *judges who have returned to the office of judge and to the post they previously held if the post previously held was taken up otherwise than as a result of a motion for appointment of a judge presented to the President of the Republic of Poland by the National Council of the Judiciary formed under Article 9a of the Law amended by Article 1*...". In essence, this aims to prevent judges who have been appointed or promoted with the involvement of the NCJ following the 2017 Amendments from becoming candidates to the post of judge member of the NCJ; however, these judges can vote for a candidate. Furthermore, there is an exception, for judges who renounce any promotion they received following a decision of the NCJ during this period. It must be added however that the process for return of promoted judges is not clarified in the Act.

72. This dual approach shows that the legal drafters are yet to address the status of these judges appointed or promoted by the NCJ as formed after the 2017 Amendments. This issue will be addressed in Sub-Section 8. At the same time, the Act would statutorily entitle them to exercise certain prerogatives that pertain to judges only, thereby introducing a differential treatment between judges impacted by different types of decisions made by the NCJ since March 2018 and other judges appointed before March 2018.

73. The impossibility of running for membership in the new NCJ for these judges impacted by different types of NCJ decisions introduces a difference in the exercise of their profession. In order to be justified, such differential treatment should be founded "*on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention*".[83] In this case, the difference is made on factual grounds, i.e., difference between a judicial appointment or promotion carried out by the newly composed NCJ since March 2018 and those appointed or promoted before March 2018.

74. The Senate in its proposed amendments of May 2024 suggested to delete new Article 2 (2) stating, amongst others, that it is disproportionate, and failing to make any differentiation between the judges who were confirmed or appointed by the NCJ. Indeed, it may be questioned whether as long as no determination has been made as to the status of the judges appointed or promoted by the newly

83 See e.g., ECtHR, *G.M.B. and K.M. v. Switzerland* (dec.), no. 36797/97, 27 September 2001; *Zarb Adami v. Malta*, no. 17209/02, 20 June 2006, para. 73.

composed NCJ after March 2018, a currently ongoing discussion, their respective rights and prerogatives could be reduced in the manner envisaged by the current Act.

75. At the same time, and as mentioned above, there have been numerous judgments by CJEU and ECtHR acknowledging the serious defects in the functioning of the judiciary in Poland, which stem from the 2017 reforms, amongst others; these issues, particularly with respect to judicial appointments and promotions by the newly composed NCJ since March 2018 arise from the decisive influence of the legislative and executive powers on the composition of the NCJ, and as a consequence on the appointment of judges carried out by this body.[84] For these judges, being able to cast a vote, without providing a possibility to be eligible as candidate, could be seen as an acceptable temporary solution, within the state's discretion to choose from amongst the legislative and policy options available to them in line with Article 46 of the ECHR based on which a state remains free to choose the means by which it will discharge its obligations arising from the execution of the judgments of the ECtHR. Further, this would reduce the risk of having the NCJ being formed in a way that includes judge members whose legal status (as a judge in general or as a judge of a specific level of courts) according to the Polish domestic legal framework may be uncertain and whose appointments have been recognized by the ECtHR to have been made as a result of "*defective procedure*" that "*inherently and continually affects the independence of judges so appointed*".[85] Indeed, it would appear unpractical and overly lengthy to postpone the election of the NCJ judge members according to the new rule until there is clarity as to the status of all the judges appointed or promoted by the NCJ after March 2018, and whether they should be able to stand for election to become members of the NCJ. As mentioned above, the Polish authorities have been requested to "*rapidly elaborate measures to restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ*" as called upon by the ECtHR, which endorsed the approach of the CoE Committee of Ministers.

76. It is noted that the legislative option would only be applicable as a transitory measure, for the first election of the NCJ in accordance with the new rules, and thus limited in time. The Act also offers the possibility for those judges who have been promoted by the newly composed NCJ from March 2018 to voluntarily renounce their promotion in order to be eligible to stand as candidates. By not ruling out completely the candidacy of all judges promoted since 2018, the legal drafters seem to aim to limit the personal scope of the ineligibility to stand for election as NCJ judge members. At the same time, excluding all these judges, even those who had been duly appointed before March 2018, appears disproportionate since even if their promotion could be reconsidered later on by competent Polish bodies, they would still retain their status as a judge. Hence, a less restrictive alternative than the one proposed in the Act could consist of allowing these particular categories of judges to stand for election. Indeed, it would not be justified to automatically limit these members of judiciary in their right to stand for elections as judge member of the NCJ. Potential future change of their position as a result of a re-assessment or invalidation of their promotion, should not automatically alter their membership in the NCJ and it should be for the 2011 Act or other applicable legislation to clarify the consequences of a change of position during their mandate on their membership in the NCJ. This should also be clarified with respect to other changes of position such as promotion to higher courts. The right to stand for elections to NCJ for individuals appointed to their first judicial positions after the period of assessorship by the NCJ after its composition was changed in March 2018 could also be regulated differently. The alternative of letting all judges, even those appointed by the NCJ after March 2018, stand for elections with the uncertainty as to their very status as a judge and the possibility of having their status of judge member of the NCJ being challenged any time, may potentially put into question the validity of the NCJ decisions adopted by the newly composed NCJ, running the risk of perpetuating uncertainties and systemic dysfunction in the NCJ. Thus, the chosen

84 See e.g., ECtHR, *Wałęsa v. Poland*, no. 5089/21, 23 November 2023, para. 173.
85 See e.g., ECtHR, Judgement, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324.

measure- can be considered as a valid policy option, falling within the discretion of the state, although the personal scope of ineligibility to stand for election should be reduced.

77. In light of the above, the transitory solution provided in Article 2 (2) of the Act may be considered as pursuing the legitimate aim of rapidly restoring the independence of the NCJ without risking to have the status of the newly elected NCJ judge members being later questioned, thereby perpetuating uncertainties. Although it could be argued that there is an objective necessity to apply this **exceptional transitory measure restricted to the first election of the NCJ judge members according to the new modalities provided by the Act, the proportionality of the contemplated scheme may still be questioned. Indeed, the Act could, for example, provide that all judges appointed by the NCJ before its composition was changed in March 2018 are eligible, even those who were promoted or transferred after March 2018.** The legislative drafters may also consider a possibility of regulating differently the right to stand for elections to NCJ for individuals appointed to their first judicial positions after the period of assessorship by the NCJ after its composition was changed in March 2018, rendering them eligible. In that case, the applicable legislation should clarify the consequences of a potential future change of their position/status as a result of a re-assessment or invalidation of their promotion or transfer in terms of their membership in the NCJ. Limiting the possibility to stand for election to judges holding posts to which they were appointed by the NCJ before March 2018, would exclude (or bring to a minimum) the risk of having the NCJ being composed of judge members whose legal status as a judge remains uncertain according to the Polish domestic legal framework and whose appointments have been recognized by the ECtHR to have been made according to a defective procedure.

78. **This approach may be justifiable as an initial, exceptional, one-off transitory measure** applicable for the first election of the NCJ according to the Act**, prior to resolving the much broader and more controversial issue related to the status of judges appointed or promoted by the NCJ after its composition changed following the 2017 reform**. In addition, as mentioned above, the adoption of the Act should be accompanied by a more comprehensive reform of the judiciary to address the systemic deficiencies of the judicial system in Poland and the status of all judges appointed in the deficient procedure involving the NCJ as composed after the 2017 Amendments.

