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URGENT INTERIM OPINION ON THE DRAFT ACT OF POLAND ON RESTORING THE RIGHT TO AN INDEPENDENT AND IMPARTIAL COURT ESTABLISHED BY LAW BY REGULATING THE EFFECTS OF RESOLUTIONS ADOPTED BY THE NATIONAL COUNCIL OF THE JUDICIARY IN 2018-2025

POLAND

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Based on an unofficial English translation of the Draft Act provided by the Ministry of Justice of Poland.

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

As consistently underlined in previous ODIHR opinions concerning judicial reform in Poland in 2017-2025, while every state has the prerogative to reform its judicial system, such reforms should always comply with the country's constitutional requirements, adhere to the rule of law principles, and be fully aligned with international law and human rights standards, as well as OSCE commitments. These core principles should guide legislative choices when designing measures to execute the judgments of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) pertaining to the systemic deficiencies of the judicial system in Poland. Any intervention aimed at remedying such deficiencies should therefore be carefully justified and strictly proportionate, adequately balancing the public interest in restoring the rule of law in Poland with the individual rights of those affected by violations of their fair trial rights as well as the rights of those who will be impacted by the contemplated reform.

The breadth and depth of the reforms required to address the systemic deficiencies of the judicial system arising from defective process of judicial appointments and promotions carried out by the National Council of the Judiciary (NCJ) as defectively composed after the 2017 Amendments, is unprecedented. While a sequenced approach to reform efforts, as suggested by the legal drafters, may be justifiable, this should be 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, including the reform of the NCJ. In this respect, it must be reiterated that the reform of the composition of the NCJ should remain among the priorities as the existing legal arrangement whereby the judge members of the NCJ are elected by the *Sejm* (lower house of the Parliament) constitutes one of the structural dysfunctions which has led to systemic deficiencies of judicial appointment and promotion system and may further aggravate the situation if not rapidly addressed. It is therefore crucial to consider legislative and policy options addressing the systemic deficiencies identified in the case law of the CJEU and ECtHR, including by restoring the independence of the NCJ through reinstating the modalities of s/election of NCJ judge members by their peers.

In this context, the *Draft Act of Poland on Restoring the Right to an Independent and Impartial Court Established by Law by Regulating the Effects of Resolutions Adopted by the National Council of the Judiciary in 2018-2025* (Draft Act) under review, which seeks to clarify the status of persons who have been defectively appointed or promoted to judicial offices by the NCJ since March 2018 and the status of their decisions **is a welcome and necessary step toward restoring the integrity of judicial proceedings and ultimately strengthening public trust in the justice system**.

The Draft Act contains a number of positive features. Overall, it presents a structured and generally rather balanced response to address the large-scale irregularities of judicial appointment processes involving the NCJ as composed after the 2017 Amendments. The Draft Act seeks to clarify the status of all persons so appointed and of their decisions, as called upon in the *Wałęsa* pilot judgement, which concludes that the

defective appointment mechanism of the Polish system and resulting appointments constitute a violation of the right to an independent and impartial tribunal established by law, although acknowledging that the effects may vary depending on the type of court and its position within the judiciary.

The framework proposed by the Draft Act serves the legitimate aim of seeking to restore the requirement of a court "established by law" and to ensure more legal certainty by clarifying the legal consequences of the irregularities in judicial appointments and promotions. The categorization of appointees envisaged in the Draft Act overall constitutes a valid policy/legal option, while falling within the wide margin of appreciation and the state's autonomy in the way it decides to cure the systemic violations of the right to a lawful tribunal. It tends to *prima facie* reflect the key principles and safeguards outlined in the 2024 ODIHR Final Opinion on the NCJ Bill.

At the same time, the Urgent Interim Opinion also highlights several issues which may deserve additional consideration and require adjustments in the Draft Act, in order to more adequately balance the public interest in restoring the rule of law in Poland with the rights of those impacted by violations of their fair trial rights and those appointed or promoted by the NCJ since March 2018 who will be affected by the contemplated reform.

Statutory Delegations - While the statutory delegations envisaged for defectively appointed or promoted judges who held valid judicial positions prior to 2018 could constitute an acceptable policy option falling within the state's margin of appreciation, it may nevertheless appear to perpetuate existing systemic dysfunctions, as long as the underlying source of the deficiency in their current judicial status remains unresolved. Therefore, alternatively, the legal drafters could assess whether existing or *ad hoc* temporary delegation mechanisms, which would be open to any judge, not only those defectively appointed or promoted, could be envisaged. The Draft Act could then clearly specify the modalities of such temporary delegation, including the legal grounds and timeframe for a delegation of judges to the specific judicial positions. Thus, the competent body of the respective courts, including court presidents and, when applicable, court collegiums, will retain the ultimate authority to formally delegate a judge and thus legitimizing their status. This would also allow the competent judicial bodies to assess the best interests and specific needs of the respective courts, in line with the principle of judicial self-governance.

Modalities and procedure for clarifying the status of persons appointed or promoted to judicial offices by the NCJ since March 2018 – Adjustments may likewise be considered concerning the modalities and procedure for carrying out the categorization of persons appointed or promoted to judicial offices for those not subject to *ex lege* validation. Instead of return to previously held judicial position (and statutory delegation) occurring automatically by operation of law, solely on the basis of the list compiled by the Ministry of Justice (MoJ), the legal drafters could consider whether **a more individualized determination of the legal consequences of the loss of legally binding force of the resolutions of the NCJ as composed after the 2017 Amendments would constitute an appropriate option.** The Draft Act could be limited to establishing such consequences, but stating that their application to individual judges would be determined in an individual administrative or other decision. Such a decision should ideally be adopted by an independent NCJ (rather than an executive body), providing that it would be composed in

accordance with international standards and recommendations, i.e., newly composed with its judge members having been s/elected by their peers, since the NCJ would be institutionally better placed to determine the individual status of judges. At the same time, acknowledging that the reform of the NCJ remains contingent upon future legislative developments and thus cannot be presumed at this stage, it could be conceivable to envisage the involvement of the MoJ, providing that the criteria and conditions of the status determination are clearly established by law with no possibility of arbitrary or discretionary interpretation. In such case, the person concerned should have the ability to consent or otherwise to challenge before court the categorization/transfer and related entitlements (including salaries, acquired seniority, increments, social, retirement and other benefits), within a specific timeframe. Judicial review should determine whether the judge falls within the categories defined in the Draft Act and whether the resulting legal consequences are consistent with applicable legislation, including the Draft Act. This could also contribute to better align the process with the requirements of Article 180 (2) of the Constitution since the said judges would have either consented to the categorization and corresponding transfer, or this would be decided/confirmed by a court.

While this would make the process more complex and prevent an automatic effect of the remedial reform, it would ensure proper judicial oversight over the application/interpretation of the Draft Act, if it comes into force, and could help reduce the risk of questioning the constitutionality of the contemplated measures, while also guaranteeing access to a court for the judges impacted by the reform. At the same time, the legal drafters should also assess whether such a solution may risk unduly impairing the functioning of the judicial system. In any case, the affected persons should be able to access a court to challenge the consequences of the application of the Draft Act, especially with respect to related entitlements (including salaries, acquired seniority, increments, social, retirement and other benefits).

In addition, to ensure compliance with norms of international law, it is also important to consider the passage of time when balancing the preservation of legal certainty and the security of judicial tenure in relation to the individual litigants' right to a "tribunal established by law". The more time passes from the moment of a defective judicial appointments, the more limited the margin of appreciation granted to authorities to remedy the situation would be, also in light of the greater expectations of individuals holding judicial offices.

Legal effects of the judgements rendered since 2018 by the persons defectively appointed or promoted to judicial offices – It is acknowledged that there is no strict requirement to automatically re-examine judgments or decisions rendered with the involvement of persons defectively appointed or promoted to judicial offices. Nonetheless, it is expected that for states to remedy the violations of the right to a fair trial by an independent and impartial tribunal established by law, instances involving a miscarriage of justice or serious violation of international human rights standards would call for reconsideration of a judicial decision. The Draft Act provides for the possibility of seeking the reconsideration of the judgements rendered since 2018 with the involvement of the persons defectively appointed or promoted to judicial offices. At the same time, it should also provide reasonable and proportionate procedural deadlines for seeking reversal, enabling parties to prepare meaningful applications without undermining the effectiveness of the remedy. Further, the legal drafters

should **re-assess whether the admissibility requirement to have raised the issue of the flawed or defective composition of the court during the original proceedings in order to seek the reversal of judgments is appropriate and not unduly limiting, with a view to ensure that remedies are accessible to all affected parties**. That being said, ODIHR acknowledges that the re-examination of all cases in which a defectively appointed judge participated would not be practically feasible, given the systemic nature of the defects in judicial appointments in Poland, the very large number of judgments affected, and the wide temporal scope of the irregularities, and may risk overwhelming the courts, undermining legal certainty, and destabilizing the justice system. Hence, **the material scope of re-examination should be potentially reserved for certain categories of criminal cases owing to their serious consequences, as well as certain civil cases, where the aggrieved party can demonstrate that there was a serious violation of fundamental rights. In any case, adequate compensatory mechanisms should be possible when the parties to the proceedings have sustained some losses or damage as a result of the judgment rendered with the participation of persons appointed or promoted by the NCJ as composed after the 2017 Amendments, beyond the mere harm resulting from such irregularity**.

At the same time, in the latter cases, pecuniary compensation should require that the individual demonstrates a direct causal link between the violation and the loss or damage incurred. Should existing domestic mechanisms prove insufficient for that purpose, the legal drafters should assess whether a new, rule-of-law-compliant remedial mechanism with clear, foreseeable grounds, safeguards against abuse, and full respect for legal certainty should be introduced. In order to reduce the risk of burdening the courts, the procedural modalities of the re-examination could be adjusted, for instance that they be rendered without hearing, unless the court would decide otherwise, and the decision may not be subject to appeal, assuming that these decisions are taken at appeal level. As an admissibility requirement for seeking re-examination with a view to manage a potential influx of petitions, the legal drafters could consider requiring that based on the circumstantial and external factors, the irregularities of the appointment procedure may have raised legitimate doubts in a reasonable person that it has impacted the independence or impartiality of one of the judges adjudicating in the initial proceeding. At the same time, the decisions of the Supreme Court involving persons appointed or promoted by the NCJ as composed after the 2017 Amendments may deserve distinct treatment in light of the case law of the ECtHR and CJEU and given their impact, in particular, given the defects identified in the ECtHR *Wałęsa* judgment with respect to the extraordinary appeal procedure held incompatible with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Finally, although the Draft Act rightly seeks to abolish the Chamber of Extraordinary Review and Public Affairs of the Supreme Court (CERPA), the failure to expressly repeal the underlying statutory provisions governing the extraordinary review procedure and to establish a new, effective remedy capable of addressing structural miscarriages of justice and violations of international human rights standards may leave individuals without guaranteed access to effective redress and this should be addressed, or re-assessed.

More detailed and elaborated considerations and concrete recommendations may be provided in the Final Opinion.

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 27 October 2025, the Minister of Justice of Poland sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") an urgent request for a legal review of the Draft Act of Poland on Restoring the Right to an Independent and Impartial Court Established by Law by Regulating the Effects of Resolutions Adopted by the National Council of the Judiciary in 2018-2025 (hereinafter "the Draft Act").

2. On 29 October 2025, ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion on the compliance of the Draft Act with international human rights standards and OSCE human dimension commitments.

3. Given the short timeline to prepare this legal review as the requestor asked that it be ready by the end of November 2025, ODIHR decided to prepare an Urgent Interim Opinion on the Draft Act.

4. This Urgent Interim Opinion does not provide a detailed analysis of all the provisions of the Draft Act but primarily focuses on the most concerning issues in terms of compliance with the rule of law and international human rights standards, including with respect to the legal effects of the resolutions of the National Council of Judiciary (hereinafter "NCJ") as composed pursuant to the 2011 Act on the NCJ, as amended by the Act of 8 December 2017, and the status of "judges"[1] so appointed or promoted by this body as well as the effects of their decisions. In particular, the Urgent Interim Opinion addresses the proportionality of measures envisaged by the Draft Act in order to restore the rule of law and ensure proper administration of justice in Poland, while ensuring access to justice and compliance with fair trial rights standards. While acknowledging that more wide-ranging reform 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 Draft Act submitted for review. A more comprehensive and detailed analysis may follow, that may revisit some of the preliminary findings and recommendations contained in the Urgent Interim Opinion and offer a final assessment of the compliance of the proposed measures with international human rights standards and OSCE human dimension commitments. The absence of comments on certain provisions of the Draft Act should not be interpreted as an endorsement of these provisions and the content of this Urgent Interim Opinion is without prejudice to any written analysis and recommendations that ODIHR may provide in the future.

5. The present legal analysis should also be read in light of the several opinions and notes on judicial reform in Poland published by ODIHR since 2017,[2] in particular the ODIHR Final Opinion on the Act Introducing Amendments to the Act on the National Council of the Judiciary of Poland (hereinafter "2024 ODIHR Final NCJ Opinion")[3] and the ODIHR Note on the Effects of Decisions of Judges Appointed in a Deficient Manner (hereinafter "2024 ODIHR Note").[4]

1 For the purpose of this Urgent Interim Opinion, the use of the term "judge" when referring to the appointment or promotion made by the NCJ as composed pursuant to the 2011 Act on the NCJ, as amended by the Act of 8 December 2017, does not aim to confer any indication as to their status.

2 Available here: <https://legislationline.org/Poland/Judicial and Prosecution Systems>, including: *ODIHR Final Opinion on the Act Introducing Amendments to the Act on the National Council of the Judiciary of Poland*, 31 December 2024, in English and in Polish; *ODIHR Opinion on Two Bills of the Republic of Poland on the Constitutional Tribunal (as of 24 July 2024)*, 24 August 2024, in English and in Polish; *ODIHR Note on the Effects of Decisions of Judges Appointed in a Deficient Manner*, 12 August 2024, in English and in Polish. See also *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 *ODIHR 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.

3 *ODIHR Final Opinion on the Act Introducing Amendments to the Act on the National Council of the Judiciary of Poland*, 31 December 2024, in English and in Polish.

4 *ODIHR Note on the Effects of Decisions of Judges Appointed in a Deficient Manner*, 12 August 2024, in English and in Polish.

6. This Urgent Interim 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.[5]

II. SCOPE OF THE OPINION

7. The scope of this Urgent Interim Opinion covers only the Draft Act submitted for review. Thus limited, the Urgent Interim Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the judiciary in Poland. The Urgent Interim 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.

8. 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.

9. 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, all ODIHR legal reviews seek to integrate, as appropriate and relevant, a gender and diversity perspective.

10. This Urgent Interim Opinion is based on an official English translation of the Draft Act provided by Ministry of Justice (hereinafter "MoJ") of Poland, which is attached to this document as an Annex. Errors from translation may result. Should the Urgent Interim Opinion be translated in another language, the English version shall prevail.

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

5 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 […]"*.

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. Poland 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.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

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

12. For a detailed overview of the applicable international and regional human rights standards and OSCE commitments as well as background regarding the reform of the NCJ and of the judiciary in Poland since 2017, reference is made in particular 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 and the *ODIHR Note on the Effects of Decisions of Judges Appointed in a Deficient Manner*. Specific mention of relevant standards and recommendations are also included throughout the Urgent Interim Opinion whenever relevant.

13. In the previous legal reviews published in 2017-2024, ODIHR has consistently acknowledged the complexity, scale and urgency of the reform required to address the systemic deficiencies of the judicial system in Poland as identified by the ECtHR, the CJEU, international organizations, as well as national observers. At the same time, 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 human dimension 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 and the chosen modalities for reform should be duly justified in light of international human rights and rule of law standards.

14. In seeking to address the legal effects of the resolutions of the NCJ as composed pursuant to the 2011 Act on the NCJ, as amended by the Act of 8 December 2017, and as a consequence the status of persons appointed or promoted by this body since March 2018, as well as the effects of their decisions, the Urgent Interim Opinion raises a number of interrelated questions. 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, particularly legal certainty, the binding force of judicial decisions (*res judicata*), the effective enjoyment of the right to access to a court, the separation of powers, as well as the principle of irremovability of judges as a fundamental guarantee of judicial independence. The Draft Act has also implications for the individual right to a fair trial by an independent and impartial tribunal established by law for parties to proceedings already adjudicated (or that may in future be adjudicated) by defectively appointed or promoted persons who may temporarily (or permanently) retain their position. It may also potentially affect the rights of those persons, including their right of access to a court and to other aspects of a right to fair trial, as well as the right to respect for private and family life. These issues must also be considered alongside broader concerns pertaining to the efficient operation of the justice system and the proper administration of justice.

1.1. Judicial Independence, Security of Tenure and Principle of Irremovability

15. The rule of law is an inherent element of democracy and is fundamental to a system of functioning and effective checks and balances between branches of state power.[8] The independence of the

8 The "rule of law" has been defined at the U.N. level as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency", see "The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General" (S/2004/616, 23 August 2004), para. 6. See also UN Human Rights Council, Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, A/HRC/29/L.11, 30 June 2015, which stresses "*the importance of ensuring accountability, transparency*

judiciary constitutes a fundamental principle and an essential element of any democratic state based on the rule of law.[9] The requirement that courts be independent forms part of the essence of every person's right to a fair trial, i.e., to a fair and public hearing by a competent, independent and impartial tribunal established by law, as guaranteed by Article 14 of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR"),[10] Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR") and Article 19(1) of the Treaty on European Union (hereinafter "TEU")[11] read in the light of Article 47 of the *EU Charter of Fundamental Rights*. The principle of judicial independence is also crucial to upholding other international human rights standards.[12] This independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being influenced by the executive or legislative branches or other external sources. The independence of the judiciary is also essential to engendering public trust in and the credibility of the justice system in general, so that everyone is seen as equal before the law and treated equally, and that no one is above the law.

16. With respect to the security of tenure and irremovability of judges, which are integral parts of the guarantee of judicial independence,[13] judges – *who have been appointed in conformity with the requirements of the rule of law* – must have guaranteed tenure until they reach the retirement age or the expiry of their term of office, where this exists. [14] Exceptions to this rule need to be limited to

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and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards". At the OSCE level, OSCE participating States have affirmed that *"the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression*"; see CSCE/OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, para. 2. See also Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, Part II, Sections B, D and E, as endorsed by the Parliamentary Assembly of the Council of Europe (PACE) on 11 October 2017 (see *PACE Resolution 2187(2017)*).

9 See UN Human Rights Council, Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, A/HRC/29/L.11, 30 June 2015, which stresses "*the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards".* As stated in the OSCE Copenhagen Document 1990, *"the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression*" (para. 2).

10 UN International Covenant on Civil and Political Rights (hereinafter "ICCPR"), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Poland ratified the ICCPR on 18 March 1977. See also UN Human Rights Committee, *General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, which provides guiding interpretation of Article 1 of the ICCPR.

11 See the consolidated versions of the Treaty on European Union, OJ C 326, 26 October 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>. Article 2 of the Treaty on European Union states: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." See also Court of Justice of the European Union (CJEU), *European Commission v. Republic of Poland*, C-619/18, 24 June 2019, para. 42. 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. It developed a similar assessment test as the ECtHR, namely relying on the nature and gravity of the irregularity and whether it creates a (real) risk of undue influence of other State authorities on the appointment; see CJEU, *Simpson v. Council* [GC], C-542/18, 26 March 2020, para. 75. In the joined cases of *AK v. Krajowa Rada Sądownictwa and CP, DP v. Sąd Najwyższy,* the CJEU underlined that the determination of whether a court is independent is based upon the objective circumstances in which the court is formed, the way and circumstances in which its members are appointed, and the features of the court that could give rise to "*legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law*" (CJEU, *A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy* [GC], C-585/18, C-624/18 and C-625/18, 19 November 2019). The CJEU in the case of *W.Ż.* also held that "*an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the requirement that a tribunal be established by law particularly when that 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, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system*" (CJEU Grand Chamber, W.Ż., C-487/19, preliminary ruling request by the Supreme Court (Civil Chamber) of Poland (regarding the Chamber of Extraordinary Control and Public Affairs of the Supreme Court), 6 October 2021, para. 130).

12 See e.g., *OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems*, 6 December 2005.

13 See e.g., UN Human Rights Committee, *General Comment no. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, para. 19; *CoE Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, 17 November 2010, para. 49; ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 32.

14 ibid. See also *UN Basic Principles on the Independence of the Judiciary*, endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 12; Consultative Council of European Judges (CCJE), *Opinion no. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*, paras. 57 and 60. The *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998), adopted by

specific cases that are clearly set out in law, and decisions to remove judges should not be taken lightly, or in a summary manner.[15] The European Court of Human Rights (hereinafter "ECtHR") and the CJEU (hereinafter "Court of Justice of the European Union") have specifically 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 and are proportionate to that objective, and do not result in a perceived or real lack of independence and impartiality of the court.[16] 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*".[17]

17. As noted in the 2024 ODIHR Final NCJ Opinion, it is unclear whether the irregularities in the appointments carried out by the NCJ as composed after the 2017 Amendments, may, under the existing domestic legal framework, lead to the conclusion that all persons thus appointed are not considered as "judges".[18] If they are not considered to have the status of judges, the principle of irremovability would not apply to them.[19] In this respect, relevant judgments of the ECtHR, CJEU and Supreme Court of Poland have found a violation of the right to a fair trial by an independent and impartial tribunal established by law when a person appointed/promoted to the Supreme Court by the NCJ as composed after the 2017 Amendments had taken part in adjudication, thereby putting into question their status of lawful judge and the related security of tenure and irremovability that should protect lawful judges to guarantee their independence. In any case, as noted above, the principle of irremovability is not absolute and exceptions to that principle would 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*".[20] In this respect, the proposed reform pursues a legitimate objective of seeking to restore the requirement of a court "established by law" and clarify the status of judges to ensure more legal certainty and reinstate/reinforce judicial independence.

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the European Association of Judges, DAJ/DOC (98)23, affirms that this principle extends to the appointment or assignment to a different office or location without consent (other than in cases of court re-organization or where such actions are only temporary). See also OSCE, *1991 Moscow Document*, para. 19.2 (v), which includes a specific commitment to guarantee the tenure of judges. See also 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).

15 See 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. 67.

16 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.

17 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 240.

18 See *ODIHR Final Opinion on the Act Introducing Amendments to the Act on the National Council of the Judiciary of Poland*, 31 December 2024, in English and in Polish, para. 86.

19 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 it is underlined that to qualify for irremovability, an appointment must satisfy both domestic constitutional standards and European standards.

20 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.

1.2. Principle of *Res Judicata*

23. With respect to the effects of decisions rendered by persons appointed or promoted by the NCJ as composed after the 2017 Amendments, it must be reiterated that legal certainty is one of the fundamental rule of law principles, and requires, among others, that where courts have finally determined an issue, their ruling should not be called into question (or principle of *res judicata*), meaning that final judgments must be respected, unless there are cogent reasons for revising them.[21] The ECtHR also emphasized that *"[t]he reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law*".[22] In principle, in an efficient judicial system, errors and shortcomings in court decisions, including those allegedly affecting the rule of law and 'social justice', should be addressed through ordinary appeal and/or cassation proceedings before the judgment becomes final, thus avoiding the subsequent risk of frustrating the parties' right to rely on binding judicial decisions.[23] Otherwise, "extraordinary reviews" (or equivalent procedures), where they exist, or other procedure or mechanism for re-examination or re-opening of cases, should only be lodged to correct fundamental judicial errors and miscarriages of justice, in other words, when made necessary by circumstances of a substantial and compelling character, but not to carry out a fresh examination of a case, or some form of "disguised" appeal.[24] The principle of legal certainly should be weighed in when considering the effects of any judgments by judges whose appointments were defective, or issued by certain panels in which these judges took part.

24. When addressing the consequences of a judge being appointed in a manner that was defective, in *Ástráðsson v. Iceland*, the ECtHR observed that several interrelated and often complementary equally important rule of law principles, including the principle of legal certainty and the right to "a tribunal established by law", need to be balanced, even where they may in some circumstances come into competition.[25] The Court further underlined, however, that the principles of legal certainty and *res judicata* are not absolute.[26] The ECtHR concluded 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 […], as relevant, in the particular circumstances of a case*",[27] such as to correct "*fundamental defects or a miscarriage of justice*".[28] Situations in which a case was incomplete or one-sided or where the proceedings led to an erroneous outcome, cannot of and by itself, "…*in the absence of jurisdictional errors or serious breaches of court procedure, abuses of power, manifest errors in the application of substantive law or any other weighty reasons stemming from the interests of justice, indicate the presence of a fundamental defect in the previous proceedings*".[29]

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21 See e.g., ECtHR, *Brumărescu v. Romania*, no. 28342/95, 28 October 1999, para. 61; and *Ryabykh v. Russia*, no. 52854/99, 24 July 2003, paras. 51-52. See also e.g., Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, Part II, Sections B, D and E, as endorsed by the Parliamentary Assembly of the Council of Europe (PACE) on 11 October 2017 (see *PACE Resolution 2187(2017)*), pages 25-27. See also Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, para. 63.

22 ECtHR, Stere and Others v. Romania, no. 25632/02, 23 February 2006, para. 53. See also *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 222, where the Court underlined that respect for the principle of *res judicata* "*by safeguarding the finality of judgments and the rights of the parties to the domestic proceedings – including any persons involved as victims – serves to ensure the stability of the judicial system and contributes to public confidence in the courts*".

23 See Committee of Ministers of the Council of Europe, *Resolution on the Execution of the Judgments of the European Court of Human Rights in the Ryabykh Group (113 cases) against Russian Federation*, 10 March 2017, Appendix 2, Part III (A). See also ECtHR, *Nelyubin v. Russia*, no. 14502/04, 2 November 2006, para. 28, where it is specifically noted that "supervisory reviews" (or equivalent procedures) should in principle not be possible if a defect could have been rectified in appeals proceedings.

24 See e.g., ECtHR, *Ryabykh v. Russia*, no. 52854/99, 24 July 2003, paras. 51-52.

25 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 237.

26 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 238.

27 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 240.

28 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, paras. 238 and 240; and *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 224.

29 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 225.

25. The CJEU adopts a similar approach and has held that to ensure the stability of the law and legal relations and sound administration of justice, final decisions should not in principle be reversed.[30] The CJEU further underlined that "*in the absence of EU legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness*".[31] The CJEU also specifically recognized a decision adopted by defectively appointed judges, in that case the Disciplinary Chamber of the Supreme Court of Poland, to be ineffective, on the ground that it was contrary to the second subparagraph of Article 19(1) TEU and that an applicant must be allowed to invoke such ineffectiveness before other national authorities or jurisdictions.[32] The Court further acknowledged the possibility of declaring "null and void" a decision of a judge "*if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that (i) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU.*"[33]

26. At the same time, the CJEU also recognized that "*if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of res judicata in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue in the main proceedings is brought back into line with the EU legislation*".[34] As also stated by the CJEU in its caselaw, "*the principle of res judicata does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance*", since the protection of human rights of individuals would be weakened if "*individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by […] a decision of a court of a Member State adjudicating at last instance*".[35]

27. In light of the foregoing, and as noted in previous ODIHR legal reviews, in the Polish context, the substantial weakening of judicial independence in Poland caused by the successive judicial reforms since 2017 and resulting systemic deficiencies of the judicial system have been widely acknowledged by the ECtHR, the CJEU, international organizations, including ODIHR, as well as national observers and the Supreme Court and Supreme Administrative Court, calling for swift reform, and potentially resorting to certain exceptional (one-time) measures to avoid perpetuating the systemic dysfunction as established by European courts. As concluded in the 2024 ODIHR Note, when assessing the effects of decisions of persons appointed or promoted in a deficient manner, a balancing test should be carried out between the individual interest in the right to a tribunal established by law and public interest in legal certainty, including of the stability of judgments and respect for the principle of *res judicata*. The application of such a balancing test implies an individualized approach which adequately takes into account the access to justice needs of all parties and also the rights and interests of third parties.[36]

30 See CJEU, *Dragoş Constantin Târşia v. Statul român, Serviciul public comunitar regim permise de conducere şi înmatriculare a autovehiculelor* [GC], case no. C-69/14, 6 October 2015, para. 28; CJEU, *XC and Others* [GC], case no. C-234/17, 24 October 2018, para. 52; CJEU, *Oana Mădălina Călin v Direcţia Regională a Finanţelor Publice Ploieşti – Administraţia Judeţeană a Finanţelor Publice Dâmboviţa and Others*, case no. C-676/17, 11 September 2019, para. 26.

31 CJEU, *Impresa Pizzarotti & C. SpA v Comune di Bari and Others*, C-213/13, 10 July 2014, para. 54.

32 CJEU, *W.Ż., AS, Sąd Najwyższy and Others*, cases nos. C-491/20-C-496/20, C-506/20, C-509/20 and C-511/20, Order of 22 December, para. 85.