8. Impact of the Decisions of the NCJ as Composed after the 2017 Amendments on the Status of Judges

8.1. General Remarks

79. As observed above, the transitional provisions of the Act are intrinsically linked to the issue of the status of judges who were appointed or promoted with the involvement of the NCJ as composed after the 2017 Amendments. To this end, the present Opinion aims to provide some general recommendations and guidance to inform the ongoing discussions on the status of these judges.[86]

80. In *Wałęsa v. Poland*,[87] with reference to the systemic problems pertaining to the judiciary in Poland, the ECtHR specifically endorsed "*the indications as to the general measures given to the respondent State by the Committee of Ministers […] whereby it exhorted Poland to, among other things, rapidly elaborate measures to […] (ii) address the* ***status of all judges*** *appointed in the deficient procedure involving the NCJ as constituted under the 2017 Amending Act* ***and of decisions adopted with their participation***",[88] without distinguishing the categories of judges, levels of jurisdiction or their

86 In September 2024, the Government of Poland announced a Bill on the Regulation of the effects of the resolutions of the National Council of the Judiciary adopted between 2018 and 2024 and shared an outline of this Bill; see See: Nowe rozwiązania dotyczące zmian w sądownictwie - Ministerstwo Sprawiedliwości - Portal Gov.pl (www.gov.pl).

87 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329.

88 The decision of the Committee of Ministers of the Council of Europe adopted at its 1468th meeting can be consulted here: <https://www.consilium.europa.eu/pl/meetings/>.

decisions. In this respect, the present Opinion should be read together with the *ODIHR Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024).

81. In general, it is "*primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention*".[89] A key principle in the ECtHR's caselaw is the margin of appreciation that States have when designing their legal system with respect to certain aspects of their human rights legal framework. In the *Ástráðsson* judgment, the ECtHR emphasized that states should be afforded a certain margin of appreciation to address the consequences of the violation of Article 6 of the ECHR, since the national authorities are in principle better placed to assess how the interests of justice and the rule of law – with all its components that sometimes stand in tension with each other – would be best served in a particular situation.[90]

82. The ECtHR in its *Ástráðsson* case developed a test to determine whether defects in judicial appointment procedure constitute a violation of the right to a "*tribunal established by law*".[91] At the same time, the ECtHR also pointed out that the right to a "*tribunal established by law*" should not be construed in an overly expansive manner, whereby any and all irregularities in a judicial appointment procedure would be liable to compromise that right, emphasizing that "*A degree of restraint should instead be exercised when dealing with this matter*".[92] In *L.G. v. Krajowa Rada Sądownictwa*,[93] when assessing whether the Supreme Court's Chamber of Extraordinary Review and Public Affairs (CERPA) amounted to an "*independent and impartial tribunal previously established by law"*,[94] the CJEU, considered various factors and circumstances, which it then concluded gave "…*rise to reasonable doubts in the minds of individuals as to the imperviousness of the persons concerned and the panel in which they sit with regard to external factors, in particular the direct or indirect influence of the national legislature and executive and their neutrality with respect to the interests before them. Those factors are thus capable of leading to a lack of appearance of independence or impartiality on the part of those judges and that body likely to undermine the trust which justice in a democratic society governed by the rule of law must inspire in those individuals*."[95] The CJEU held that the panel of judges of the CERPA did not have the status of an independent and impartial tribunal previously

89 See e.g., ECtHR, *Assanidze v. Georgia* [GC], no. 71503/01, 08 April 2004, para. 202.
90 See ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 243.
91 In the *Ástráðsson* case the ECtHR developed a test to determine whether defects in judicial appointment procedure constitute violation of the right to a "tribunal established by law" based on three cumulative criteria, namely whether: (1) there was a manifest breach of the domestic law; (2) the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges; and (3) the allegations regarding the right to a "tribunal established by law" were not effectively reviewed and remedied by the domestic courts. Applying the *Ástráðsson* test, the ECtHR concluded in *Wałęsa* that the flawed NCJ was a body no longer offering sufficient guarantees of independence from the legislative or executive powers; that its appointment procedure disclosing undue influence of the legislative and executive powers amounted to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of the judges so appointed; and that there was an absence of procedure before domestic courts to challenge the defects in the process of appointing the judges. The CJEU, in the *Simpson* ruling, also explicitly confirmed that the right to an independent court established by law also covers the process of appointing judges and developed a similar assessment test as the ECtHR, namely relying on the nature and gravity of the irregularity, but also assessing whether "*the irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned*", see CJEU, *Erik Simpson and HG v Council of the European Union and European Commission* [GC], Joined Cases C-542/18 RX-II and C-543/18 RX-II, 26 March 2020, para. 75.
92 See ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 236.
93 See CJEU, *L.G. v Krajowa Rada Sądownictwa* [GC], C-718/21, 21 December 2023, paras. 76-77. In L.G. v. Krajowa Rada Sądownictwa, the CJEU was called to assess a request for a preliminary ruling from the Supreme Court's Chamber of Extraordinary Review and Public Affairs (CERPA) and held that when assessing the impact of irregularities in the appointment process, it, first, presumes that a national court or tribunal satisfies the requirements of Article 267 of the Treaty on the Functioning of the European Union (TFEU), irrespective of its actual composition; this presumption may be rebutted where a final judicial decision handed down by a court or tribunal of a EU member state or an international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purpose of Article 19 (1) Treaty on European Union, read in the light of Article 47 (2) of the Charter of Fundamental Rights of the European Union (EU Charter), and consequently, that the panel of judges did not satisfy the requirements in order to be classified as a 'court or tribunal' within the meaning of Article 267 TFEU.
94 The requirement of an "*independent and impartial tribunal previously established by law" derives from second subparagraph of Article 19 (1) Treaty on European Union, read in the light of Article 47 (2) of the Charter of Fundamental Rights of the European Union (EU Charter).*
95 See CJEU, *L.G. v Krajowa Rada Sądownictwa* [GC], C-718/21, 21 December 2023, paras. 76-77. In L.G. v. Krajowa Rada Sądownictwa, the CJEU was called to assess a request for a preliminary ruling from the Supreme Court's Chamber of Extraordinary Review and Public Affairs (CERPA) and held that when assessing the impact of irregularities in the appointment process, it, first, presumes that a national court or tribunal satisfies the requirements of Article 267 of the Treaty on the Functioning of the European Union (TFEU), irrespective of its actual composition; this presumption may be rebutted where a final judicial decision handed down by a court or tribunal of a EU member state or an international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purpose of Article 19 (1) Treaty on European Union, read in the light of Article 47 (2) of the Charter of Fundamental Rights of the European Union (EU Charter), and consequently, that the panel of judges did not satisfy the requirements in order to be classified as a 'court or tribunal' within the meaning of Article 267 TFEU.

established by law. This approach was confirmed in *C.W. S.A. and Others*[96] with regards to a judge of the Civil Chamber of the Supreme Court given this judge's appointment by the NCJ as composed after the 2017 Amendments, even though the judge was not part of any of the chambers/compositions that was definitively found to be in violation of Article 6 of the ECHR by the ECtHR. The CJEU held that *"[i]n that regard, the circumstances capable of giving rise to such systemic doubts relate, in principle, to the individual situation of the judge or judges […] and, in particular, to the irregularities committed during their appointment within the judicial system concerned, and not to the fact that those judges are assigned to a given panel of judges…*".[97] The CJEU thus makes a link between the requirement that a tribunal must be established by law and the principle of judicial independence in the sense that it examines whether an irregularity committed during the appointment of judges "*create[s] a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give[s] rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned*".[98]

83. Notwithstanding these nuanced differences in the approaches taken with respect to the irregularities of judicial appointment processes involving the NCJ as composed after the 2017 Amendments, the CJEU and ECtHR judgments concluded that there had been a violation of the right to a "tribunal established by law" with respect to certain judges and the respective categories/judicial level they belong to, or panels/chambers. The question then arises whether these judgments of international courts and respective conclusions can be considered to extend beyond those specific cases and in effect touch on *all* judges that were appointed with the involvement of the NCJ as composed after the 2017 Amendments. In *Dolińska-Ficek and Ozimek* and *Advance Pharma* cases, the ECtHR observed that **the rule of law issues went beyond the Supreme Court and may also affect the legality of the appointment of other judges in Poland.**[99] As a consequence, this suggests a potential impact of the irregularities of judicial appointment processes not limited to the appointment to Supreme Court positions but potentially to other courts.

84. Neither the case law of the CJEU nor that of the ECtHR give clear guidance on how to address the issue of the status of all judges appointed or promoted by the NCJ as composed after the 2017 Amendments. As far as the ECtHR is concerned, the lack of such an explicit finding is consistent with the ECtHR's commitment to subsidiarity in relation to judicial reform, as mentioned above. In its caselaw, the ECtHR acknowledged that "*[a]lthough … the lack of independence of the reformed NCJ generally results in defects undermining the independence of and impartiality of a court, the effects thereof vary depending on the type of court and its position within the judiciary*".[100] Hence, **this would suggest that there may be differentiation in the legal effects of the NCJ decisions on appointments and promotions, and potentially, on the status of judges depending on their bench and level**.

85. The Constitution of Poland provides that "*judges are appointed for an indefinite period*" (Article 179) and that they may be recalled from office or transferred to another bench or position against their will only "*by virtue of a court judgment and only in those instances prescribed in statute*" (Article 180 (2)). Given the constitutional guarantees, the removal, demotion or transfer of those appointed or promoted by the NCJ after March 2018, if they are considered as "judges", by operation of law, could be considered to undermine the principle of separation of powers, notwithstanding the issue of constitutionality of the legal provisions adopted for that purpose. It should be underlined that the

96 CJEU, *C.W. S.A. and Others v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, C-326/23, 7 November 2024.
97 CJEU, *C.W. S.A. and Others v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, C-326/23, 7 November 2024, para. 36.
98 CJEU, *W.Ż.* [GC], C-487/19, 6 October 2021, para. 130.
99 ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, no. 49868/19 and 57511/19, 8 November 2021, para 368; ECtHR, *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 364-365.
100 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324 (a). In Ástráðsson, the ECtHR held that with respect to what constitutes a "tribunal" and the composition thereof, that "*the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be*", see ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 222.

amendments to the Act on the Supreme Court and other acts governing the judiciary[101] adopted in June 2022 and later expanded, introduced the possibility for a party to submit a motion to assess the independence, impartiality and "established by law" requirements of a judge hearing a case.[102] However, the outcome of such an assessment impacts the case in question and is not conceived to have an impact on the status of the concerned judge.

86. It is unclear whether the irregularities in the appointments carried out by the NCJ as composed after the 2017 Amendments, may lead to the conclusion that all persons thus appointed are not considered as "judges" under the domestic legal framework. If they are not considered to have the status of judges, then as the Venice Commission and Council of Europe Directorate General Human Rights and Rule of Law concluded, the principle of irremovability would not apply to them, underlining that a judicial appointment must satisfy both domestic constitutional standards and European standards to qualify for irremovability.[103] To the extent the termination of the judicial position qualifies as removal, the principle of the irremovability of judges should apply. At the same time, as noted above, this principle is not absolute: an exception to that principle would only be acceptable "*if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it*".[104]

87. National authorities may consider various options when they seek to address the status of those whose appointments or promotions were affected by the involvement of the NCJ as composed after the 2017 Amendments. Following the *Ástráðsson* case, the Icelandic authorities opted to immediately suspend the defectively appointed judges and no longer involve them in adjudicating individual cases, while carrying out new nomination procedures to fill judicial positions left by the defectively appointed judges.[105] At the same time, the circumstances and scope of the Icelandic case, which only concerned four defective appointments, cannot be compared to the Polish situation, where it is estimated that between 2,200 and 3,500 judges (out of approximately 10,000 judges in Poland) have been appointed or promoted by the NCJ as composed after the 2017 Amendments.[106]

88. The status of judges could be addressed via a variety of means, including *ex lege* and/or by individualized decisions and/or some forms of individual evaluation carried out by independent bodies or institutions,[107] according to procedures and/or mechanisms established by law, which should also comply with the constitutional provisions. Regardless, the authorities' discretion in this matter must be balanced against the rights of the defectively appointed persons. While appointing judges in a defective manner violates the rule of law, the consequences of the measures taken to rectify the situation may affect several key rule of law principles, including the effective exercise of the right to access to a court, legal certainty and the binding force of judicial decisions (*res judicata*), and the

101 Act on the Organization of Common Courts, Act on the Organization of Military Courts and Act on the Organization of Administrative Courts.

102 See *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Supreme Court and Certain other Acts of Poland* (as of 16 January 2023), 25 January 2023, in English and Polish, Sub-Section III.3.

103 See Venice Commission and the CoE Directorate General Human Rights and Rule of Law, *Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland*, CDL-AD(2024)018, 8 May 2024, para. 60; and*Poland – Joint Opinion of the Venice Commission on European standards regulating the status of judges*, CDL-AD(2024)029, 14 October 2024, para. 23, where they underlined that to qualify for irremovability, an appointment must satisfy both domestic constitutional standards and European standards.

104 See e.g., CJEU, *European Commission v. Republic of Poland*, C-619/18, 24 June 2019 para. 79; and ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 239.

105 P. Filipek, Defective Judicial Appointments and their Rectification under European Standards, 2023, p. 466. See also: CoE Search - CM with communications from Iceland to the Committee of Ministers.

106 The website of the Chancellery of the President of the Republic indicates, as of October 2024, 3,440 judges and assessors have been appointed between 2018 and 2024. See also Helsinki Foundation for Human Rights (HFHR), Nowa KRS: krajobraz po reformie – opracowanie HFPC | Helsińska Fundacja Praw Człowieka (hfhr.pl) for an analysis of appointments by the President of the Republic of Poland to judicial positions at the request of the NCJ from 2018 to August 2023.

107 UN ECOSOC, E/CN.4/2005/102/Add.1, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Principle 30, which reads as follows: "*The principle of irremovability, as the basic guarantee of the independence of judges, must be observed in respect of judges who have been appointed in conformity with the requirements of the rule of law. Conversely, judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions by law in accordance with the principle of parallelism. They must be provided an opportunity to challenge their dismissal in proceedings that meet the criteria of independence and impartiality with a view toward seeking reinstatement*." See also Vetting: An Operational Framework in Rule-Of-Law Tools For Post-Conflict States (Office of the United Nations High Commissioner for Human Rights 2006) HR/PUB/06/5; Vetting Public Employees in Post-Conflict Settings: Operational Guidelines (United Nations Development Programme 2006).

principle of irremovability of judges, where it applies. They may also violate other rights of the defectively appointed persons, including the right to respect for private and family life.

89. Whatever the policy and/or legislative options chosen to address the status of all judges, they should also be based on a proper assessment of their potential impact in terms of financial and human resources required for their implementation and the human rights impact of any measures taken on the population as a whole, especially from the perspective of right to access to a court, to be tried within a reasonable time and good administration of justice in general. A rule of law-based approach would suggest that the policy and legislative options chosen should to the extent possible rely on existing bodies if they are composed in accordance with international standards and are effective/operational, even if they would perform new, distinct functions, rather than resorting to *ad hoc* mechanism that would need to be established for that purpose.