33 See e.g., CJEU, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) [GC], C-487/19, 6 October 2021, para. 161; and CJEU, *'R' S.A. v. AW 'T' sp. z o.o.,* C-225/22, 4 September 2025, para. 69.

34 CJEU, *Impresa Pizzarotti & C. SpA v Comune di Bari and Others*, C-213/13, 10 July 2014, para. 62.

35 CJEU, *Gerhard Köbler v. Republik Österreich*, C-224/01, judgment of 30 September 2003, paras. 33 and 40.

36 *ODIHR Note on the Effects of Decisions of Judges Appointed in a Deficient Manner,* 12 August 2024, in English and in Polish, para. 20.

2. BACKGROUND AND GENERAL REMARKS ON THE APPROACHES TAKEN WITH RESPECT TO THE IRREGULARITIES OF JUDICIAL APPOINTMENT PROCESSES

28. As underlined in the Explanatory Statement to the Draft Act, the main purpose of the Draft Act is to implement the pilot judgment of the ECtHR in the case of *Wałęsa v. Poland* of 23 November 2023,[37] which concludes that the irregularities of judicial appointment processes caused by the involvement of the NCJ as composed after the 2017 Amendments result in defective appointments that constitute a violation of the right to an independent and impartial tribunal established by law, although acknowledging that the effects may vary depending on the type of court and its position within the judiciary. It is noted that the ECtHR, taking into consideration the measures already adopted by the Polish government and those under preparation, including the Draft Act, agreed to extend the adjournment of the cases concerned by the Wałęsa pilot judgment for an additional year, that is until 23 November 2026.[38]

29. In the *Wałęsa* case, the ECtHR endorsed the indications as to the general measures given to Poland by the Council of Europe Committee of Ministers in the decision adopted at its 1468th Meeting on 5-7 June 2023, calling upon Poland to "*among other things, rapidly elaborate measures to (i) restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ; (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*** *and (iii) ensure effective judicial review of the NCJ's resolutions proposing judicial appointments to the President of Poland, including the Supreme Court*".[39] without distinguishing the categories of judges, levels of jurisdiction or their decisions. In this respect, the present Urgent Interim Opinion should also be read together with the *ODIHR Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024).

30. 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*".[40] 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.[41] At the same time, the authorities' discretion in this matter must be balanced against the individual rights of those that will be impacted by the Draft Act, including those who have been appointed or promoted by the NCJ as composed following the 2017 Amendments, or those whose right to a fair trial by an independent and impartial tribunal established by law have been or may have been violated as a result of the irregularities of the appointment or promotion. The ECtHR further pointed out that the right to a "*tribunal established by law*" [42] should not be construed in an overly

37 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329.
38 See <"Rule-of-law" cases against Poland adjourned - ECHR - ECHR / CEDH>.
39 ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329. The relevant 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/>.
40 See e.g., ECtHR, *Assanidze v. Georgia* [GC], no. 71503/01, 08 April 2004, para. 202.
41 See ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 243.
42 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,*

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*".[43]

31. When looking at the irregularities of judicial appointments and the requirement that a tribunal must be established by law, the CJEU, while generally relying on the ECtHR caselaw when applicable, emphasized more the linkages with the principle of judicial independence in the sense that it examines whether in light of the various systemic and circumstantial factors, the said irregularities "*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*".[44]

32. 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, from the CJEU and ECtHR judgments concerning judicial reforms in Poland and their effects, it can be discerned that the irregularities in the appointment process of certain judges and the respective categories/judicial level they belong to, or panels/chambers, involving the post-2017 NCJ (essentially the Chamber of Extraordinary Control and Public Affairs and the (former) Disciplinary Chamber of the Supreme Court or bench of other Chambers involving at least one deficiently appointed judge), amongst others, led to the finding of a violation of the right to a "tribunal established by law".[45]

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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.

43 See ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 236.

44 CJEU, *W.Ż.* [GC], C-487/19, 6 October 2021, para. 130. See also 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; in that case, the CJEU concluding that the various systemic and circumstantial factors 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*." (paras 76-77). See also CJEU, *C.W. S.A. and Others v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, C-326/23, 7 November 2024, which confirms this approach, 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, where 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*…" (para. 36).

45 See also in particular, ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021, para. 353, underlining that the NCJ, as established under the 2017 Amending Act, is "*a body which no longer offered sufficient guarantees of independence from the legislative or executive powers*" and calling upon Poland under Article 46 of the ECHR to undertake "a rapid remedial action" noting that the 2017 Amendments to the 2011 Act enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, "thus systematically compromising the legitimacy of a court composed of the judges so appointed"; *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 318, reiterating the "*inherent lack of independence of the NCJ" and concluding that "it is an inescapable conclusion that 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*"; see also ECtHR, *Juszczyszyn v. Poland*, no. 35599/20, 30 April 2021 (the Disciplinary Chamber of the Supreme Court lacking attributes of an "independent and impartial tribunal established by law); and *Tuleya v. Poland*, nos. 21181/19 and 51751/20, 6 July 2023 (the Disciplinary Chamber of the Supreme Court lacking attributes of an "independent and impartial tribunal established by law"). Applying the Ástráðsson test, the ECtHR concluded in *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, 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. See CJEU, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, C-824/18, 2 March 2021, paras. 131-139, further elaborating on other relevant contextual factors which may also contribute to doubts being cast on the independence of the NCJ and its role in judicial appointment processes and, consequently, on the independence of the judges appointed at the end of such a process; see also CJEU, *L.G. v Krajowa Rada Sądownictwa* [GC], C-718/21, 21 December 2023, paras. 76-77, regarding the Supreme Court's Chamber of Extraordinary Review and Public Affairs (CERPA), where the CJEU 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

33. The question then arises whether these judgments of international courts and respective conclusions can be considered to extend beyond those specific defectively appointed judges and the respective categories/judicial level they belong to and in effect touch on *all* judges that were appointed with the involvement of the NCJ as composed after the 2017 Amendments. In its caselaw, the ECtHR acknowledged that "*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*".[46] Hence, this would suggest that there may or should be differentiation in the legal effects of decisions taken by judges depending on their bench and level. 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[47] and consequently the legal effects their respective decisions may have. 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. At the same time, the case law of European instances does not go as far as questioning the legality of all judicial appointments made by the NCJ as composed following the Act amending the Act on the NCJ of 8 December 2017 (hereinafter "2017 Amendments").

34. Neither the case law of the CJEU nor that of the ECtHR give clear guidance or suggest a single solution or remedy to address the consequences of defective judicial appointments, determine the status of persons appointed or promoted as a result, and the resulting potential large-scale violations of the right to have access to an independent and impartial tribunal established by law. 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*".[48] Hence, this suggests that there may be differentiation in the legal effects of the NCJ resolutions on appointments and promotions, and consequently, on the status of judges depending on their bench and level.

35. The Constitution of Poland provides that "*judges are appointed for an indefinite period*" (Article 179) and that they may be recalled from office, suspended, 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" under the domestic legal framework, 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.

36. Whatever the policy and/or legislative options chosen to address the status of all judges and of their decisions, they should also be based on a proper assessment of their potential impact in terms of

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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; see also CJEU, *C.W. S.A. and Others v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, C-326/23, 7 November 2024, para. 36, with regards to a judge of the Civil Chamber of the Supreme Court, where 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*…". The CJEU 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*"; see CJEU, *W.Ż.* [GC], C-487/19, 6 October 2021, para. 130.

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

47 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.

48 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.

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 mechanisms/procedures and 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.

37. In sum, as underlined in the 2024 ODIHR Final NCJ Opinion, while acknowledging the margin of appreciation and Poland's autonomy in the way it may decide to cure the large-scale systemic violations of the right to a fair trial by an independent and impartial tribunal established by law, there are a number of general considerations that should be taken into account when assessing the Draft Act, including:

- whether the legislative initiative complies with rule of law principles, international human rights standards and the Constitution, duly weighing the principles of separation of powers, legal certainty and *res judicata*, security of tenure and irremovability of judges, if and where applicable, and the individual rights of those impacted by the measures, including rights to access to court and other fair trial guarantees, as well as respect for private and family life;
- a blanket (*ex lege*) removal to the extent that the termination of the judicial position qualifies as removal – without any form of individualized approach at least for certain categories of appointees is likely to be considered disproportionate unless there are very convincing reasons invoked by the authorities and the modalities and procedure offer sufficient safeguards to avoid arbitrary or discretionary application;[49]
- the interpretation of the ECtHR caselaw allows for a possible differentiation of the effects of the irregularities of the appointment/promotion processes 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;
- 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;
- individual rights of the defectively appointed or promoted persons 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 public interest in ensuring the good administration of justice and trial within a reasonable time, and in addressing the systemic dysfunctions created by the judicial reforms since 2016 with a view to ultimately restore public confidence in the judicial system, should also guide the framing of the proposed legislation;

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

- the fact that the Polish courts are European courts called to apply European Union law which requires that the courts be independent in the sense of European rule of law to ensure a common European legal space based on mutual trust, is also of relevance.

38. While acknowledging that the remedial solution envisaged in the Draft Act is to a large extent a matter of national legislative choice, the sensitivity of the envisaged reform and the unprecedented scale of the systemic deficiencies in the judicial system – also from a comparative perspective – make it essential that the legislative process fully complies with the core principles of democratic law-making.[50] In particular, it should ensure inclusive and meaningful participation of all relevant stakeholders, including judges, judicial associations, representatives of the legal professions, and the wider public. With respect to the latter, it will also be crucial to clearly articulate and widely communicate the purpose, rationale, and scope of the proposed reform in a manner that is accessible and comprehensible to all. The overarching purpose of ensuring meaningful and inclusive participation is to foster broad consensus on the reform and also ensure that the legal profession, and judges in particular, including judges who were lawfully appointed and chose to refrain from seeking promotion not only because of the defective composition of the NCJ but also in light of other measures, such as amendments to the disciplinary rules and proceedings,[51] regard the proposal as a fair, proportionate, and adequate response to the systemic challenges. Achieving such consensus is also essential for restoring confidence in the courts and ensuring that judges are able to perform their functions in full independence and are perceived as such by the public (see also Sub-Section 6 *infra*, which includes further and more detailed recommendations related to the legislative process for the development and adoption of the Draft Act).

39. Finally, the Explanatory Memorandum refers to a two-stage approach to the reform, indicating that "it is not necessary to establish a properly constituted NCJ in order to achieve the objective of the first stage".[52] As noted in the 2024 ODIHR Final NCJ Opinion, while a sequenced approach to reform efforts may be justifiable, this should be 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.[53] In this respect, it must be reiterated that 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. To ensure the legal coherence of the Draft Act with other legislative initiatives seeking to address the other systemic deficiencies identified in the case law of the CJEU and ECtHR, the Draft Act and the legislative initiatives to reform the NCJ and reinstate the modalities of appointment of NCJ judge members by their peers, should be presented and debated as a 'package' so as to reduce the risk of discrepancies and inconsistencies which would trigger even greater legal uncertainty and instability in the system.

50 See ODIHR, *Guidelines on Democratic Lawmaking for Better Laws* (2024), Part II.

51 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).

52 The Explanatory Memorandum states: "*the first stage of changes related to restoring the right to an independent and impartial court will be implemented by virtue of the Act, by depriving the resolutions of the National Council of the Judiciary from 2018 -2025 concerning applications for appointment to the position of judge (with the exception of resolutions adopted in relation to judges referred to in Article 2 para 2 of the Act). This means that it is not necessary to establish a properly constituted Council in order to achieve the objectives of the first stage*".

53 *ODIHR Final Opinion on the Act Introducing Amendments to the Act on the National Council of the Judiciary of Poland*, 31 December 2024, in English and in Polish, Executive Summary.

3. CATEGORIZATION PROPOSED IN THE DRAFT ACT AND PROPORTIONALITY OF THE MEASURES TO ADDRESS THE STATUS OF DEFECTIVELY APPOINTED/PROMOTED PERSONS

40. Article 1 of the Draft Act regulates the effects of the resolutions adopted in individual cases by the NCJ composed pursuant to the 2017 Amendments, between 2018 and 2025, meaning during the period in which its judge members were elected by the *Sejm* (lower house of the Parliament) in a manner inconsistent with international recommendations that call upon for the s/election of judge members of judicial councils by their peers;[54] this shift has brought into question the very independence of the NCJ, which constitutes a key institutional safeguard of the independence of the judiciary and of individual judges, thereby giving rise to 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.

41. Article 2 (1) of the Draft Act defines that the "*resolutions referred to in Article 1, on the submission of a request for appointment to the office of Supreme Court judge, court of appeal judge, regional court judge, district court judge, Supreme Administrative Court judge, voivodship administrative court judge, military regional court judge or military garrison court judge* ***are deprived of their legally binding force***".

42. The Draft Act further regulates the legal effects of NCJ resolutions adopted in 2018-2025 with respect to four principal categories of judges, and clarifies their status as follows:

- entry-level judges following graduation from the National School of Judiciary and Public Prosecution and judicial traineeship, or other entry-level judges who passed the judicial exam and have worked in courts as court referendaries or judge's assistants, as well as judges exercising the right to return to the profession of judge following resignation to occupy public or other functions,[55] for which the Draft Act provides the *ex lege* confirmation of the legally binding force of the resolution appointing them as judges **("Article 2 (2) category");** subsequent promotions or transfers obtained through the NCJ as composed after the 2017 Amendments are then addressed as for those holding judicial office before March 2018;
- sitting judges whose original judicial appointments happened before March 2018, thereby complying with constitutional and international standards, but whose subsequent promotion or transfer was based on resolutions of the NCJ as composed following the 2017 Amendments, with such promotion or transfer being *void ex lege* and the said judge being returned to the judicial office in the previous position on the date of entry into force of this Act ("**Article 3 category**"), with two-years statutory delegation to the previously held position as per Article 4 of the Draft Act (see Sub-Section 3.1.2. *infra*);
- persons who did not previously hold judicial office and were appointed (for the first time) to judicial office solely on the basis of resolutions of the NCJ as composed following the 2017

54 See *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, and references therein. See also ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 2, which 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*". See also 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; Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, para. 82; and ENCJ, *Compendium on Councils for the Judiciary* (2021), p. 6. See also 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*."

55 See Article 2 (2) (1) of the Draft Act referring to the graduates from the National School of Judiciary and Public Prosecution (*Krajowa Szkoła Sądownictwa i Prokuratury*) entitled to first-instance appointments following judicial traineeships; court referendaries or judge's assistants who have passed the judicial exams without judicial traineeships (Article 2 (2) (2)); administrative court assessors (Article 2 (2) (3)); and judges validly appointed prior to March 2018 who have resigned and exercising the right to return to the profession of judge (Article 2(2)(4) of the Draft Act).

Amendments, whose appointments should be **terminated *ex lege* upon entry into force of the Draft Act** ("**Article 5 category**") (see Sub-Section 3.2. *infra*).

- judges compelled to retire (prematurely) under the Act of 9 June 2022 amending the Act on the Supreme Court and certain other Acts ("**Article 13 special category**"), who shall return to the office of judge in the position held immediately before being defectively appointed by the NCJ.

43. Overall and as analysed in greater details below, the Draft Act presents a structured and generally rather balanced response to address the large scale irregularities of judicial appointment processes involving the NCJ as composed after the 2017 Amendments, and to clarify the status of all judges so appointed, as called upon in the *Wałęsa* pilot judgement. The framework proposed by the Draft Act serves the legitimate aim of seeking to restore the requirement of a court "established by law" and to ensure more legal certainty by clarifying the legal consequences of the irregularities in judicial appointments.

44. The Draft Act institutes a categorization of judges that have been appointed or promoted by the NCJ as composed after the 2017 Amendments, whereby the judicial status of certain categories is validated *ex lege*, essentially for those appointments based on existing statutory mechanisms where the NCJ's role and discretion has in principle been limited, and its resolutions did not constitute a decision on the competition for vacant judicial positions, as also explained in the Explanatory Memorandum (**Article 2 (2) category)**. In this case, these judicial office-holders may be considered to have a legitimate expectation to retain their positions, stemming not only from the existence of formally valid legislation but also in view of the years in service since their defective appointments, a matter of consideration in view the ECtHR case law. The nature of the individual right to respect for private and family life under Article 8 of the ECHR and the interests of the administration of justice, would appear to constitute legitimate and proportionate grounds to limit the right to fair trial which is not absolute. Accordingly, the *ex lege* statutory rectification of the irregularities affecting their initial appointments appears justified and proportionate, particularly when taking into account the wide margin of appreciation afforded to states in matters of restoration.

45. The Draft Act also distinguishes between those with lawful prior judicial status (Article 3 category), who are returned to prior judicial position although statutorily delegated (with maintenance of remuneration, continuity of service, and opportunity to compete again) and those lacking prior judicial authority (Article 5 category - first-time appointees to judicial office), who lose office but still retain the possibilities to become a referendary or return to prior profession. The Draft Act also provides for appeal mechanisms (Article 15 of the Draft Act).

46. The special rules regarding appointment or promotion by the NCJ as composed after the 2017 Amendments to the Supreme Court – excluding the two-year statutory delegation as they are not mentioned in Article 4 (1) of the Draft Act – are not objectionable, as they are the logical consequence to implement the abundant caselaw of the ECtHR and CJEU. Indeed, the ECtHR unequivocally acknowledged 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*."[56] The caselaw of the CJEU leads to the same conclusion.[57] In light of this, and as concluded in the 2024 ODIHR Final NCJ Opinion, **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**

56 See ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(a).
57 See e.g., CJEU, *W.Ż.* [GC], C-487/19, 6 October 2021, para. 130. See also CJEU, *L.G. v Krajowa Rada Sądownictwa* [GC], C-718/21, 21 December 2023, paras. 76-77; and CJEU, *'R' S.A. v. AW 'T' sp. z o.o.,* C-225/22, 4 September 2025, para. 69.

now abolished Disciplinary Chamber), as well as to other Chambers of the Supreme Court, should be reconsidered and may warrant *ex lege* invalidation.[58]

47. The 2024 ODIHR Final NCJ Opinion had concluded that differentiating between categories of appointments and promotions, along with *ex lege* regulation of some categories of appointees, was a valid policy/legal option providing that the legislation clearly detailed the different categories of judges, including clear and objective criteria for categorization and possible validation or invalidation of appointments/promotions – to exclude potential arbitrariness or perception thereof, as well as 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.[59] The categorization proposed in the Draft Act falls within the wide margin of appreciation and the state's autonomy in the way it decides to cure the systemic violations of the right to a fair trial by an independent and impartial tribunal established by law and overall would *prima facie* reflect the key principles and safeguards outlined in Section 8 of the 2024 ODIHR Final NCJ Opinion.

48. It is important to underline that the categorization is not discriminatory in the sense of Article 14 of the ECHR and Article 26 of the ICCPR since the difference of treatment between the above-mentioned categories appears objectively justified. Entry-level judges (or other judges falling within Article 2 (2) category judges), or judges who were lawfully appointed before March 2018, or those who did not hold prior judicial office before being appointed by the NCJ as composed after the 2017 Amendments cannot be regarded as being in "relatively similar position". Although for the members of the two latter categories, they both exercised judicial functions following irregularities in the appointments or promotion, nevertheless the differentiation is objective given their different professional backgrounds and experience, and none of the discriminatory grounds would seem to be present here (including the "any other status").[60]

49. However, as further detailed below, certain adjustments remain necessary in order to more adequately balance the public interest in restoring the rule of law in Poland with the rights of those impacted by violations of their fair trial rights and those appointed or promoted by the NCJ since March 2018 who will be affected by the contemplated reform. This concerns first the statutory delegations envisaged for Article 3 category of defectively appointed judges, which may appear to perpetuate existing systemic dysfunctions – notwithstanding some vague and broadly framed criteria governing the potential recall of the delegation. They may also in practice afford such judges a head-start advantage in repeat competitions. Adjustments may likewise be considered with respect to the modalities and procedure for carrying out the categorization of judges: for those not subject to *ex lege* validation, a more individualized determination of their status, possible transfer within the judiciary or other previously held positions, and clarity regarding the corresponding legal consequences/entitlements, including salaries, accrued seniority, possible increments, advancement and social, retirement and other related benefits – in accordance with the provisions of the Draft Act and other applicable legislation, who should have an effective opportunity to challenge such determination before a court. In addition, the temporal effect of certain provisions of the Draft Act, especially those validating the judge's status *ex nunc* (from the entry into force of the Draft Act), may result in a contradiction when it comes to the validity of judgments rendered prior to that date, an issue that should be addressed.

58 See *ODIHR Final Opinion on the Act Introducing Amendments to the Act on the National Council of the Judiciary of Poland,* 31 December 2024, in English and in Polish, paras. 102-103.

59 See *ODIHR Final Opinion on the Act Introducing Amendments to the Act on the National Council of the Judiciary of Poland,* 31 December 2024, in English and in Polish, paras. 105-110.

60 See e.g., ECtHR, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, 16 March 2010.

3.1. Previous Judicial Office-Holders Whose Subsequent Advancement or Transfer Was Based on NCJ Resolutions Deprived of Binding Force (Article 3)

50. According to Article 3 of the Draft Act, this category includes judges holding a previously established judicial office before March 2018 and whose promotion, transfer, or advancement was based on resolutions of the NCJ as composed after the 2017 Amendments, and thereby deprived of binding force pursuant to Article 2 (1) of the Draft Act.

51. The Draft Act restores these judges to their earlier (before promotion through the NCJ as composed after the 2017 Amendments) judicial office positions (Article 3(1)), while allowing them to perform for two years the duties associated with the promoted/advanced position in a higher court through a statutory delegation mechanism (Article 4 (1)). It also recognizes the services they have performed in the advanced positions derived from NCJ resolutions deprived of legal effect, for the purposes of determining salary and seniority (Article 3 (2)-(4)).

52. Since the NCJ resolutions adopted between 2018-2025 are deprived of legal effect *ex lege* (Article 2 (1)), the Draft Act further clarifies that judicial positions (promotions, advancements) conferred through these resolutions shall be deemed vacant on the date of entry into force of the Draft Act (Article 29 (1)) and shall be announced by the Minister of Justice in the Official Journal of the Republic of Poland *("Monitor Polski"),* not earlier than two weeks after the date of entry into force of the Draft Act. Such repeat selection process, *providing that it would be carried out by a properly constituted NCJ* – with the judge members s/elected by their peers, which would necessitate amendments to the 2011 Act on the NCJ (though acknowledging that the adoption of such amendments remains contingent upon future legislative developments and thus cannot be presumed at this stage), according to the relevant proceedings defined in Articles 30-31 of the Draft Act, would preserve their opportunity for advancement within a constitutionally compliant framework, while also addressing the systemic obligations identified by the CJEU and ECtHR (including *Reczkowicz*, *Dolińska-Ficek*, and *Wałęsa*) to remedy the legal effects of the irregularities of judicial appointments made through a body lacking independence.

53. The Draft Act aims to (transitionally) ensure continuity of service for a period of at least two years through statutory delegation to the post occupied prior to the entry into force of the Draft Act, while also preserving financial entitlements, and recognizing seniority accrued while occupying the invalidated post. From the perspective of individual rights, the Draft Act seems to attempt to mitigate potential adverse consequences of the reform for this category of judges (with minimal intrusive changes or professional harm as they will *de facto* continue to occupy the same functions with the corresponding salaries and benefits pending the repeat competition, while also avoiding the perception of retribution or revenge). This also purportedly aims to safeguard the proper administration of justice by reducing the risk of overburdening the courts, which could arise if such individuals were automatically demoted by operation of law.

54. 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 allegedly the foreseeable consequences of one's own actions.[61] As mentioned above, although unlawfully (or defectively) appointed judges may not benefit from the same protection as lawful judges, especially with respect to security of tenure and irremovability, it remains important that the legal framework applicable to them to remedy the situation provides for clear and objective criteria to determine their status and all related benefits, to reduce any risk of potential arbitrariness or discriminatory implementation. This is in line with the principle of legal certainty as a key element of the rule of law, irrespective of the status or functions of the person.

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

3.1.1. Modalities and Procedure for Determining the Status of Judges Transferred to Former Judicial Positions

55. As noted above, the appointments of previous judicial office-holders whose subsequent transfer or advancement based on a resolution of the NCJ as composed after the 2017 Amendments are defective. When regularizing this situation, the interest in the efficient administration of justice and the recognition of different sub-categories of judicial office-holders among this group may be considered as a valid policy option. However, as underlined in the 2024 ODIHR Final NCJ Opinion, the legislation should clearly set out the conditions and modalities of possible transfer to the former or other (equivalent) judicial positions. Such main sub-categories could further distinguish between those who were moved horizontally, and those promoted to a higher court, although appointments to the Supreme Court require special regulation.

56. According to international standards and recommendations, a transfer of judges or other equivalent measures may only occur with their own freely given consent, except in exceptional circumstances such as *legitimate* institutional re-organization.[62] 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*",[63] and this should ideally be reflected in the legislation regulating such a matter. In any case, an appointment to another post should be subject to appeal before a court and/or other independent authority, to investigate the legitimacy of the transfer[64].

57. It is 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"*. It is for the competent domestic authorities to determine whether the contemplated reform may potentially fall within the scope of this provision. n the Polish situation, as underlined above, it may be argued that the proposed reform and related re-organization of the judicial system responds to the legitimate objective of urgently implementing the judgements of the European courts, thereby seeking to restore the requirement of a court "established by law" and to ensure more legal certainty by clarifying the legal consequences of the irregularities in judicial appointments.

58. It may be possible that judicial offices which such judges were holding before their appointments/promotions are no longer vacant. In case if the current office-holder is lawfully appointed judge, the person concerned should in principle be offered another judicial office of status and tenure equivalent to the initial judicial position.[65] With respect to the mechanism envisaged by the Draft Act, it should also be possible for the office-holder to request that the transfer be made to a position equivalent to the former judicial position should circumstances linked to personal or family life be invoked.

59. While the Draft Act provides for the return to initial judicial position, it does not include a mechanism to assign judges to an equivalent post if the previous post is no longer available (e.g., court reorganizations, or overstaffing) or for other reasons. Moreover, the restoration to a prior post (Article 3 of the Draft Act) is not subject to an individualized determination that would clarify, for each of the judge concerned, not only the status and specific prior judicial position (or equivalent) but also the

62 ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, paras. 32-33. 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.

63 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.

64 *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.

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

related entitlements, including salary, accrued seniority, possible increments, advancement and social, retirement and other related benefits).

60. The Draft Act envisages instead the publication of a list by the MoJ of the judges appointed or promoted by the NCJ as composed after the 2017 Amendments indicating the specific effects of the NCJ resolutions and their legal bases; an appeal to the Supreme Court against inclusion on the MoJ list may be brought within two weeks of the publication of the list (Articles 14-15 of the Draft Act) which, however, exclusively concerns the correctness of classification, not the related benefits or other elements linked to the status of a judge.

61. This modality could fall within the wide margin of appreciation and the state's autonomy in the way it decides to remedy the violations identified in the case law of the CJEU and ECtHR. At the same time, the Draft Act does not foresee any procedure by which the judge's personal circumstances that may warrant transfer to an equivalent position would be assessed, as well as the possibility to challenge before a court the consequences of the measures contemplated, especially in terms of associated entitlements (including salaries, acquired seniority, increments, social, retirement and other benefits), unless such remedy would be provided in other legislation.

62. It is noted that **any decision determining the legal consequences of the loss of legally binding force of the resolutions of the NCJ as composed after the 2017 Amendments should ideally be adopted by an independent NCJ (rather than an executive body such as the MoJ),** providing that it would be composed in accordance with international standards and recommendations, i.e., newly composed with its judge members having been s/elected by their peers. Indeed, the NCJ would be institutionally better placed to determine the individual status of judges. **At the same time, acknowledging that the reform of the NCJ remains contingent upon future legislative developments and thus cannot be presumed at this stage, it could be conceivable to envisage the involvement of the MoJ, providing that the criteria and conditions of the status determination are clearly established by law with no possibility of arbitrary or discretionary interpretation**.

63. Instead of transfer (and statutory delegation) occurring automatically, solely on the basis of the list compiled by the MoJ under Article 14, after the Draft Act comes into force, the legal drafters could consider whether a more individualized determination of the legal consequences of the loss of legally binding force of the resolutions of the NCJ as composed after the 2017 Amendments: the Draft Act could be limited to establishing such consequences, but stating that their application to individual judges would be determined in an individual administrative or other decision, ideally of the newly composed NCJ following a reform reinstating the s/election of its judge members by their peers. **In such case, the judge concerned should have the ability to consent or otherwise to challenge before court the categorization/transfer and related entitlements (including salaries, acquired seniority, increments, social, retirement and other benefits), within a specific timeframe.** Judicial review should determine whether the judge falls within the categories defined in the Draft Act and whether the resulting legal consequences are consistent with applicable legislation, including the Draft Act. This would help ensure compliance with Article 180(2) of the Constitution since the said judges would have either consented to the categorization and corresponding transfer, or this would be decided/confirmed by a court.