90. In light of the foregoing, ODIHR acknowledges the margin of appreciation and Poland's autonomy in the way it may decide to cure the violations of the right to a fair trial by an independent and impartial tribunal established by law. At the same time, the following recommendations could be drawn to address the issue of judges appointed or promoted by the NCJ as composed after the 2017 Amendments, while seeking to adhere to rule of law principles, international human rights standards, and the need for legal certainty. In particular, there are a number of general considerations to take into account when devising the policy and/or legislative options addressing the status of the defectively appointed judges:

- any reform should be in compliance with rule of law principles, international human rights standards and the Constitution, duly weighing the principles of separation of powers, legal certainty, security of tenure and irremovability of judges, where applicable, and the individual rights of those impacted by the measures, including rights to access to court and to respect for private and family life;
- a blanket removal to the extent that the termination of the judicial position qualifies as removal – without any form of individual assessment of personal conduct nor at least categorization of the persons subject to the measures is likely to be considered disproportionate unless there are very convincing reasons invoked by the authorities;[108]
- as noted above, the interpretation of the ECtHR caselaw allows for a possible differentiation of the effects of the defective appointments/promotions depending on the type of courts and positions within the judiciary;
- any procedure or criteria should not go into assessing the legality and appropriateness of individual judgments and court proceedings and should not give rise to risks of potential undue interference of the executive or legislative branches;
- any policy and/or legislative options should allow for a rather rapid resolution of the matter;
- any measures should not have the purpose of retribution or revenge;
- any behaviour otherwise amounting to potential disciplinary or criminal offences should be addressed *separately*, and be investigated and as applicable sanctioned in accordance with the ordinary disciplinary or criminal proceedings.

8.2. The Consequences of Defective Appointments

91. In order to decide how and by what means the status of those appointed or promoted by the NCJ as composed after the 2017 Amendments should be addressed, an important consideration concerns the validity of the resolutions proposing the appointments or promotions of judges. If all these NCJ resolutions are considered to be void *ex tunc* due to the manner in which the NCJ was formed, the

108 ECtHR, *Polyakh and Others v. Ukraine*, nos. 58812/15, 17 October 2019, para. 296.

consequence would be that those who were appointed as judges for the first time, are not judges, and those that were promoted would continue to keep their status as judges (if they were judges prior to the promotion) but lose their promotion. This issue needs to be resolved as removal and transfer (against their will) of those that have judge status, would in principle require a court decision in accordance with Article 180 of the Constitution.

92. In its resolution of January 2020, the Supreme Court of Poland noted that it acts on the assumption that those appointees have formally acquired the status of a judge, though acknowledging this may be refuted following preliminary rulings of the CJEU.[109] In a resolution adopted on 2 June 2022, the Supreme Court noted that there are no grounds for assuming *a priori* that every judge of a common court who was appointed as a result of taking part in a competition before the NCJ as composed after the 2017 Amendments does not meet the minimum standard of impartiality.[110]

93. It cannot be derived from the CJEU's caselaw that all persons appointed by the NCJ as composed after the 2017 Amendments do not have judicial status. Nor does it follow that these persons could be dismissed simply on the basis of the fact that they were appointed by the NCJ during this period without any judicial review. At the same time, it cannot be interpreted either as a clear confirmation that these persons are entitled to the status of judges. Similarly, from the ECtHR caselaw, it follows that finding a violation of the right to a tribunal "established by law" cannot be interpreted as confirming the lack of judicial status of the group of persons that was defectively appointed.[111]

94. An approach that would consider all the appointment/promotion resolutions by the NCJ to be void of legal effect would have far-reaching consequences given the sheer number of appointees it concerns.[112] Adopting an indiscriminate approach not taking into account the different judicial levels nor differentiating between the different categories of judges, including entry-level judges who followed a route that did not require the NCJ to exercise any significant discretion, for instance persons appointed to their first judicial positions after the period of assessorship and judicial training, may raise questions of proportionality. Further, the voidness of all these appointments would also potentially have far-reaching consequences for the decisions taken by or with the involvement of those defectively appointed, and for the administration of justice in general.

95. As noted in ODIHR's *Note on the Effects of Decisions of Judges Appointed in a Deficient Manner*,[113] the ECtHR and CJEU caselaw does not require a state to pronounce all judgments or decisions rendered by defectively appointed judges void *ex tunc* – from the outset, and hence non-existent, nor to re-open automatically all cases decided by defectively appointed judges. The caselaw gives a rather wide margin of appreciation or acknowledges the state's autonomy in the way it decides to cure the violations of the right to a fair trial by an independent and impartial tribunal established by law. However, this margin of appreciation may be limited in case of pressing need of a substantial and compelling character, especially in case of miscarriage of justice or serious violation of international human rights standards, which would call for reconsideration of a judicial decision.

96. The passage of time is also of relevance when taking measures to address the status of defectively appointed judges. Considerations of legal certainty often support the legal status quo, even, in exceptional cases, if it came into existence illegally. Passage of time may also "erase" irregularities as statutes of limitations do, and the ECtHR has also noted the importance of limitation periods to

109 Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, 23 January 2020, see <BSA I-4110-1_20_English.pdf (sn.pl)>.

110 Supreme Court of Poland, Criminal Chamber, I KZP 2/22, 2 June 2022, para. 2.

111 See ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 280. See also CJEU, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, C-824/18, 2 March 2021, paras. 131-139; see also European Parliament, Briefing: *CJEU Case-law on Judicial Independence, A chronological Overview*, October 2023.

112 The website of the Chancellery of the President of the Republic indicates, as of October 2024, 3,440 judges and assessors have been appointed between 2018 and 2024. See also Helsinki Foundation for Human Rights (HFHR), Nowa KRS: krajobraz po reformie – opracowanie HFPC | Helsińska Fundacja Praw Człowieka (hfhr.pl) for an analysis of appointments by the President of the Republic of Poland to judicial positions at the request of the NCJ from 2018 to August 2023.

113 See ODIHR *Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024).

ensure legal certainty.[114] Applying these considerations to defective judicial appointments in *Ástráðsson*, the Court pointed out that "…*while it is not within its competence to set a specific time-limit before which an irregularity in the appointment procedure could be challenged by an individual relying on the "tribunal established by law" right, it does not agree with the Government that the absence of such time-limit would in practice have the effect of rendering the appointments open to challenge indefinitely […]. This is because, with the passage of time, the preservation of legal certainty will carry increasing weight in relation to the individual litigant's right to a "tribunal established by law" in the balancing exercise that must be carried out. Needless to say, account must also be taken of the evidential difficulties that would arise with the passage of time and of the relevant statutory time-limits that may be applicable in the domestic law of the Contracting Parties to challenges of such nature*."[115] This implies that national authorities could set a time-limit after which the irregularity of the appointment cannot be challenged by a party in a case, regarding the validity of that judgement. Per analogy, with the passage of time, **the national authorities may invoke the need to ensure legal certainty to statutorily regularize some of the defective appointments**, perhaps even with retrospective effect (without changing the effects of earlier judgements).

97. Insofar as differing views may be taken on whether the status of judge applies to those appointed with the involvement of the NCJ as composed after the 2017 Amendments, depending on the type of courts and positions within the judiciary, as well as the nature and extent of the defect, different legal effects may be accorded to these appointments/promotions. As the ECtHR held in *Wałęsa*, "*the lack of independence of the reformed NCJ generally results in defects undermining the independence of and impartiality of a court, the effects thereof vary depending on the type of court and its position within the judiciary*".[116]

98. In light of the above, differentiating between the levels of courts and positions would allow flexibility in the approaches taken depending on the gravity of the breaches/irregularities at hand, and importantly the extent of the impact of those on the independence of the judiciary, and perception of independence and impartiality of appointed judges. While individualization is often said to be required, this is not always indispensable at the level of each particular individual case and may be done through establishing categories at the legislative level, although cogent reasons have to be provided for the choice of such an approach.[117] In the Polish case, the abundant international caselaw calling upon the authorities to rapidly clarify the status of all judges appointed in the deficient procedure involving the NCJ as composed after the 2017 Amendments could provide such a justification**.**

99. In light of the above, **proportional and differentiated measures that consider the specific circumstances of individual appointments or promotions (whether individual or category-based) are recommended to address these issues while respecting the rights of affected judges.** Hence, **the public authorities may choose to opt for a categorization of judicial appointments/promotions. Such categorization could be made based on the caselaw of the ECtHR and CJEU with respect to specific appointments/promotions to certain high-level judicial positions and possibly other criteria, such as the dates when individual judges applied for promotion and the state of the reforms and their evaluation by European courts at that time** (see also para. 128 *infra*) **or the unlikeliness that certain types of judicial appointments/promotions were carried out for improper political motives or perception thereof. On this basis, the status of certain categories of judges appointed or promoted by the NCJ as composed after the 2017 Amendments may be addressed *ex lege*, while others may require a more individualized approach.**

114 ECtHR, *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, paras. 137-140, where the Court held that "*limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time […]. Limitation periods are a common feature of the domestic legal systems of the Contracting States as regards criminal, disciplinary and other offences*".