64. While this would make the process more complex and prevent an automatic effect of the remedial reform, it would ensure proper judicial oversight over the application/interpretation of the Draft Act and reduce the risk of questioning the constitutionality of the contemplated measures, while also guaranteeing access to a court for the judges impacted by the reform. At the same time, the legal drafters should also assess whether such a solution would risk unduly impairing the functioning of the judicial system. In any case, the affected persons should be able to access a court to challenge the

consequences of their return to initial judicial position, especially with respect to related entitlements (including salaries, acquired seniority, increments, social, retirement and other benefits).[66]

65. In this respect, the Draft Act could envisage mechanisms according to which each of the categories of judges identified in the Draft Act could be subject to a single collective action, accompanied by the establishment of a simplified form of judicial proceedings, thus avoiding the need for separate individual actions for each of the judges affected. A request could be submitted by the MoJ to the court, seeking a confirmation of the transfer of the judges, as applicable, on the grounds that they fall within the situation prescribed by the Draft Act.

66. This would also guarantee that judges affected would have access to effective judicial protection, as they would be granted the possibility of contesting the transfer before it occurs and in front of a proper tribunal "established by law", assuming that adequate rules requiring the recusals of judges falling under the scope of Article 2 (1) of the Draft Act are excluded from adjudicating these cases. Hence, **any judicial endorsement or review mechanism should meet 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.**

3.1.2. Statutory Delegation Mechanism

67. As mentioned above, Article 4 introduces a transitional framework governing the performance of judicial duties by those judges falling under Article 3 – namely, judges who had previously held a valid judicial office before receiving promotion or transfer through resolutions of the NCJ as composed after the 2017 Amendments, being deprived of legal force by the Draft Act. While Article 3 provides that such judges are restored to their last lawfully held judicial position with uninterrupted continuity of service, Article 4 seeks to safeguard judicial stability by permitting these individuals, for a period of up to two years (or "indefinitely" if they participate in the repeat competition for appointment to the higher judicial office they previously occupied as per Article 4 (6)-(8)), to continue performing adjudicatory functions within the higher courts to which they were previously promoted or transferred, pending the repeat competitions for the said judicial positions by a properly composed NCJ. According to Article 4 (9) of the Draft Act, the delegation terminates either upon the judge's resignation (subject to three months' notice) or upon the final completion of the repeat competition, "*unless a resolution is adopted to present a request for the appointment of that judge to hold office in the position in the court to which he/she has been delegated*". Although the provision is not entirely clear, Article 4 (9) appears to imply that such delegation would remain in effect should the judge successfully complete the repeat competition conducted by the newly composed NCJ.

68. This is achieved through a statutory delegation mechanism that operates automatically, by operation of law, with the start of the delegation being determined by the president of the court to which the judge is delegated (Article 4 (2)). In addition, Article 4 maintains the financial and professional interests of affected judges by ensuring that their remuneration corresponds to the judicial position in which they exercise delegated functions and that they retain the same salary rates as judges normally sitting in those courts, while allowing judges to resign from the delegation with six months' notice. Where a judge is not ultimately selected for the higher post through the repeat competition, the consequences provided for in Articles 3 and 14 follow automatically: the judge returns to the earlier held judicial position. Since the promotion that was previously granted to the judge by the NCJ as composed after the 2017 Amendments has been deprived of legal effect e*x lege*, and the judge is restored to their earlier post following the unsuccessful conclusion of the repeat competition (by a validly composed NCJ), Article 14 requires the Minister of Justice to publish information on the specific legal consequences that have arisen for that person.

66 See *ODIHR Final Opinion on the Act Introducing Amendments to the Act on the National Council of the Judiciary of Poland*, 31 December 2024, in English and in Polish, para. 121.

69. Such an (automatic) statutory delegation to the post occupied prior to the defective promotion or transfer, allowing delegated judges to maintain their existing caseloads without the need for redistribution and by ensuring that they retain jurisdiction over pending cases until their final resolution, is problematic on several accounts. This is despite the acknowledgment of the alleged objective to ensure the proper administration of justice by preventing a resulting shortage of judges, enabling the continued functioning of the courts and minimizing potential disruption to ongoing proceedings.

70. First, this statutory delegation mechanism would appear to perpetuate existing systemic dysfunctions by continuing to allow defectively appointed judges who have sought promotions by the NCJ as composed after the 2017 Amendments to serve for at least two years in their existing positions, even if formally the Draft Act has acknowledged their return to previously held (lawful) post. While this may potentially be considered as a policy option to remedy the violations of the right to a tribunal "established by law", it may still raise questions from the perspective of restoring trust in the judiciary. While the Draft Act seeks to mitigate this risk by providing the possibility of recall by the NCJ "*if this is required for the court to be considered an impartial and independent body*" (Article 27 (1)),[67] there is no clear definition of this condition, and it may be open to arbitrary or discretionary application and potential abuse. Moreover, contrary to the situation of appointments to entry-level judicial positions or other cases covered by Article 2 (2) of the Draft Act, this modality would not seem justified by legitimate expectations and existential difficulties. Indeed, as underlined above, Article 8 of the ECHR could in principle not be relied upon to complain of a loss of reputation or other repercussions that were allegedly the foreseeable consequences of one's own actions.[68] Notably, the provisions of the Draft Act specify that the years of service and activities undertaken in the defective appointment shall not be taken into consideration in the repeat competition (Article 31 (3)) – notwithstanding some vague and broadly framed criteria governing the potential recall of the delegation.

71. It is noted that the existing legal framework already envisages mechanisms of temporary delegations in cases where the needs arising from the workload of an individual court may so require, as assessed for instance by the president of the court of appeal, subject to the consent of the judge to be delegated and the collegium of the court to which the posting is to occur.[69]

72. In this respect, the legal drafters could consider whether the existing mechanisms, to the extent possible, or *ad hoc* temporary delegation mechanisms, which would allow delegations to be opened to any judicial office-holder, not solely the one holding the position prior to the entry into force of the Draft Act, could be used. In that case, the previous office-holder could also be considered on an equal footing with other judges. This should allow for the respective courts to assess the best interests and concrete, specific needs of the respective courts, in line with the principle of judicial self-governance. This would appear as a more balanced and proportionate approach to ensure the proper administration of justice while avoiding the risk of appearing to perpetuate past systemic deficiencies, even if on a temporary basis. The Draft Act could clearly specify the modalities of the ad hoc temporary delegation, including the legal grounds and timeframe for a delegation of judges to the specific judicial positions which will become vacant, while reiterating the ultimate authority of the competent body of the respective courts, including court presidents and court collegiums when applicable to formally delegate a judge.

67 The assumption seems to be that by the time such recall will take place there will be a new NCJ, validly composed with judge members having been s/elected by their peers in compliance with international recommendations.

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

69 See e.g., Article 77 (9) of the 2001 Act on the Common Courts as amended (**2024.334)**, which provides: "*In particularly justified cases, the president of the court of appeal may delegate a judge of a district court or a judge of a regional court to perform the duties of a judge in a higher court, after obtaining the consent of the judge and the collegium of the court to which the posting is to take place, taking into account the rational use of staff and the needs arising from the workload of the individual courts operating in the area of appeal; assignment of cases to a delegated judge; as Judge-Rapporteur, may not exceed 30 cases per year*."

3.2. Persons Appointed to Judicial Office for the First Time Solely on the Basis of NCJ Resolutions Deprived of Binding Force (Article 5)

73. According to Article 5 of the Draft Act, this category includes individuals appointed to judicial office for the first time solely on the basis of resolutions of the NCJ deprived of binding force pursuant to Article 2 (1) of the Draft Act.

74. The Draft Act provides that their judicial office terminates *ex lege* upon entry into force of the Draft Act. At the same time, they are offered alternative pathways: appointment as court referendaries (Article 6 (1) of the Draft Act), return to their prior legal profession (e.g., prosecutor (Article 7), attorney (Article 8 (1)), legal counsel (Article 8 (2)), notary (Article 8 (3)), or access to the general pension system if they had retired (Article 12). For persons who have held a prosecutorial office immediately before the defective NCJ-based appointment, Article 13(5) entitles them to seek reinstatement to that office in accordance with the procedure and criteria set out in Article 7 (1), with Article 7 (2)-(3) applying correspondingly. For individuals without prior judicial or prosecutorial status before their defective NCJ-based appointment, Article 13 (6) refers them to Article 12 (2)-(4), affirming that their rights must be determined under the general pension scheme and that the pathways for returning to their pre-appointment professions (attorney, legal counsel, notary, or public administrative post, as applicable) remain open under Articles 8 and 9.

75. As noted above, if such persons are not considered to have the status of judges, then the principle of irremovability would not apply to them.[70]

76. It should be acknowledged, however, that where individuals lack prior judicial status and where their appointment to judicial office solely rests upon an invalid procedure, terminating the appointment would appear as being legally justified to restore the independence and constitutional legitimacy of the judiciary, and falling within the scope of the wide margin of appreciation to remedy the violations of Article 6 (1) of the ECHR.

77. At the same time, the automatic termination of judicial office of this category of persons remains the most severe measure in the Draft Act. For those who had no prior judicial post, the impact of the Draft Act remains substantial and thus warrants careful scrutiny to ensure that it does not disproportionately infringe upon individual rights, while ensuring appropriate safeguards to prevent undue hardship or reputational harm, including effective remedies, access to judicial review, and respectful treatment.

78. In the Draft Act, the termination of judicial status occurs immediately by operation of law without prior notice and review by a tribunal, with judicial review being available only after publication of the list of terminated judges by the MoJ (Article 15). While the Draft Act includes mitigating measures to limit possible undue impact on the private life of individuals concerns - such as guaranteed access to referendary positions, provisions regarding reintegration into prior professions, protection of social security contributions and pensions, the fact that the Draft Act leads to automatic and collective removal without prior notice and with immediate effect raises concerns and would require more nuanced approach. Although in this particular case, *ex lege* termination of a judicial status could fall within the wide margin of appreciation of states to implement ECtHR judgements, adequate advance notice and social security guarantees should be provided.

79. At the same time, to ensure compliance with norms of international law, it is also important to consider the passage of time when balancing the preservation of legal certainty and the security of

70 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.

judicial tenure in relation to the individual litigant's right to a "tribunal established by law"[71]. The more time passes from the moment of a defective judicial appointments, the more limited the margin of appreciation granted to authorities to remedy the situation would be, also in light of the greater expectations of individuals holding judicial offices.

80. It should be also noted that the Draft Act establishes rather different rules for reinstatement of legal professionals whose judicial appointments are nullified. Although all those persons entered the judiciary under comparable circumstances, former prosecutors enjoy a statutory right to return (Article 7), whereas former attorneys, legal counsels, and notaries must navigate ordinary admission procedures of their self-governing bodies (Article 8). While the distinction may be triggered by the different self-regulatory rules and autonomy of the respective professions, it may also appear to lack strong justification in light of the Draft Act's goal to restore rule of law and continuity. A more nuanced statutory reinstatement rules for affected legal professionals would better align with this objective, reducing uncertainty and ensuring fairness. Moreover, automatic return for prosecutors may raise public trust and conflict of interest concerns, as it could suggest continuity between disputed NCJ appointments and restored prosecutorial roles.

81. Finally, the invalidation of appointments and return to their previously held positions may have serious consequences regarding the salaries and other entitlements deriving from one's positions. In particular, the withdrawal of pension rights for persons covered by Article 13 who also fall within Article 5 (1) and other consequences linked to the return to their prior positions may raise concerns under Article 8 of the ECHR (because the loss of retirement status and associated benefits, potential reduction of salaries, loss of social/professional contacts, potential reputational harm), as they may directly affect a person's private and family life, financial security, and dignity.[72] At the same time, the assessment depends on the overall context, including whether the interference pursues a legitimate aim, is grounded in law, and remains strictly proportionate to that aim. In the Polish context, the Draft Act aims to remedy systemic violations stemming from the NCJ's lack of independence due to its composition after the 2017 Amendments, an objective that is the legitimate consequence of the abundant ECtHR and CJEU case law. With respect to the proportionality of the measure, it is noted that the Draft Act envisages mitigating safeguards. Although the Draft Act removes the judicial pension linked to an invalid appointment, it does not leave the affected persons without social protection: they regain access to the general social insurance system, their contributions are retroactively regularised, and they may seek reinstatement in their prior profession or obtain alternative lawful positions. These measures mitigate the impact of the Draft Act and reflect an effort to balance individual reliance interests with the pressing need to restore an independent judiciary.

82. In order to prevent any risk of finding a violation of the ECHR, especially its Article 8, it would be important to contemplate in the Draft Act procedures capable of assessing the individual consequences of the measures contemplated (demotion and/or return to previous position, and possible reduction of salaries and/or pensions) 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.[73] **Furthermore, the Draft Act should ensure that the affected persons are able to challenge the decisions and/or measures affecting their post, status and related remuneration and benefits, or other rights.**

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71 See OSCE/ODIHR, *Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024), Sub-Section 7.5. See also ECtHR, *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 252, where the ECtHR emphasized that "…*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"*.. In the case *Besnik Cani*, the Court found that "*an irregularity in the appointment procedure of a judge may not necessarily be open to a challenge by an individual relying on the 'tribunal established by law' right in an indefinite or unqualified manner. With the passage of time, the preservation of legal certainty and the security of judicial tenure 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"*; see ECtHR, *Besnik Cani v. Albania*, no. 37474/20, 4 October 2022, para. 113.

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

73 Ibid.

83. At the same time, given the consequences of the measures on the individuals falling under the Article 5 Category, and while acknowledging that the Draft Act reflects a degree of awareness of the need to mitigate the impact of remedial measures on individuals appointed to judicial office through defective procedures, **additional safeguards are advisable to ensure that the termination of first-time judicial appointees of the Article 5 Category results from the correct application of the Draft Act, and that their related status and entitlements have been rightly determined. Reasonable advance notice of termination should be ensured.** In any case, the Draft Act – if not already provided by other applicable legislation, should ensure that the affected persons are able to challenge the decisions and/or measures affecting their post, status and related remuneration, entitlements and other benefits, or other rights.

3.3. Transparency and Publicity of the Legal Consequences of the Draft Act

84. As mentioned above, Article 14 of the Draft Act entrusts the Minister of Justice with preparing and publishing, in the Official Gazette ("*Monitor Polski*"), a list of all persons to whom the legal effects of the Draft Act apply. This list will include personal data (forename, surname, date of birth, position, and date of appointment), the judicial or prosecutorial positions and related date of appointment in question, and the specific consequences imposed on each individual under the Act with their respective legal bases. Article 14 aims to ensure transparency with respect to the legal status of defectively appointed persons and how it is regularized, which is not only a statutory duty[74] but also important for the restoration of public trust and legal certainty.

85. It is noted that under the respective Acts governing the different branches of the judiciary, judicial appointments as well as transfers or removals are published in the "*Monitor Polski*".[75] Given the systemic defects in the judicial appointments as recognized by the CJEU and ECtHR and the need to restore public trust, transparency about how such irregularities in past judicial appointments are being legally rectified, may be viewed as an essential component of restoring legal certainty and rebuilding confidence in the administration of justice. The State may therefore contend that public knowledge of the scope of the corrective measures is necessary to ensure the predictable functioning of courts, to enable litigants to understand the implications for their cases and ultimately to enhance public confidence in the courts so reformed.

4. Reversal of Judgements Rendered With the Participation of Persons Appointed as Judges by Resolutions of the NCJ Deprived of Binding Force (Articles 3 and 5 Categories)

86. Chapter 4 of the Draft Act deals with the reversal of judgments issued by persons appointed to hold office as judge as a result of resolutions adopted by the NCJ from 2018 to 2025, which are deprived of binding force. This includes judgments rendered by Article 3 Category judges (previous judicial office-holders promoted by the NCJ since March 2018) and Article 5 Category judges (persons appointed to judicial office for the first time by the NCJ as composed after the 2017 Amendments).

87. Article 33 of the Draft Act establishes limited admissibility rules upon which a judgment handed down by a defectively appointed person as per Articles 3 (1) or 5 (1) of the Draft Act may be set aside, i.e.:

- the petition shall be submitted to the competent court at the request of a party or participant in the initial proceedings *within one month* of the date of publication of the above-mentioned MoJ list referred to in Article 14 of the Draft Act (Article 33 (4));

74 Under the respective Acts governing the different branches of the judiciary, judicial appointments as well as transfers or removals are published in the Official Journal of the Republic of Poland "Monitor Polish"; see e.g., Article 109 of the 2001 Act on the Common Courts.

75 See e.g., Article 109 of the 2001 Act on the Common Courts.

- if that party or participant had already raised objections within the deadline for filing a petition to disqualify a judge because of the irregularities of the composition of the bench in the first instance court or because of the lack of independence or impartiality of a person in that bench (Article 31 (2) (1)); and
- if the party based the appeal objections on those grounds (Article 31 (2) (2)).

If no such objection was invoked, the judgment remains final and binding and retain its legal force and *res judicata* effect.

4.1. Admissibility Requirements for Seeking Reversal

88. 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. It 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 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.

89. By limiting the admissibility requirements to bring a claim to set aside a judgment rendered with the participation of a defectively appointed judge, the legal drafters are seeking to strike a balance between legal certainty, *res judicata* and the stability of the overall legal system on the one hand, with the right to a fair trial and an effective remedy of affected individuals whose case have been adjudicated with the participation of a person appointed in the procedure involving the defectively elected NCJ, on the other. At the same time, such requirements may appear unduly limiting, especially the short deadline and the requirement to have requested the disqualification of the defectively appointed judge from the bench of the respective court during the proceedings and to have based the appeal on that argument. As a result, this may place beyond the reach of reversal the overwhelming majority of judgements rendered by deficiently appointed judges, including decisions of persons whose judicial office is to be discontinued as per Article 5 of the Draft Act.

90. This approach appears to be grounded in the ECtHR reasoning in *Ástráðsson v. Iceland*, where the Court emphasized that while legal certainty and the force of *res judicata* are not absolute, departures from these principles are justified only under circumstances of a substantial and compelling character, such as the correction of fundamental defects or miscarriages of justice.[76] Importantly, the ECtHR clarified that the wrongful composition of tribunal constitutes a fundamental vice, irrespective of whether the breach is "flagrant".[77] The Court also highlighted the necessity of balancing legal certainty, *res judicata* and the irremovability of judges against the requirement that cases be decided by a tribunal established by law.[78]

91. The CJEU has also emphasized the importance of *res judicata*, noting that to ensure the stability of the law and legal relations and sound administration of justice, final decisions should not in principle be reversed.[79] The CJEU further emphasized that "*in the absence of EU legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness*".[80] The CJEU also specifically

76 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, paras. 238-240.
77 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, paras. 244-245.
78 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, para. 240.
79 See CJEU, *Dragoș Constantin Târșia v. Statul român, Serviciul public comunitar regim permise de conducere și înmatriculare a autovehiculelor* [GC], case no. C-69/14, 6 October2015, para. 28; CJEU, *XC and Others* [GC], case no. C-234/17, 24 October 2018, para. 52; CJEU, *Oana Mădălina Călin v Direcția Regională a Finanțelor Publice Ploiești – Administrația Județeană a Finanțelor Publice Dâmbovița and Others*, case no. C-676/17, 11 September 2019, para. 26.
80 CJEU, *Impresa Pizzarotti & C. SpA v Comune di Bari and Others*, C-213/13, 10 July 2014, para. 54.

recognized a decision adopted by defectively appointed judges, in that case the Disciplinary Chamber of the Supreme Court of Poland, to be ineffective, on the ground that it was contrary to the second subparagraph of Article 19 (1) TEU and that an applicant must be allowed to invoke such ineffectiveness before other national authorities or jurisdictions.[81] The Court further acknowledged the possibility of declaring "null and void" a decision of a judge "*if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that (i) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU.*"[82] At the same time, the CJEU also recognized that "*if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of res judicata in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue in the main proceedings is brought back into line with the EU legislation*".[83] As also stated by the CJEU in its caselaw, "*the principle of res judicata does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance*", since the protection of human rights of individuals would be weakened if "*individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by […] a decision of a court of a Member State adjudicating at last instance*".[84]

92. As underlined in the *ODIHR Note on the Effects of Decisions Rendered by Improperly Appointed Judges*, the fact that a judicial appointment was defective does not, as a matter of principle, lead to the automatic invalidation of all judicial acts in which such a person participated.[85] The Note stresses that "*only under exceptional circumstances could a final judgment later be reviewed or re-opened when a pressing need of a substantial and compelling character justifies a departure from the principle of legal certainty and the force of res judicata, such as when implementing decisions of the international courts, correcting fundamental defects or a miscarriages of justice".*[86] Thus, states are under no obligation to re-open all cases decided by judges appointed to their office in the deficient procedure. Even where an individual appointed in violation of the "tribunal established by law" requirement participates in adjudication, the appropriate consequence is not to nullify all resulting rulings but to allow the parties the possibility, where relevant, to seek reopening or review, especially in cases of miscarriages of justice or owing to the severe consequences that flow from the said judgement, such as in case of a criminal conviction, especially in case of deprivation of liberty.

93. As also mentioned in the ODIHR Note, overall, reopening of cases adjudicated with the involvement of a defectively appointed judge can be considered (and justified), specifically in cases when a clear violation of the right to a fair trial by a tribunal established by law and the undermining of judicial independence are evidenced by the caselaw of the ECtHR and CJEU, and where re-examination of the judgment is the only possibility to achieve *restitutio in integrum* in case of pressing need of a substantial and compelling nature, including in case of violation of international human rights standards.[87]

94. With respect to the deadline for seeking reversal, one month (from the publication of the MoJ list under Article 14 of the Draft Act – or, in case of an appeal to the Supreme Court, from the possible

81 CJEU, *W.Ż., AS, Sąd Najwyższy and Others*, cases nos. C-491/20-C-496/20, C-506/20, C-509/20 and C-511/20, Order of 22 December, para. 85.
82 CJEU, W.Ż. [GC], C-487/19, 6 October 2021, para. 161.
83 CJEU, *Impresa Pizzarotti & C. SpA v Comune di Bari and Others*, C-213/13, 10 July 2014, para. 62.
84 CJEU, *Gerhard Köbler v. Republik Österreich*, C-224/01, judgment of 30 September 2003, paras. 33 and 40.
85 See OSCE/ODIHR, *Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024), para. 85.
86 See OSCE/ODIHR, *Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024), para. 41.
87 See OSCE/ODIHR, *Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024), para. 58.

publication of the decision to dismiss or transfer) may appear insufficient for the preparation of a duly substantiated and solid request for re-examination[88]. Given the potential complexity of the underlying legal issues, including the need to reconstruct procedural history, gather and review case materials, and assess the legal impact of a defective composition of the court, such a short time-limit may impair the very essence of the right of access to a court. **A more reasonable deadline would better accommodate the preparation necessary for an effective remedy and align with the principle that procedural limitations must pursue a legitimate aim and remain proportionate to that aim**. In particular, consideration could be given to prescribing a period of 3-6 months, subject to the circumstances of the case. For instance, criminal proceedings or matters involving vulnerable persons - where an individual may face limitations in accessing legal assistance or other necessary resources - may warrant the application of a longer timeframe. Regarding the requirement to have raised the issue of the irregularity of the composition of the court during the proceedings both during first instance and appellate proceedings, this two-tier standing requirement that conditions the reopening of proceedings seeks to preserve legal certainty and to prevent an unmanageable influx of re-examination petitions – both constituting legitimate aims in the abstract, considering the systemic scale of the appointments affected and the fact that the passage of time may increase the weight of *res judicata* principle.[89] At the same time, this admissibility requirement would appear to be unduly limiting and may raise concerns regarding compliance with Article 6 of the ECHR for several reasons.

95. First, the distinction between parties whose legal representatives raised an objection during the proceedings and those whose representatives failed to do so appears, at first sight, to rest on an objective criterion, namely the presence or absence of procedural action. However, until the 2022 Amendments to the Act on the Supreme Court and other Acts, contesting the judicial status of another judge constituted a disciplinary offence for judges following the 2020 amendments.[90] Hence, any objection or appeal alleging defective judicial appointment or lack of independence or impartiality of the bench was therefore bound to fail. Hence, it would appear inappropriate to require, *ex post facto*, recourse to a remedy that was manifestly futile as a precondition for reversal/reopening. Although the legal situation has changed since 2022, it remains questionable to what extent the raising of such issues could be considered to constitute an effective remedy, given that, as a matter of written law, the participation of defectively appointed judges in adjudication was treated as lawful in terms of strict legality.

96. Moreover, a party was neither required nor reasonably expected to know whether the judge assigned to their case had been appointed prior to the reform of the NCJ. In many instances, the party may only have become aware of this fact at a stage when the procedural rules no longer permitted the issue to be raised. Even assuming that a party had knowledge of the judge's appointment pathway, procedural strategy, including the wish not to antagonize the very judge adjudicating the case, may well have led legal representatives to refrain from doing so. In any case, it would be unreasonable to impose on a party whose rights under the ECHR were violated the burden of the acts or omissions of its legal representative.

97. In addition, the requirement that a party must have raised the objection both in first instance and at the appellate stages, risks depriving individuals of the possibility of seeking re-examination even where they demonstrated, at first instance, a genuine and sufficiently articulated interest in challenging the participation of a defectively appointed judge. The failure to reiterate such an objection at the appellate stage may reflect neither acquiescence nor waiver, but rather strategic or

88 For example, part 54.5 of the Courts Procedure Rules of UK states that judicial review must be taken promptly "and in any event not later than 3 months after the grounds to make the claim first arose.".

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

90 See *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;

resource-based considerations, including concerns that pressing the objection might prejudice other grounds of appeal or jeopardize the overall prospects of success.

98. Further, under Polish law, appellate courts are required to examine *ex officio* whether a court of first instance was properly constituted, and parties are not obliged to raise such an issue themselves.

99. Finally, the parties were confronted with a judge appointed by the State pursuant to legislation enacted by that same State, giving rise to a legitimate expectation that the court was lawfully constituted. If the State subsequently determines that those laws were incompatible with the Constitution or with international standards, it cannot reasonably require that the parties to a case should have anticipated such a defect and raised it as a prerequisite for seeking re-examination of the judgments.[91] As the ECtHR has consistently held,[92] the State cannot shift the consequences of its own systemic failure to the individual whose rights were affected. Conditioning access to re-examination on prior procedural steps that the individual could not reasonably have taken fails to meet the requirement of proportionality and risks depriving the right of access to a court of its practical effectiveness.

100. In light of the foregoing, the necessity of the dual-stage objection requirement proposed by the Draft Act is difficult to assess in the absence of empirical data demonstrating that a more permissive rule would pose a concrete and disproportionate burden on the administration of justice. At the same time, there are still strong grounds for questioning whether this additional procedural hurdle strikes a fair balance between safeguarding legal certainty and ensuring the effective protection of the right to a fair trial by an independent and impartial tribunal established by law. Consequently, **the legal drafters should re-assess whether the admissibility requirement to have raised the issue of the flawed or defective composition of the court during the proceedings in order to seek the reversal of judgments is appropriate and not unduly limiting,** especially when the judicial decisions may have or have had grave consequences for the parties to the proceedings, such as criminal conviction resulting in deprivation of liberty and the imposition of a criminal record.

101. **As an alternative admissibility requirement for seeking re-examination with a view to manage a potential influx of petitions, the legal drafters could consider requiring instead that based on the circumstantial and external factors, the irregularities of the appointment procedure may have raised legitimate doubts in a reasonable person that it has impacted the independence or impartiality of one of the judges adjudicating in the initial proceeding**.[93]

102. **The decisions of the Supreme Court involving persons appointed in the procedure involving the defectively elected NCJ may deserve distinct treatment in light of the case law of the ECtHR and CJEU and given their impact.** Especially, **the extraordinary appeal decisions rendered by the CERPA may be regulated separately, given the defects identified with respect to the extraordinary appeal procedure[94] which has been held incompatible with the rule of law in the ECtHR *Wałęsa* judgment.** At the same time, certain other judgments rendered by the CERPA, including those relating to electoral disputes may require to be excluded from the scope of reopening, even where rendered with the participation of judges appointed by the NCJ as composed after the

91 For the purpose of this Urgent Interim Opinion, ODIHR seeks to use the terminology of the CoE *Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights*, where "re-examination" is used as the generic term, while the term "re-opening" refers to the re-opening of court proceedings, as a specific means of re-examination, which may take other forms than re-opening, such as administrative re-examination of a case (e.g., granting a residence permit previously refused); see Council of Europe, Committee of Ministers, *Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights*, adopted on 19 January 2000, para. 5 of the Explanatory Memorandum.