115 ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 252.

116 See ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(a).

117 ECtHR, *Polyakh and Others v. Ukraine*, nos. 58812/15, 17 October 2019, para. 292.

100. Other factors to be taken into account in assessing the ECHR compatibility of a legislative scheme in the absence of an individualized assessment of an individual's conduct is the severity of the measures involved and whether the legislative scheme is sufficiently narrowly tailored to respond to the pressing social need it seeks to address in a proportionate manner.[118] In addition, certain safeguards have to be in place in order for such measures to be justified and comply with the principle of proportionality. Key among those is that those affected by the measures taken can have access to a court to review how the legal framework of the measures has been applied in particular cases, and to possibly challenge the administrative decisions regarding their career and associated benefits adopted on the basis of the Act.

8.3. Proportionality of the Measures to Address the Status of Defectively Appointed Judges

101. According to international and regional standards, the selection/promotion of judicial appointees should be based on merit, according to objective, pre-established, and clearly defined criteria,[119] aiming to assess the candidates' ability, integrity and experience.[120] The UN Basic Principles on the Independence of the Judiciary also highlight the importance of ensuring that the method of appointment "*shall safeguard against judicial appointments for improper motives*" and furthermore "*there shall be no discrimination against a person on the grounds of race, colour, sex, religion, **political or other opinion**, national or social origin, property, birth or status*".[121]

102. As noted, neither the caselaw of the CJEU nor the ECtHR provide clear guidance on how to address the status of *all* judges or which judges should be covered by the measures or what the consequences should be for their status. Yet, it cannot be discerned that it is absolutely necessary to remove all defectively appointed judges from their positions. The ECtHR did however unequivocally acknowledge that "*all the judges appointed to two entire chambers of the Supreme Court – the [now abolished] Disciplinary Chamber and the CERPA as well as judges appointed to the Civil Chamber on the reformed NCJ's recommendation do not meet the requirements of an 'independent and tribunal established by law'. By implication, the same applies to other Supreme Court judges so appointed*."[122]

103. In light of this, **the appointments made by the NCJ as composed after the 2017 Amendments to the CERPA and the Chamber of Professional Responsibility (a successor of the now abolished Disciplinary Chamber), as well as to other Chambers of the Supreme Court should be reconsidered. In this respect, authorities have a choice of various policy options at their discretion. This could be done, for instance, through regulating *ex lege* the status of these appointees. In case of *ex lege* invalidation of their appointment, new selection procedure should rapidly be initiated by a newly composed, independent NCJ** (see Sub-Section 8.5)**, which would appear as a rapid and effective option; or potentially through other means, including by granting the power to a newly composed, independent NCJ to address their status, ensuring that fair opportunities are offered to all eligible candidates to occupy these high-level judicial positions**. Indeed, there are circumstances where certain judges held back from seeking promotion not only because the NCJ's composition had become defective but also because of other measures, such as amendments to the disciplinary rules and proceedings,[123] which had made it more difficult for judges to exercise their decisional independence.

104. The consequences of possible invalidation of the appointments to the Supreme Court would need to be specified by law – especially with respect to the conditions and modalities of possible transfer to former or other judicial positions, remuneration and other benefits – with due consideration of the protection of the right to respect for private and family life under Article 8 of the ECHR (see also para. 108 *infra*

118 *Ibid.* para. 293.
119 See e.g., UNHRC *General Comment no. 32*, 2007, para. 19; CoE *Recommendation CM/Rec(2010)12*, para. 44; ODIHR 2010 *Kyiv Recommendations*, para. 21; *European Charter 1998* paras. 2.1. and 2.2. ; CCJE, *Opinion no. 10 (2007) on the Council for the Judiciary at the Service of Society*, paras. 50-51.
120 1985 *UN Basic Principles on the Independence of the* Judiciary, Principle 13; and CCJE *Opinion no. 1 (2001)*, paras. 17 and 29.
121 *Ibid.* Principle 10.
122 See ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(a).
123 See the Act amending the Law on the Organisation of Common Courts, the Act on the Supreme Court and certain other acts adopted on 20 December 2019 and signed by the President on 4 February 2020. See also ODIHR, *Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland* (14 January 2020).

regarding possible transfers to former or other judicial positions and Sub-Section 8.4 on the protection of individual rights).

105. It appears that there is a substantial number of appointees who graduated from the National School of Judiciary and Public Prosecution, who completed an assistantship and who thus followed a route that would *a priori* not require the NCJ as composed after the 2017 Amendments to exercise any significant discretion in order for them to be confirmed as judges. For this category of judges (estimated to be about 1,600 judges), the risk that the executive may have exercised undue influence over the appointment process is relatively minimal. **While authorities enjoy certain discretion in revisiting the status of all judicial appointments (since March 2018), in the case of entry-level appointments, validation or confirmation of status may be considered as a valid and appropriate policy option. In such cases, the legal drafters may consider providing legal grounds for a validation of all such appointments to be made by a (newly composed) independent NCJ, providing that this validation process would not create undue hardship on the functioning of this body. As the status of judges appointed after March 2018 is questioned due to the irregularities of the appointment procedure and the lack of independence of the NCJ, ex lege regulation validating the status of the judges may not suffice, unless followed by formal administrative decisions made by aa reformed (independent) NCJ.** In such case, the criteria, conditions and modalities of confirmation/validation of appointments of these entry-level judges should be clearly established in the legislation. In order not to be cumbersome, the newly reformed NCJ's role could consist, for instance, in re-issuing resolutions confirming the initial judicial appointments, while ensuring that they retain the seniority acquired, possible increments and other related benefits linked to the duration in office.

106. **The legal drafters should assess whether a statutory confirmation (recognition *ex lege*) of certain appointments to certain other categories of lower-level judicial positions could also be considered** providing that for such types of appointments, the involvement of the NCJ as composed after the 2017 Amendments cannot be considered or perceived to have led to undue influence by the executive undermining the integrity of the outcome of the appointment process.

107. Other categories of judges who benefited from resolutions of the NCJ as composed after the 2017 Amendments include those who were directly appointed from outside the judiciary to more senior judicial posts, and those who were already judges and secured promotions. On the one hand, some of the applicants after March 2018 who secured judicial posts above the usual entry level will have started their professional career before the 2017 system entered into force and were selected/promoted, at least officially, on the basis of objective criteria. As such, these judges who were appointed in conformity with the law in force, which has not been declared unconstitutional so far, would *a priori* have a legitimate expectation, and therefore an arguable claim, to not be demoted and to serve until retirement, unless other legal grounds for demotion or early termination would exist.[124] On the other hand, the 2017 reform of the NCJ has increased the influence of the executive and legislative branches over the work of the NCJ, and hence the risk of judicial appointments and promotions for improper political motives. On this basis, there are arguments for treating the status of more senior judicial appointments by the NCJ as composed after the 2017 Amendments as questionable.