92 See, among other, the Wałęsa judgment, where the Court explicitly treats the problem as systemic and orders general measures, not just individual relief.

93 See e.g., CJEU, *W.Ż.* [GC], C-487/19, 6 October 2021, para. 161.

94 In particular with respect to "*(i) the lack of foreseeability of the legal provisions which afford unfettered discretion in interpreting the grounds for appeal to the authorities and bodies involved in the procedure; (ii) the possibility of using in practice this exceptional remedy as an "ordinary appeal in disguise" and obtaining through it a fresh examination of the case, including re-determination of facts, with the adjudicating body acting as a tribunal of fact at the third or fourth level of jurisdiction; (iii) the exceptionally extended and retrospectively applied time-limits for lodging an extraordinary appeal allowing the Prosecutor General and the Commissioner to contest judgments that became final before the entry into force of the 2017 Act on the Supreme Court; (iv) the lack of sufficient safeguards against a possible abuse of process and the instrumentalising of the extraordinary appeal procedure (e.g. for political reasons, as currently demonstrated by entrusting the Prosecutor General – who is an active politician and at the same time the Minister of Justice wielding considerable authority over the courts – with extensive powers in respect of questioning the finality of judicial decisions by means of an extraordinary appeal)"*; see ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(c).

2017 Amendments, since such judgments by their nature have generated outcomes that are structurally irreversible – such as conferring and terminating mandates, enabling the formation of representative institutions and ensuring continuity of democratic governance. Any retrospective reconsideration of such determinations would risk undermining legal certainty, destabilizing the democratic mandate, and impairing the reliability of the electoral process as a whole. By contrast, other CERPA determinations do not produce comparable irreversible effects and, in the light of ECtHR and CJEU case law on the right to a tribunal established by law, may legitimately warrant differentiated treatment.

103. **The decisions rendered by the (former) Disciplinary Chamber and its successor (the Chamber of Professional Responsibility) likewise deserve separate mention**. In the case of *Advance Pharma sp. z o.o v. Poland*, the ECtHR noted that "*one of the possibilities to be contemplated by the respondent State is to incorporate into the necessary general measures the Supreme Court's conclusions regarding the application of its interpretative resolution of 23 January 2020 in respect of the Supreme Court and other courts and the judgments given by the respective court formations*".[95] In its Resolution, the Supreme Court takes a clear position that where a judge was appointed to the Supreme Court by the NCJ composed according to the 2017 NCJ Amending Act, that a court formation should be considered unduly appointed or unlawful according to applicable legal provisions for all decisions rendered from the date of the Resolution, or irrespective of the date for judgments issued with the participation of judges of the *[now abolished]* Disciplinary Chamber (and then by the newly formed Chamber of Professional Responsibility).[96] In its Council Implementing Decision (EU) No 9728/22 of 14 June 2022 approving the Assessment of the Recovery and Resilience Plan for Poland (hereinafter "Council Implementing Decision"),[97] Poland is specifically called upon to have the judgments of (in the meantime) abolished Supreme Court's Disciplinary Chamber re-examined by a court meeting the requirements of Article 19 (1) TEU, thereby singling out the decisions of this Chamber. With respect to the other decisions of the Supreme Court rendered with the involvement of persons appointed or promoted by the NCJ as composed after the 2017 Amendments, the legal drafters should assess whether they could be subject to the general admissibility requirements (see below). At the same time, acknowledging that the reopening or reversal of all judgments in which a person appointed in defective procedure has participated may lead to an unmanageable influx of re-examination petitions, as underlined in the 2024 ODIHR Note, it may be possible to address differently the criminal, civil and administrative cases seeing the types of consequences generally attached to the respective cases.[98] The material scope of re-examination should be potentially reserved for certain categories of criminal cases owing to their serious consequences, as well as certain civil cases, where the aggrieved party can demonstrate that there was

95 ECtHR, *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 365.

96 The Supreme Court resolution of 23 January 2020 in its relevant parts held that: *"…45. Lack of independence of the [NCJ] leads to defectiveness in the procedure of judicial appointments. However, such defect and its effect undermining the criteria of independence and impartiality of the court may prevail to a different degree. First and foremost, the severity and scope of the procedural effect of a defective judicial appointment varies depending on the type of the court and the position of such court in the organisation of the judiciary. The status of a judge of an ordinary court or a military court is different from the status of a judge of the Supreme Court....The severity of irregularities in competition procedures for the appointment of judges of ordinary and military courts and judges of the Supreme Court, since the normative changes implemented in 2017, has varied; however, it was definitely more severe in the case of appointments for judicial positions in the Supreme Court […] 60. The question of preventive or subsequent guarantees that a case will be heard and a judgment issued by an independent and impartial court is not a new question in the light of civil and criminal procedural regulations applied by common courts, military courts, and the Supreme Court. As has been mentioned, many instruments provide guarantees that a judgment will be issued by an independent and impartial court: recusal of a judge, regulations concerning the allocation of cases, the option of changing court in order to ensure objective conditions that the court will be perceived as impartial and independent, conditional and unconditional grounds for annulment of a judgment, invalidity of proceedings, annulment of a judgment ex officio as manifestly unfair beyond the scope of an appeal, reopening proceedings. Such regulations must be interpreted in such a way that ensures to the best extent possible the fulfilment of the requirements under Article 45(1) of the Constitution of the Republic of Poland, Article 6(1) ECHR and in particular Article 47 of the Charter within the meaning provided in the case-law of the Court of Justice of the European Union, in particular the judgment of 19 November 2019 in cases C-585/18, C-624/18 and C625/18…";* see 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)>.

97 See Council Implementing Decision (EU) No 9728/22 of 14 June 2022 approving the assessment of the recovery and resilience plan for Poland and its Annex, indicating among the key milestones, that disciplinary cases shall be examined by an independent and impartial court established by law, which shall not be the Disciplinary Chamber; the need to clarify the scope of disciplinary liability of judges and to specify that the content of judicial decisions is not classified as a disciplinary offence, and more generally strengthening the procedural guarantees and powers of parties in disciplinary proceedings concerning judges; ensuring that judges affected by decisions of the Disciplinary Chamber of the Supreme Court have access to review proceedings of their cases by an independent and impartial tribunal established by law, among other.

98 See OSCE/ODIHR, *Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024), para. 58.

a serious violation of fundamental rights. In any case adequate compensatory mechanisms should be possible when the parties to the proceedings have sustained some losses or damage as a result of the judgment rendered with the participation of a defectively appointed judge, beyond the mere harm resulting from such irregularity. At the same time, in the latter cases, pecuniary compensation as a remedy should require that the individual demonstrates a direct causal link between the violation and the loss or damage incurred (see also Sub-section 4.2. *infra*).

104. As to the potential risk of burdening of the courts, the procedural modalities of the reopening decision could be adjusted, for instance that they be rendered without hearing, unless the court would decide otherwise, and the decision shall not be subject to appeal, assuming that these decisions are taken at appeal level. Facilitating reopening or reversal of criminal judgments is particularly important in light of the specific risks associated with criminal convictions, including those resulting in custodial sentences/lengthy imprisonment, where enhanced safeguards may be needed, given the profound effect on the individual's liberty and the heightened requirements of fairness, for guaranteeing the availability of the re-examination to challenge conviction, providing that the appointment defect may have had material consequences. In the *Moreira Ferreira* case, the ECtHR held that in the criminal-law sphere, the **requirements of legal certainty are not absolute**. Specifically concerning reopening of cases, it held that considerations such as the emergence of new facts, the discovery of a **fundamental defect in the previous proceedings that could affect the outcome of the case – especially to correct judicial errors and miscarriages of justice, or the need to afford redress,** particularly in the context of the execution of the Court's judgments, all militate in favour of the reopening of criminal proceedings.[99] While the State should not be required and would not be justified to institute a general annulment or amnesty mechanism which, in the current circumstances, could risk undermining the administration of justice or public trust in the system, a more streamlined mechanism to re-open all cases decided by deficiently appointed judges would at the same time recognize the need for strengthened safeguards where deprivation of liberty has been ordered. Therefore, for serious convictions, specifically those that resulted in custodial sentences, **the Draft Act should provide for an accessible, a lower-threshold, review mechanism, ensuring that the convicted person has access to a remedy allowing to challenge the conviction in the criminal case on the ground that it was issued with the participation of a person who was appointed to judicial office in deficient procedure.**

105. Such a mechanism should not imply the automatic invalidation of all such decisions, but should ensure that there is a special procedure in place where courts can examine whether the structural defect had a concrete impact on the fairness of the criminal proceedings, following the reasoning in the ODIHR Note that only where the defect has compromised the essence of the right to a fair trial should the decision be subject to reopening or revision. It should not depend, however, on the raising of prior objection in order to protect individuals whose rights under Article 6 were impaired due to circumstances entirely attributable to the State. A revision mechanism that genuinely aims to remedy structural violations must ensure that access is real and not illusory, and must avoid placing undue procedural burdens on those whose rights were compromised through no fault of their own.

106. Finally, the Draft Act introduces the concept of "irreversible legal effects" as a limitation on reversal proceedings, providing that where a challenged judgment has already produced such effects, the court must refrain from quashing it and instead issue a declaratory finding of unlawfulness. While it could be justified to seek to preserve a flexible standard capable of accommodating the broad spectrum of outcomes produced by judicial decisions, the notion of "irreversible legal effects" remains insufficiently defined. As currently drafted, it provides little guidance to individuals or courts regarding its scope or practical application, raising concerns regarding legal certainty and foreseeability – core components of the rule of law and elements required under Article 6 of the ECHR. **In this respect, either a more detailed statutory definition would enhance the consistency**

99 ECtHR, *Moreira Ferreira v. Portugal (no. 2)Moreira Ferreira v. Portugal (no. 2) [GC]*, no. 19867/12, 11 July 2017, para. 62.

of application and certainty as to when victims of a violation may meaningfully obtain redress. Alternatively, consideration could be given to retain the flexible formulation while supplementing it with a non-exhaustive, illustrative list of situations that qualify as "irreversible legal effects". Providing such guidance would better ensure that parties understand the circumstances in which reopening is unavailable, while preserving the ability of courts to evaluate exceptional cases on their merits. This clarification would be consistent with the principle of legal certainty and would reduce the risk of arbitrary or uneven application of this limiting clause across different branches of law.

4.2. Pecuniary Compensation in Case of Damages

107. The ECtHR has recognized that whether restitution is feasible depends heavily on the practical circumstances. In *Gurov v. Moldova*,[100] for instance, the Court declined to award compensation because a retrial before a properly constituted court was readily available and would not undermine domestic legal certainty. At the same time, the systemic nature of the defects in judicial appointments in Poland, the very large number of judgments affected, and the wide temporal scope of the irregularities can create a scenario in Poland in which re-examination of all cases decided by defectively appointed judges would overwhelm the courts, undermine legal certainty, and destabilize the justice system. Accordingly, as mentioned above, *restitutio in integrum* in the strict sense, i.e., through re-examination of the cases, would not appear realistically possible for all the cases adjudicated by defectively appointed judges. It may thus appear more appropriate to establish adequate compensatory procedures , when the parties have sustained some losses or damage as a result of the judgment rendered with the participation of a defectively appointed judge, beyond the mere harm resulting from such irregularity, while retaining the possibility to seek re-examination in cases owing to the serious consequences that flow from a criminal conviction or where the aggrieved party can demonstrate that there was a gross violation of fundamental rights

108. As noted in the 2024 ODIHR Note**, when re-opening is not possible or no other remedy is available, another manner of redress consists of providing pecuniary compensation in case of damage**s,[101] when an individual may qualify as a victim, not simply when an individual may have suffered some form of harm as a result of the state's actions or failure.[102]

109. It should be noted, however, that the status of victim would require the demonstration of a direct causal link between the violation and the loss or damage sustained by individuals.[103] In this regard, there may be a question as to whether the mere fact that a ruling is given by a court, involving a defectively appointed judge, which is then not an independent and impartial tribunal established by law causes in itself harm to an individual in a situation where the substantive effect of the flawed judicial decision itself is likely to have been the same. In this respect, the ECtHR tends to consider that the finding of the violation in and of itself constitutes just satisfaction, thereby avoiding to pronounce itself on the speculative question of whether or not an applicant would have been convicted had the requirements of Article 6 been followed.[104] In any case, it may be difficult for anybody challenging a decision of a defectively appointed judge to demonstrate that their case may have been decided differently had the judge in question been correctly appointed, or had a different, correctly

100 ECtHR, *Gurov v. Moldova*, application no. 36455/02, 11 October 20

101 See ECtHR, *Scozzari and Giunta v. Italy*, nos. 39221/98 and 41963/98, 13 July 2000, paras. 248-250, where the Court held: "*the purpose of awarding sums by way of just satisfaction is to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied.*"

102 It is noted that in the context of cases involving Article 6 ECHR the Court has often stated that the finding of the violation in and of itself constitutes just satisfaction.

103 See Article 34 of the ECHR. At the EU level, the CJEU has repeatedly held that individuals who have been harmed have a right to reparation if three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by those individuals; see e.g., CJEU, *Gerhard Köbler v. Republik Österreich*, C-224/01, judgment of 30 September 2003, para. 51; and *Tomášová*, case no. C-168/15, judgment of 28 July 2016, para. 22. This does not mean that a Member State cannot incur liability under less strict conditions based on national law (see CJEU, *Gerhard Köbler v. Republik Österreich*, C-224/01, judgment of 30 September 2003, para. 57).

104 See e.g., ECtHR, *Findlay v. UK*, no. 22107/93, 25 February 1997, paras. 85 and 88.

appointed judge heard their case.[105] As emphasized in the 2024 ODIHR Note, "*if an individual does not satisfy the qualification of victim, demonstrating a direct causal link between the violation and the loss or damage s/he sustained, they would in principle not be entitled to damages, notwithstanding the fact that they may have suffered some form of harm as a result of the defective judicial appointment. It may however be difficult for anybody challenging a decision of a defectively appointed judge to demonstrate, without reopening the case, that they have suffered damage because their case would have been decided differently had the judge in question been correctly appointed, or had a different, correctly appointed judge heard their case*".[106]

4.3. Procedural Considerations

110. Overall, 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. As underlined in the 2024 ODIHR Note, a rule of law-based approach would suggest that the policy and legislative options chosen should to the extent possible rely on existing mechanisms already provided by the Polish legislation.[107] At the same time, the Explanatory Memorandum acknowledges that the protection of individual human rights is not ideal in Poland and it is not clear how cassation can undo this shortcoming.

111. Should the policy- and law-makers assess that existing mechanisms would be insufficient or ineffective to ensure reparation for the violations of the right to a tribunal established by law, especially in light of the magnitude of the Polish situation and number of decisions potentially concerned, they may eventually consider establishing a separate, special mechanism, as done for instance in Iceland with the setting up of the Court on the Reopening of Judicial Proceedings to address the consequences of the *Ástráðsson* case.[108] At the same time, should a new, special mechanism be contemplated, it should be designed in full compliance with international fair trial standards and the principle of legal certainty, and the legislator should be wary of not perpetuating the defects identified with respect to the extraordinary review procedure before the CERPA[109] (see also Sub-Section 5.2 *infra*). In particular, it will be essential to ensure the foreseeability of the legal provisions and define clear and precise legal grounds for potential annulment or ineffectiveness of the decisions, or for re-opening of cases when there is a pressing need of substantial and compelling character clearly defined in the law, to avoid unfettered discretion in interpreting such grounds; the determination of reasonable time-limit for lodging a request for re-opening, depending on the cases; the inclusion of sufficient safeguards against a possible abuse of process and the instrumentalizing of the procedure; clarity as to the legal consequences and effects for the parties to the initial proceedings and third parties.[110]

105 See e.g., ECtHR, *Findlay v. UK*, no. 22107/93, 25 February 1997, paras. 85 and 88, where the Court underlines, with respect to the allocation of pecuniary and non-pecuniary damages that it was not possible to speculate as to whether the proceedings would have led to a different outcome had they fulfilled the requirements of Article 6 (1) of the ECHR.

106 See OSCE/ODIHR, *Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024), para. 88.

107 See OSCE/ODIHR, *Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024), para. 75.

108 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.

109 In particular with respect to "*(i) the lack of foreseeability of the legal provisions which afford unfettered discretion in interpreting the grounds for appeal to the authorities and bodies involved in the procedure; (ii) the possibility of using in practice this exceptional remedy as an "ordinary appeal in disguise" and obtaining through it a fresh examination of the case, including re-determination of facts, with the adjudicating body acting as a tribunal of fact at the third or fourth level of jurisdiction; (iii) the exceptionally extended and retrospectively applied time-limits for lodging an extraordinary appeal allowing the Prosecutor General and the Commissioner to contest judgments that became final before the entry into force of the 2017 Act on the Supreme Court; (iv) the lack of sufficient safeguards against a possible abuse of process and the instrumentalising of the extraordinary appeal procedure (e.g. for political reasons, as currently demonstrated by entrusting the Prosecutor General – who is an active politician and at the same time the Minister of Justice wielding considerable authority over the courts – with extensive powers in respect of questioning the finality of judicial decisions by means of an extraordinary appeal)"*; see ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(c).

110 See OSCE/ODIHR, *Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024), para. 77.

5. OTHER ISSUES

5.1. Amendments to the Act on the National Council of Judiciary

112. As noted above, it is essential that the legislative initiative to reform the NCJ and reinstate the modalities of s/election of judge members of the NCJ by their peers be developed and adopted as a package together with the Draft Act, to ensure coherence and avoid inconsistencies.

113. In addition, the Draft introduces changes to the 2011 Act on the NCJ, as amended, allowing for judicial review against certain resolutions of the NCJ and requiring justification for certain resolutions of the NCJ. These are legitimate and necessary procedural steps to protect the rule of law and to grant some procedural guarantees to the independence of the courts. However, such measures may become problematic if used or perceived as apparent remedies to the impropriety of the NCJ, lending false legitimacy to a body that cannot be considered compatible with judicial independence because of its improper composition not in line with international recommendations.

5.2. Abolition of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court (CERPA)

114. Article 51 of the Draft Act states that the CERPA is abolished. The CERPA was established by the Act on the Supreme Court adopted on 8 December 2017 and later became competent to examine "extraordinary appeals", aiming to re-introduce into the Polish legal system a form of extraordinary revision that used to be in place.[111]

115. In its *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (proposed by the President, as of 26 September 2017)*, ODIHR concluded that the introduction of this extraordinary review of final court decisions raised serious prospects of incompatibility with key rule of law principles, including the principle of *res judicata* and the right to access justice.[112] The subsequent case-law of the ECtHR concluded that the CERPA was lacking attributes of an "independent and impartial tribunal established by law", also noting the lack of sufficient safeguards against possible abuse of process and instrumentalization of the extraordinary review procedure, concluding to the incompatibility with fair trial standards and the principle of legal certainty under Article 6 (1) of the ECHR on account of several defects.[113] The CJEU reached a similar conclusion with respect to the CERPA.[114]

116. By abolishing this Chamber (Article 51), the Draft Act generally aligns with the binding obligations emerging from the ECtHR's pilot judgment in *Wałęsa*,[115] where the ECtHR reviewed the specific

111 The system of extraordinary revision (*rewizja nadzwyczajna*) was abolished in 1995 and replaced by cassation proceedings. A motion for extraordinary revision could be brought by the Minister of Justice, the Attorney General, the First President of the Supreme Court, the Minister of Social Affairs for social security-related matters (but also by the Commissioner for Human Rights of Poland since 1 January 1988) against any final judgment, including judgments by the Supreme Court.

112 *ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (proposed by the President, as of 26 September 2017), para. 57.

113 Including in particular, "*[t]he CERPA, a body which is not, as said above, an independent and "lawful" court under the Convention has exclusive competence to deal with any motion for the exclusion of judges involving a plea of lack independence of a judge or a court, including – as shown by the facts of the present case – the situation where the motion is directed against them personally. This, as also emphasised by the Supreme Court in its resolution of 23 January 2020 (...) gives no guarantee that the matter will be heard objectively as the CERPA judges themselves do not possess the required independence and, in cases where their own independence is being challenged on the basis of the defective appointment, they will be judges in cases concerning themselves, in breach of the fundamental principle nemo iudex in causa sua*" and *"(i) the lack of foreseeability of the legal provisions which afford unfettered discretion in interpreting the grounds for appeal to the authorities and bodies involved in the procedure; (ii) the possibility of using in practice this exceptional remedy as an 'ordinary appeal in disguise' and obtaining through it a fresh examination of the case, including re-determination of facts, with the adjudicating body acting as a tribunal of fact at the third or fourth level of jurisdiction; (iii) the exceptionally extended and retrospectively applied time-limits for lodging an extraordinary appeal allowing the Prosecutor General and the Commissioner to contest judgments that became final before the entry into force of the 2017 Act on the Supreme Court; (iv) the lack of sufficient safeguards against a possible abuse of process and the instrumentalising of the extraordinary appeal procedure (e.g. for political reasons, as currently demonstrated by entrusting the Prosecutor General – who is an active politician and at the same time the Minister of Justice wielding considerable authority over the courts – with extensive powers in respect of questioning the finality of judicial decisions by means of an extraordinary appeal)*"; see ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324 (b) and (c).

114 See e.g., CJEU, *L.G. v Krajowa Rada Sądownictwa* [GC], C-718/21, 21 December 2023.

115 The Draft Act and its Explanatory Memorandum invoke the ECtHR case of *Wałęsa v. Poland* as justification for abolishing the extraordinary review mechanism, suggesting that this reform is aligned "to a significant extent" with the ECtHR findings. It should be noted, however, that in *Wałęsa*, the Court did not condemn "extraordinary appeals" as such, but rather the specific features of the Polish extraordinary review mechanism, in particular: its adjudication

features of the Polish extraordinary review mechanism before the CERPA and concluded that these characteristics, rather than the mere existence of an extraordinary remedy, were incompatible with Article 6 (1) of the ECHR and the principle of legal certainty. It is noted that the Draft Act removes the legal basis for the existence of the CERPA from the Code of Civil Procedure and repeal Article 3 item 4 of the Act of 8 December 2017 on the Supreme Court which provided the legal basis for the establishment of the CERPA as one of the Chambers of the Supreme Court. However, it does not expressly repeal Articles 89-90 of the Supreme Court Act, which remain the primary statutory provisions defining the extraordinary review procedure and modalities. While Article 51 and the Explanatory Memorandum to the Draft Act assert that the extraordinary review mechanism is abolished, the formal architecture of the Supreme Court Act still contains the enabling provisions for that remedy which creates ambiguity, risks generating uncertainty about the residual competence of the CERPA previously entrusted with extraordinary review, and therefore may compromise legal clarity and undermine legal certainty as to the consequences of the reform.

117. The Explanatory Memorandum further argues that ordinary cassation suffices as a safeguard against miscarriages of justice, thereby eliminating the need for extraordinary review mechanism. Yet this reasoning does not fully address the structural context of Poland's legal system where there is no individual constitutional complaint, a mechanism that in many jurisdictions serves as a subsidiary safeguard for fundamental rights violations where ordinary remedies may fail. At the same time, it is questionable whether there currently exists in the current Polish legal framework an effective remedy with respect to individual rights protection. Against this background, there appears to be a need to ensure that a functional alternative remedy to address structural miscarriages of justice and flagrant violations of international human rights standards is available or introduced, to ensure compliance with Article 13 of the ECHR on access to effective remedies.

118. Therefore, although the Draft Act correctly aims to dismantle the CERPA, without the explicit repeal of the underlying statutory provisions and without introducing an alternative effective remedy to address structural miscarriages of justice and violations of international human rights standards – access to effective remedies for individuals adversely affected by such violations will not be guaranteed. **The legal drafters should re-assess whether new provisions should be introduced for that purpose, in which case the mechanism should be designed in full compliance with international fair trial standards and the principle of legal certainty, and the legislator should be wary of not perpetuating the defects identified with respect to the extraordinary review procedure before the CERPA**[116].

5.3. Consideration of the NCJ's Request for the Appointment of a Judge by the President of the Republic of Poland

119. Articles 41-43 of the Draft Act provide that the respective judges of military courts, common courts and administrative courts shall be appointed to judicial office by the President of the Republic of

by a Chamber not constituting "a tribunal established by law", the vagueness of the statutory ground of "social justice", and its excessive retrospective reach, allowing challenges to final judgments issued even during the democratic transition. These characteristics, rather than the mere existence of an extraordinary remedy, were deemed incompatible with Article 6 (1) of the ECHR and the principle of legal certainty. The judgment thus cannot be straightforwardly read as requiring the abolition of the extraordinary review in total; it requires, rather, the removal of institutional and procedural defects that rendered the said Chamber incompatible with ECHR guarantees. At the same time, such a measure would fall within the ambit of the wide margin of appreciation afforded to states to implement ECtHR judgements.

116 In particular with respect to "*(i) the lack of foreseeability of the legal provisions which afford unfettered discretion in interpreting the grounds for appeal to the authorities and bodies involved in the procedure; (ii) the possibility of using in practice this exceptional remedy as an "ordinary appeal in disguise" and obtaining through it a fresh examination of the case, including re-determination of facts, with the adjudicating body acting as a tribunal of fact at the third or fourth level of jurisdiction; (iii) the exceptionally extended and retrospectively applied time-limits for lodging an extraordinary appeal allowing the Prosecutor General and the Commissioner to contest judgments that became final before the entry into force of the 2017 Act on the Supreme Court; (iv) the lack of sufficient safeguards against a possible abuse of process and the instrumentalising of the extraordinary appeal procedure (e.g. for political reasons, as currently demonstrated by entrusting the Prosecutor General – who is an active politician and at the same time the Minister of Justice wielding considerable authority over the courts – with extensive powers in respect of questioning the finality of judicial decisions by means of an extraordinary appeal)"*; see ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(c).

Poland, at the request of the NCJ, *within three months* of the date of submission of the request to the President.

120. While it is rather common and widely accepted that appointments or promotions of judges may be made by an official act of the Head of State, yet given the importance of judges in society, the need to ensure their independence and perception thereof and in order to emphasize the fundamental nature of their functions, the role of Heads of States should remain ceremonial in nature and they should be bound by the proposal from judicial councils or similar independent bodies,[117] or the proposals only rejected exceptionally. [118] The politicization arising when decisive authority in judicial appointments is vested in a political body and where that body's involvement extends beyond a merely formal or ceremonial role clearly risks jeopardizing judicial independence.[119] The Draft Act thus aims to prevent the recurrence of situations where the President of the Republic did not proceed with the appointment of the said judges following submission by the NCJ. At the same time, it is unclear what would be the consequences of the expiry of the three months period, all the more in light of Article 179 of the Constitution of Poland whereby *"Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary"*.

121. While the proposed arrangement aims to avoid the situation when judicial appointments may be prevented by the President of the Republic by providing for a time-limit for the appointment, it may be advisable to specify the consequences of the non-compliance with the time-limit, although acknowledging that this may potentially raise issues of constitutionality.

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

122. 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 coherence between the different legislative initiatives is ensured, and that the development and adoption of legislation is carried out 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.[120]

123. 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).[121] 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).[122]

117 See e.g., CCJE, *Opinion no.10(2007) on the Council for the Judiciary at the service of society*, para. 49; Venice Commission, *Report on Judicial Appointments by the Venice Commission*, CDL-AD(2007)028, para. 14; see also CDL-AD(2023)029, *Joint Opinion of the Venice Commission and The Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Legal Safeguards of the Independence of the Judiciary From the Executive Power of Netherlands*, para. 24.

118 See e.g., Venice Commission, *Report on Judicial Appointments by the Venice Commission*, CDL-AD(2007)028, para. 14.

119 See e.g., CDL-AD(2023)029, *Joint Opinion of the Venice Commission and The Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Legal Safeguards of the Independence of the Judiciary From the Executive Power of Netherlands*, para. 24.

120 See ODIHR, *Guidelines on Democratic Lawmaking for Better Laws* (2024), Principle 8.

121 See *1990 OSCE Copenhagen Document*.

122 See *1991 OSCE Moscow Document*.

124. 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.

125. 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*".[123] The 1998 European 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.[124] 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.[125] 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.[126] To guarantee effective participation, consultation mechanisms should allow for input at an early stage, from the initial policymaking phase *and throughout the process*,[127] 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.

126. 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. Although it is important to allow sufficient time for meaningful discussions throughout the legislative process, as noted above, rapid remedial actions, as also called upon by the ECtHR is needed to address the systemic deficiencies of the Polish legal system. Given the fundamental importance of such a reform for the society, it will also be crucial to clearly articulate and widely communicate the purpose, rationale, and scope of the proposed reform to the public in a manner that is accessible and comprehensible to all. 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]

123 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*".

124 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"*.

125 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.

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

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