108. With respect to promotions specifically, for instance those who have applied for managerial functions in courts or posts in higher courts (those who became presidents of courts, disciplinary spokespersons, or judges of court of appeals, or Supreme Administrative Court), they should have been aware of the fact that their promotion was enabled by a politically motivated reform of the NCJ, which constitutionality could be challenged. It would appear justifiable that such promotions should be

124 According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118.)

reconsidered entirely. At the same time, it may be conceivable to differentiate between those who were appointed before the decisions of the Supreme Court in December 2019 and January 2020 or prior to the *Grzęda* case in March 2022, and who may claim that they were not aware of or did not believe that there was a legal problem with their appointments/promotions given the legal framework in force at the time. Yet, those who were appointed after those key decisions could not justifiably rely on the reasoning that they were not aware of irregularities pertaining to their appointments/promotions. Therefore treating this category of judges separately may also be a valid legal/policy option.

109. In light of the above, **for certain senior appointments and promotions, such as presidents of courts, disciplinary spokespersons, judges of court of appeals, or judges of the Supreme Administrative Court, *ex lege* regulation for some of these categories could also possibly be considered as a valid legal/policy option. It is important however that these categories are defined on the basis of clear criteria, which would exclude potential arbitrariness or perception of thereof. In order to formally implement the law in practice, individual administrative decisions regarding judges affected by such *ex lege* regulations adopted by a reformed (independent) NCJ may be needed, subject to judicial review. A reformed, independent NCJ, could alternatively be given a power to invalidate or validate such appointments, based on clear criteria and procedure for doing so**. The legal drafters could also consider including further considerations when determining the relevant categories in legislation, including the dates when individual judges applied for promotion and the state of the reforms and their evaluation by European courts at that time. Similar date-based categories could be considered for appointments made to senior judicial posts from outside the judiciary, as discussed in the previous paragraph.

110. In case the option of *ex lege* invalidation is chosen by the legal drafters for certain categories of judicial appointments carried out with the involvement of the NCJ as composed after the 2017 Amendments, the legislation should **clarify the conditions and modalities of possible transfer to their former or other judicial positions, when the appointments were made from within the judiciary**. It is noted that according to international standards and recommendations, a transfer of judges or other equivalent measures may in principle be justified in exceptional cases of *legitimate* institutional re-organization.[125] It is also noted that Article 180 (5) of the Constitution of the Republic of Poland provides that *"[w]here there has been a re-organization of the court system or changes to the boundaries of court districts, a judge may be transferred to another court or retired with maintenance of full remuneration"*. In the Polish situation, as underlined above, the proposed re-organization responds to the urgent need to implement the judgements in the European courts. It may be possible that there are no longer vacant positions in the courts where the judges were previously sitting before their appointments. In this case, the judge concerned should in principle be appointed to another judicial office of equivalent status and tenure; or where this does not exist, s/he should be provided with full compensation for the loss of office.[126] An appointment to another post shall be subject to appeal before a court and/or other independent authority, to investigate the legitimacy of the transfer.[127] As also underlined in the ODIHR Warsaw Recommendations, "*transfers made in the context of court reorganization should respect the general principles of consent, fairness and transparency to the greatest degree possible*",[128] and this should ideally be reflected in the legislation regulating such a matter.

125 ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 33. See also e.g., ODIHR *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (30 August 2017), in English and in Polish, para. 70. See also *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), prepared by the Judicial Group on Strengthening Judicial Integrity, para. 16.3.

126 *Ibid.* ODIHR *Warsaw Recommendations*, October 2023, para. 33.

127 *Ibid.* ODIHR *Warsaw Recommendations*, October 2023, para. 33. See also 2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, para. 50; and 1998 European Charter of the Statute for Judges, para. 3.4.

128 ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 33. See also e.g., ODIHR *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (30 August 2017), in English and in Polish, para. 70. See also *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), prepared by the Judicial Group on Strengthening Judicial Integrity, para. 16.3.

111. In sum**, the legislation should clarify the conditions and modalities of transfer to their previous judicial positions or, if not possible, to a judicial office of equivalent status and tenure – ideally with the consent of the judges concerned, while ensuring that they have the possibility to appeal the administrative decisions regarding such transfers as well as related benefits**. In cases of return to previous judicial positions, Article 8 of the ECHR could in principle not be relied upon to complain of a loss of reputation or other repercussions that were the foreseeable consequences of one's own actions.[129]

112. Differentiating between the different categories of appointments and promotions would allow to reduce the personal scope of the contemplated measures to those situations where the risk of influence of the executive on the outcome of the appointments/promotions may have been higher, allowing for a more individualized approach in such cases. At the same time, **the legislation should clearly detail the different categories of judges, the criteria for categorization and possible validation or invalidation of appointments/promotions, the applicable procedure and consequences for each category, especially in terms of potential transfers, remuneration and other benefits, which may vary depending of the type and level of judges/courts, while taking into account the above-mentioned general considerations to guide the processes.** In any case, individual rights of the defectively appointed judges whose appointments would be invalidated, pursuant to Articles 6 and 8 of the ECHR, will also need to be respected, to the extent that those rights are engaged. The legislative solutions should favour measures that would minimize adverse effects on the personal and professional lives of affected judges, especially in terms of reputational damage and financial impact.

8.4. Individual Rights of the Defectively Appointed Judges

8.4.1. Right of Access to a Court

113. The question arises as to the right of access to court for those appointees whose rights and benefits would be impacted as a consequence of the adoption of a legislative reform to address the status of judges. As noted above, the judges were appointed or promoted by the NCJ as composed after the 2017 Amendments in conformity with the law in force, which has not been declared unconstitutional so far. Consequently, in the present circumstances, they may claim to *a priori* have a legitimate expectation, and therefore an arguable claim according to Article 6 (1) of the ECHR, to not be demoted and to serve until retirement, unless other legal grounds for early termination exist. This may especially be the case for those who were appointed before the decisions of the Supreme Court in December 2019 and January 2020 and at least prior to the *Grzęda* case, and who may claim that they were not aware of or did not believe that there was a legal problem with their appointments/promotions given the legal framework at the time.

114. In the case of *Denisov v. Ukraine*, the ECtHR, noting that the scope of the "civil" limb has been substantially extended in relation to public-employment disputes, underlined that "*a presumption that Article 6 applied to 'ordinary labour disputes' between a civil servant and the State"* and that *"[o]n the basis of the principles set out in Vilho Eskelinen and Others, Article 6 [ECHR] has been applied to employment disputes involving judges who were dismissed from judicial office […], removed from an administrative position without the termination of their duties as a judge […] or suspended from judicial office […]*."[130] Hence, the transfer of judges to their previously held positions or the return of other appointees who came from outside of the judiciary, would fall within the scope of Article 6 of the ECHR. If the consequences of the demotion/return do not involve other limitations such as inability to re-apply to the vacant positions or ineligibility for a certain period of time, the nature and

129 See e.g., ECtHR, *Gillberg v. Sweden [GC]*, no. 41723/06, 3 April 2012, para. 76.

130 ECtHR, *Denisov v. Ukraine [GC]*, no. 76639/11, 25 September 2018. See also *Grzęda v. Poland* [GC], paras. 326-327, where it is underlined that: "*Members of the judiciary should enjoy – as do other citizens – protection from arbitrariness on the part of the legislative and executive powers, and only oversight by an independent judicial body of the legality of a measure such as removal from office is able to render such protection effective*". See also e.g., ECtHR, *Pająk and Others v. Poland [GC]*, no. 25226/18 and 3 others, 24 October 2023, para. 139.

severity of the measures would not be as such as to render them "criminal" to render Article 6 applicable under its criminal limb.[131]

115. At the same time, as underlined above, the right of access to a court is not absolute. It may be subject to limitations that pursue a legitimate aim, providing that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, and that the said limitations do not reduce the access left to the individual in such a way or to such an extent that the very essence of the right of access to a court is impaired.[132]

116. Any reform aimed at clarifying the status of judges who have been defectively appointed not only aims at implementing the judgments of the international courts but also seeks to restore legal certainty, which is a key element of the rule of law. As such, it may be considered as pursuing a legitimate aim. At the same time, it would be important to ensure that those who may be demoted or returned have access to a court to contest such demotion/invalidation of their appointments on procedural and substantive grounds. Any review must be sufficient, which would ensure a review of both facts and law.[133] If the decision on demotion/invalidation of appointment is adopted by the NCJ, it will need to be assessed whether the NCJ composed of judge members appointed by their peers could be considered an "independent and impartial tribunal established by law" for that purpose, the decision of which are in any case challengeable before the Supreme Court (although the Supreme Court's panel deciding on such cases should not be composed of judges themselves appointed by the NCJ as composed after the 2017 Amendments). Particular care must be exercised with respect to higher level judges, where the likelihood of knowing the judges reviewing their cases is higher and therefore it is important that strict procedural rules for recusal are in place.

8.4.2. Right to Respect for Private and Family Life

117. The invalidation of appointments and return to their previously held positions may have consequences regarding the salaries and other benefits deriving from one's positions, unless the legislation would provide that the judges concerned will retain their salaries and benefits received in their previous positions prior to demotion/invalidation of appointment.

118. It is pertinent to assess if the removal of a defectively appointed judge or demotion brings it within the scope of the right to respect for private and family life which is protected *inter alia* by Article 17 of the ICCPR, Article 8 of the ECHR and Article 7 of the EU Charter of Fundamental Rights. Interference with the right to respect for private life is only acceptable if it complies with the strict requirements of Article 8 (2) ECHR, meaning that it is prescribed by law, pursues a legitimate aim and is necessary in a democratic society, and strictly proportionate to the aim pursued.[134] As a comparison, the ECtHR has considered that vetting leading to the dismissal from judicial office and consequential loss of all remuneration with immediate effect falls within the scope of Article 8 of the ECHR given the serious consequences for the "inner circle" of a judge, that is, her/his well-being and family members, but also, given the assessment of professional competence carried out by the vetting

131 ECtHR, *Polyakh and Others v. Ukraine*, nos. 58812/15, 17 October 2019, paras. 158-159.

132 See e.g., ECtHR, *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, para. 120. See also e.g., ECtHR, *Gumenyuk and Others v. Ukraine*, no. 11423/19, 22 July 2021, para. 70.

133 *ODIHR Report on the evaluation (pre-vetting) of candidates for members of the Superior Council of Magistracy in Moldova* (29 September 2023), paras. 102 and 106.

134 Article 8(2) of the ECHR provides: "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"*. See also ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, paras. 379-414, where the Court concluded that the interference was sufficiently foreseeable, in the public interest of reducing the level of corruption and restoring public trust in the justice system corresponding to the legitimate aims of national security, public safety and the protection of the rights and freedoms of others, and that the dismissal and lifetime ban imposed on the applicant and other individuals removed from office on grounds of serious ethical violations was not inconsistent with or disproportionate to the legitimate objective pursued by the State to ensure the integrity of judicial office and public trust in the justice system. In *Sevdari v. Albania*, no. 40662/19, 13 December 2022, paras. 94-96, where the Court held that "*the applicant's dismissal, based essentially on the fact that she was unable to prove that her husband had paid tax on some of his income from lawful activities in the previous two decades and in the absence of any indications of bad faith or deliberate violations by the applicant herself, was disproportionate to the legitimate aims pursued by the vetting process*", and hence concluded that it violated Article 8 of the ECHR. See also e.g., Venice Commission, *Kosovo - Opinion on the Concept Paper on the Vetting of Judges and Prosecutors and draft amendments to the Constitution*, CDL-AD(2022)011, para. 18.

body, triggering stigmatization in the eyes of society as being unworthy of performing a judicial function.[135]

119. In the Polish context, a decision on demotion or removal would not necessarily follow from an assessment of the performance and/or integrity of the judge concerned, which may mean that there is less of an impact on the reputation of a judge that is protected under Article 8 of the ECHR. Even with a demotion being a less severe step in this regard, the judges who return to their previous post as a result of the reform may claim an impact on their private life and their professional credibility. However, the ECtHR held that where negative effects complained of are limited to the consequences of the unlawful conduct which were foreseeable by the applicant, Article 8 cannot be relied upon to allege that such negative effects encroach upon private life.[136] Indeed, Article 8 of the ECHR could in principle not be relied upon to complain of a loss of reputation or other repercussions that were the foreseeable consequences of one's own actions.[137] At the same time, it could also be argued that the appointees relied on the law in force at the time and that the defect resulted from the conduct of the State. In any case, various factors should be taken into account, including if the judge was aware of the violation of the law, and whether they acted in good or bad faith.[138]

120. If Article 8 of the ECHR is deemed applicable, it will need to be assessed whether the interference pursues a legitimate aim and is necessary in a democratic society, and strictly proportionate to the aim pursued.[139] In this respect, the consequences of the measures contemplated (demotion and/or return to previous position, and possible reduction of salaries and/or obligations to repay part of salaries received when occupying previous position) with respect to the effect on "inner circle", including personal well-being and family members, one's opportunities to establish and develop relationships with others; and social and professional reputation would need to be assessed.[140]

121. In order to prevent any risk of finding a violation of the ECHR, it would be important to provide in the legislation that the affected persons are able to have their claim reviewed. **It is thus important for the affected persons/defectively appointed judges to be able to access a court to challenge the decisions and/or measures affecting their post, status and related remuneration and benefits, or other rights.** Therefore, the mechanisms and bodies that are in place to contribute to the process of restoring the rule of law should meet certain requirements and the procedure offer certain safeguards, including compliance with fair trial standards. It would not be sufficient to allow those who are affected to take part in a new selection/appointment process, without them having had access to an independent and impartial body presenting all the characteristics of a "independent and impartial

135 See e.g., ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, paras. 362-369. See also Venice Commission, *Kosovo - Opinion on the Concept Paper on the Vetting of Judges and Prosecutors and draft amendments to the Constitution*, CDL-AD(2022)011, para. 18.

136 ECtHR, *Gražulevičiūtė v. Lithuania*, no. 53176/17, 14 December 2021, para 102.

137 See e.g., ECtHR, *Gillberg v. Sweden [GC]*, no. 41723/06, 3 April 2012, para. 76.

138 Article 8(2) of the ECHR provides: *"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*". See also ECtHR, *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, paras. 379-414, where the Court concluded that the interference was sufficiently foreseeable, in the public interest of reducing the level of corruption and restoring public trust in the justice system corresponding to the legitimate aims of national security, public safety and the protection of the rights and freedoms of others, and that the dismissal and lifetime ban imposed on the applicant and other individuals removed from office on grounds of serious ethical violations was not inconsistent with or disproportionate to the legitimate objective pursued by the State to ensure the integrity of judicial office and public trust in the justice system.

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140 See ECtHR, *Gyulumyan and Others v. Armenia* (dec.), no. 25240/20, 21 November 2023, paras. 88-95.

tribunal established by law", either involved in the decision leading to the demotion or removal, or at minimum, reviewing any measure or decision to that effect on the basis of both facts and law.[141]

8.5. Institutional Mechanism and Procedure for Determining the Status of the Defectively Appointed Judges

122. In a decision of 7 June 2023, the CoE Committee of Ministers referred to the need to regulate the status of improperly appointed judges and the rulings issued by them. A note prepared by the Secretariat of the Committee of Ministers pointed out that comprehensive solutions are still required to ensure in a viable manner the right to tribunal established by law and that in addressing the status of deficiently appointed judges, the authorities need to elaborate general measures and that these "*do not need to result in the automatic removal of deficiently appointed judges from their office but could, for example, include some sort of mechanism to verify deficient judicial appointments after March 2018*".[142] The CoE Committee of Ministers further underlined that *"[t]hat mechanism would require the involvement of the NCJ, whose judicial members are elected by judges.*"[143] In any case, whatever the mechanism chosen, it should not be under the influence of other branches of government. Otherwise, some form of categorization by law may be contemplated.

123. As noted above, apart from the situations of judges of certain courts whose situation could potentially be dealt with *ex lege*, the determination of the status of any appointees not falling within these clearly defined categories may require a more individualized approach.

124. For any chosen solution that will be implemented by the public authorities to address the status of defectively appointed judges, the following consideration should be taken into account to define the most adequate and effective institutional mechanism and procedure:

- they should not give rise to risks of potential undue interference of the executive or legislative branches;
- outside of the circumstances where the status is addressed *ex lege*, the determination of the status of defectively appointed judges should be carried out by an independent body presenting all the characteristics of a "tribunal" under Article 6 (1) of the ECHR, or at least subject to judicial review;
- the involvement of existing bodies if they are composed in accordance with international standards and are effective/operational should be preferred, rather than resorting to *ad hoc* mechanism that would need to be established for that purpose.

125. It is important to explore the role that the NCJ and potentially other judicial self-governing bodies, such as assemblies of judges, could play in this regard. To restore the rule of law and the independence of the judiciary, and to embed trust in the process, the institutional mechanisms and procedure for determining the status of the defectively appointed judges should not be under the influence of the executive or the legislature. Hence, in practical terms, if decisions on demotion or invalidation of appointments are made by the NCJ as composed after the 2017 Amendments, the impartiality and independence of the NCJ itself may be questioned. Therefore, the NCJ, composed of judge members appointed by their peers, and presenting all guarantees of independence, should ideally have a role in the process. This seems to be acknowledged in the abovementioned note prepared by the Secretariat of the Committee of Ministers in which it considers that a mechanism to verify deficient judicial appointments would require the involvement of the (validly composed) NCJ. Such involvement would give legitimacy to the reform process, whereas this could be less achievable through an *ex lege*

141 *ODIHR Report on the evaluation (pre-vetting) of candidates for members of the Superior Council of Magistracy in Moldova* (29 September 2023), paras. 102 and 106.

142 Committee of Ministers, Notes, 1468th meeting (5-7 June 2023) (DH) - H46-18 *Reczkowicz* group, application no. 43447/19; *Broda and Bojara* (no. 26691/18) and *Grzęda v. Poland* [GC], no. 43572/18.

143 Committee of Ministers, Notes, 1468th meeting (5-7 June 2023) (DH) - H46-18 *Reczkowicz* group, application no. 43447/19; *Broda and Bojara* (no. 26691/18) and *Grzęda v. Poland* [GC], no. 43572/18.

solution or through the involvement of an *ad hoc* independent body that would be established for that purpose. This may not be feasible, if the reform of the NCJ contemplated by the Act under review is not implemented.

126. Given the margin of appreciation and procedural autonomy left to states to address the violations of the right to a fair trial, there is no requirement to establish an additional mechanism to cure the violations of international human rights standards.

127. In light of the above, it is important **to envisage in the legislation an institutional mechanism to ensure that grounds for invalidation or validation of the appointments/promotions provided by law are rightly applied to an individual appointee may be required. Involving existing judicial bodies in the process, if they are composed in accordance with international standards and are effective/operational, such as an (independent) NCJ composed of judge members s/elected by their peers, possibly after seeking the opinions of the assembly of judges, is also important to fully insulate the process from potential politicization in the future. Any decision concerning the individual status of a defectively appointed judge should be subject to judicial review mechanism meeting the criteria of an "*independent and impartial tribunal established by law*" under Article 6 (1) of the ECHR, not themselves involving defectively appointed judges and with strict procedural rules for recusal in place.**

9. Recommendations Related to the Process of Preparing and Adopting the Act and Other Rule of Law-related Legislative Initiatives

128. As noted above, the complexity and scale of the needed reform to address the systemic deficiencies of the judicial system in Poland is immense and requires a thorough and coherent policy underpinning the reform process to prevent a piecemeal and fragmented approach to legislative changes that may be detrimental to reform efforts. At the same time, given the urgency to address certain systemic dysfunctions in order not to further aggravate the situation, a sequenced approach to legislative reform could be justifiable in the circumstances, providing that it is accompanied by an in-depth reflection on a comprehensive reform of the judicial system that is prepared in a participatory and inclusive manner, including with active and meaningful involvement of representative of the judiciary, civil society and the public, ensuring that the contemplated policy and legislative options are debated at length.[144]

129. Indeed, OSCE participating States have committed to ensure that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*" (1990 Copenhagen Document, para. 5.8).[145] Moreover, key commitments specify, *"[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (1991 Moscow Document, para. 18.1).[146]

130. As done in previous opinions, ODIHR would like to reiterate that is a good practice when initiating fundamental reforms of the judicial system, for the judiciary and civil society to be consulted and play an active part in the process. In this regard it is acknowledged that authorities have initiated consultations and sought advice from both national and international organizations.

131. With regard to the judiciary's involvement in legal reform affecting its work, the CCJE has expressly stressed "*the importance of judges participating in debates concerning national judicial policy*" and the fact that "*the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system*".[147] The 1998 European

144 See ODIHR, *Guidelines on Democratic Lawmaking for Better Laws* (2024), Principle 8.
145 See *1990 OSCE Copenhagen Document*.
146 See *1991 OSCE Moscow Document*.
147 CCJE *Opinion no. 18 (2015)*, para. 31, which states that "*the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system*".

Charter on the Statute for Judges also specifically recommends that judges be consulted on any proposed change to their statute or other issues affecting their work, to ensure that judges are not left out of the decision-making process in these fields.[148] Public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.[149] Consultations on legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.[150] To guarantee effective participation, consultation mechanisms should allow for input at an early stage, from the initial policymaking phase *and throughout the process*,[151] meaning not only when the draft is being prepared but also when it is discussed before Parliament, be it during public hearings or during the meetings of the parliamentary committees. Given the sensitivity and importance of such a wide-ranging reform, it is fundamental that all voices are heard, even those that may be critical of the proposed initiatives with a view to address the issues being raised and achieve broad political consensus and public support within the country about such a reform. Ultimately, this tends to improve the implementation of laws once adopted, and enhance public trust in public institutions in general.

132. The upcoming reform process relating to the judiciary, especially of this scope and magnitude, **should be open, transparent, inclusive, and involve effective and extensive consultations, including with representatives of the judiciary, professional community of judges and of lawyers, the academia, civil society organizations and the public, should allow sufficient time for meaningful discussions in the legislative body and should involve a full impact assessment including of compatibility with relevant international human rights and rule of law standards, according to the principles stated above. Adequate time should also be allocated for all stages of the policy- and law-making process, at the governmental stage and before the legislature.** It would be advisable for relevant stakeholders to follow such principles in future rule of law reform efforts. ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary.

[END OF TEXT]

148 European Association of Judges, *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998), para. 1.8. See also 2010 CCJE Magna Carta of Judges, para. 9, which states that *"[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)*"; and ENCJ, *2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate*, Recommendation 5, which states that *"[j]udiciaries and judges should be involved in the necessary reforms"*.

149 See *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (from the participants to the Civil Society Forum organized by ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

150 See ODIHR, *Guidelines on Democratic Lawmaking for Better Laws* (2024), Principle 7.

151 See ODIHR, *Guidelines on Democratic Lawmaking for Better Laws* (2024), Principle 7.